QUEENSLAND

# ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION

# REPORT

ON

# REVIEW OF INDEPENDENCE OF THE ATTORNEY-GENERAL

JULY 1993

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[1] This determination was notified in the Queensland Government Gazette of 27 November 1991 as required by the *Electoral Districts Act 1991* (Qld). It does not form part of the numbered series of EARC Reports.

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| **the Act** | *Electoral and Administrative Review Act 1989* |
| **the Commission** | Electoral and Administrative Review Commission, Queensland |
| **CPD** | Commonwealth Parliamentary Debates |
| **EARC** | Electoral and Administrative Review Commission, Queensland |
| **Fitzgerald Report** | *Report of a Commission of Inquiry Pursuant to Orders in Council 1989*, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Chairman G E Fitzgerald) |
| **FOI** | Freedom of Information |
| **H R** | House of Representatives |
| **LRC** | Australian Law Reform Commission |
| **MLA** | Member of the Legislative Assembly |
| **MP** | Member of Parliament |
| **PCEAR** | Parliamentary Committee for Electoral and Administrative Review |
| **PSMC** | Public Sector Management Commission |
| **QPD** | Queensland Parliamentary Debates |
| **SCAG** | Standing Committee of Attorneys General |

## LIST OF APPENDICES



Notes: References to numbered submissions in this Report are in brackets preceded by the letter "S". For example, a reference to submission no. 7 will be written as "(S7)".

References to published material are in the form of the Harvard Citation system.

# CHAPTER ONE

# INTRODUCTION

## The Mandate for this Review

1.1 The Electoral and Administrative Review Commission (the Commission) was established by the *Electoral and Administrative Review Act 1989* (the Act). The Commission's objective is to provide reports to the Chair of the Parliamentary Committee for Electoral and Administrative Review, the Speaker of the Legislative Assembly and the Premier (the Minister responsible for the administration of the Act) with a view to achieving and maintaining:

> *" (a) efficiency in the operation of the Parliament; and*
>
> *(b) honesty, impartiality and efficiency in -*
>
> *(i) elections;*
>
> *(ii) public administration of the State;*
>
> *(iii) Local Authority administration"* (s.2.9(1) of the Act).

1.2 The Commission's functions also require it to investigate and report from time to time in relation to:

> *"... the whole or part of the public administration of the State, including any matters pertaining thereto specified in the Report of the Commission of Inquiry ... "* (s.2.10(1)(a)(iii) of the Act).

1.3 In the *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Fitzgerald Report) concerns were expressed regarding the independence of the Attorney-General:

> *"The Justice Department and the Ministry of Justice exemplify the local distortions which have been introduced into the Westminster system of Government. They are probably both causes and consequences of those distortions.*
>
> *Traditionally, the Attorney-General is not only a member of the Executive but the Chief Law Officer of the Crown. There has been some debate upon the extent to which these latter functions enjoy autonomy from Executive control, but as chief law officer, the Attorney-General has extensive powers and discretions which are intended to be exercised in the public interest including powers and discretions with respect to the initiation, prosecution, and discontinuance of criminal proceedings. The Attorney-General also has primary responsibility for legal advice in relation to matters of public administration and government. The proper performance of such functions is dependent upon impartiality and freedom from party political influences, which is threatened if the Attorney-General is subject to Cabinet control and Parliament is effectively dominated by the Executive"* (1989, p.138).

1.4 The Fitzgerald Report considered that separation of the office of the Attorney-General and the Ministry of Justice would be *"... a substantial step towards proper principle ... "* given that:

> *"In Queensland, the risks of partiality were accentuated by the effective amalgamation of the offices of Attorney-General and Minister for Justice (and now the Ministry of Corrective Services)"* (1989, p.138).

1.5 In his recommendations, Mr Fitzgerald proposed that this Commission should implement and supervise reforms he had recommended including:

> *"(i) separation of the offices of Attorney-General and Minister for Justice, and,*
> *(ii) re-establishment of the independent role of the office of Attorney-General"* (1989, p.371).

1.6 The Commission initially decided that it would not conduct this review, primarily because the recommendation for separation of portfolio responsibilities of the Minister for Justice and Attorney-General was implemented by the Ahern Government in September 1989, a situation which was maintained during the first term of the current government.

1.7 Following the 1992 Legislative Assembly election the Government decided to restructure the public administration of justice, with the result that the Department of Justice and Corrective Services was abolished and responsibility for various justice matters within that portfolio returned to the Attorney-General. The resulting administrative structure is once again known as the Department of Justice and Attorney-General.

1.8 The Premier, in response to an enquiry from the Commission, stated that the amalgamation decision had been taken as a result of practical anomalies created by the separation of the two portfolios. He referred to measures which were in place to achieve the traditional independence of the role of the Attorney-General, including the independent role of the Director of Prosecutions and of the Solicitor-General, and the provision of objective and independent advice to the Attorney-General.

1.9 The Commission accepted the validity of these reasons advanced by the Premier. The Commission appreciated the fact that many, perhaps most, of the administrative responsibilities of the Attorney-General which might cause that office to be subject to political pressures had been reviewed and in some cases assigned to other ministerial portfolios.

1.10 Nevertheless, the Commission believed it was obliged by the terms of the Act and the recommendations of Mr Fitzgerald to examine whether the original concerns of the Fitzgerald Report in regard to the previous Department of Justice and Attorney-General had been addressed in the administrative structure of the new department.

1.11 Another concern was to address a question raised directly in the Fitzgerald Report, "the independence of the Attorney-General". This part of the review focuses on the particular powers and functions of the Attorney-General under the common law and prerogative, and the extent to which that independence can or should be protected in a contemporary political context.

1.12 The process adopted by the Commission for the *Review of the Independence of the Attorney-General* was developed to comply with the Commission's statutory responsibilities under the Act. In particular the Act states:

> *"(1) The Commission is not bound by rules or the practice of any court or tribunal as to evidence or procedure in the discharge of its functions or exercise of its powers, but may inform itself on any matter and conduct its proceedings in such manner as it thinks proper.*
>
> *(2) The Commission-*
>
> *(a) shall act independently, impartially, fairly, and in the public interest;*

*(b) shall make available to the public all submissions, objections and suggestions made to it in the course of its discharging its functions, and otherwise act openly, if to do so would be in the public interest and fair;*

*(c) shall not make available to the public, or disclose to any person, information or material in its possession, if to do so would be contrary to the public interest or unfair;*

*(d) shall include in its reports-*

*(i) its recommendations with respect to the relevant subject-matter;*

*(ii) an objective summary and comment with respect to all considerations of which it is aware that support or oppose or are otherwise pertinent to its recommendations"* (s.2.23).

SUBMISSIONS

1.13 The Commission commenced the review on 14 November 1992 with the placement of newspaper advertisements in *The Courier-Mail* and 23 regional newspapers which identified issues relevant to the review and sought public comment on them by way of submissions. A press release inviting submissions was also issued.

1.14 In response, the Commission received eight submissions. These were from - A Sandell, Department of Justice and Attorney-General, Queensland Law Society Inc., Bar Association of Queensland, Public Sector Management Commission, State Public Service Federation (Queensland), Hon John Dowd, and K Lindeberg. Copies of these submissions were made available at the Commission's Public Reading Room.

CONSULTATIONS AND ADDITIONAL SOURCES OF INFORMATION

1.15 Additional information for the review was obtained from a number of other sources including:

(a) correspondence and interviews with a range of persons with direct knowledge of the system; and

(b) books and reports, journal articles and monographs, newspaper and magazine articles, and other publications.

**The Structure of the Report**

1.16 This Report consists of eight chapters of which this introduction is the first.

1.17 Chapter Two introduces elements of the constitutional and political framework of government in Queensland and the implications of these elements for the duties of the Attorney-General. The chapter considers the concept of responsible government and examines the role of the Attorney-General in the context of both administrative and executive responsibilities.

1.18 Chapter Three examines possible consequences of the Attorney-General's dual role and concludes that in Australia this status is an accepted political convention. In the light of this convention, the issue of how best to protect and strengthen the independence of the Attorney-General from political influence is examined. Finally the chapter discusses the merits of having an Act of Parliament to specify the powers, privileges and obligations of the Attorney-General.

1.19 Chapter Four examines particular prerogative powers of the Attorney-General in relation to the possibility of conflict of interest as both cabinet minister and first law officer of the Crown. The chapter addresses the matter of whether civil litigation in the public interest should require the fiat (legal authority) of the Attorney-General to proceed.

1.20 Chapter Five chronicles the separation of portfolio responsibilities of the original Department of Justice and Attorney-General, and subsequent re-amalgamation. The chapter examines whether administrative re-organisation of the department in the intervening period has satisfied the concerns expressed in the Fitzgerald Report. It also discusses proposals for commercialisation of the Crown Law Division of the Department of Justice and Attorney-General.

1.21 Chapter Six deals with the issue of formal qualifications of the Attorney-General, noting that for the greater part of this century in Queensland non-lawyers have been appointed to that office.

1.22 Chapter Seven is a consolidation of the recommendations which emerged from the Commission's investigation.

1.23 The final chapter, Chapter Eight, acknowledges the contributions of the persons who assisted with this review.

## CHAPTER TWO

## THE ROLE OF THE ATTORNEY-GENERAL

### Introduction

2.1 Australian Attorneys-General, in common with those of a number of Commonwealth countries including Canada, Nigeria, New Zealand, Malaysia, Trinidad and Tobago, and Sierra Leone, are typically members of cabinet and thus occupy a unique position as both politician and first law officer of the Crown. W.M. Hughes was both Prime Minister and Attorney-General from 1915 to 1921, and Robert Menzies was at one stage concurrently Attorney and acting Prime Minister (Edwards 1984, p.368). More recently, Lionel Bowen was deputy Prime Minister in the Hawke Government from 1983 to 1990 and Attorney-General from 1984 to 1990 and was acting Prime Minister on 27 occasions.

2.2 In some cases Attorneys-General have been considered too junior for participation in the deliberations of cabinet. Fraser's first Attorney-General, Menzies' last and each of McMahon's were excluded from the cabinet for this reason (Solomon 1989, p.63).

2.3 Like other ministers, the Attorney-General has portfolio responsibilities including the administration of numerous statutes. In Queensland, re-amalgamation of the Departments of Attorney-General and Justice considerably extended the scope of the administrative responsibility of the Attorney-General.

2.4 Unlike most other ministers, the Attorney-General has a range of unique functions by virtue of the office. The Attorney-General is nominal head of the Bar and has precedence over all Queen's Counsel. The Attorney-General has full authority over legal matters pertaining to the State and acts on its behalf in litigation. The Attorney-General acts as the "*guardian of the public interest*" (Edwards 1964, p.286), and thus must balance conflicting private and collective interests.

2.5 The Attorney-General provides legal advice to parliament, cabinet and Executive Council, and advises cabinet and Executive Council on judicial appointments. The Attorney-General may instigate or terminate criminal proceedings, advise on the exercise of the prerogative of mercy and grant immunities from prosecution, appear in a case as amicus curiae ("friend of the court"), intervene in any case where prerogatives are in issue or where such intervention is expressly provided for in legislation, and sue for the protection of any public advantage enjoyed as a common law right, such as the right to have the criminal law enforced.

2.6 The Attorney-General may also institute proceedings for contempt of court where it is in the public interest to do so, apply for judicial review where it is alleged that a court or tribunal has acted *ultra vires* or on other grounds whether the Crown is a party or not (see for example, *Judicial Review Act 1991 (Qld)*), and administer and enforce the Crown copyright in public documents. In addition, the Attorney-General may intervene in any litigation where the interpretation of the Australian Constitution is raised.

2.7 As first law officer of the Crown and leader of the Bar the Attorney-General owes unique responsibilities to the courts. It sometimes happens that a court is confronted by an application to which no party has an obvious adverse interest. The system of justice administered by the common law courts demands that the court hear argument so as to better equip it to correctly apply the law and reach a just result. In such cases, the court will call for the Attorney-General to be joined as contradictor (or to appear amicus curiae) so that it may have the benefit of a forensic testing of the applicant's submissions.

2.8 Protection of the public interest in matters of justice and the law must be exercised without favour, independently of political or other sectional interests. It has been argued that this independence may be compromised where the first law officer participates in the political process as a member of the government.

2.9 On the other hand the possibility of improper political influence over the justice system is tempered in Queensland by the statutory independence of the Director of Prosecutions and the Solicitor-General, as for example provided for in s.10(2) of the *Director of Prosecutions Act 1984*:

> *"(2) In the discharge of his functions the Director shall be responsible to the Minister but nothing in this section shall derogate from or limit the authority of the Director in respect of the preparation, institution and conduct of proceedings".*

2.10 In any event, some assert that whatever the constitutional and administrative safeguards the integrity of the office of Attorney-General ultimately depends on the personal qualities and values of the holder of the office (Edwards 1984, p.67).

**Traditional and Portfolio Responsibilities of the Attorney-General in Queensland**

2.11 Traditionally the Attorney-General is chief law officer of the Crown and a minister of the government. The Public Sector Management Commission (PSMC) in its review of the Department of the Attorney-General considered the role of the Queensland Attorney-General to include the following duties:

(a) representation of the Crown in civil proceedings;

(b) intervention in any private suit which affects Crown prerogatives or on matters of public policy where the Government wishes to have its views brought to the attention of the court;

(c) acting to enforce public rights or to lend authority to an action of a private citizen;

(d) representation of the Crown when sued for a Declaration of Right;

(e) acting as a respondent to a legitimacy petition; and

(f) acting as protector of charities (1991, p.24).

2.12 The Attorney-General is in a unique position in relation to the courts. The Attorney-General normally nominates appointments to the judiciary. The Attorney is also the protector of the integrity of the courts, whether by instituting proceedings for contempt of court, or appearing in court as a friend of the court, or speaking publicly on behalf of the courts or judges.

2.13 The Attorney-General is nominally head of the Bar, but rarely intervenes in its processes and plays no role in disciplinary affairs of the profession. The Attorney may, however, appeal against the leniency or severity of a disciplinary determination. That the Attorney-General may play an important role in the profession was demonstrated recently in New South Wales when the Attorney-General, supported by the state government, resolved not to make any further recommendations for appointment of Queen's Counsel.

2.14 Although the provision of legal advice to government is traditionally a duty of the Attorney-General, this role in practice is largely undertaken by the Crown Solicitor (an appointed official), or officers of the Attorney-General's Department, and in the most important cases, by the Solicitor-General. The advice would normally be conveyed to cabinet by the Attorney-General.

2.15 Similarly, although the provision of advice to parliament falls within the duties of the Attorney, where the Speaker seeks advice this request is conveyed by the Clerk of the Parliament directly to the Crown Solicitor (O'Shea 8 July 1993, EARC file 012/84). In terms of the doctrine of separation of powers, the fact of a branch of executive government advising the legislature could be viewed as unsatisfactory. In this respect the parliament is empowered to seek the advice of private counsel, a right which is exercised very infrequently (Doyle 28 June 1993, EARC file 012/76).

2.16 The portfolios of the Attorney-General and the Minister for Justice were combined for the period 1957 to 1989. The recommendation of the Fitzgerald Commission of Inquiry that they be separated was based on the view:

(a) that Justice Department officials had failed to provide advice on corruption issues;

(b) that officials of the Justice Department could attempt to impede the reform process recommended in the report of that Commission; and

(c) that ideally the Attorney-General should not be subject to administrative responsibilities unrelated to legal matters (Fitzgerald Report 1989, pp.138-9).

2.17 In 1989 the Ahern Government acted upon the recommendation for separation. Portfolio responsibility for the administration of justice was divided upon the creation of the Department of the Attorney-General and the Department of Justice and Corrective Services.

2.18 The current Attorney-General told the parliament in relation to the 1989 restructuring of the Department of Justice and Attorney-General:

> *"Commissioner Fitzgerald's view was that this division was necessary because the office of the Attorney-General carries with it a number of very significant legal discretions that have to be exercised without reference to political considerations. Those include discretions relating to the discontinuation of prosecutions, the granting of indemnities, the decision whether to grant a fiat. The Fitzgerald view*

> *was that the Minister who exercised those discretions ought not to be encumbered by the constraints of a portfolio that involved policy considerations outside the law, policy considerations such as the economic concerns that the Minister for Justice must necessarily have"* (QPD, 4 October 1990, p.3912).

