CROWN LAW OFFICERS LEGISLATION AMENDMENT (ABOLITION OF LIFE TENURE) BILL 2007
Agreement in Principle

Debate resumed from 23 October 2007.

Mr GREG SMITH (Epping) [8.15 p.m.]: I lead on the Crown Law Officers Amendment (Abolition of Life Tenure) Bill on behalf of the Opposition. I expect other Opposition members will also speak to the bill. It is wilful blindness, sheer incompetence or blatant political prejudice that is driving the Iemma Government to undermine the independence that successive Directors of Public Prosecutions and Crown Prosecutors have enjoyed in this State for over 20 years. In 1986 the New South Wales Parliament enacted the Director of Public Prosecutions Act, which shifted front-line responsibility for the prosecution of serious criminal offences in New South Wales from the Attorney General to the Director of Public Prosecutions.

At the time Parliament also enacted the Crown Prosecutors Act 1986 and the Criminal Procedure Act 1986. Then Labor Attorney General Terry Sheahan—whom I commend—commenced his second reading speech by referring to his earlier announcement of far-reaching reforms to the administration of justice in this State. One of those reforms has already entered into the statute books. It is the Judicial Officers Act, which deals with judicial education, accountability and sentencing. Former Attorney General Terry Sheahan said:

> The package of bills I now bring forward makes the other fundamental changes to the criminal justice system, which I foreshadowed. Its principal features are, first, the Office of the Director of Public Prosecutions is to be established. This will mean that the general responsibility for the prosecution of serious criminals in this State will be vested in a single person who is politically independent.

The proposed removal of tenure from the Director of Public Prosecutions and Deputy Directors of Public Prosecutions, Crown Prosecutors, Public Defenders and the Solicitor General, but particularly the criminal officers, make the officers appointed to those positions vulnerable to attempts to influence their decision-making and conduct, thus undermining the necessary independence that those officers should have. Let us not forget that at the present time two prominent Labor Party members are facing trial for child sexual assault and other charges. Judging from what happened in the past before the Office of the Director of Public Prosecutions was established, there was an unacceptable amount of interference in serious prosecutions.

Clearly, the Office of the Director of Public Prosecutions was established to take politics out of the prosecution process. Prior to the enactment of the Crown Prosecutors Act 1986, Crown Prosecutors were appointed by commission and no age limit was nominated in their instruments of appointment. Former Labor Attorney General Sheahan said of persons who are already serving as Crown Prosecutors that not only is their status as independent prosecutors preserved, but they gain a security of tenure not provided by the

present system of appointment by commission.

I want to clear up something that happened in 1991, I believe, during debate on an amendment to the Crown Prosecutors Act and the Statute Law (Miscellaneous Provisions) Bill No. 3. Then Director of Public Prosecutions Blanche, at his initiative I believe but certainly at his encouragement, sought to allow the Attorney General to appoint acting Crown Prosecutors for up to five years. It was not, as the Attorney General now says, that the Government of the day was seeking to put a tenure of five years on Crown Prosecutors. It was to extend the acting Crown Prosecutor position from one year to five years.
<49>
At that stage Labor's shadow Attorney General, Paul Whelan, expressed his support for Crown prosecutors in the following terms—and I remind Government members that this is one of their respected and legendary Ministers of the recent past:

> It is offensive that Crown prosecutors are going to be appointed for merely five years.

He was talking about acting Crown prosecutors. He went on to state:

> The Crown prosecutors do not agree with that because they see it as offensive and contrary to the law.

It was not contrary to their financial interests but it was contrary to the law. Peter Anderson, another Labor legend and shadow Minister for Police and Emergency Services, also supported Crown prosecutors retaining tenure after discussing an experience he had as a police prosecutor when an inspector tried, inappropriately, to direct him. The reports of the Wood commission and the report of the Independent Commission Against Corruption on Milloo are full of those types of interference. Peter Anderson stated:

> It was understood that we had a degree of independence as police prosecutors. The independence of Crown prosecutors is far more important because they are dealing with indictable matters that carry the full range of penalties available under our statutes.

A little later he said:

> The Crown prosecutor has a responsibility to perform his or her duties without fear or favour, affection or ill will.

Later he said:

> It is well and good to have judges who make decisions, but we need committed, competent and honest Crown prosecutors and public defenders. They carry out their duties for a lot less money than they would receive at the private bar.

That is the reason they have tenure of office. He then said:

> If their roles are diminished and the principles of independence are eroded, the justice system in this State will never recover.

Peter Anderson, an eminent Labor Minister, who is still on good terms with the party, said:

> If their roles are diminished and the principles of independence are eroded, the justice system in this State will never recover.

