

PARLIAMENT OF WESTERN AUSTRALIA

LEGISLATIVE COUNCIL

REPORT
OF
STANDING COMMITTEE
ON
LEGISLATION
IN RELATION TO THE
DIRECTOR OF PUBLIC
PROSECUTIONS BILL

Presented by the Hon Garry KELLY (CHAIRMAN)

JULY 1990

COMMITTEE MEMBERS

Chairman: Honourable Garry Kelly MLC
Members: Honourable John Caldwell MLC
Honourable Cheryl Davenport MLC
Honourable Peter Foss MLC
Honourable Derrick Tomlinson MLC

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RECOMMENDATION

The matter be remitted to the Committee with a direction from the Council to consider the matter of appointment or reappointment of the DPP.

A. BACKGROUND

1. The Committee met to consider the bill and has heard evidence from Mr Peter Fitzpatrick AM, Executive Officer of the Law Society.
2. Before it was able to proceed any further with its planned programme of witnesses, the Hon J Caldwell raised a question as to whether the Committee was able to consider the method of appointment of the Director of Public Prosecutions in view of the remark by the Attorney General that the Government would not accept the Bill if the Director were to be appointed by a panel.
3. The Hon J Caldwell asked whether to consider the method of appointment was contrary to the policy of the Bill as fixed by giving the Bill a second reading. The advice of the Clerk was sought who indicated that it might be so considered.
4. Accordingly it was decided to set out the arguments aired in Committee, to pay particular attention to those areas where the opposing views may be reconciled and to report the matter to the House with a recommendation that it be referred back to the Committee with a direction to consider the method of appointment.
5. The Committee system is an ideal way to arrive at a working solution to the differences aired in the second reading debate. To date there has not been an opportunity to discuss these differences.

B. THE NEED FOR INDEPENDENCE

The particular circumstances

6. Independence of a prosecutor is only ever likely to be questioned when the Director is called upon to prosecute elements of Government or persons whom it would not be in the interest of Government to prosecute.
7. The Director should be fair but vigorous. The very word 'prosecute' indicates the active role that the Director must play. In taking this role there is a greater chance that the Director may offend than, say, would judges who

by the nature of their role are called upon to stand in the middle and take a more passive part.

8. A prosecutor who found it not in his or her interest to be vigorous would defeat this purpose and undermine public confidence in the system of government and the administration of the laws.

How independence can be affected

9. Independence may be affected in many ways:-

- (a) there may be the power to direct
- (b) a person having power over the professional future of another may influence by indicating a preference which is taken rightly or wrongly by that other person as a direction to act in accordance with that preference
- (c) a person whose professional career may be influenced by another may act in a manner that he or she thinks will be pleasing to that other, even when that other is not conscious that this is being done, in the belief, mistaken or otherwise, that this conduct will improve his or her future job prospects.

Appointment and term

10. It had been agreed on all sides that the DPP should be independent. The difference arose as to how this should be achieved.
11. It is also agreed that if the DPP were appointed for a fixed period (of say 5 years) and depended on the Executive for reappointment the position would not be independent. (See para 10 above. The evidence of Mr Fitzpatrick emphasised this point)
12. The Government has suggested that the DPP have a tenured appointment similar to a judge (but to age 65).
13. A position considered within the Committee was that this would give independence but may have some undesirable consequences. The points canvassed were:-
 - (a) Judges usually remain in office until retirement and by the nature of their office their increasing experience benefits the community. That is recognised in their retirement age of 70.
 - (b) The DPP is the Chief Executive of a department and is charged with its administration and vigorous

leadership. That requires people at a different and earlier stage of their professional career.

- (c) It was thought better for it not to be seen as a lifetime job but rather as an important step along the way in an illustrious career.
 - (d) It is feared that giving a judicial salary and emoluments would not attract senior counsel at that stage of career.
 - (e) It was believed that such a person would require a salary package with more emphasis on salary and less on say, superannuation, even if it were commensurate with that of a judge .
 - (f) Even with that change in emphasis, the salary that could be offered to a suitable applicant in the general legal community would involve a considerable drop in earnings for a suitable applicant.
14. The question is how we can reconcile the concerns expressed in paragraph 9 with those mentioned in paragraph 11.
15. The Opposition's solution as proposed in the second reading debate was that the DPP be appointed by an independent panel.
16. In reply the Government indicated that this is unacceptable. It considers it a matter of principle. It believes that if it can be trusted to appoint judges and other high officers it should be trusted to appoint the DPP as is the case in other jurisdictions in Australia.

Reappointment

17. In Committee the point was reconsidered and it was conceded that it was the reappointment (or rather non reappointment or fear of non reappointment) that led to the loss of independence. The Opposition members indicated that they were prepared to recommend through the Committee that the appointment be made by the Executive but that reappointment should be guaranteed in increments (until age 65) unless the panel decided otherwise.

Dismissal

18. There was opposition within the Committee to giving the Executive the power to dismiss for incompetence without reference to the panel. Incompetence is an easier basis for dismissal than that required for a judge and it is agreed that this should be so. In fact, it highlights the arguments raised in paragraph 11 (b).
19. However, the power to dismiss judges is not solely with the Executive but rather with Parliament. This was felt necessary to preserve the independence of the judiciary.
20. It was argued that the panel should be the body to recommend on dismissal. For the use of a panel there is an excellent precedent set by the Vasta case in Queensland where the Parliament appointed a panel of judges to determine whether Mr Justice Vasta had been guilty of improper conduct.

Terms of appointment

21. There would appear to be no objection to these being set by someone other than the Executive. Government service remuneration is almost universally set by an independent Tribunal. The bill already provides for this by implication.
22. It was proposed that the Tribunal also set the DPP's remuneration having regard to relativities with judges salaries but not so as to be bound by them especially as to the mix of salary and other benefits and having regard to the shorter term of appointment. The Tribunal would also be responsible for increases.

Independence of staff

23. Commentators proposed to individual members of the Committee that persons who were members of the public service, who saw their future in that service and who were looking to advance themselves in the public service would not have the necessary independence when it came to decisions about Government. The Committee would like to explore this point further.
24. The proposed amendment as circulated by the Opposition would not prevent the DPP from using Crown Law staff on a secondment or contract basis in much the same way as the DPP could use private practitioners. However, the DPP would be able to have some completely independent staff or to change over completely to in-house staff if the DPP were so minded.

C. SUGGESTED COMPROMISE

DPP

25. The DPP be appointed by the Executive in consultation with the panel.
26. The terms of employment be set by the the Salaries and Allowances Tribunal which can hear submissions from the DPP having reagrd to the matters mentioned in the body of the report.
27. On the expiry of the initial term the question as to whether the DPP be reappointed and the length of that appointment be decided by the panel.
28. Action to dismiss for incompetence be with the Executive on the recommendation of the panel.

DPP Staff

29. Further discussions take place with the Attorney General to see whether in fact the suggested amendments prevent the usage of Crown Law staff occurring in the manner set out in his second reading speech.

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