2.19 The PSMC reviewed the operation of the Department of the Attorney-General in 1990 and concurred with the view that the Attorney-General, as the first law officer of the Crown in both civil and criminal matters, should have administrative responsibility only for statutes and those parts of the common law which focussed on the operation of legal mechanisms and which were in keeping with the Attorney's role as first law officer (1991, p.25).

2.20 Division of responsibilities between the two departments appears to have created administrative duplications and inefficiencies, and engendered confusion on the part of clients. Following the 1992 Legislative Assembly election the departments were re-amalgamated, although in total, administrative responsibilities were substantially different from those of the Department of Justice and Attorney-General prior to 1989.

## Attorneys-General in Other Jurisdictions

### BRITAIN

2.21 The British Attorney-General is generally a leading counsel of established reputation, is nominal head of the Bar and has precedence over all Queen's Counsel. The Attorney-General provides legal advice to cabinet, represents the Crown in matters of public interest and supervises major public prosecutions.

2.22 The Attorney-General, although holding ministerial rank, has only minor administrative responsibilities and is not a member of the cabinet. The Attorney-General is further removed from routine administrative issues as each department possesses internal legal resources (Renfree 1984, p.205).

2.23 Government machinery is structured so as to exempt the office of Attorney-General from involvement in most political and administrative matters. The Home Office is responsible for policing, custodial institutions, organisation of magistrates courts, development of penal policies and appointment of the Director of Prosecutions, while the Lord Chancellor advises on judicial appointments and is responsible for law reform and administration of the courts. It should be noted that the Home Secretary and Lord Chancellor are cabinet ministers. The Lord Chancellor also sits as a Law Lord and may therefore be involved in judicial review of government decisions and actions (Boulton 1989, p.64).

2.24 In relatively recent history the possibility of involvement of the Attorney-General in cabinet in either an advisory or full-time capacity has been debated, as has the possibility of appointment of a non-politician to the position of Attorney-General, particularly by virtue of the support for this initiative by former Attorney-General Sir Hartley Shawcross (Edwards 1984, p.61).

### NEW ZEALAND

2.25 As early as 1866 the role of the Attorney-General had become a matter for debate in New Zealand. At that time the Attorney-General was a political officer, who sat in one or other House of the General Assembly. This

arrangement was terminated by the *Attorney-General's Act 1866* whereby the office became a non-political, permanent appointment (Edwards 1984, p.389). This situation prevailed until 1876 when legislation allowed the position to be filled by a political or non-political officer and thus potentially available to members of the parliament and the Executive Council. Since that time the office of Attorney-General has been held by cabinet ministers (Edwards 1984, p.390).

2.26 Former Attorney-General Wilkinson considered it desirable that the Attorney-General be a member of cabinet:

> *"There will undoubtedly be times when a situation would be easier for an Attorney-General if he was not a member of Cabinet. This is in my view, however, substantially outweighed by the fact that as a member of Cabinet, he is much better equipped to make assessments on matters of public interest. Only in Cabinet can he obtain the 'over view' needed to make fully informed and properly balanced decisions"* (1979, p.118).

UNITED STATES OF AMERICA

2.27 In the United States the Attorney-General has both administrative and legal responsibilities. The Attorney-General has always been a member of cabinet and heads the Justice Department which has a police function (through the Federal Bureau of Investigation). The 1980 Virginia Conference addressed the possibility of a separation of legal and administrative tasks through the creation of a Ministry for Justice but the proposition was rejected (Edwards 1984, p.61).

OTHERS

2.28 Under the constitutions of other Commonwealth countries such as Kenya, Malta, Botswana, Zimbabwe, India, Cyprus and the Solomon Islands, the Attorney-General is a non-elected official (Dale 1983, p.119; Edwards 1984, p.74). In the Bahamas, Botswana, Cyprus, Kenya, Malta, the Seychelles, Western Samoa and Zimbabwe, Attorneys-General are constitutionally empowered to act as Director of Prosecutions, exercising relatively unfettered discretion (Dale 1983, p.120).

2.29 Edwards considers there to be accountability weaknesses in each model. One is the question of who is ultimately responsible to parliament for decisions of the Attorney-General. Furthermore, in parliamentary systems, some person must be responsible for justice matters generally. It thus becomes necessary to differentiate the roles of Justice Minister, Attorney-General and Director of Prosecutions to some extent (1984, pp.66-7).

## CHAPTER THREE

## INDEPENDENCE OF THE ATTORNEY-GENERAL

### Introduction

3.1 This chapter deals with the second of the Fitzgerald recommended reforms concerned with the office of the Attorney-General, namely *"... re-establishment of the independent role of the office of Attorney-General"* (1989, p.371).

3.2 The Report's stress upon "independence" arises from the dual nature of the Attorney's responsibility. As are other ministers, the Attorney-General is subject to the conventions and practices associated with ministerial responsibility, including that of cabinet solidarity. As first law officer, however, the Attorney has duties and responsibilities which are not collegiate.

3.3 Yet in the role of law officer the Attorney-General does exercise political judgments of a kind. Often the Attorney-General will have to measure the "public interest" and clearly the political disposition of the Attorney will be brought to bear in assessing that public interest.

3.4 The potential for conflict between the two roles will arise where the Attorney-General's ministerial colleagues attempt to influence the Attorney's assessments of the public interest or where the Attorney consciously or unconsciously acts to accommodate the partisan political needs or wishes of the cabinet.

3.5 The Fitzgerald Report was concerned with these same questions:

> *"... as chief law officer, the Attorney-General has extensive powers and discretions which are intended to be exercised in the public interest, including powers and discretion with respect to the initiation, prosecution and discontinuance of criminal proceedings. The Attorney-General also has primary responsibility for legal advice in relation to matters of public administration and government. The proper performance of such functions is dependent upon independence and impartiality and freedom from party political influences, which is threatened if the Attorney-General is subject to Cabinet control ... "* (1989, p.138).

3.6 Various commentators have expressed the view that while the Attorney-General should heed the opinions of cabinet colleagues, decisions for which the Attorney is responsible should be taken without regard to the cabinet-room agenda. On the legitimacy of cabinet influence over a decision of the Attorney-General, Sir Hartley Shawcross, a former English Attorney-General, has insisted that:

> *"... the assistance of his colleagues is confined to informing him of particular considerations which they think might affect his own decision, and does not consist, and must not consist, in telling him what the decision ought to be ... he is not to be put ... under pressure by his colleagues to take a decision in one sense or another"* (cited in Plehwe 1980, p.16).

3.7 It should be noted, however, that there is no statutory basis for asserting a right in the Attorney-General to act independently, and that independence is essentially a matter of convention (see Marshall 1984, p.112). It may even be argued that powers exercised by the Attorney-General are executive rather than judicial or even quasi-judicial.

3.8 Public scandal arising earlier this century from the *Campbell affair* in Britain where cabinet for political purposes directed the Attorney-General to withdraw a criminal prosecution against Campbell, editor of the communist newspaper *Workers Weekly*, has resulted in the conventional expectation that, in relation particularly to institution and withdrawal of criminal proceedings, the Attorney-General takes decisions independently of cabinet. These decisions may legitimately include political considerations of a public policy nature, but not considerations of party political advantage.

**Ellicott's Resignation**

3.9 The resignation in 1977 of then Commonwealth Attorney-General, Robert Ellicott QC, placed the question of independence prominently in the public arena. Ellicott's resignation was precipitated by circumstances surrounding the case of *Sankey v. Whitlam*, a private prosecution against former Prime Minister Whitlam and former members of the Whitlam cabinet. Both Sankey's solicitors and the solicitors of two of the defendants requested that in the public interest the Attorney-General assume formal control over the proceedings.

3.10 The Attorney-General attempted to conduct an investigation of the merits of the action. His request to his own cabinet for access to all records relevant to the matter was refused, cabinet deciding to invoke executive immunity with respect to key documents (CPD, H.R., 6 September 1977). Cabinet also expressed the view that the Attorney-General should assume authority over the proceedings with a view to their termination.

3.11 Ellicott resigned his office, explaining in a letter to the Prime Minister:

> *"I am doing so because decisions and actions you and the Cabinet have recently made and taken have impeded and in my opinion have constituted an attempt to direct or control the exercise by me as Attorney-General of my discretion in relation to the criminal proceedings Sankey v Whitlam and others. In the circumstances I feel that I have no other course but to resign my office. I regard it as vital to our system of government that the Attorney-General's discretion in criminal matters remains completely independent"* (CPD, H.R., 6 September 1977).

3.12 The Prime Minister denied that the action constituted interference, stating that he considered it:

> *"... proper for the Attorney-General in such matters to consult with and to have regard to the views of his colleagues, even though the responsibility for the eventual decision to prosecute or not rests with the Attorney-General, and the Attorney-General alone"* (CPD, H.R., 6 September 1977).

3.13 Although accounts of the details of the affair differ somewhat, it would appear that political pressure was brought to bear upon Ellicott over whether he should terminate the prosecution, as desired by the Prime Minister, in ways which Ellicott considered contrary to the convention of the independence of the Attorney-General.

3.14 The questions to be addressed in regard to independence are the relationship to the cabinet process of the Attorney-General in the role of law officer and how public responsibilities of the Attorney-General may best be protected from expediencies which may arise in the political process.

**The Attorney-General as Cabinet Minister**

EVIDENCE AND ARGUMENTS

3.15 On the question of the Attorney-General's dual role as first law officer and member of the executive, submissions seemed to accept the conventional Australian position that the Attorney-General is both politician and cabinet minister.

3.16 A Sandell (S1) thought the issue to be somewhat academic:

> *"As far into the future as one can see the Attorney-General is and will remain a member of Cabinet and subject to its codes and rules".*

3.17 The PSMC (S5) asserted that English conventions in this respect were of limited relevance:

> *"There is little benefit in debating whether Queensland's Attorney-General should be a full-time public servant, an elected member of Parliament, a member of the Ministry or a member of Cabinet, whether inner or outer. Australian parliamentary traditions are derived from, not pure reflections of, the Westminster system. All Attorneys-General in Australia are and have been Cabinet Ministers".*

3.18 The Department of Justice and Attorney-General (S2) emphasised that non-involvement of the English Attorney-General in the cabinet process was a matter of convention rather than law, and was sceptical of the effect of separation of traditional responsibilities of the Attorney-General from related justice issues:

> *"That division, however, only constructs a chinese wall around the office of the Attorney-General by separating part of the administration of law from political reality ... The separation of responsibilities as predicated by Fitzgerald, in line with the British system, does not afford the Attorney-General any more independence than does the system adopted in most of the former British colonies ... "*

3.19 The PSMC (S5) was also sceptical that such an administrative arrangement would work, noting that exclusion of the English Attorney-General from the cabinet did not:

> *"... prevent horrific miscarriages of justice such as those that occurred in the cases of the Maguires, the Guildford Four and the Birmingham Six".*

3.20 The Queensland Law Society (S3) regarded total impartiality as an unrealistic expectation and felt that independence was not critical where statutory independent officers controlled operational decisions and advice:

> *"It is unrealistic to expect that the Attorney-General will in all matters ignore his parliamentary and Cabinet ties, and his environment to a large extent precludes him from doing so ... So long as the current system of appointment remains, the Attorney-General will continue to act in a political environment. Rather than place (at least in terms of public perception) unfair burdens upon that office, it will be preferable not to impose upon the Attorney-General obligations which might be regarded as requiring independence".*

3.21 A former New South Wales Attorney-General, John Dowd (S7), expressed the view that independence hinged largely upon personal qualities of the Attorney-General and other cabinet members:

> *"... the mixture of each Cabinet and the relative power of the Premier, the Attorney-General and Cabinet members will determine the extent of the Attorney-General's power and thus his 'independence' ... an assertive Premier or a strong Cabinet may oblige a less assertive Attorney to conform to the will of Cabinet".*

3.22 None of the submissions suggested that the position of Attorney-General should be filled by an appointed rather than elected official. The PSMC (S5) felt that the status of Attorney-General was not at issue, and that the public interest was generally well served under the traditional arrangement:

> *"The conventional expectation held of all Ministers is that such powers will be exercised in the public interest and in good faith, that is, consistent with the purposes of the legislation under which the power arises".*

3.23 The PSMC (S5) added that debate on the role of the Attorney-General was an enduring one:

> *"... the debate surrounding the most appropriate model for the Queensland Government to adopt with respect to the Attorney-General has never been (and may never be) resolved. There is, however, no doubt that the constitutional role of the Attorney-General needs to be clarified".*

ANALYSIS OF EVIDENCE AND ARGUMENTS

3.24 It is generally accepted that the Queensland Attorney-General is, as is common in the Australian context, a member of the executive. There would appear to be no mandate or compelling argument to recommend otherwise. The conventional arrangement need not be detrimental to informed decisions by the Attorney-General, particularly where advice is provided to the Attorney without fear or favour by independent law officers.

3.25 A former English Attorney-General, Sam Silkin QC, has criticised the convention in that country of excluding the Attorney-General from the inner cabinet:

> *"... for my part I regret ... that the Attorney-General in this country does not, unless invited, sit at the Cabinet table. I regret it because I am convinced that the more intimately the government's principal legal adviser is aware of the battles and the arguments and the stresses and the strains that eventually result in policy, the better able he is to assist in ensuring that if there is a lawful and proper way of achieving its objectives, that way will be found"* (cited in Edwards 1984, p.71).

3.26 A former New Zealand Attorney-General and subsequent Prime Minister, Sir Geoffrey Palmer, approached the question from a a different perspective:

> *"When the Attorney-General is present in Cabinet and properly briefed on the legal aspects of issues, there is a better chance that Cabinet will heed the law and be aware of the implications of its actions in legal terms ... To have an Attorney-General who is a politician but not in Cabinet has no advantages that I can see"* (1987, pp.249 and 252).

3.27 The critical issues to be addressed in this review are the administrative structures and practices which may best contribute to independence of the office of the Attorney-General.

3.28 In this respect each submission which addressed the matter focussed upon the statutory offices of the Solicitor-General and Director of Prosecutions as the chief sources of advice to the Attorney-General. Most comments stressed how important it was that both be independent. The roles of these law officers are discussed below.

**Statutory Law Officers**

THE SOLICITOR-GENERAL

3.29 The role of the Solicitor-General is governed by the *Solicitor-General Act 1985*. The Act specifies the qualifications necessary for the position of Solicitor-General:

> *"5(3) A person shall be eligible for appointment to the office of Solicitor-General if-*
>
> *(a) he is a barrister entitled to practise in the Supreme Court of not less than 10 years' standing; and*
>
> *(b) he has not attained the age of 65 years".*

3.30 The functions of the Solicitor-General are specified in s.8 of that Act:

> *"8. **Functions of Solicitor-General**. The functions of the Solicitor-General are-*
>
> *(a) to act upon the request of the Attorney-General, as counsel for-*
>
> *the Crown in right of the State;*
> *the State;*
> *a person suing or being sued on behalf of the State;*
> *a body established by or under an Act;*
> *any other person or body where it is to the benefit of the State that he should so act; and*
>
> *(b) to carry out for the benefit of the Government of the State such other functions ordinarily performed by counsel as the Attorney-General requests".*

3.31 Whilst subject to the authority of the Attorney, the Solicitor-General must discharge responsibilities in terms of the legal merits of a matter and should not be subject to direction for political purposes. This principle was felt to be sufficiently important by Isaac Isaacs, a former Victorian Solicitor-General at a time when the post was a ministerial office like the Attorney's, that when faced with what he regarded as an improper direction of the Attorney-General in a prosecution matter, Isaacs resigned rather than derogate from professional and public responsibilities (Cowen 1967, pp.30-7).

3.32 The current Attorney-General, Dean Wells, has stressed the significance of this office:

> *"The role of the office of the Solicitor-General is to appear and to advise on matters of special importance to the Government as a whole ... The office of the Solicitor-General is committed to providing prompt, efficient, cost-effective legal service to the Government in its most difficult legal matters"* (QPD 4 October 1990, p.3917).