Yesterday the upper House passed legislation that will do that very thing—it will put Crown prosecutors, deputy directors and public defenders on seven-year contracts in the future—up to seven years, as they might get only two years. The Attorney General threatened Opposition members and said that if this legislation did not go through there would only ever be acting Crown prosecutors, one year at a time. An examination of the legislation reveals that the Attorney General can sack them at any time without reason, without cause, if they are only acting. Shame on this Labor Government for what it is doing to independence in our courts! This is the just tip of the iceberg because I have no doubt that next it will be the magistrates and the judges.

Prior to the enactment of the Director of Public Prosecutions Act 1986 and the Crown Prosecutors Act 1986 there were a series of criminal cases where corrupt or political interference had been attempted. Let me refer to some of those cases. Laurie Brereton and Geoff Cahill, both significant Labor figures, were involved in the Botany council case, which is referred to in *Wran*, a publication that has not been taken off the shelves but that might not now be available for sale. *Wran*, which was written by Mike Steketee and Milton Cockburn, sets out what happened in the Botany council case. Good Labor people were threatened after being offered money to turn blind eye to a rezoning and they were expelled from the party when they would not agree to that rezoning. The Philip Weston bail case was a case of some scandal and, in the Commonwealth area, we remember the social security conspiracy case. I refer to the Kevin Humphreys case and to the involvement of Murray Farquhar, a great friend of the Premier at the time. I refer also to Kevin Jones, the magistrate.

Mr Michael Daley: Why don't you go back to Askin?

Mr GREG SMITH: I am giving some context to these matters. I have also mentioned cases that occurred when Liberal governments were in power. The Croatian case—a case involving men being drilled to form an army to go back to Croatia—was a Commonwealth matter, and the least serious charge was chosen. That matter did not involve a New South Wales government. In the context of both Commonwealth and State governments—New South Wales in particular—there was clearly a reason to take away the prosecution power from politics. I refer also to the Cessna-Milner case—a terrible case in which New South Wales police prosecutors were leaned on to accept a matter involving a large amount of cannabis being prosecuted in the magistrates court before Magistrate Murray Farquhar. The Spencer-Brindle case involved narcotics agents and interference with the course of justice. That case was one of the issues examined by the Stewart royal commission.

In the Morgan Ryan immigration racket, Justice Lionel Murphy and Judge John Foord

were charged and eventually discharged—ultimately they were not convicted—but Mr Wran, the then Premier, was convicted of contempt of court. I refer to the Donald Mackay murder. The interference that occurred in the police investigation and other things led to the Wood royal commission and later to the Nagle commission. I refer also to the Baldwin bashing and the inner city branches of the Labor Party where Domican and Meissner, on behalf of head office, wreaked havoc on people who did not vote their way. I will refer in more detail to the Love Boat scandal involving Virginia Perger, as it is pertinent to this debate. Virginia Perger, a prostitute, said that a number of politicians, mainly Labor members but one Liberal member was mentioned, came on board this boat and she gave them her services. For a long time politicians on both sides were trying to buy photographs as photographs were supposed to have been taken.

I refer to the matter of Doogan and others, to police corruption and to their involvement in importing drugs. It was a Commonwealth prosecution in which police prosecutors, branch-managed, somehow managed to put a corrupt court constable in charge to handle the documents and to try to obtain documents concerning Maurice Kaplan, the so-called fat man and Mr Big witness and main witness in the prosecution of Rex Jackson. I remind Government members of the prosecution of Rex Jackson, a Labor Minister for Corrective Services, taking corrupt money for the early release of prisoners. Labor members distanced themselves from that issue. The day before the committal the Clerk of the Peace entered into an agreement to support an application for a closed court for Mr Kaplan, Mr X, Mr Brown, or whatever they called him. Late in the afternoon the Government instructed the Clerk of the Peace to withdraw that agreement and so he was exposed without State Crown support.

Mr Barrier Collier: Point of order. My point of order relates to relevance under Standing Order 76. This debate is about an Act to amend the terms of appointment of the Director of Public Prosecutions, Crown prosecutors, public defenders and the Solicitor General. The member for Epping is giving us a good lesson on the history of both parties but it is not relevant to the appointment of Crown officers. I ask you to draw him back to the leave of the bill.

ASSISTANT-SPEAKER (Mr Grant McBride): Order! As a lawyer the member for Epping would appreciate that argument. However, the member for Epping has had a fair go and it would be appropriate for him come back to the leave of the bill.

Mr GREG SMITH: I have come to the end of those featured matters. I am glad that the member for Miranda could see the relevance of debate up until then. However, it was getting a little too tough. When those cases were conducted we had no Director of Public Prosecutions. Once we appointed a Director of Public Prosecutions the atmosphere of all these cases—the foundation of the National Crime Authority, the Woodward, Stewart and Costigan royal commissions—led to politicians saying, "Let us distance ourselves from politics in the prosecution area and have independent directors." That happened right around Australia as well as in New South Wales. Since then prosecution agencies at that level have been clean. There might have been complaints from time to time about sentences or about the fact that a Crown prosecutor annoyed a witness, a victim's family,

or something like that, but prosecution agencies enforcing the criminal justice system have remained clean.
<50>
That is at risk if somebody perceived to be a mischievous director is not going to be affected by this legislation and stays. In recent years the Director of Public Prosecutions has acted independently and has outspokenly criticised the Government and the Coalition regularly. That is largely what brought all this about.

If the claim by the Attorney General that a decision was made two and a half years ago by the Government not to appoint any more Crown Prosecutors is true, it shows deception by the Government in its present term and last term in office because it never revealed that to those who are willing to serve as Acting Crown Prosecutors. Many of those people gave up successful practice at the Bar because they wanted to be Crown Prosecutors. The practice had been that after serving for a period as Acting Crown Prosecutor one became a permanent tenured Crown Prosecutor. About six years ago the Criminal Procedure Amendment (Pre-Trial Disclosure) Act was passed. It was an attempt by the Government to get more cases dealt with by pleas of guilty or to have issues disposed of well before the trial date to save the cost of running trials.

The Government authorised the Director of Public Prosecutions to appoint about 12 extra Crown Prosecutors to be available as arraignment Crowns. There are people here today, including my learned friend the member for Maitland, who have worked through the culture of arraignment Crowns, finding bills much earlier than they used to so that there could be more certainty in what charges would be brought at trial, bearing in mind one has to obtain the leave of the court to amend the indictment. That system, which put on an extra 10 Crown Prosecutors—and some of the Acting Crown Prosecutors are now acting in those vacant positions—did not succeed in that respect. It also did not succeed in getting more disclosure from the defence.

Because that system did not work so well the Government moved into criminal case processing, but that has not worked well either. Everything was aimed at cutting the cost of proceedings, keeping as many matters as possible out of the superior courts and getting as much plea bargaining as possible—or charge negotiation, as they now call it—so that the criminal justice system would be more efficient. It has largely been the Crown Prosecutors who have achieved this efficiency, and, because of their experience, the Public Defenders have achieved greater efficiencies than many counsel who do defence work.

Someone who expects to be a Crown Prosecutor permanently cannot be told that he or she has to give up his or her practice to do that and then be told the tenure will be only for seven years, and if he or she has already reached 60 it will be only five years. In his second reading speech the Attorney General said that life tenure is an anachronistic concept. Last week we celebrated the 30th anniversary of the Anti-Discrimination Act, and we did that by passing of the Anti-discrimination Amendment (Breastfeeding) Bill. Age discrimination has long been a fundamental plank in the Anti-Discrimination Act, and now the Commonwealth has enacted age discrimination legislation. Crown

Prosecutors and Directors of Public Prosecutions have life tenure because of the Anti-Discrimination Act.

Mr Michael Daley: What about superior court judges?

Mr GREG SMITH: Under the Constitution they go to age 72.

Mr Michael Daley: Exactly. It is discriminatory.

Mr GREG SMITH: This is discrimination that has been discovered after all these years. Crown Prosecutors have been known to go to 78 years of age under the old system. We now get into the situation where life tenure suddenly becomes an evil thing. The Attorney General thinks he can sell to the community and to the media that nobody gets life tenure these days. In effect, that suggests that all these crotchety, senile lawyers will be in practice until they are about 103 because they do not have to retire. In fact, the oldest Crown Prosecutor in recent years was 74 when he retired and the oldest one still practising now is 68. He is still appearing in very difficult murder trials in the Supreme Court and he has got plenty of years left in him. Because the Government says he can stay on, that is fair enough. He may stay until he is much older—and he is very fit for it.

Judges and magistrates in the Supreme Court, the Local Court and the District Court can stay until they are aged 72, but for some reason a Crown Prosecutor, a Public Defender and a Deputy Directors of Public Prosecutions, who could become the director or could act as the director, has to retire at 65. Somebody made a smart comment and said that 65 is the retirement age. Since when? That has been so for about 15 years ago. But the legislation we have just celebrated removed the compulsory retirement age of 65, and people in the public service are exempt from having to retire at 65. Will the Government say that is anachronistic too and bring the retirement age back to 65? What about staffers in this Parliament? Will they be limited to 65 years of age?

Mr Thomas George: What about members of Parliament in this place?

Mr GREG SMITH: What about members of Parliament? Are they all going to be limited to 65 years of age? What an insult when the population is growing older and people are working longer. The Attorney General claimed that New South Wales is on its own in having this tenure, but that is not really so because in Victoria Directors of Public Prosecutions, Crown Prosecutors or Chief Crown Prosecutors can get renewable contracts up to 20 years, which means they could be in those positions for 40 years. In the legislation there is no age limit on these people. To set an age limit in New South Wales is to do something that is not done with other prosecutors in Australia. I ask the Government to check the facts.