3.33 The Solicitor-General, who has in each case been a senior Queen's Counsel, is assisted by the Crown Solicitor and the resources of the Crown Law Division of the Department of Justice and Attorney-General. Crown Law is the government's central legal resource and provides services to ministers, government departments and other agencies.

THE DIRECTOR OF PROSECUTIONS

3.34 In order to discharge responsibilities as the Crown's first law officer, the Attorney-General must have access to independent advice in criminal, civil and administrative law. On administrative law issues such as freedom of

information, judicial review of administrative decisions and equal employment opportunity, the Freedom of Information and Administrative Law and Crown Law Divisions are the authoritative sources of advice. Provision of advice on criminal law issues is the responsibility of the Director of Prosecutions. The Director of Prosecutions is an independent statutory officer and a Crown Law Officer for the purposes of the *Criminal Code*.

3.35 While the Attorney-General has power to institute and stay criminal proceedings, these decisions are almost invariably taken by the Director of Prosecutions. The fact that the Director of Prosecutions makes these prosecutorial decisions removes the possibility of their being politicised. The ability of the Attorney-General to override decisions of the Director of Prosecutions, however, does raise an issue of political accountability.

3.36 In Queensland the position of Director of Prosecutions by s.5 of the *Director of Prosecutions Act 1984* ("DOP Act") must be filled by a barrister or solicitor of the Supreme Court of not less than ten years standing.

3.37 The duties of the Director of Prosecutions are defined in s.10:

> *"**10. Functions of Director**. (1) The Director-*
>
> *(a) shall prepare, institute and conduct on behalf of and in the name of Her Majesty-*
>
> *(i) criminal proceedings;*
> *(ii) proceedings in the Court of Criminal Appeal;*
> *(iii) proceedings in the High Court of Australia or before the Judicial Committee of the Privy Council that arise out of criminal proceedings;*
>
> *(b) shall prepare, institute and conduct on behalf of and in the name of Her Majesty or on behalf of and in the name of a complainant proceedings in the Court of Criminal Appeal being appeals against convictions before justices or penalties imposed by justices;*
>
> *(c) shall, upon the direction of the Minister or of his own motion-*
>
> *(i) prepare, institute and conduct an examination of witnesses in relation to an indictable offence before justices;*
> *(ii) take over and conduct proceedings in respect of a simple offence or in respect of an indictable offence being taken in a summary manner;*
>
> *(d) shall, upon the direction of the Minister, assist on the behalf of the Crown a coroner or instruct counsel assisting a coroner in an inquest under the Coroners Act 1958-1982;*
>
> *(e) shall perform such duties as he may be charged with by or under this Act or any other Act;*
>
> *(f) shall perform such duties of a legal nature as the Minister may direct."*

3.38 Most of the functions of the Director of Prosecutions can be carried out without authority of the Attorney-General. Section 10(2) of that Act is particularly significant in relation to the autonomy of the Director of Prosecutions:

> *"(2) In the discharge of his functions the Director shall be responsible to the Minister but nothing in this section shall derogate from or limit the authority of the Director in respect of the preparation, institution and conduct of proceedings".*

3.39 Grounds for termination of appointment of the Director of Prosecutions are defined in the DOP Act as misbehaviour, physical or mental incapacity, bankruptcy and excessive absenteeism. Otherwise the Director may only be removed where in contravention of s.7:

> *"**7. Other employment curtailed.** The Director shall not, without the consent of the Minister -*
>
> *(a) engage in the practices of his profession except in the exercise of the functions of his office; or*
>
> *(b) engage in paid employment outside the duties of his office".*

3.40 These provisions provide substantial security of independence of the Director of Prosecutions as termination of the appointment must be justified in terms of the DOP Act. Similar provisions relate to termination of the appointment of the Solicitor-General, although in defined circumstances the Solicitor-General may engage in paid external employment:

> *"**16. Other employment curtailed.** (1) With the approval of the Governor in Council first had and obtained the Solicitor-General may engage in the practice of his profession as a barrister otherwise than in discharge of his functions:*
>
> *Provided that, if he does so-*
>
> *(a) he shall at all times give priority to the discharge of his functions as Solicitor-General;*
>
> *(b) he shall not at any time-*
>
> *appear for the defence upon a charge brought by the Crown;*
>
> *act in any case to which the Crown is a party for any party other than the Crown;*
>
> *or*
>
> *permit or suffer a conflict of interests to exist between his practice of his profession and the proper discharge of his functions as Solicitor-General".*

EVIDENCE AND ARGUMENTS

3.41 The PSMC (S5) identified the central issue of independence as being:

> *"... the extent to which incumbent Attorneys are able to balance the competing pressures of party-political and bureaucratic influence on the one hand, and the public interest on the other".*

3.42 A Sandell (S1) believed that the best means of tempering the possibility of political and administrative interference in decisions of the Attorney-General was availability of frank and comprehensive advice from independent law officers of proven ability and integrity:

> *"The choice of the Solicitor General under these circumstances, must produce the best available. He is an appointed official, not an elected one. Here the highest possible legal qualifications become absolutely necessary. Such an official would and should be above giving the Attorney-General the advice he might want to hear".*

3.43 Former New South Wales Attorney-General, John Dowd (S7), considered that:

> *"... 'independence' of an Attorney-General will vary with personality, Cabinet status and other political constraints - it is only by ensuring that the Attorney-General receives the best independent departmental advice that any independence can be protected".*

3.44 The Department of Justice and Attorney-General (S2) argued that, rather than enhancing independence, the previous arrangement of two justice-related portfolios merely resulted in poor communication, policy dislocation, and inefficiency. Priority in the matter of independence should be given to the maintenance of independence of the judiciary and the public offices of the Solicitor-General and Director of Prosecutions:

> *"The maintenance of a strong independent public prosecutor and an independent Solicitor-General are essential if the Attorney-General (whether legally qualified or not) is to maintain independence from political or cabinet influence in matters affecting non-political activities ...*
>
> ...
>
> *Because of the independence of the public prosecutor, the Legal Aid Commission and all judicial officers, the Attorney-General, acting in his independent capacity as the chief law officer, has the ability to influence the administrative practices of each of those separate functionaries without impinging on their respective responsibilities nor their independence".*

3.45 The Bar Association of Queensland (S4) merely observed that it would:

> *"... like to emphasise the necessity for the maintenance of a strong independent Public Prosecutor and an independent Solicitor-General".*

3.46 The Queensland Law Society (S3) asserted that formal procedures and existing administrative structures substantially guaranteed independence:

> *"The independent role of the Director of Prosecutions and of the Solicitor-General, and the procedures which have been implemented for the provision of objective and independent advice removes the need for the independence of the Attorney-General in these areas".*

ANALYSIS OF EVIDENCE AND ARGUMENTS

3.47 Submissions on the adequacy of protections of independence of the Attorney-General endorsed the status quo. Each stressed the importance of maintenance of consistently professional advice from law officers of proven ability and integrity.

3.48 None recommended additional statutory measures comparable to those contained in the New South Wales *Constitution Act 1902*.

3.49 There, in s.38, the Governor is prevented from appointing a minister to act in the place of the Attorney-General. The provision emphasises the special role of the Attorney-General in the political system. It has the advantage of ensuring that the policies of the Attorney-General are not overturned in particular cases when the Attorney-General is temporarily absent from office. An acting Attorney-General may not wish to adopt the same attitudes as the Attorney-General on issues such as appealing against sentences imposed on some offenders, or granting of a fiat.

3.50 Adoption of the New South Wales approach would, however, be contrary to the policy adopted in Queensland. Legislation such as the *Public Service (Administrative Arrangements) Act 1990* has attempted to amend Queensland statutes to remove references to ministers by title. Portfolio responsibilities are formalised through an Order in Council.

3.51 This is reinforced by a recent amendment to the *Acts Interpretation Act 1954*:

> *"**33.(1)** In an Act-*
>
> *(a) a reference to a Minister is a reference to a Minister of the Crown; and*
>
> *(b) a reference to a particular Minister by title, or to "the Minister" without specifying a particular Minister by title, includes a reference to any other Minister, or any member of the Executive Council, who is acting for or on behalf of the Minister."*

3.52 A different aspect of the independence of the Attorney-General concerns the relationship of the Attorney-General to the Solicitor-General and Director of Prosecutions, and the manner in which the independence of the latter two officers can be strengthened.

3.53 Section 4.6 of the *Police Service Administration Act 1990* provides that the Commissioner of Police may furnish to the Minister reports and recommendations to ensure the effective administration of the Police Service. That Act also provides that a register of communications be maintained:

> *"**4.7 Recording and publication of communications.** (1) The Commissioner is to keep a register in which is to be recorded-*
>
> *. all reports and recommendations made to the Minister under section 4.6 (1)(a);*
>
> *and*
>
> *. all directions given in writing to the Commissioner under section 4.6 (2).*
>
> *(2) Within 28 days following 31 December in each year, the Commissioner is to have prepared a copy of the register, which copy, being certified by the Commissioner, or a delegate of the Commissioner, as a true copy of the register is to be furnished forthwith to the Chairman of the Criminal Justice Commission, with or without comment of the Commissioner.*
>
> *(3) Within 28 days following receipt of the certified copy of the register, the Chairman is to give a copy together with the comments of the Commissioner relating thereto, and with or without further comment of the Chairman, to the Chairman of the Parliamentary Criminal Justice Committee.*
>
> *(4) The Chairman of the Parliamentary Criminal Justice Committee is to table in the Legislative Assembly-*
>
> *. the certified copy of the register;*
>
> *and*
>
> *. all comments relating thereto,*
>
> *within 14 sitting days after the Chairman's receipt thereof."*

3.54 If the Solicitor-General and Director of Prosecutions were to present annually to the parliament an account of directions given to them by the Attorney-General, public accountability and thus the independence of all parties would be strengthened. The Attorney-General would be better protected from possible innuendo of cabinet interference, while law officers would be better equipped to withstand any such attempts at interference.

3.55 Accountability in respect of the relationship of the Attorney to these statutory officers would also be enhanced if the Attorney were to deliver in the parliament an account of any directions given to the Director of Prosecutions.

3.56 In the Commonwealth, accountability provisions relating to directions of the Attorney-General to the Director of Public Prosecutions are contained in the *Director of Public Prosecutions Act 1983*:

> ***"Directions and guidelines by Attorney-General***
>
> ***8. (1)*** *In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions and guidelines as the Attorney-General, after consultation with the Director, gives or furnishes to the Director by instrument in writing.*
>
> ***(2)*** *Without limiting the generality of sub-section (1), directions or guidelines under that sub-section may-*
>
> *(a) relate to the circumstances in which the Director should institute or carry on prosecutions for offences;*
>
> *(b) relate to the circumstances in which undertakings should be given under sub-section 9(6); and*
>
> *(c) be given or furnished in relation to particular cases.*
>
> ***(3)*** *Where the Attorney-General gives a direction or furnishes a guideline under sub-section (1), he shall-*
>
> *(a) as soon as practicable after that time that is the relevant time in relation to the instrument containing the direction or guideline, cause a copy of the instrument to be published in the Gazette; and*
>
> *(b) cause a copy of that instrument to be laid before each House of Parliament within 15 sitting days of that House after that time.*
>
> ***(4)*** *Subject to sub-section (5), the relevant time for the purposes of sub-section (3), in relation to an instrument under sub-section (1), is the time when the instrument is made.*
>
> ***(5)*** *Where-*
>
> *(a) an instrument under sub-section (1) relates to a matter in relation to which proceedings may be instituted or are being carried on; and*
>
> *(b) the Attorney-General is satisfied that the interests of justice require that the contents of the instrument not be disclosed,*
>
> *the relevant time for the purposes of sub-section (3) in relation to the instrument is whichever is the earlier of the following times:*
>
> *(c) the time when the Attorney-General ceases to be satisfied as to the matter mentioned in paragraph (b); or*
>
> *(d) the time when-*
>
> *(i) it is decided that no proceedings will be instituted in relation to the matter; or*

> *(ii) all proceedings in relation to the matter (including proceedings by way of appeal from, or otherwise arising out of, proceedings in relation to the matter) are determined or discontinued".*

3.57 The Law Reform Commission of Canada adopted a similar approach in its review of the role of the Attorney-General in criminal prosecution matters, recommending that:

> *"The Attorney-General should have the power to issue general guidelines, and specific directives concerning individual cases, to the Director* [of Public Prosecutions]. *Any such guidelines or directives must be in writing, and must be published in the Gazette and made public in Parliament. If it is necessary in the interests of justice, the Attorney-General may postpone making public a directive in an individual case until the case concerned has been disposed of"* (1990, p.53).

**RECOMMENDATIONS**

3.58 **The Commission recommends that the *Solicitor-General Act 1985* be amended to require the Solicitor-General to present to the Parliament a report within four months of the end of each financial year containing a copy of any written directions and references received from the Attorney-General.**

3.59 **Similarly, it is recommended that the *Director of Prosecutions Act 1984* be amended to require the Director of Prosecutions to include in the Annual Report required under s.16 of that Act a copy of any written guidelines and directions received from the Attorney-General.**

3.60 **The Commission recommends that where the Attorney-General decides to exercise his or her own powers in relation to a prosecution or an appeal overriding a decision of the Director of Prosecutions, the Attorney-General shall report the circumstances of each such instance and the reasons for each decision to the Legislative Assembly within 3 sitting days of its occurrence. This recommendation is contained at clause 10 of the draft Bill in Appendix A to this report.**

3.61 **The Commission further recommends that all guidelines and directions issued by the Attorney-General to the Director of Prosecutions must be in writing and must be published immediately in the *Queensland Government Gazette* and a copy of those guidelines or that direction laid before the Legislative Assembly within 3 sitting days of its publication in the Gazette. Where it is considered necessary in the interests of justice, the Attorney-General may postpone making public a direction in an individual case until the case concerned has been disposed of. This recommendation is contained at clause 11 of the draft Bill in Appendix A to this report.**

**An Attorney-General Act**

3.62 As explained in Chapter Two, the Attorney-General exercises functions in the role of law officer which are different in nature from those of other ministers. The law officer functions are to be exercised expressly in the public interest and are derived from the prerogative of the Crown and from the common law.

3.63 The Attorney-General does not, therefore, represent the government or the State by virtue of that royal prerogative. The Attorney-General in representing the public interest represents the people.

3.64 It is for this reason that it is possible, for example, for the courts to entertain actions by both the State and the Attorney-General. This was confirmed in *Queensland v The Commonwealth* (1977) 16 ALR 487 where actions were brought in both the name of the State and the Attorney-General. Mr Justice Aitkin said:

> *"Generally speaking, when an Attorney-General sues to enforce a public right or liberty he does so as representing Her Majesty's subjects, and not the body politic of the government unit in which he holds office. The presence of the State of Queensland as a plaintiff adds emphasis to the Attorney's separate role, even though he appears by the same counsel as the State"* (at p.510).

3.65 In the two mainland territories of Australia and in Canada it has been considered either necessary or desirable that these powers should be detailed in statutory form. Given recent moves nationally and in Queensland to move away from monarchical forms, it might be thought proper that the time has arrived when Queensland also should determine legislatively the functions which its Attorney-General should have and the general manner in which they should be exercised.

3.66 The connection between the monarchy and the Attorney-General's role and powers was made clear in a case decided by the High Court in 1926 which concerned in part the ability of the Commonwealth Attorney-General to represent the Commonwealth. Mr Justice Isaacs said:

> *"The King himself is supposed to be present in court ... but he cannot constitutionally plead his own cause. For that purpose the Attorney-General represents him notwithstanding that the King is fictionally present. This function of the Attorney-General is quite distinct from his political functions"* (*Kidman v The Commonwealth* (1926) ALR 118, at p.121).

3.67 Chief Justice Knox said:

> *"By virtue of his office he (the Attorney-General) is the legal adviser of the Crown in right of the Commonwealth and the proper person to conduct or defend legal proceedings on behalf of the Crown in that right, and, apart from the powers inherent in his office he is by Order in Council ... entrusted with the administration of, among other matters, "causes", an expression which includes every proceeding competently brought before and litigated in a court"* (at p.120).

3.68 The Explanatory Memorandum which accompanied the Australian Capital Territory *Law Officer Bill* gave the reasons for statutory expression of Attorney-General's powers and functions:

> *"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."*

3.69 It was feared that the method of appointment in that particular jurisdiction may have caused the exercise of those prerogative powers to be invalid. The Attorney-General is appointed by the Chief Minister, not by a representative of the Crown such as the Governor-General or a Governor. No such problem arises in Queensland where clearly the Attorney-General's powers are derived through the Governor from the Crown.

3.70 In the Northern Territory no similar problem arose, but with the advent of self-government it was thought desirable to specify the Attorney-General's powers and responsibilities in legislation.

3.71 The Canadian legislation (*The Department of Justice Act 1970*) defines the powers of the Attorney-General of Canada by reference to those of the Attorney-General of England (s.5). In Queensland this is unnecessary. What the Bill would do is to encompass all the prerogative and other powers currently possessed by the Attorney-General of Queensland.

3.72 The encapsulation of those powers in legislative form would be a significant step in recognising the independent role of the Attorney-General in the performance of those functions, while at the same time providing an opportunity for accountability in their exercise.

3.73 The powers which the Commission considers should be detailed in legislation are essentially traditional powers and it is probably unnecessary to comment upon them. Several, however, are of current significance.

3.74 The most important in this regard is the power of the Attorney-General to grant a fiat to enable a private citizen who would not otherwise have standing to bring proceedings to enforce and protect public rights. This is discussed in detail in the following chapter.

3.75 A second significant power concerns the Attorney-General's relationship with the courts. The powers and functions of the Attorney-General carry with them a set of obligations. Mention was made in Chapter Two of the Attorney's role as guardian of the public interest. In that capacity the Attorney-General has a particular role as defender of the courts and the judges, who normally cannot speak publicly to defend themselves.

3.76 This is manifest, for example, in the Attorney-General's responsibility to bring actions for contempt of court, in either civil or criminal proceedings. This function was discussed in some detail during the *Thalidomide case*, in which an English newspaper, the *Sunday Times*, was held to have been in contempt for articles published which might have prejudiced legal proceedings. In the House of Lords, Lord Diplock said he approved of the practice where in civil matters:

> *"... the Attorney General accepts the responsibility of receiving complaints of alleged contempt of court from parties to litigation and of making an application in his official capacity for committal of the offender if he thinks this course to be justified in the public interest. He is the appropriate public officer to represent the public*

> *interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves; but he acts on behalf of the Crown as 'the fountain of justice' and not in the exercise of its executive functions. It is in a similar capacity that he is available to assist the court as amicus curiae and as a nominal party to relator actions"* (*Attorney-General v Times Newspapers Ltd* [1974] AC 273, at p.311).

3.77 Lord Cross of Chelsea said that in cases of alleged contempt of court:

> *"If the Attorney takes them up he does not do so as a Minister of the Crown-'putting the authority of the Crown behind the complaint'- but as amicus curiae bringing to the notice of the courts one matter of which he considers that the court shall be informed in the interests of the administration of justice"* (at p.326).

3.78 The Attorney-General is supposed to aid the courts more directly when they are criticised. It is for the Attorney to respond on behalf of the judges, particularly if they are subjected to politically inspired criticism.

3.79 Another function which deserves mention is the Attorney-General's role as legal advisor to government. This is not restricted to those occasions when the government wants advice on matters of high legal or political significance and the Attorney can be expected to call on the Solicitor-General's expertise. More generally the Attorney is responsible for ensuring that the government receives legal advice which takes account of whole of government interests. In other words, cabinet should not take decisions which have legal significance on the basis solely of advice obtained by individual departments for their own purposes.

3.80 There has been little published analysis of the position in Australia but Edwards has published a text *"The Attorney-General, Politics and the Public Interest"* dealing with the situation in England. One important distinction between the practices in the two countries is that in England departments have their own generally well-developed and resourced legal sections while the law officers have far fewer supporting lawyers.

3.81 Nevertheless English cabinets have had to develop rules to ensure that the law officers provide input. Edwards explains that there is a policy:

> *"... that requires a departmental legal adviser to consult the Law Officers if he is in doubt concerning the legality or constitutional propriety of legislation which the Government propose to introduce, the vires of subordinate legislation or the legality of administrative actions. The same philosophy underlines the wisdom of ministers and their officials seeking the advice of the Attorney General or the Solicitor General on questions involving legal considerations and which are destined, in due course, to surface before the Cabinet or one of its committees. This eventuality may arise in connection with proposed legislation but that in no way exhausts the range of situations in which law and policy are intermingled and Cabinet decisions must be taken in the light of both considerations.*
>
> *To avoid the embarrassment of a minister discovering for the first time the legal uncertainties or objections to the course of action that he brings before the Cabinet for its collective approval it makes eminent good sense that he first clear away any potential legal objections by consulting beforehand the Law Officers. This may give the false impression that the Attorney General and Solicitor General, with their small coterie of legal officials, are themselves fully equipped to handle the infinite range of legal questions that are brought to their attention in this way. This is not so. What is clear is the unlimited extent to which the Law Officers' Department can mobilise at short notice the full range of legal and other expertise within the government itself, from outside counsel and academic lawyers, which may be demanded in dealing with a complex situation. It is the same breadth of approach that explains the resistance within the Law Officers' Department to permitting the briefing of the Attorney General and Solicitor General, on legal points that may*

> *arise in ministerial meetings, to be undertaken by the departmental legal adviser directly concerned. This task, it is rightly felt, must be undertaken by lawyers who are constantly available and responsible to the Law Officers and whose outlook is not coloured by the narrowly conceived needs of each ministry. Furthermore, as previously mentioned, the possibility is a very real one of two or more departments disagreeing on legal questions and the proper solution out of such an impasse is to seek the opinion of the Law Officers"* (pp.188-9).

3.82 The Commonwealth Attorney-General's Department, in a paper prepared for this Commission, commented on Edwards and on the relevant statements in the Fitzgerald Report pertaining to the need for independent advice:

> *"16. The "independence" of the Law Officers in that consultative role described their freedom not to defer to the proposed Minister's policy position in assessing legal implications of a proposal. That independence is said to enhance the status of the Law Officers as a "'court of last resort' to which the ranks of departmental legal advisers must defer". (What is said to be demonstrated here may be no more than that the Law Officers, if they disagree with a departmental adviser, are more likely to be right because their assessment will not be unduly influenced by policy considerations.) Edwards goes on to mention possible conflict between a proposing Minister and the "independent" advice of the Attorney-General on a law-and-policy issue, giving examples of areas where the legal aspects are likely to be treated in the result as being either, on the one hand, central or, on the other, peripheral - with the decision of Cabinet going accordingly.*
>
> *17. The section of the Fitzgerald Report to which you have drawn attention classes the giving of legal advice along with the use of powers and discretions in the public interest (as discussed above) as something properly requiring "independence and impartiality and freedom from party political influences" (p.138). This seems self-evident if the concern is that the quality of the legal advice be of the highest possible order. Any system of advice would be seriously defective if objectivity, balance or thoroughness were liable to be sacrificed out of a desire to achieve a political aim with unnecessary haste. The system should protect its users against the sometimes uninformed and almost invariably unsafe expectation that the lawfulness of a course of action will not be tested in the courts. Certainly there may be cases where it will be justifiable to proceed with the acceptance of a calculated risk that executive action or the validity of legislation will not be tested (or tested quickly) or will not be the subject of an adverse ruling or that the legal implications will, if adverse, be tolerable. In such case the highest quality of advice will be needed to assess the risk and all relevant legal consequences and to take account of any available course that might improve prospects of success in the event of challenge.*
>
> *18. Also, it seems obvious that sound and balanced advice will sometimes be necessary on whether proposed measures, while legally open, are likely to attract criticism because they offend established principle (e.g. retrospective penalties, reversed onuses, summary detention, exclusion of review by the courts) and furthermore that the Attorney-General as the Minister responsible for the Government's policy on "law and justice" and "human rights" (including conformity with any relevant treaties or international standards) will often have his own policy position to argue on such matters"* (Rose 1 March 1993, EARC file 012/48).

3.83 These commentaries make clear the importance of the role of the Attorney-General in providing the cabinet with advice which has a "whole of government" legal perspective. This has implications for any implementation of commercialisation of the Government's legal services, a matter addressed in some detail in Chapter Five.

3.84 Another obligation which flows from the Attorney-General's precedence as head of the Bar and role as advisor to the Crown is that the Crown is expected to be a model litigant. As Mr Justice Mahoney stated in *P & C Cantarella v Egg Marketing Board* [1973] 2 NSWLR 366 at 383:

> *"The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result."*

3.85 After quoting extensively from English authorities and the Privy Council, Mr Justice Mahoney referred to a comment by Sir Samuel Griffith in *Melbourne Steamship Co. Ltd. v Moorehead* (1912) 15 CLR 333 where the Chief Justice expressed concern that the Crown had taken a purely technical point of pleading:

> *"... and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a fortiori not in criminal proceedings.*
>
> *I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken"* (at p.333).

3.86 The Commission considers that the formulation of these and other powers and responsibilities of the Attorney-General in legislation will help ensure the independence of the Attorney-General and acceptance by the organs of government of the role of the Attorney-General.

**RECOMMENDATION**

3.87 **The Commission recommends the enactment of legislation to specify the powers, functions and responsibilities of the Attorney-General in the form of the draft Bill in Appendix A to this report.**

# CHAPTER FOUR

# RELATOR ACTIONS

## Introduction

4.1 The Attorney-General exercises a range of prerogative powers. One of these is as protector of public rights. It is the exclusive right of the Attorney-General to approach the courts when there has been a breach of public right or liberty. A member of the public does not have the necessary standing to apply to the courts where there is alleged to be a breach of public right unless the person has a special interest in the subject matter beyond that of any other member of the public. The law of "standing" is the set of rules which determine whether a person is considered to be a proper person to commence court proceedings. The Australian Conservation Foundation was held by the High Court not to have standing to sue the Commonwealth over permissions granted for the construction of the Iwasaki resort ((1980) 146 CLR 493).

4.2 A person lacking standing can nevertheless bring an action to enforce a public right or liberty if the person gains the consent (or "fiat") of the Attorney-General. The action is then brought in the name of the Attorney-General "at the relation of" the person. Such an action is usually known as a "relator" action.

4.3 The "public rights or liberties" involved have a wide scope. For example, a nuisance which inflicts damage, injury or inconvenience upon all of a class of persons who come within the sphere or neighbourhood of its operation is a public nuisance (Halsbury's *Laws of England*, 4th Ed., Vol. 34, p.102).

4.4 The Attorney-General's role is as the guardian of the public interest. The joining of the Attorney with a relator is required to set the machinery of justice in motion (Edwards 1964, p.289).

4.5 Civil litigation in the public interest may be directed against a law of the State or action of the government, thus creating the possibility of conflict of interest for the Attorney-General between the role of cabinet minister and duties as first law officer.

4.6 The question of whether the Attorney-General should lend formal authority to such an action is a matter of absolute discretion, guided by the merits of the application and a balancing by the Attorney of private and public interests. The credibility and effectiveness of this aspect of the justice system therefore relies upon the ability of the Attorney-General to act independently of party political influence.

4.7 In Queensland, all applications for a fiat are referred by the Attorney-General to the Crown Law office. A fiat will not be recommended unless senior counsel is satisfied that the case is an appropriate one, and it is the only means by which the plaintiff could obtain the relief sought (Wells 11 March 1993, EARC file 012/52).

4.8 Before granting a fiat, the Attorney-General would usually wish to obtain a copy of the writ and the statement of claim, evidence from counsel of a prima facie case, a statement from the plaintiff's solicitors to the effect that the plaintiff is a fit and proper person and capable of funding the action, and agreement that full relief cannot be granted without consent of the Attorney-General.

4.9 While it could be assumed that legal and administrative arrangements would ensure evaluation of each application on its merits, the final decision rests with the Attorney-General. A prominent instance where the discretion of the Attorney-General was compromised in this type of decision concerned Lake Pedder in Tasmania.

4.10 Conservationists had sought a fiat from the Tasmanian Attorney-General to challenge the proposed flooding of Lake Pedder for hydro-electric purposes. The Attorney-General announced that this would be granted. Cabinet intervened, opposing the Attorney's position and precipitating his resignation. The vacant portfolio was assumed by the Premier who then refused a fiat.

4.11 A further instance raising questions of the independence of the Attorney was where conservationists applied for a fiat to obtain an injunction upon limestone mining in the Mt Etna Recreation Reserve in Queensland. Subsequently the reservation of the land as a recreation reserve was revoked by Order in Council of 16 June 1977, thus removing the basis of the action. One week after revocation the Queensland Attorney-General refused his fiat, no reasons being given (Law Reform Commission 1985, p.91).

4.12 Cabinet intervention in a decision of this nature was regarded by former Prime Minister Menzies as inappropriate:

> *"... the granting or withholding of a fiat is a matter which rests in the discretion of the Attorney-General, a discretion which he exercises according to certain rules. Cabinet does not decide such a matter nor, indeed would it be at all proper for the Attorney-General's judgement, which is reposed in him because of his special qualification and office, to be overruled by anyone"* (cited in Renfree 1984, p.211).

4.13 Instances of the Commonwealth Attorney-General granting a fiat to challenge Commonwealth legislation are few. Latham did so inadvertently in the *Shipping Board case*. It seems he did not anticipate constitutional issues arising. Latham's view was that the Attorney-General should not allow a relator action challenging the constitutional validity of Commonwealth legislation (Renfree 1984, p.209).

4.14 Murphy took a different view as Attorney-General and gave his fiat to allow a challenge to the *Commonwealth Representation Act*. The action was based on a claim that the Constitution required electoral divisions to have equal numbers of electors. *Attorney-General of Australia v Commonwealth of Australia* (*McKinlay's case*) (1975) 7 ALR 593 was the first instance where the Attorney-General granted a fiat specifically and deliberately to allow a challenge to Commonwealth legislation.

4.15 The Attorney's action, however, coincided with the interests of a government which desired electoral reform after failing to procure a redistribution of electoral boundaries by the usual means (LRC 1978, p.13). Murphy also granted a fiat to Canberra residents to challenge a decision by the cabinet, of which he was a member, authorising the construction of a telecommunications tower in a national park on Black Mountain in Canberra (see *Kent v Kavanagh* (1973) 1 ACTR 43; *Johnstone v Kent* (1975) 132 CLR 164). In other instances though, relator applications may challenge the interests of the government and thus potentially place the Attorney-General in a position of conflict of interest.

4.16 Mr Justice Gibbs commented in *Victoria v The Commonwealth* (the *AAP case)* (1975) 7 ALR 277 upon the requirement for the Attorney-General to give his fiat to challenge decisions or actions of the Commonwealth:

> *"... I would, in Australia, think it somewhat visionary to suppose that the citizens of a State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible"* (at p.315).

4.17 The courts have made it clear that a decision of the Attorney-General to refuse a fiat is not subject to judicial review. In *London County Council v The Attorney-General* [1902] AC 165 Lord Halsbury LC ruled that the jurisdiction of the Attorney-General to sue on behalf of relators was absolute, and that in such matters the Attorney was responsible to the parliament exclusively:

> *"... it seems to be that it is for the Attorney-General and not for the courts to determine whether he ought to initiate litigation ... it is a matter entirely beyond the jurisdiction of this or any other court"* (at pp.168-9).

4.18 The extent of the Attorney-General's authority to refuse or dispense fiat was tested in *Attorney-General v Independent Broadcasting Authority* (1973) QB 629 (the *McWhirter case*) where the plaintiff applied for an injunction against the broadcasting of a television program on the artist and film-maker Andy Warhol. The court allowed an interim injunction prior to a decision of the Attorney as the matter required a prompt judicial response.

4.19 A more recent British case may be the most significant on the position of the Attorney-General. In 1977 the Post Office Workers Union announced a one week ban on services with South Africa. It was a statutory offence to wilfully delay mail or to solicit any other person to do so. Gouriet, a private citizen asserting no special interest, applied to the Attorney-General for his fiat to obtain an injunction restraining the ban due to its illegality. Attorney-General S Silkin refused his fiat (LRC 1978, p.11).