So what if former Justice Greg James undertook a review? He is a good friend and he is a good lawyer, but what is his qualification to undertake a review of Crown Prosecutors and Public Defenders? Where are the reasoned comments? It is just a review in which he says, effectively, "This is what I think is a good idea". I do not mean any disrespect to

him. That was all he was asked to do. He was asked, "Is this a good idea?" and he said, "I think it might be a good idea". He gives no justification for discriminating between the Director of Public Prosecutions continuing until age 72 and the Solicitor-General continuing to age 72—on a renewable contract, of course—because he has not trodden on the corns, like the Director of Public Prosecutions might have. Why is the Director of Public Prosecutions non-renewable and the Solicitor-General renewable? That is a good question. But I will not adopt the Kevin Rudd approach of just asking questions; I will give answers instead. I mention the Meissner case.

Mr Michael Daley: Go back to Askin.

Mr GREG SMITH: When Askin was around Crown Prosecutors had no limit on how long they could stay. Going back to the Meissner case, the Attorney General was asked recently if he could express support for the Crown Prosecutors. He said he could not do that because he had not investigated what the other Crown Prosecutors were like. This is a man who says he has got all the information to change everything. He knows what is happening in other States but now he cannot make a comment on the Crown Prosecutors and he will not give them the credit they deserve. He will not mention the outstanding Mark Tedeschis or the Margaret Cunneens or the many other outstanding people, and he will not express his support for them.

If a member of the public complains about a Crown Prosecutor, rather than finding out what the Crown Prosecutor's version of events is, and the version of those instructing him, he just shoots the complaint off to the Legal Services Commission.
<51>
That is called loyalty, is it? It is not loyalty and the Crown Prosecutor not only has a duty to defend judges; he should defend prosecutors. He was not prepared to comment on Queensland or the other States. Let me remind the House what the Court of Criminal Appeal said in the Pauline Hanson case. Queensland has many good prosecutors, but because they are employed under the Public Service Act, which is most undesirable, and are not paid much, when they get more experience they leave and go to the private bar. So Queensland loses the benefit of their knowledge and experience. In the Pauline Hanson case in 2003 Chief Justice De Jersey said:

> The case will in my view provide a further illustration of the need for a properly resourced, highly talented, top level team of prosecutors within or available to the Office of the Director of Public Prosecutions. In this complex case, which resulted in a trial of that length, and a consumption of vast public resources, highly talented lawyers of broad common law experience should desirably have been engaged from the outset in the preparation and then presentation of the Crown case … I do not raise this critically of the prosecutors who were involved: my observation relates to the resourcing of the Office. Had that been done, the present difficulty may well have been avoided.

Unfortunately, that was a reflection on the lack of resources given to the Queensland Office of the Director of Public Prosecutions and the fact that there was a culture in that State of not paying prosecutors enough. The same applies in South Australia and Western

Australia. It is only in Victoria that Crown Prosecutors are paid reasonably well. In that State they are appointed for up to 20 years at a time and the term is renewable. In this State Crown Prosecutors are well paid, and that is how we attract the best. The Government should recognise that we attract very good Crown Prosecutors. Just as the Government recognises the hard-working staff in hospitals who are under attack, it should recognise—

Mr Michael Daley: Who is attacking them?

Mr GREG SMITH: The Attorney General was not prepared to recognise that they were doing a good job. The Government should recognise that our Crown Prosecutors do a sterling job. I should like to give an example of a Crown Prosecutor being in a crucial and dangerous position if he or she is under contract that is coming up for renewal and is prosecuting someone. A Crown Prosecutor prosecuted Joe Meissner over the love boat scandal. He put to one of Joe Meissner's witnesses, Frank Walker, QC, that he had an improper relationship with a well-known criminal, Abraham Gilbert Saffron. The judge rejected that question. The Crown Prosecutor had material from a criminal justice source to support the question. Nevertheless, the judge disallowed it. Mr Walker complained to the Bar Association, which then disciplined that Crown Prosecutor. Imagine if a Labor Government is in office and that Crown Prosecutor sought to obtain another contract. What chance would he have? No chance whatsoever.

Mr Michael Daley: Does it work in reverse?

Mr GREG SMITH: I agree. It could work in reverse. I believe that in the important and most sensitive area of criminal justice, whoever is in power must not be allowed to discontinue the services of somebody for political reasons or because they have upset someone. Crown Prosecutors regularly upset people by cross-examining them and sometimes calling them liars or accusing them of doing awful things to some child or to some other person. Sometimes Crown Prosecutors upset judges by disagreeing with them and refusing to call a witness, as is the right of a Crown Prosecutor, who makes that ultimate decision. Crown Prosecutors make enemies by upsetting people. Judges and various other people who have been upset ring and complain to people like the Attorney General, the Director of Public Prosecutions and the Deputy Director of Public Prosecutions.