4.20 Gouriet applied to a judge in chambers for an injunction, issuing the writ of summons in his own name. Justice Stocker refused the application.

4.21 The matter was appealed to the Court of Appeal [1977] 1 QB 729. The Attorney-General had claimed that his discretion was absolute, that he was not required to give reasons, that the court had no right to enquire as to how the decision was obtained, and that if wrong he was answerable to the parliament exclusively.

4.22 In that hearing it was held by a majority that the Court had no power to review decisions of the Attorney-General in refusing consent, and thus that the plaintiff was not entitled to a permanent injunction. The Court did find, however, that the plaintiff could seek a declaration that the proposed strike was illegal and that pending a decision on that claim an interim injunction would be allowed.

4.23 The Court of Appeal took an antagonistic position on the relator requirement. Lord Denning MR observed in relation to prerogative powers of the Attorney-General:

> *"Parliament has passed no enactment upon it. There is no binding precedent on our books about it ... If he does not give his consent, then any citizen of the land - any one of the public at large who is adversely affected - can come to this court and ask that the law be enforced"* (at p.763).

4.24 Lord Justice Lawnton stated:

> *"What I cannot, and will not, accept is that he and he alone, in relation to law enforcement through the civil courts is the sole arbiter of what is in the public interest"* (at p.771).

4.25 Lord Justice Ormrod stated that the relator requirement had:

> *"... the practical advantage of preventing a large number of frivolous, futile or merely mischievous cases coming to the courts, but there are other ways of dealing with that problem. It has the grave disadvantage of putting the Attorney-General into the invidious position of appearing ... to be standing between the private citizen and the court"* (at p.778).

4.26 The case then proceeded to the House of Lords on appeal (*Gouriet v Union of Post Office Workers* [1978] AC 435). The House of Lords overturned the decision of the Court of Appeal, affirming the necessity in such a case for the involvement of the Attorney-General, but were divided on the desirability of the rule of legal standing.

4.27 Lord Wilberforce said that only the Attorney-General could apply to civil courts for injunctive relief against threatened breaches of the law:

> *"It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere in the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights"* (at p.477).

4.28 Lord Wilberforce also found that the courts should not become involved on the issue of standing:

> *"The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact that ... decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve"* (at p.482).

4.29 Lord Fraser concurred, stating that the Attorney-General was responsible to the parliament rather than the courts:

> *"If the Attorney-General were to commit a serious error of judgement by withholding consent in relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgement, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts"* (at p.524).

4.30 In Queensland, access to the civil courts in public interest actions is a matter for the Attorney-General's discretion. Decisions of the Attorney-General to grant or refuse a fiat are not subject to judicial or administrative review.

4.31 Since 1989 only three requests have been made to the Attorney-General for a fiat. None was granted. The precise number of applications prior to 1989 is not known. Approximately 14-20 fiats were requested, with about four being granted (Wells 25 March 1993, EARC file 012/53).

**The Question of Reform**

4.32 The issue of relator actions was discussed in the Report of the West Australian Royal Commission into Commercial Activities of Government and Other Matters. The report expressed the opinion that the need for a person to obtain a fiat before challenging government expenditure decisions placed the Attorney-General in a potential conflict of interest situation:

> *"In the course of the inquiry, however, the Commission has noted the expenditure, by or on behalf of the government or its agencies, of large sums, the lawfulness of which may have been questionable at the time. In such cases, under the current standing rules, no member of the public may be able to establish, to the satisfaction of a Court, a special interest in seeking judicial review of such expenditure"* (1993, para. 3.6.4).

4.33 The report noted that only the Attorney-General had lawful authority to challenge many executive decisions and actions:

> *"The Attorney-General, in his or her capacity as the guardian of the public interest, automatically has standing to seek judicial review in such cases. However this right in the Attorney-General harkens from former times when the role of the Attorney-General was more that of an independent officer of Parliament than a minister of the government of the day. Today, an Attorney-General is no longer perceived as a minister who stands apart from the government of the day, free from direction"* (1993, para. 3.6.4).

4.34 It continued:

> *"A conflict of interest is inevitable. The consequence is that the Attorney-General should not be expected to institute legal proceedings which may have the consequence of invalidating administrative or executive action at the request of a member of the public concerned to ensure that government acts in accordance with the rule of law ... "* (1993, para. 3.6.4).

4.35 The report of the Royal Commission, adopting the "floodgates" argument, did not recommend extension of the right of standing:

> *"Because so many actions of government are accompanied by the expenditure of money, we can readily imagine an unwarranted increase in the number of applications for judicial review of administrative action if such a test were introduced"* (1993, para. 3.6.5).

4.36 The report *Standing in Public Interest Litigation* was produced by the Australian Law Reform Commission in 1985, some eight years after being given a reference from then Attorney-General Ellicott to examine the issue. The report recommended that the right of the Attorney-General to intervene in public interest litigation should be unrestricted (1985, para. 300), that the Attorney-General should retain the ability to commence an action of his own motion (ex officio), or to consent to a relator action and should retain the power to intervene in any public interest litigation initiated by others to protect Crown prerogatives or argue issues of general public policy.

4.37 Additionally, the Law Reform Commission recommended that private individuals, other than "meddlers", should have a right to commence and maintain public interest litigation. Private individuals should also have limited intervention rights:

> *"Other persons should be able to intervene only at the court's discretion, which should be exercised having regard to-*

- *the proposed intervener's stake in the subject matter or outcome of the proceeding;*
- *if the proposed intervener has no such personal stake - the interests of those that do; and*
- *the proposed intervener's motivation and capacity to present a case adequately.*

*Leave should not be refused simply because the proposed intervener lacks a personal stake in the proceeding"* (1985, paras. 301-2).

4.38 It was recommended that any person should have standing unless in the opinion of the court that person was *"... merely meddling"*, or had no personal stake and was clearly incapable of adequately representing the public interest (paras. 252-3).

4.39 The Law Reform Commission also recommended that in certain circumstances the courts should have discretion to award costs against the Attorney-General:

> *"In relator actions, if an order is made against the relator and if special or unusual circumstances exist (such as where an Attorney-General has participated in the conduct of an investigation to such an extent that it may be properly said that to be 'his case' rather than the relator's), the court should be able to make an order for costs against the Attorney-General. There should also be power to declare unenforceable any security, indemnity or other arrangement binding the relator plaintiff to reimburse the Attorney-General for costs.*
>
> *When the Attorney-General intervenes in a public interest proceeding and thereby becomes a party, the court should have the power to make an order for costs against him"* (1985, paras. 318-9).

4.40 Mention has been made (at paras. 4.14-15) of Murphy's willingness as Commonwealth Attorney-General to grant his fiat to private individuals wishing to challenge Commonwealth laws or actions. As a member of the High Court he maintained that the rules of standing were too narrow.

4.41 *"Standing"*, Justice Murphy said, *"is a judicial invention"*. He pointed out that in practice questions of standing were often brushed aside if a court considered that in the public interest the issue of substance should be settled. In this area he thought the test should be broad, and that a cultural or other interest might be sufficient (*Australian Conservation Foundation v. The Commonwealth* (1979-80) 28 ALR 257, at 289-290).

4.42 In 1989, Justice Toohey, of the High Court, told an international environmental law conference in Sydney that he favoured a different approach to standing in environmental issues. He said there was a certain unreality in applying the conventional standing tests where legislation existed to protect some aspect of the environment:

> *"It is the community as a whole or in part that will suffer where there has been a breach of some public duty imposed by legislation ... There are good reasons why an organisation, formed to protect the environment, should be permitted to proceed in such a case"* (Toohey 1989).

4.43 The High Court has not, however, had a case in recent years in which it has needed to revise the law of standing as it had developed in the *Australian Conservation Foundation Case* and in *Onus* (1981) 149 CLR 27. Nor have any of the parliaments sought to enact the recommendations made by the Australian Law Reform Commission in 1985.

EVIDENCE AND ARGUMENTS

4.44 The Law Society (S3) acknowledged the potential for political influence to be applied to an Attorney-General determining whether to grant a fiat, and went on to say:

> *"As the Attorney-General is a member of the political party currently in government, it is possible for a decision to be motivated by purely political considerations. However, any allegation along those lines would be difficult to prove because the reasons for the granting or denial of a fiat are not made known. In any event, the exercise of the discretion by the Attorney-General is not reviewable by the courts".*

4.45 The Law Society (S3) suggested that the courts could determine the merits of relator applications through a process similar to that of committal proceedings:

> *"... the defendant/accused would not be required to defend or appear until a prima facie case had been established before a magistrate. If this procedure were found to be cumbersome in particular situations, then the Attorney's fiat might continue to be available as an alternative. So long as the option of establishing a prima facie case before a magistrate was available, then it would be difficult to substantiate any charge of political partiality in refusing a fiat".*

4.46 The issue of whether the Attorney-General should control access of public interest litigants to the courts was addressed only by the Law Society (S3) who were of the opinion that this discretion could be dispensed with.

ANALYSIS OF EVIDENCE AND ARGUMENTS

4.47 If standing were to be broadened, the filtering role now performed by the Attorney-General would be transferred to the courts, which would determine the merits of any action to enforce public rights or liberties brought by a member of the public without a special interest. But unlike the courts, the Attorney-General is not solely concerned with the merits of the action. The Attorney-General is also required to make a decision on public interest grounds. That is the reason why the courts will not review a decision by the Attorney-General not to grant a fiat in any particular case.

4.48 This does not mean that the Attorney-General (at least in the Australian political context) should not be accountable for decisions granting or refusing a fiat. The fact is that the Attorney-General is a cabinet minister and cannot ignore political considerations, even though the Attorney-General ought not be subject to cabinet direction in the exercise of the discretion.

4.49 Whatever the degree of independence the Attorney-General has, or is permitted by cabinet colleagues to have, the decisions which are made must be based on public interest grounds. On that aspect alone, the Attorney-General ought to be accountable for them to the parliament. Though the decisions may be of a kind unique to the Attorney-General's portfolio, they are decisions taken in the public interest by an elected minister rather than an independent official. In that sense they are like many other decisions which ministers take and for which they are responsible to parliament.

4.50 At the very least this means that the parliament must be told when the Attorney-General makes a decision to grant or refuse a fiat. As a minimum, the parliament should be informed of the nature of the application, and the alleged breach of public right or liberty which is sought to be challenged in the court. The Attorney should also explain why he took the particular decision. Parliament, equipped with this information, may judge not only the propriety of the Attorney-General's decision but also whether it, the parliament, should be concerned at the alleged breach and itself take action to correct it.

4.51 It would not be appropriate for the Commission to make a recommendation in this report as to whether the standing rules should be so broadened as to dispense with the need for the Attorney-General to issue a fiat. The issue is too complex to be undertaken as an adjunct to a report on the independence of the Attorney-General. The Australian Law Reform Commission took eight years to produce its recommendations. But it is an important issue which the Commission considers should be undertaken in the near future. The report of the Australian Law Reform Commission, which includes draft legislation, provides a starting point. The Commission believes that the Queensland Law Reform Commission should be asked to investigate and report on the desirability of broadening the standing rules applicable to public interest litigation.

**RECOMMENDATIONS**

4.52 **The Commission recommends that where an application for a relator action has been refused, or not approved within 60 days, the Attorney-General, within 3 sitting days of such refusal or expiry of the period allowed for non-approval, table in Parliament a statement which sets out the nature of the application for the grant of the fiat, the alleged breach of public right or liberty and the reasons for the Attorney-General's decision. This recommendation is contained at clause 9 of the draft Bill in Appendix A to this report.**

4.53 **The Commission further recommends that the Attorney-General provide a reference to the Law Reform Commission to examine the question of standing in public interest litigation.**

# CHAPTER FIVE

# DEPARTMENTAL ISSUES

## The Amalgamation Question

5.1 This chapter is concerned with the structure of the department for which the Attorney-General has ministerial responsibility.

5.2 The *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Fitzgerald Report) in its recommendations for administrative reform asserted that:

> *"It would be a substantial step towards proper principle if the office of Attorney-General were separated from that of the Minister for Justice"* (1989, p.138).

5.3 The recommendation was a consequence of deficiencies in the administration of justice which that Commission of Inquiry felt arose through the influence of Justice Department officials over successive Attorneys-General.

5.4 The Ahern Government acted quickly to implement this particular recommendation. Portfolio responsibilities of the Department of Justice and Attorney-General were apportioned between the Attorney-General and the Minister for Justice, and a Department of Attorney-General and a Department of Justice and Corrective Services created.

5.5 In 1990 the Public Sector Management Commission (PSMC) conducted simultaneous reviews of the Attorney-General's and Justice Departments. The PSMC was established to manage Queensland public sector reform in the areas of structural review, functions and management, personnel and management systems and standards, and merit and equity principles (PSMC First Report 1990, p.5).

5.6 In its *Report on Review of the Department of the Attorney-General* the PSMC conceded that it was not possible to provide a definitive model of the perfect Department of the Attorney-General and adopted as the central criterion in its analysis of responsibilities a "pure law" focus (1991, p.26). The PSMC recommended that the administrative responsibilities of the Attorney-General, as first law officer of the Crown in both civil and criminal matters, should be confined to statutes and those parts of the common law concerned with legal mechanisms (1991, p.25).

5.7 Accordingly, appropriate responsibilities were defined as representation of the Crown in civil proceedings, intervention in private suits affecting Crown prerogatives or matters of public policy, litigation to enforce public rights, as defendant representing the Crown for a declaration of right, as respondent to each legitimacy petition, and acting as protector of charities (1991, p.24).

5.8 An examination of the practices and structures of the Department of Justice and Corrective Services and the Department of the Attorney-General identified inappropriate locations of responsibility for legislation in each department (1991a, p.2).

5.9 The PSMC noted that of 80 Acts which fell to the jurisdiction of the Attorney-General, many were there solely for historical reasons as they named the Attorney specifically as minister responsible. Accordingly, it was recommended that a policy of non-specific reference to ministers be adopted in future when drafting legislation (1991, p.32).

5.10 The PSMC failed to see any administrative logic in the apportionment of responsibility for statutes and recommended that a working party of representatives of the Department of the Attorney-General, the Department of Justice and Corrective Services, and the PSMC be established to allocate the statutes for which the Attorney-General and the Minister for Justice respectively should be responsible. The determinations were subsequently implemented.

5.11 The PSMC was also concerned that administration of the courts and related matters should fall to the jurisdiction of the Justice Department. To that end the review recommended that the Public Trust Office and responsibility for payment of the judiciary be assigned to the Department of Justice (1991, p.31). The PSMC also proposed that the Attorney-General's Department be responsible for appointment of magistrates and acting magistrates as it already recommended appointment of judges of the District and Supreme Courts (1991a, p.2).

5.12 Consistent with apportionment upon the "pure law/administrative" distinction, it was recommended that responsibility for the *Criminal Code 1899* and *Evidence of Commission Act 1988* be given to the Department of Attorney-General, while administration of the *Prisoners (Interstate Transfer) Act 1982* be by the Minister for Justice and Corrective Services (1991, p.11).

5.13 Other anomalous responsibilities were addressed by a recommendation that the position of Deputy Master of Titles be transferred from the Crown Solicitor's Office to the Department of Lands (1991, p.7).

5.14 The review noted the absurdity of two Queensland Government ministers and their support staff attending Standing Committee of Attorneys-General (SCAG) meetings and recommended that representation at SCAG meetings be decided on the basis of the agenda (1991, p.13).

5.15 Reforms flowing from the PSMC review resulted in more rational and consistent administrative arrangements. As could perhaps have been expected, however, the reallocation of responsibilities was disruptive to clients and other interested parties.

5.16 The Premier later observed that "*In practice the division into two portfolios had some unforeseen consequences*" (Goss 15 October 1992, EARC file 012/10). Chief of these was confusion as to the jurisdictions of the respective offices:

> *"There was a degree of confusion in the legal profession and the general public as to which Minister should be approached on particular matters. In national forums such as the Standing Committee of Attorneys-General it was necessary for both Ministers to attend. More specifically in relation to matters related to the judiciary and the courts, there was considerable uncertainty"* (Goss 15 October 1992, EARC file 012/10).

5.17 The Government, in the belief that the original Fitzgerald Report concerns had been addressed and the Fitzgerald reform program substantially delivered, re-amalgamated the justice-related portfolios following the 1992

Legislative Assembly election. Commercial, liquor and other anomalous responsibilities were dispatched to Treasury, the Department of Tourism, Sport and Racing and the newly-created Department of Consumer Affairs.

EVIDENCE AND ARGUMENTS

5.18 The submission of K Lindeberg (S8) maintained that the separation issue should not be dismissed lightly:

> *"The Queensland justice (excluding the Judiciary) and administrative system is so interlinked and the power of the Executive so undiminished ... that should unexpected or extraordinary Queensland political events suddenly throw up a situation where the need for independence of the Attorney-General becomes a crucial test, then the rule of law has the potential to play second fiddle to party political considerations".*

5.19 As to divided administrative responsibility, the Department of Primary Industries commented that:

> *"This Department, like other agencies and individuals, was frequently unable to simply ascertain whether a policy issue was under the province of the Minister for Justice or the Attorney-General. The frequency of joint Cabinet Submissions by those 2 Ministers testifies that the uncertainty prevailed even between the former departments ... "* (Miller 11 December 1992, EARC file 012/58).

5.20 Comments by the president of the Queensland Law Society (S3) suggested that this confusion existed in the general community:

> *"I experienced difficulty myself when finding that the Attorney-General was responsible for administration of the Legal Aid Commission, but the Minister for Justice was responsible for the Public Trustee. From my position both areas were inter-related as providers of legal services".*

5.21 The Department of Justice and Attorney-General (S2) considered the dual department arrangement to be an administrative headache best dispensed with:

> *"To provide more than one department with the responsibility of developing legal issues is disruptive to good government, creates interdepartmental conflict resulting in the development of imprecise laws and in some instances inconsistencies with other legislation".*

5.22 On the general issue of separation, the former New South Wales Attorney-General, John Dowd (S7), warned that:

> *"There is a general misconception that the functions of the Attorney-General are somehow impeded by the Attorney being responsible for the administration of justice ... "*

and described the existence of two departments as *" ... administratively cumbersome".*

5.23 The PSMC (S5) advised this Commission that in its 1990 review of the Departments of Attorney-General and Justice and Corrective Services it had considered recommending re-amalgamation:

> *"... it became apparent that both agencies were operating at less than optimum efficiency and effectiveness. This was due in no small part to a lack of clarification regarding the responsibility for various issues associated with the law and the judiciary, continuing disputation regarding the responsibility for various Acts, perceptions of confusion in the minds of major clients of both departments, as well as operational overlaps between the two agencies".*

5.24 The PSMC (S5) endorsed the view that Fitzgerald had been concerned to achieve a short-term separation for strategic purposes:

> *"It appears that the major justification for the separation was an essentially short-term strategy to wrest control of the reform process in the area from former Justice Department officials, rather than for any public policy-related or other reason".*

ANALYSIS OF EVIDENCE AND ARGUMENTS

5.25 A desire to exclude Justice Department officials from implementation of the Fitzgerald reform proposals appears to have been primarily responsible for the recommendation for separation:

> *"In the aftermath of this report's release, present and former Justice Department personnel, who are steeped in attitudes which have contributed to the current problems, may well try to reassert their influence and regain control of the agenda for reform"* (Fitzgerald Report 1989, p.139).

5.26 By the time of re-amalgamation, a substantial majority of reforms involving or otherwise relating to the Justice Department had been achieved. The Commission is of the opinion that while separation was intended to remove administrative responsibilities from the Attorney's portfolio, the primary purpose was to reduce the vulnerability to bureaucratic interference of a range of reforms.

5.27 The Attorney-General sought to allay concerns which might have arisen in relation to re-amalgamation:

> *"The Justice portfolio which has now been appended to the portfolio of Attorney-General, is not the same Justice portfolio which was excised from the Attorney-General's portfolio in 1989 ... The areas which previously presented a problem are now found in the new portfolio of Consumer Affairs and Corrective Services, Treasury, Tourism, Sport and Racing"* (Wells 16 December 1992, EARC file 012/60).

5.28 Re-amalgamation must be seen in the context of legal and administrative reform since 1989. The administration of justice has been subject to extensive review over the intervening period. In the opinion of the PSMC (S5):

> *"... in the three years since the initial implementation of the Report, the introduction of other legal and administrative processes ... has greatly reduced the grounds for concern about the quality of government decision making which gave rise to the Fitzgerald Report's concerns in this area".*

5.29 The range of statutes for which the Attorney is responsible as minister is contained at Appendix B. The *Queensland Government Gazette* illustrates the essentially justice-based nature of the portfolio responsibilities of the Attorney-General:

> *"Legal Aid*
> *Dispute Resolution*
> *Justices of the Peace and Commissioners for Declaration*
> *Judges and Magistrates*
> *Criminal Proceedings*
> *Law Reform*
> *Legal Advice and Services to Government*
> *Individual Rights and Freedoms*
> *Legal Profession*
> *Criminal Justice Reform*
> *Coroners*

*Administrative Reform*
*Administration of Justice*
*Elections and Referendums*
*Public Trustee"* (12 March 1993, p.952).

5.30 Given the completion of the bulk of the justice-related Fitzgerald reform matters and reduction of potential for conflict of interest due to reallocation of inappropriate administrative matters, the Commission sees no "independence" problems arising from amalgamation and concurs that positive administrative benefits are likely to ensue.

**Commercialisation of the Crown Law Division**

5.31 The submission of the State Public Services Federation (SPSF) - Queensland (S6) raised an issue in regard to the independence of the Attorney-General not addressed in other submissions:

> *"As the Crown Law Division is the chief provider of legal services to the Attorney-General, then it follows that if the position of Crown Law is compromised, then the independence of the Attorney-General will also be affected ... For a number of years now the Crown Law Division has suffered and continues to suffer two principal restrictions ... the most crucial restriction is that there has been a severe restraint on the granting of adequate funds to provided staff (legal and support), technology, library facilities and suitable accommodation ... "*

5.32 Proposals for commercialisation of the Crown Law Division were viewed by the SPSF (S6) as a threat to the quality of advice available to the Attorney-General:

> *"It is expected that an employer should seek to introduce efficiencies into the workforce which will provide the largest output of work for the smallest outlay of money. What cannot be permitted in a unit of public administration is that legal obligations placed on the government of the day and the Attorney-General are allowed to be changed for apparent economic reasons".*

5.33 The Commission sought the Attorney-General's reaction to the submission of the State Public Service Federation, but the Attorney-General declined to comment (Wells 14 May 1993, EARC file 012/57).

5.34 The Crown Law Division of the Department of Justice and Attorney-General uses the services of 81 solicitors and barristers, 27 law clerks and 42 support staff. The Division provides legal services to ministers and government agencies and is moving toward commercialisation of its services:

> *"... the Division is undergoing a major transformation from a highly professional but non-commercial legal adviser to the Crown, to a commercially-competitive legal firm"* (Department of Justice and Attorney-General 1992, p.34).

5.35 While the Annual Report of the Department presents commercialisation as a fait accompli, the Commission understands that no cabinet submission has been developed, and that the Minister has not made a decision on the proposal.

5.36 In effect, commercialisation means that services are to be provided on a competitive user-pays basis. Non-commercial government agencies may be "tied" to the Crown Law Division for a period of two or three years. Once this period has expired they will have a discretion to obtain advice and legal services from the private sector.

5.37 Commercialisation involves Treasury assessment of how much money is to be spent by government on legal services rather than a needs-based assessment by the Attorney-General's Department. If departments choose to spend their funds building up their own legal resources or buying advice from outside government, the funds available to Crown Law will be reduced. So too will be its staff and its ability to meet the needs of other departments. Eventually Crown Law could be greatly reduced in size and effectiveness.

5.38 The commercialisation initiative follows a review of the Division (or Crown Solicitor's Office as it was then known) by financial and management consultants Coopers and Lybrand, and arises at least partly from the 1990 PSMC review of the Department of the Attorney-General which found that the level of Crown Law services was limited by budget. It recommended that a working party of staff of the Department, Treasury and PSMC be established to develop and implement a system for "user-pays" (1991, pp.32-3).

5.39 A Treasury review of the resources available to the Department of Justice and Attorney-General attributes to the Director of Crown Law the opinion that commercialisation would:

> *"... allow Crown Law to better respond to client needs by providing added flexibility in terms of staffing levels and the ability to moderate demand through an appropriate pricing structure"* (1993, p.6).

5.40 That review noted that Crown Law wished to maintain, for some unspecified period, a monopoly over government legal services in a user-pays environment. Treasury's preference was somewhat different:

> *"Treasury on the other hand sees that commercialisation must involve a degree of exposure to competition and market forces so as to promote the rational use of resources, improved productivity and enhanced customer service"* (1993, p.6).

5.41 As evidence of its commitment to competition the Department boasts that file workload per Crown Law officer has more than doubled since 1986-87 and that administrative costs per file have been reduced by 38% in the same period (1992, p.36). While structural and productivity efficiencies are to be commended, it must be acknowledged that over-emphasis upon cost-effectiveness may have consequences for quality and comprehensiveness of services.

5.42 This possibility is pertinent to the independence issue. Crown Law provides advice to departments and agencies, but also advice to the Attorney-General on a range of public interest issues. Considerations of equity should not be overlooked in the drive to resource efficiency. The Treasury review recognised that the areas of advice to cabinet or ministers, policy matters within the Attorney-General's portfolio, drafting of subordinate legislation and other legislative instruments, constitutional issues, and public international law and treaties, may need to be funded from the Consolidated Fund as a Community Service Obligation (1993, p.66).

5.43 The budget appropriation reserved to Crown Law Division for advice purposes would be removed and distributed among departments and agencies. An outcome of full commercialisation may be that government agencies are tempted to ration requests for advice. Although commercialisation is intended to promote availability of legal services,

budget emphasis may instead be exported to agencies, thus encouraging neglect of public responsibilities. There is also the scenario where the allocation is expended in advance of the end of the financial year. Legal questions denied due regard after that date could result in substantial civil litigation against the State.

5.44 Account should also be taken of the ability of departments to apply legal services funds to alternative purposes.

5.45 The Treasury review report proposed limited competition in the short term:

> *"... a phased implementation of a commercialised environment is proposed through such vehicles as revenue retention, discussion of capital funding to enable commercial operations to begin and tying Departments to Crown Law for one or two years before allowing full competition"* (1993, p.6).

5.46 The conditions which apply to "tying" of departments must be carefully developed. Currently departments are tied to Crown Law only to the extent that services of the Division are supplied without charge. The Commission understands that at least one major government department which contracts work to a private firm retains officers on that firm's premises, while solicitors of the firm at times work on departmental premises. Account must also be taken of the fact that almost half of Queensland Government departments each maintain a small number of legal officers for internal purposes (EARC file 012/71). The PSMC review of the Department of the Attorney-General recommended that establishment and development of internal legal units be prohibited, although the Commission understands this recommendation was not formalised in any meaningful way.

5.47 If conditions of "tying" are not rigorous, prospects for the continued survival of Crown Law may be at risk. Possible methods of circumvention such as engagement for particular projects of consultants who in turn obtain private legal services should be addressed.

5.48 Once the "tying" period has expired and full competition applies, other problems may present themselves. In a period of market inactivity, private sector "dumping" of services, or provision of unutilised capacity at cost or below cost, may drive a commercialised public sector agency from the market. A concomitant issue is the situation which evolves when the market recovers and fees increase sharply. If public sector provision is unavailable, government may find itself without specialist advice in areas such as administrative law and in expenditure terms significantly worse off than had been the case previously.

5.49 Confidentiality is an important consideration. Large firms maintain that the use of "Chinese walls" allows them to represent competing commercial interests, but this device may not meet all of the problems which arise when firms are providing advice and services to government.

5.50 Another matter of some importance is that of co-ordination and supervision of the government's legal policy, which may become ineffective where advice to public sector agencies is received from disparate sources. In such a situation the Attorney-General may be unable to ensure compliance of agencies with government legal policies and practices.

5.51 The Australian Government Solicitor's Office began operations upon a commercial basis in 1992. The Commonwealth has approached commercialisation cautiously and consideredly, having commissioned industry research to determine viability of particular fee structures and the

capacity of the market to support its operations. Commonwealth departments are tied to the services of the Australian Government Solicitor's Office for three years. The outcomes of commercialisation have yet to be demonstrated.

5.52 Commercialised public sector units will require a period of adjustment as they attempt to adopt a client and service orientation which may be quite foreign to their organisational cultures. Furthermore, operational systems must be developed to a competitive standard. The 1990 PSMC review of the Department of Attorney-General noted that a notional billing system existed within Crown Law and that all which was required for commercial billing was for these to be invoiced to clients.

5.53 The Commission understands however that the time costing system under development in the Crown Law Division has been unreliable, inconsistent and for extended periods completely inoperative. By comparison the time costing system adopted by the Australian Government Solicitor's Office has been under development since 1983. It would appear that the Crown Law time costing system will require development before user-pays begins on the Treasury review recommended date of July 1994.

5.54 It would also appear that current levels of equipment and support do not place Crown Law in any approximation of a competitive position. Although refurbishment of accommodation and equipment will be undertaken prior to commercial commencement, concerns have been expressed as to the competitive adequacy of the electronic information system planned for the Division. The Treasury review acknowledged that in the area of information technology *"... Crown Law have only the most basic equipment at their disposal"* (1993, p.35).

5.55 Information systems adopted by the Australian Government Solicitor's Office were acquired at a cost nationally of some tens of millions of dollars. The Crown Law Division, the third largest legal firm in Queensland, will be in competition with firms possessing productivity efficiencies by virtue of sophisticated information systems. While Crown Law perhaps maintains a higher proportion of support staff to legal officers than might be the case in the private sector, larger private firms may also enjoy competitive advantages in the form of organisational resources devoted to financial controllers, accountants, trainers and marketing personnel.

5.56 This Commission is less concerned about the financial handicaps faced by Crown Law in entering the commercialisation fray than it is with whether commercialisation is an appropriate model for government legal services.

5.57 In Chapter Three the Commission noted (in para. 3.81) that the English cabinet had found it necessary to develop special rules to ensure that the operations of government lawyers tied to various departments did not prevent the Attorney-General from providing a proper overview of legal and political-legal issues and advising the government accordingly.

5.58 The guidelines had been set in place because there had been incidents where the government had been embarrassed as a result of blunders by lawyers whose focus was on the interests of the particular department and thus exclusive of a "whole of government" perspective. One of the problems with commercialisation is that private lawyers won't have the background of the departmental lawyer. Advice will be directed solely towards achieving a particular object.

5.59 Crown Law is the only body of lawyers able to provide the Attorney-General and the government generally with "whole of government" advice.

5.60 It is also the only body of lawyers, in association with the Solicitor-General and the Director of Prosecutions, which is likely to keep to the fore the requirement that the government, through the Attorney-General, should act as a model litigant (see paras. 3.84-5). This is not a consideration which private lawyers could be expected to take into account when advising departments. Departments might also fail to give it proper weight.

5.61 In its proposed Attorney-General's Bill the Commission has listed among the functions of the Attorney-General that of being:

> *"(b) the State's principal legal advisor."*

5.62 This has always been the function of the Attorney-General, and the Commission is concerned that moves towards commercialisation may detract from that function.

5.63 The Commission considers that the Attorney-General should have the right to insist that any legal advice to government should come through the office of the Attorney-General or be given by the Department of Justice and Attorney-General. The Attorney should be aware of instances where advice is sought from outside government and should have a right of access to such advice as provided to client departments.

5.64 In the absence of such arrangements the Attorney-General cannot properly exercise traditional and statutory functions. This is more basic than the question of independence, though the latter requires that the Attorney's own department should be adequately staffed to provide the Attorney and the government generally with advice which takes into account the interests of the government as a whole.