If a Crown Prosecutor were to apply for reappointment, naturally those complaints may be relevant. The complaints may be quite unfounded because generally a thorough inquiry is not conducted into them because the Crown Prosecutor was just doing his job for the community: fighting crime. That is the real job: fighting crime. Serving infringement notices for crimes such as breaking into cars and things like that is not fighting crime; that is giving criminals a slap on the wrist and letting them go. The real fighters of crime are the police, prosecutors, Public Defenders, jurors and judges involved in the incredible process of the criminal trial. That cannot be replicated in any other form.

It is like being in the army for the citizens of this State or country. The New South Wales

Crown Prosecutors have been operating for 177 years and have a proud record of service to this State. It is not suggested that we abolish the position, but it is a different thing once those positions are taken from tenure under commission and then from tenure under legislation to appointments under a seven-year contract. A Crown Prosecutor older than 57 will not be offered a seven-year contract but, instead, six, five or four years. Perhaps a contract may not be offered because if someone dares to criticise this Government, he or she may be put out.

From time to time people have paid the penalty when they have upset their political masters. It is not right that Crown Prosecutors just doing their job but who belong to the political party not in government, or who follow an unusual religion, or are of a colour or nationality that is not liked, or because they are ugly or for some other reason, get up the nose of some official in the Attorney General's Department, the Attorney General himself or perhaps even someone who talks to the Attorney General, who could say, "We will not reappoint him. I am not going to put that person back." That is the problem with this proposal. I believe sincerely that this is a big mistake by the Government.

I can assure members opposite that if we are elected next time, and I believe we will be, we will restore tenure—not life tenure, but we will act in accordance with our amendments for all officers except the Director of Public Prosecutions and the Solicitor-General, because the obvious argument is to limit those terms to 10 years initially. Officers in those positions operating at that extreme level of work easily suffer burnout, often when they are getting towards the age people normally retire. Crown Prosecutors and Public Defenders often start in that office when they are in their thirties, and they may give 30 or 40 years of good service. One or two of those officers might be seen as a bit resistant to change or a bit stubborn in accepting particular types of briefs or get on people's nerves. That does not justify cutting down this fine structure and fine group of people to a limited term of seven years.

I have spoken long enough in this debate. The Opposition does not oppose the bill, but it certainly pursued its amendments, and the result was close. The Attorney General was lobbying the crossbench members personally. There seems to be something personal from him on this issue and he claims that there is something personal on my side. I have no personal view; I have given all that away. When I left that office I had to weigh up everything. I have changed my mind. I would not now get a job back there because I would not be reappointed. I am on the wrong side of the fence. In recent times we have seen that if someone is on the other side of the fence, they will not get reappointed.

Mr Barry Collier: You can always have a by-election.

Mr GREG SMITH: We can always have a by-election. I am not offering myself for a by-election. I shall conclude my remarks as I expect other people will speak in this debate, but this is a black day in the history of this State.

Mr MALCOLM KERR (Cronulla) [8.48 p.m.]: The Crown Law Officers Legislation Amendment (Abolition of Life Tenure) Bill 2007 seeks to amend the Director of Public

Prosecutions Act 1986, the Crown Prosecutors Act 1986, the Public Defenders Act 1995, and the Solicitor General Act 1969 to, inter alia, remove life tenure for future appointees to certain statutory legal offices and to fix the term of the office and retirement age for future appointees under these Acts. The member for Epping mentioned approaches to crossbench members. I take the House to a speech of Reverend the Hon. Fred Nile in another place.
<52>
The Government has a very high regard for Reverend the Hon. Fred Nile. It made him an Assistant Deputy-President and he was the Government's choice to head the Joint Select Committee on the Royal North Shore Hospital. One would expect that what he said in another place would be said with integrity and honesty.

Mr Michael Daley: It depends on what he said.

Mr MALCOLM KERR: That is an interesting character assessment of Reverend the Hon. Fred Nile. He said:

> My concern is that if the bill is amended in the way Opposition proposes, the Minister then can simply not proceed further with the bill. We would finish in a worse situation.

Why? Without any reference to Crown Prosecutors and the Director of Public Prosecutions, this Government decided arbitrarily that it would not appoint Crown Prosecutors permanently. It made that decision 2½ ago but never announced it. It was a State secret. As a result, the Crown Prosecutors who were given a commission could have their employment terminated after one year by the Attorney General. That is what Reverend the Hon. Fred Nile meant when he said we would be in a worse situation. That was the sword of Damocles being held over the heads of the cross-bench members.

That is an indictment of the way legislation is dealt with in another place. The Government says to cross-bench members, "If you do not pass this—you may not think it is a satisfactory piece of legislation—there will be worse to come." That is the state of government in New South Wales and the justice system—the most important area that any Government must administer because it delivers justice to our fellow citizens. I will deal with the office of Crown Prosecutor, because it goes to the heart of this legislation. I am indebted to R. R. Kidston, QC, who wrote an article in the *Australian Law Journal* entitled "The Office of Crown Prosecutor". The article states:

> When in 1788 Captain Phillip and some thousand souls of varied rank and calling landed here, they came not as barbarians without a law, nor as Utopians minded to fashion or try out a new set of laws, though in part they did make something new. They came at that time to found a penal settlement under England's Crown. They were all persons under her law; and indeed two-thirds of them were prisoners of it. With them the existing law of England came, and was at once in force, so far as it fitted their condition and that of the new settlement.
>
> By 1821, when Macquarie finished his administration, the settlement, of less penal and military character, had a substantial civic and economic life;

> it held nearly 40,000 people … It could fairly be called a colony in which free men might follow in the main the English way of life, under English law.

However, even in 1821 some English laws were no longer applicable and would never be suited to improving the colony. I have referred to English decisions and textbooks, no doubt as the member for Maitland and the Parliamentary Secretary have done.

Mr Frank Terenzini: Up-to-date editions.

Mr MALCOLM KERR: I would hope that the member consulted up-to-date editions that also contained some history to show how we got to modern times. There is an old saying in Cronulla: "Those who forget the past are condemned on relieve it."

Mr Barry Collier: To relieve it?

Mr MALCOLM KERR: No, to relive it. The only relief here is that the Parliamentary Secretary is not speaking. This point is very important because England has no office of Crown Prosecutor. The office exists only in Australia.

Mr Greg Smith: It has the Crown Prosecution Service.

Mr MALCOLM KERR: That is correct, but there is no office of Crown Prosecutor. Therefore, it is very important that we protect what we have.

ACTING-SPEAKER (Ms Diane Beamer): Order! The member for Cronulla will address his remarks through the Chair.

Mr Michael Daley: Point of order: Standing order 74 is very clear. The Speaker can intervene when members are quarrelling among themselves. They are slowing down the proceedings.

Mr MALCOLM KERR: To the point of order: It is quite clear that we are in heated agreement. There is a Crown Prosecution Service.

ACTING-SPEAKER (Ms Diane Beamer): Order! I ask the member for Cronulla earlier to stop having a conversation with the member for Epping and address his remarks through the Chair. The member for Cronulla may proceed.

Mr MALCOLM KERR: Madam Acting-Speaker, I am certainly speaking through you and I want to respond to the interjection. The CPS is sometimes referred to by the English police as the "Criminal Protection Service". No-one would say that about Crown Prosecutors in New South Wales. In fact, Kidston went on to say that Crown Prosecutors are there—and we should be proud of this:

Neither to indict, nor on trial to speak for conviction except upon credible evidence of

guilt; nor to do even a little wrong for the sake of expediency, or to pique any person or please any power; not to be either gullible or suspicious, intolerant or over-pliant: in the firm and abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance.

Mr Barry Collier: That sounds like wedding vows.

Mr MALCOLM KERR: We on this side of the House are married to justice. I have not even consummated my speech. It is true: we are wedded to justice. It is a high note to sound and hard to hear in the babble. Nevertheless, that wedding has taken place and that is why we are here: to speak on behalf of justice. Let us presume that a Crown Prosecutor is proceeding in a case that involves the police. The Government is uncomfortable with the matter and someone from the Attorney General's office might telephone and say, "Bill Bloggs, do you enjoy being a Crown advocate? The matter before the court is very important and I do not think it suits the Government's interests for the prosecution to proceed with the same degree of vigour," or words to that effect. Does any member believe that that is an unreasonable example to provide?

Mr Michael Daley: Yes.

Mr Barry Collier: Point of order: That is an outrageous thing to say, whether the member is talking about a Labor or a Liberal Attorney General. It is completely outrageous and the member for Cronulla should withdraw it.

Mr MALCOLM KERR: To the point of order. I do not intend to withdraw it because I was quoting from a speech given by Paul Whelan in this House. It was the example that he gave. I am simply reciting an historic example given by a member of the Labor Party.

ACTING-SPEAKER (Ms Diane Beamer): Order! I have heard some fairly outrageousness things in this debate. The member for Cronulla may proceed with his version.

Mr MALCOLM KERR: Thank you, Madam Acting-Speaker. I also thank you on behalf of Paul Whelan.

Mr Barry Collier: I am sure you will produce that.

Mr MALCOLM KERR: Of course I will. For the benefit of the Parliamentary Secretary and his speechwriter, the quote comes from a second reading speech Paul Whelan gave on the Statute Law (Miscellaneous Provisions) Bill (No. 3) and the Statute Law (Penalties) Bill. The debate resumed on 7 May and it is in *Hansard*.
<53>
Mr Frank Terenzini: What year was that?

Mr MALCOLM KERR: I think it was 1992.