5.65 The Commission is not in a position to make recommendations about the commercialisation process. It is concerned to ensure that any policy adopted in this respect does not undermine the functions and independence of the Attorney-General.

**RECOMMENDATION**

5.66 **The Commission recommends that any decision to implement commercialisation of the Crown Law Division of the Department of Justice and Attorney-General should take into account, and make provision for, the proper function of the Attorney-General as the Government's chief legal advisor.**

# CHAPTER SIX

# QUALIFICATIONS OF THE ATTORNEY-GENERAL

## Introduction

6.1 For more than half of this century it was the practice of Queensland governments to appoint as Attorney-General and the first law officer of the State a person who was not a lawyer and possessed no legal qualifications. It was not that the government had no lawyers among its ranks available for appointment as Attorney-General, but rather that it became a convention that lawyers be excluded from responsibility for the Attorney-General portfolio.

6.2 It was not always so. At least since the time when Sir Samuel Griffith was Attorney-General, it was regarded as normal and proper that the Attorney-General should be a lawyer. The protocol was entrenched to the degree that in 1903, when the Labor Party formed its first Commonwealth government and had no lawyer within its ranks, it appointed as Attorney-General (and a member of its cabinet) a non-Labor member, Henry Bournes Higgins, later to become a member of the High Court. The tradition of appointing a lawyer as Attorney-General has been followed at the Commonwealth level and almost invariably in most of the States with the exception of Queensland.

6.3 In the Queensland of the late 19th and early 20th century, however, it was considered proper that the Attorney-General should be a barrister. If the government minister in charge of legal matters was a solicitor rather than a barrister, that minister was given the title of Minister for Justice, rather than Attorney-General.

6.4 After T J Ryan vacated the office in 1919, the government had no legally qualified member to fill the position, irrespective of title. For the following decade non-lawyers occupied the post under the title of Attorney-General. From May 1929 until a change of government in June 1932, however, a barrister, Neil MacGroarty, was Attorney-General.

6.5 From June 1932 until December 1986, no lawyer held the post. Appointees to the position of Attorney-General came from a variety of backgrounds. As examples, A W Munro was a Commonwealth public servant and accountant, P R Delamothe a doctor, W E Knox a company secretary and manager, W D Lickiss a valuer, S S Doumany an economist and N J Harper a farmer and valuer (Waterson and Arnold 1982, pp.23,26,55,58,69; Australian Information Group 1993, p.599; Queensland Parliamentary Handbook 1988).

6.6 From 1986 until September 1989, the Attorney-General was a solicitor, P J Clauson. Since the change of government in 1989, Dean Wells has been Attorney-General. He has academic qualifications in law but has not been admitted to practice as either a solicitor or a barrister.

6.7 The earlier practice of restricting the title of Attorney-General to barristers and calling solicitors Minister for Justice disappeared with the appointment of non-lawyers to the post, all of whom were known as Attorney-General. This situation was partly addressed with the passage of the *Department of Justice Act 1957*, which created the office of Minister for Justice and Attorney-General.

6.8 That Act stated:

> *"**3. When Minister for Justice to act for or as the Attorney-General.** (1) It shall be lawful for the Governor in Council from time to time by Proclamation published in the Gazette to order and declare any of the following:-*
>
> ...
>
> *(b) That whenever under any Act, law, practice or otherwise any act is required, permitted or enabled to be done by, to or with reference to the Attorney-General, then the act may be done by, to or with reference to the Minister for Justice or such other person as may be named in the Proclamation in that behalf;"*

6.9 In introducing the Bill for that Act, Attorney-General Munro explained that:

> *"Its chief objective is to make legislative provisions so that a Minister who administers the Department of Justice may be called the Minister for Justice instead of the Attorney-General ... This title of Attorney-General might be appropriate if it so happened that the ministerial head were a barrister or solicitor but in my view it is clearly inappropriate when the ministerial head is a layman"* (QPD 24 September 1957, p.284).

6.10 In relation to the range of duties required to be performed by the Minister for Justice and Attorney-General, Munro continued:

> *"I think the more experienced members of this House will agree with me when I say that no one person either within this House or outside it, is completely equipped to deal with all of them ... This ministry covers the executive responsibility for a complex system of the law which can only be fully understood by a highly-trained and very experienced lawyer, and in addition it covers the executive responsibility for the business administration of a number of activities, a full understanding of which necessitates a broad general knowledge and experience of business, economics and finance"* (QPD 24 September 1957, p.284).

6.11 The Fitzgerald Report focussed upon the fact of non-lawyer Attorneys-General:

> *"Whatever may be the position in relation to the Justice Ministry, legal expertise can be beneficial for the discharge of the functions of the office of the Attorney-General. The practical result of the appointment of a non-legal person to the amalgamated ministry was probably, however to emphasise the dependence of the Minister upon Justice Department officials"* (1989, p.138).

EVIDENCE AND ARGUMENTS

6.12 Little reference was made in submissions to the qualifications desirable to the position of Attorney-General. The question of whether the independence of the Attorney-General is protected by or contingent upon possessing legal qualifications was addressed in two submissions.

6.13 A Sandell (S1) thought that a mandatory requirement for legal qualifications in the role of Attorney-General was an impediment upon the discretion of government in choosing an executive:

> *"The theory of legal qualifications as a prerequisite for appointment to Attorney-General is admirable. It should not be mandatory. Should this theory be extended even further will it become necessary for the Treasurer to be an Accountant, and the Minister for Primary Industries to hold a Degree in Agriculture ... Should qualifications ever become more of a necessity, would it not be preferable to become proficient in administration, management, communications and above all leadership".*

6.14 The Department of Justice and Attorney-General (S2) implicitly acknowledged the importance of legal experience in the process of law reform:

> *"Law reform has been the traditional role of the Attorney-General. In planning such activities it is necessary not only to understand the intricacies of the law but also to ensure its proper implementation and execution".*

6.15 That submission (S2), nevertheless, dismissed a legal background as a mandatory requirement for the post of Attorney-General:

> *"It is conceivable that in future governments there may not be a member of parliament who is suitably qualified to assume the mantle of Attorney-General. Does that mean that the position should not exist or that a non-elected individual be appointed to hold that post. That would be unacceptable;*
>
> ...
>
> *The maintenance of a strong independent public prosecutor and an independent Solicitor-General are essential if the Attorney-General (whether legally qualified or not) is to maintain independence from political or cabinet influence in matters affecting non-political activities ... "*

ANALYSIS OF EVIDENCE AND ARGUMENTS

6.16 It is a matter of record that prior to 1986, Queensland experienced 50 years of government without a legally qualified Attorney-General. This situation contributed to the dependence of successive Attorneys-General upon the advice of the Justice Department.

6.17 In respect of Fitzgerald Report comments on the desirability of legal qualifications for the holder of the office of Attorney-General, the Commonwealth Attorney-General's Department has remarked:

> *"... the comment in the Fitzgerald report that 'legal expertise can be beneficial for the discharge of functions of the office of the Attorney-General' seems from a Commonwealth perspective to be a considerable understatement ...*
>
> *Recent experience shows that it is not necessary - and indeed increasingly difficult - for the Attorney to be, on all occasions, "his own lawyer" but he/she does need to be able to exercise informed judgment to determine when it is necessary or appropriate to draw on the expert resources available to him/her and to evaluate and explain the significance of the advice given. He (and to add "or she" is to suggest no mere academic possibility) is in truth the "first Law Officer" (see Law Officers Act 1964 s.5) and in that capacity, and so far as colleagues and the Parliament are concerned, responsible for the advice given"* (Rose 1 March 1993, EARC file 012/48).

6.18 It is often argued that if other ministers need not possess experience particular to their office, the Attorney-General need not either.

6.19 This is true only in the sense that all ministers, including Attorneys-General, are dependent on the advice they are given by their officials. In one important sense, however, the Attorney-General is distinguishable from the holders of other portfolios. The Attorney-General may be required on occasion to act as a lawyer. By contrast, the Minister for Health is not required to perform medical operations, the Minister for Education is not required to instruct school students, and the Treasurer is not required to prepare profit and loss statements (though the possession of relevant skills by each would presumably be beneficial for their understanding of their portfolios).

6.20 The role of the Attorney-General includes ministerial functions which could be performed by any minister, but there are additional functions, as noted by Renfree:

> *"The office of Attorney-General is a common law office, and mere appointment by the Crown carries with it the common law functions of the office quite apart from statutory provisions"* (1984, p.205.)

6.21 The Canadian *Report of the Royal Commission into Civil Rights* (the *McRuer Report*) also noted that duties of the Attorney-General required common law as well as administrative capacities, and observed that the Attorney-General:

> *"... must of necessity occupy a different position politically from all other officers of the Crown. As the Queen's Attorney he occupies an office with judicial attributes"* (cited in Scott 1987, p.254).

6.22 As noted earlier the New South Wales *Constitution Act 1902* recognises the special functions of the Attorney-General by prohibiting the appointment of another minister to act as Attorney-General if the Attorney is ill or out of the State. It provides in s.38 that the sections which provide for the appointment of acting ministers generally, do not authorise *"a Minister of the Crown to exercise any function that is by an Act or any other law annexed or incident to the office of the Attorney-General"*. In the absence of the Attorney-General, the Solicitor-General would normally be called upon to perform any of the common law or prerogative functions which could not be performed by an acting minister.

6.23 An Attorney-General who does not have legal training may find it difficult or even impossible to make an independent assessment of the advice provided by officials. Perhaps more so than any other minister, the non-lawyer Attorney-General is reliant upon the advice of officials.

6.24 Fitzgerald was concerned that reliance of the Attorney-General upon departmental advice had weakened the independence of that office. His recommendation for splitting the Department of Justice from the Attorney-General's Department appears to have been based on concerns over failure of Justice Department officials to provide advice on corruption issues and the possibility that they might interfere with the reform process recommended.

6.25 It has been argued by the Premier, the Department of Justice and Attorney-General and the PSMC that the availability of independent advice from the Solicitor-General and the Director of Prosecutions overcomes the problems identified by Fitzgerald. This may be so to a greater extent in relation to policy advice (with which Fitzgerald was primarily concerned) than in relation to the legal, common law and prerogative matters which are the concerns of this chapter.

6.26 Dogmatic insistence upon the need for legal qualifications may not represent the best outcome in the public interest. There are valid arguments against a mandatory requirement for legal experience and qualifications. For example, as suggested by the Department of Justice and Attorney-General (S2), it may transpire that no member of the government is qualified in law. Additionally, if such a requirement were mandatory, the Premier may be placed in the position of recommending the appointment of a legally qualified junior member of the government when more experienced non-lawyer members may be more appropriate.

6.27 Former New Zealand Attorney-General Peter Wilkinson has expressed his surprise at being appointed to the position of first law officer upon the basis of rudimentary legal qualifications:

> *"My qualifications for the job were limited to a law degree ... I had never practised law, and at the time of my appointment as titular head of the legal profession I was only six years out of law school"* (1979, p.116).

6.28 Given the expansion of opportunities for legal training in the last decade, the argument that there may not be legally qualified government members of future parliaments is unconvincing. It is not uncommon in contemporary politics for lawyers to become members of parliament. Of the government members of the current (47th) Parliament of Queensland, five had practised either as barrister or solicitor prior to election (*Biographical Guide to the 47th Parliament of Queensland*, March 1993).

6.29 As has been noted earlier, a succession of Queensland governments thought it unnecessary to have legally qualified Attorneys-General.

6.30 The Commission believes that the practice of appointing persons without legal training as Attorney-General has neither promoted good government nor a healthy relationship between government and the legal profession. It has enhanced the power of officials and been detrimental to the independence of the Attorney-General in traditional areas which in comparable jurisdictions would be the responsibility of a lawyer Attorney.

6.31 Nevertheless, an edict requiring the Attorney-General to be appointed from the lawyers on the government benches in parliament would not guarantee that independence. Furthermore, while government members may be legally qualified, they may not possess other qualities expected of competent ministers.

6.32 For these reasons the Commission, while convinced of the desirability of the Attorney-General having legal qualifications, makes no recommendation that such qualifications should be mandatory.

# CHAPTER SEVEN

# SUMMARY OF RECOMMENDATIONS

## Introduction

7.1 In this Report the Commission has made a number of recommendations arising from its Review of Independence of the Attorney-General. These recommendations have been drawn together below.

## Consolidation of Recommendations

CHAPTER THREE Independence of the Attorney-General

7.2 **The Commission recommends that the *Solicitor-General Act 1985* be amended to require the Solicitor-General to present to the Parliament a report within four months of the end of each financial year containing a copy of any written directions and references received from the Attorney-General** (at para. 3.58).

7.3 **Similarly, it is recommended that the *Director of Prosecutions Act 1984* be amended to require the Director of Prosecutions to include in the Annual Report required under s.16 of that Act a copy of any written guidelines and directions received from the Attorney-General** (at para. 3.59).

7.4 **The Commission recommends that where the Attorney-General decides to exercise his or her own powers in relation to a prosecution or an appeal overriding a decision of the Director of Prosecutions, the Attorney-General shall report the circumstances of each such instance and the reasons for each decision to the Legislative Assembly within 3 sitting days of its occurrence** (at para. 3.60). **This recommendation is contained at clause 10 of the draft Bill in Appendix A to this report.**

7.5 **The Commission further recommends that all guidelines and directions issued by the Attorney-General to the Director of Prosecutions must be in writing and must be published immediately in the *Queensland Government Gazette* and a copy of those guidelines or that direction laid before the Legislative Assembly within 3 sitting days of its publication in the *Gazette*. Where it is considered necessary in the interests of justice, the Attorney-General may postpone making public a direction in an individual case until the case concerned has been disposed of** (at para. 3.61). **This recommendation is contained at clause 11 of the draft Bill in Appendix A to this report.**

7.6 **The Commission recommends the enactment of legislation to specify the powers, functions and responsibilities of the Attorney-General in the form of the draft Bill in Appendix A to this report** (at para. 3.87).

CHAPTER FOUR Relator Actions

7.7 **The Commission recommends that where an application for a relator action has been refused, or not approved within 60 days, the Attorney-General, within 3 sitting days of such refusal or expiry of the period allowed for non-approval, table in Parliament a statement which**

**sets out the nature of the application for the grant of the fiat, the alleged breach of public right or liberty and the reasons for the Attorney-General's decision** (at para 4.52). **This recommendation is contained at clause 9 of the draft Bill in Appendix A to this report.**

7.8 **The Commission further recommends that the Attorney-General provide a reference to the Law Reform Commission to examine the question of standing in public interest litigation** (at para. 4.53).

CHAPTER FIVE Departmental Issues

7.9 **The Commission recommends that any decision to implement commercialisation of the Crown Law Division of the Department of Justice and Attorney-General should take into account, and make provision for, the proper function of the Attorney-General as the Government's chief legal advisor** (at para. 5.66).

## CHAPTER EIGHT

## CONCLUDING REMARKS AND ACKNOWLEDGEMENTS

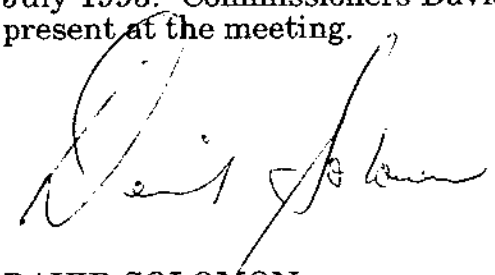
8.1 The Commission wishes to express its appreciation to all persons and organisations who made submissions in response to the matters raised in the Commission's advertisements for this review, or who otherwise provided their views for this *Review of Independence of the Attorney-General.* A full list of all persons and organisations who made written submissions to the Commission appears as Appendix D.

8.2 All submissions, comments and opinions expressed have been taken into account. Public input is essential to the Commission's review process and the Commission has benefited greatly from the public response to this review.

8.3 The Commission also wishes to express its appreciation to the following members of staff who assisted it during the conduct of the review: Michael Clair (Project Officer), Sussan Jacobs (former Research Officer) and Sandy Kilminster (former Research Assistant).

8.4 The Commission also thanks Professor Paul Finn, Research School of Social Sciences, Australian National University, for his valuable contribution as consultant for this Review.