ACTING-SPEAKER (Ms Diane Beamer): Order! The member for Cronulla need not respond to interjections or questions.

Mr MALCOLM KERR: As always, Madam Acting-Speaker, I will follow your ruling and not respond. The effect of this bill is that one of the most important offices in the State is being threatened and made vulnerable. My evidence for that assertion is the extract cited by Mr Paul Whelan, a former Minister for Police and a former shadow Attorney General, which shows exactly how inappropriate the bill before the House is.

Unlike the member for Epping in his exposition of the historical basis on which the permanency of the office of Crown Prosecutor exists, I will not cite examples. The member for Epping mentioned the discrimination involved the age limit of 65 years but the Attorney General asserts that life tenure is an antiquated concept—but then this Labor Government thinks a life sentence is an antiquated concept as well. People who commit murder receive a sentence of 20 years in New South Wales.

I have to say that 65 is a very arbitrary limit. Winston Churchill was 65 when he became Prime Minister of England. It is just as well the current New South Wales Attorney General was not in England in 1939 saying, "Stop! We cannot have a 65-year-old leading the fight against Hitler. This man is too old. He could not even be a Crown Prosecutor in my jurisdiction. He should not be England's Prime Minister." If the present Attorney General had been in office in England in 1939, he would have cost us World War II! That is what happens when people are committed to ageism.

Johno Johnson served this Parliament with distinction after turning 65. Let us not have an attack on people because of age. Anybody would think that Crown Prosecutors are older drivers. The regard in which Crown Prosecutors are held by this Government is absolutely appalling. I am pleased the member for Miranda recognises that the Opposition is wedded to justice. Long may that continue. I assure the House and the Government that it will continue.

Mr BRAD HAZZARD (Wakehurst) [9.03 p.m.]: As the member for Epping has indicated, the Opposition has concerns about this bill. A lengthy and detailed debate has taken place in the Legislative Council and in this House. The bill is directed to amending the Director of Public Prosecutions Act 1986, the Crown Prosecutors Act 1986, the Public Defenders Act 1995 and the Solicitor General Act 1969. Its principal purpose is to remove life tenure for future appointees and to fix the term of office or retirement age of future appointees under those Acts.

Most members of this House would know that I am a lawyer and that I have more than a passing acquaintance with each of the offices affected by this bill. I have the highest regard for those offices. One of the more base traits of the Parliament is that frequently members choose to attack the legal system, the judiciary and cornerstone safeguards of our democracy. If members on both sides of the Chamber are fair about it, in our private moments we will admit that Executive Government can lend itself to excesses of power.

It is quite important for members on both sides of the Chamber to ensure on behalf of the broader community that legislation passed by this House reflects the need for a strong judicial system and strong support for the judicial system to maintain the necessary democratic safeguards for the citizens of New South Wales. One of the aspects of the current arrangement with the various offices to which I have referred is that they feature effective life tenure. As the member for Epping pointed out earlier, life tenure does not usually mean a particularly advanced number of years. In practical terms life tenure is far less than what might be considered excessive.

In my view it is important that as far as is humanly possible we have a system whereby people who fulfil these roles can be strong and untainted advocates and totally without any fear whatsoever of influence from government. The member for Epping set out various examples of his experience. I do not propose to discuss those but I am able to say that when we fiddle with something less than strong tenure that is provided under current tenure arrangements, we run a grave risk that the people who will be subject to reappointment, particularly relatively short reappointment in the ambit of a working life, from time to time may feel pressure from their political masters.

In this State under this Government particularly, I must say that there has been an intrusion into all levels of government at the highest levels by members of the current political party in government. To that extent I must add that the risk of intrusion exists far beyond the current Government and I do not directing my comments especially to the current Government. It is a risk that exists throughout the whole political spectrum, but it has been particularly evident during the last 12 years of this Government.

For that reason, I have some real concerns about what this bill purports to do. Although it may be unnecessary, I nevertheless propose to embark upon a defence of the current Director of Public Prosecutions. This is a very interesting bill because it seeks to differentiate tenure arrangements for the Director of Public Prosecutions and the Solicitor General. Each officer will have a 10-year term, but there is a difference that has no basis in logic whatsoever. The bill states:

> The Solicitor General is to be appointed for a fixed but renewable term of 10 years with compulsory retirement at age 72 …
>
> The Director of Public Prosecutions is to be appointed for a fixed and non-renewable term of 10 years with compulsory retirement at age 72 …

The difference between the two positions is that the Director of Public Prosecutions has a non-renewable term. The merits of renewable or non-renewable appointments can be argued in opposite directions in debating whether a renewable or a non-renewable term is reasonable. But there is no argument and no justification whatsoever for treating the Director of Public Prosecutions in a manner that is different from the manner in which the Solicitor General will be treated if this bill is passed.