8.5 The Report was adopted unanimously at a meeting of the Commission on 9 July 1993. Commissioners Davies, Hall, Hughes, Hunter and Solomon were present at the meeting.



DAVID SOLOMON
**Chairman**

9 July 1993.

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**APPENDIX A**

Queensland

# ATTORNEY-GENERAL BILL 1993

## TABLE OF PROVISIONS

# 1993

# A BILL

## FOR

An Act relating to the functions and powers of the Attorney-General and for related purposes

**The Parliament of Queensland enacts—**

**Short title**

**1.** This Act may be cited as the *Attorney-General Act 1993*.

**The office of Attorney-General**

**2.(1)** There is to be an Attorney-General for Queensland.

**(2)** The Attorney-General is—

(a) the Minister who is designated by the Governor as Attorney-General or Minister for Justice and Attorney-General ; or

(b) if the Governor does not designate a Minister as Attorney-General or Minister for Justice and Attorney-General—the Minister.

**Principal function of Attorney-General**

**3.(1)** The Attorney-General is the first law officer of Queensland.

**(2)** Without limiting subsection (1), the Attorney-General is—

(a) the State's chief legal representative; and

(b) the State's principal legal adviser; and

(c) responsible for the administration of law and justice in the State.

**General powers of Attorney-General**

**4.** The Attorney-General has power to do all things necessary or convenient to be done in connection with the Attorney-General's functions.

**Attorney-General retains traditional functions, powers etc.**

**5.(1)** The Attorney-General has the traditional functions, powers, prerogatives and privileges of the Attorney-General for Queensland.

**(2)** Without limiting subsection (1), the Attorney-General—

(a) has primary responsibility for providing legal advice to the Governor, the Government and the Legislative Assembly; and

(b) is head of the Bar and has precedence over all counsel; and

(c) may start and conduct litigation on behalf of—

(i) the State; or

(ii) the Governor; or

(iii) a Minister; or

(iv) a person suing or being sued on behalf of the State.

**Specific powers of Attorney-General**

**6.** The Attorney-General may—

(a) present ex officio indictments[1]; and

(b) enter nolle prosequi on indictments[2]; and

(c) grant immunities from prosecution; and

(d) enforce charitable and public trusts; and

(e) bring proceedings to enforce and protect public rights; and

(f) grant fiats to enable private citizens, who would not otherwise have standing, to bring proceedings—

(i) to enforce charitable and public trusts; or

(ii) to enforce and protect public rights; and

(g) challenge the constitutional validity of legislation (including Commonwealth legislation) that affects the public interest in Queensland; and

(h) appear before a court to assist the court in appropriate cases; and

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1 This refers to the Attorney-General's power to present an indictment against a person for an indictable offence whether or not the person has been committed for trial. See section 561 of the Criminal Code.

2 This refers to the Attorney-General's power to inform a court in writing that the State will not further proceed on an indictment. See section 563 of the Criminal Code.

(i) advise the Executive Council on judicial appointments; and

(j) institute proceedings for contempt in the public interest; and

(k) apply for judicial review to correct errors by courts and tribunals.

**Additional functions and powers of Attorney-General**

**7.** The Attorney-General also has the functions and powers that are conferred on the Attorney-General under this or another Act.

**Exercise of Attorney-General's powers by another Minister etc.**

**8.** The Governor in Council may, by Gazette notice, declare that specified functions, powers, privileges and immunities of the Attorney-General may be exercised or enjoyed by another specified Minister or a specified person.

**Attorney-General to report on relator applications**

**9.(1)** This section applies if—

(a) an application is made for the Attorney-General to grant a fiat in a proceeding to enforce or protect a public right; and

(b) the application is refused or is not approved within 60 days.

**(2)** The Attorney-General must prepare a statement that outlines—

(a) the nature of the application; and

(b) the breach of public right alleged; and

(c) the reasons for the Attorney-General's refusal or inaction.

**(3)** The statement must be laid before the Legislative Assembly within 3 sitting days after—

(a) if the application is refused—the refusal; or

(b) if the application is not approved within 60 days—the end of the 60 days.

**Attorney-General to report on prosecution action taken without agreement of Director of Prosecutions**

**10.**(1) This section applies if the Attorney-General decides to exercise powers in relation to a prosecution, or an appeal arising out of a prosecution—

(a) without first obtaining a decision about the matter from the Director of Prosecutions; or

(b) overriding a decision of the Director of Prosecutions.

**(2)** The Attorney-General must prepare a statement that outlines the circumstances and reasons for the decision.

**(3)** The statement must be laid before the Legislative Assembly within 3 sitting days after the decision.

**Directions and guidelines by Attorney-General to the Director of Prosecutions**

**11.(1)** After consultation with the Director of Prosecutions (the "**Director**"), the Attorney-General may give to the Director written directions or guidelines about the functions of the Director's office.

**(2)** Without limiting sub-section (1), a direction or guideline may—

(a) relate to the circumstances in which the Director should institute or carry on a prosecution for an offence; or

(b) relate to the circumstances in which an immunity from prosecution should be given.

**(3)** If the Attorney-General issues a direction or a guideline, the Attorney-General must cause a copy to be—

(a) immediately published in the Gazette; and

(b) laid before the Legislative Assembly within 3 sitting days after it is published in the Gazette.

**(4)** However, if—

(a) the direction or guideline relates to a matter about which a proceeding may be started or is being carried on; and

(b) the Attorney-General is satisfied that the interests of justice

require that the contents of the direction or guideline not be disclosed;

the copy of the direction or guideline need not be immediately published in the Gazette, but must be published in the Gazette at whichever is the earlier of the following times—

(c) the time when the Attorney-General ceases to be satisfied;

(d) the time when—

(i) it is decided that the proceeding will not be started; or

(ii) the proceeding and all other proceedings about the matter (including by way of appeal from, or otherwise arising out of, a proceeding about the matter) are decided or end.

## Regulations

**12.** The Governor in Council may make regulations for the purposes of this Act.

## Repeal

**13.** The *Department of Justice Act 1957* is repealed.

## APPENDIX B

## STATUTES FOR WHICH THE MINISTER FOR JUSTICE AND THE ATTORNEY-GENERAL RESPONSIBLE

(Source: Administrative Arrangements Order 1993, *Queensland Government Gazette*, 12 March 1993).

ANZ Executors & Trustee Company Act 1983
Acts Interpretation Act 1954
Acts Repeal Act 1991
Age of Majority Act 1974
Alfred Grant Pty Ltd and Other Companies (Distribution of Trust Moneys) Act 1979
Anti-Discrimination Act 1991
Appeal Costs Fund Act 1973
Australia and New Zealand Banking Group Act 1970
Australia and New Zealand Banking Group Limited (NMRB) Act 1991
Australian Colonies Act 1861 (Imperial)
Australian Consular Officers' Notarial Powers and Evidence Act 1946
Australian Courts Act 1828 (Imperial)
Bail Act 1980
Bank of Adelaide Merger Act 1980
British Probates Act 1898
British Subject (Interpretation) Act 1970
Burials Assistance Act 1965
Cattle Stealing Prevention Act 1853
Central and Northern Districts Boundaries Act 1900
Colonial Courts of Admiralty Act 1890 (Imperial)
Colonial Probates Act 1892 (Imperial)
Commercial Arbitration Act 1990
Commercial Bank of Australia Limited Merger Act 1982
Commercial Banking Company of Sydney Limited Merger Act 1982
Commercial Causes Act 1910
Commissions of Inquiry Act 1950
Common Law Pleading Act 1867
Common Law Practice Act 1867
Common Law Process Act 1867
Common Law Process Act 1867 Amendment Act 1870
Commonwealth Places (Administration of Laws) Act 1970
Commonwealth Powers (Family Law - Children) Act 1990
Companies (Acquisition of Shares) (Application of Laws) Act 1981
Companies Act 1961
Companies Act Amendment Act 1972
Companies Act Amendment Act 1974
Companies (Administration) Act 1981
Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act 1981
Companies (Application of Laws) Act 1981
Company Take-overs Act 1979
Coroners Act 1958
Corporations (Queensland) Act 1990
Costs Act 1867
Court Funds Act 1973
Courts of Conciliation Act 1892
Crimes (Confiscation of Profits) Act 1989

Criminal Code Act 1899 (including Criminal Code)
Criminal Code Amendment Act 1922
Criminal investigation (Extra-Territorial Offences) Act 1985
Criminal Justice Act 1989
Criminal Law Amendment Act 1892
Criminal Law Amendment Act 1894
Criminal Law Amendment Act 1945
Criminal Law (Rehabilitation of Offenders) Act 1986
Criminal Law (Sexual Offences) Act 1978
Crown Proceedings Act 1980
Decentralisation of Magistrates Courts Act 1965
Defamation Law of Queensland (of 1889)
Department of Justice Act 1957
Description of Women (Reference to Conditions in Life) Act 1975
Director of Prosecutions Act 1984
Disposal of Unexecuted Warrants Act 1985
Dispute Resolution Centres Act 1990
District Courts Act 1967
District Courts (Venue of Appeals) Act 1988
Dividing Fences Act 1953
Domicile Act 1981
Electoral Act 1992
Equity Act 1867
Equity Procedure Act 1873
Evidence Act 1977
Evidence (Attestation of Documents) Act 1937
Evidence and Discovery Act 1867
Evidence on Commission Act 1988
Financial Transaction Reports Act 1992
Freedom of Information Act 1992
Fugitive Offenders Act 1850
Futures Industry (Application of Laws) Act 1986
Habeas Corpus Act 1862 (Imperial)
Imperial Acts Application Act 1984
Imperial Acts (Termination of Application) Act 1968
Interdict Act 1867
Judges (Pensions and Long Leave) Act 1957
Judges' (Salaries and Allowances) Act 1967
Judges' Validating Act 1888
Judicature Act 1876
Judicial Review Act 1991
Jurisdiction of Courts (Cross-vesting) Act 1987
Jury Act 1929
Jury Act Amendment Act 1934
Justices Act 1886
Justices Acts and Real Property Fees Act 1932
Justices of the Peace and Commissioners for Declarations Act 1991
Kelly, Honourable Jack Lawrence, Enabling Act 1976
Law Reform (Abolition of the Rule of Common Employment) Act 1951
Law Reform Commission Act 1968
Law Reform (Husband and Wife) Act 1968
Law Reform (Legitimacy of Children of Voidable Marriages) Act 1955
Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952
Legal Aid Act 1978
Legal Aid Act Amendment and Public Defence Act Repeal Act 1991
Legal Assistance Act 1965
Legal Practitioners Act 1905

Legal Practitioners Act Amendment Act 1938
Legal Practitioners Acts 1881-1991
Legal Practitioners Acts Amendment Act 1954
Legal Practitioners Acts Amendment Act 1968
Legal Process Restriction Act 1904
Limitation of Actions Act 1974
Magistrates Courts Act 1921
Maintenance Act 1965
Maintenance and Alimony Relief Act 1935
Marketable Securities Act 1970
Married Women (Restraint Upon Anticipation) Act 1952
Married Women's Property Act 1890
Oaths Act 1867
Oaths Act Amendment Act 1876
Oaths Act Amendment Act 1884
Oaths Act Amendment Act 1891
Official Secrets Act 1911 (Imperial)
Partnership Act 1891
Partnership (Limited Liability) Act 1988
Peace and Good Behaviour Act 1982
Peaceful Assembly Act 1992
Penalties and Sentences Act 1992
Police Complaints Tribunal Acts Repeal Act 1990
Printing and Newspapers Act 1981
Prisoners (Interstate Transfer) Act 1982
Property Law Act 1974
Public Office (Age Qualification) Act 1985
Public Trustee Act 1978
Public Trustee Regulations (Continuation) Act 1988
Queen's Counsel Regulation 1982
Queensland Law Society Act 1952
Queensland Law Society Acts Amendment Act 1967
Reciprocal Enforcement of Judgments Act 1959
Reconstructed Companies Act 1894
Recording of Evidence Act 1962
Referendums Act 1989
Regulatory Offences Act 1985
Securities Industry Act 1975
Securities Industry (Application of Laws) Act 1981
Securities Industry (Release of Sureties) Act 1981
Sheriff's Act 1875
Small Claims Tribunals Act 1973
Solicitor-General Act 1985
Solicitors Act 1891
Special Prosecutor Act 1988
Status of Children Act 1978
Stipendiary Magistrates Act 1991
Succession Act 1981
Supreme Court Act 1867
Supreme Court Act 1874
Supreme Court Act 1892
Supreme Court Act 1893
Supreme Court Act 1895
Supreme Court Act 1899
Supreme Court Act 1921
Supreme Court Acts 1861-1989
Supreme Court Acts Amendment Act 1959
Supreme Court Constitution Amendment Act 1861

Supreme Court Judges Appointment Act 1983
Supreme Court Library Act 1968
Supreme Court of Queensland Act 1991
Trust Accounts Act 1973
Trustee Companies Act 1968
Trusts Act 1973
Unauthorised Documents Act 1953
Vasta, Honourable Angelo, (Validation of Office) Act 1989
Vexatious Litigants Act 1991
Voluntary Aid in Emergency Act 1973
Voting Rights (Public Companies) Regulation Act 1975
Wages Attachment Act 1936
Writs of Dedimus Act 1871

# APPENDIX C

## ADVERTISEMENT CALLING FOR PUBLIC SUBMISSIONS

QUEENSLAND

ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION

**NOTICE OF NEW REVIEW**

**INDEPENDENCE OF THE ATTORNEY-GENERAL**

The Electoral and Administrative Review Commission is required by the Electoral and Administrative Review Act 1989 to inquire into the whole or part of the public administration of the State including any matters pertaining thereto specified in the Report of the Commission of Inquiry. Among the matters contained in the report of that Inquiry by Mr G E Fitzgerald, QC were:

(i) separation of the Offices of Attorney-General and Minister for Justice; and

(ii) re-establishment of the independent role of the Office of Attorney-General.

Following the recent election the Government revised its administrative arrangements and created a new portfolio of Minister of Justice and the Attorney-General. This restores the practice adopted by most governments prior to 1989.

The Commission has decided that it should conduct a review into the two matters referred to by Mr Fitzgerald.

Because the Commission has limited time and resources available to it, the Review will not take the format which has customarily been utilised by the Commission. There will, for example, be no Issues Paper published or public seminar conducted.

However the Commission is seeking public submissions to the Review. These should be provided to the Commission by the end of this year.

An information paper with some background material is available from the Commission, and can be obtained by writing to the Electoral and Administrative Review Commission, PO Box 349, North Quay, Qld, 4002; or calling (07) 237 1185 or (008) 177 172 (non-metropolitan callers).

DAVID SOLOMON
Chairman, 14 November 1992

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# APPENDIX D

## LIST OF PUBLIC SUBMISSIONS

| Submission No. | Name/Organisation | Address | Date Received |
|---|---|---|---|
| 1 | **A Sandell** | Lot 85<br>Greensward Road<br>TAMBORINE QLD 4270 | 28/11/92 |
| 2 | **Department of Justice and Attorney-General** | B Smith<br>Director-General<br>GPO Box 149<br>BRISBANE QLD 4001 | 24/12/92 |
| 3 | **Queensland Law Society Inc** | G Fox<br>President<br>Law Society House<br>179 Ann Street<br>BRISBANE QLD 4000 | 29/01/93 |
| 4 | **Bar Association of Queensland** | R Douglas<br>President<br>Level 5<br>Inns of the Court<br>BRISBANE QLD 4000 | 19/02/93 |
| 5 | **Public Sector Management Commission** | P Coaldrake<br>Chair<br>PO Box 190<br>BRISBANE<br>ALBERT STREET QLD 4002 | 31/03/93 |
| 6 | **State Public Service Federation Queensland** | J Walker<br>Director<br>Industrial Services<br>GPO Box 545<br>BRISBANE QLD 4001 | 27/04/93 |
| 7 | **Hon John Dowd** | King Chambers<br>155 King Street<br>SYDNEY 2000 | 04/05/93 |
| 8 | **K Lindeberg** | 12 Winster Court<br>ALEXANDRA HILLS QLD 4161 | 08/06/93 |

V. R. Ward, Government Printer, Queensland—1993