There appears to be only one explanation for the differentiation. Currently New South Wales has a Director of Public Prosecutions who is very much his own man. He has been a regular subject of criticism in the media by the Government and occasionally by the Opposition. In all honesty I submit to the House that the steadfast resoluteness of a

Director of Public Prosecutions standing up to the forces of political influence and media influence is far more important to a system of justice which safeguards our community than is anything else, other than having a strong independent judiciary. In the context of this legislation the Director of Public Prosecutions should be treated in exactly the same way as the Solicitor General is treated.
<54>
There are strong arguments that tenure until 72, as the member for Epping said, is entirely appropriate. I would argue that tenure could be extended beyond 72. Some of the greatest wisdom in legal and judicial spheres, in the major professions, and broadly in the community, is to be found in people in their 70s and 80s. I recall judges who were writing excellent appraisals of the legal process in their 80s. It is disappointing that the House is happy to take an ageist approach to removing life tenure and reducing the retirement age to 65 for some officers and to 72 for the senior positions of Director of Public Prosecutions and Solicitor General. That makes no sense at all to me.

Nick Cowdery holds a most difficult position but he speaks up regularly on many issues. He is vested with the task of choosing whether to pursue prosecutions or drop them, without giving all the reasons for his decision publicly. Such decisions often upset those immediately involved, including family members. His is a difficult position, but a necessary one. This bill, which seeks to distinguish between the Solicitor General and the Director of Public Prosecutions, is fundamentally flawed. On balance, Nick Cowdery has done far more good than bad, and it is disappointing to think that a government may determine Crown law office positions based on an assessment of personality.

With regard to each of the other offices, the Opposition has indicated clearly that there will be changes when we are returned to government. The Opposition has a strong view that officers who have to make impartial decisions in a process that safeguards our community should not be or feel under threat. I look forward to the day when the Liberal Party and The Nationals, in government, are able to bring sense to this legislation to ensure that officers appointed for seven years do not have to worry whether their decisions will put their necks in the guillotine of political opportunism.

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [9.13 p.m.], in reply: I thank honourable members for their contributions to debate on this bill, particularly the members for Epping, Cronulla and Wakehurst. This bill will abolish life tenure for a number of statutory legal offices in New South Wales, including the Director of Public Prosecutions. One point made by all speakers for the Opposition—although I note they did not oppose the bill—related to the independence of the offices. Every other Australian jurisdiction has rejected the assertion that there should be lifetime appointments in order to be independent. In his second reading speech on the bill, the Attorney General, the Hon. John Hatzistergos, noted that the law in the Commonwealth and the other States and Territories generally specifies a term of appointment for these positions or allows a renewable fixed term. New South Wales with its provision for life tenure is the anomaly. We are the only jurisdiction to automatically provide the Director of Public Prosecutions with a life appointment. We are the only jurisdiction to provide

Crown prosecutors with a life appointment. In his report to the Hon. John Hatzistergos, the Hon. Greg James QC, a person of the highest integrity, said this:

> The Director, Solicitor General, Public Defenders and Crown Prosecutors are barristers, with the responsibilities, protections, immunities and roles as such. They are represented by the Bar Association, and practice, subject to their Acts, in accordance with the ethics of the Bar and the Rules of the Bar Association. Those rules mention their independence and detachment as barristers. The Acts of Parliament under which the DPPs and Crown Prosecutors are appointed and practice, and the general law, including that as to contempt, as to perverting justice etc, operate to ensure independence, impartiality and detachment. Protections are also found in scrutiny under the ICAC Act, by the Ombudsman, the Auditor-General and the Police Integrity Commission, so far as officials or police might act adversely towards office-holders. The Parliamentary Code of Conduct and Standing Orders apply to criticism in Parliament and office-holders have the ability to apply to the judges and the Attorney-General for assistance. All these operate to give Crown Prosecutors in particular, and other office-holders who are barristers, a great deal of protection in the performance of their public duties so that, if those duties are being properly performed, no compromise of their independence, whether they are appointed for life or for a term, would seem to be in prospect.
>
> It is clear that in the performance of their official functions the Prosecutors, the DPP and Deputies, and, indeed all the offices with which this advice is concerned, must be free from adverse influence and should not themselves seek to exercise their office for any personal benefit or advantage. The various Acts and institutions to which I have referred above also operate to prevent that.

The reforms in this bill are timely and appropriate. They bring New South Wales law into line with the law of other Australian jurisdictions. They also align New South Wales law with contemporary management theory and practice. Fixed-term appointments provide an incentive for performance improvement and allow for some turnover in highly demanding positions. These public offices, and the communities they serve, will benefit from these reforms. I commend the bill to the House.

Question—That this bill be now agreed to in principle—put and resolved in the affirmative.

Motion agreed to.

Bill agreed to in principle.

Passing of the Bill

Bill declared passed and returned to the Legislative Council without amendment.