

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, and Minister for Justice) [11.33 a.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crown Law Officers Legislation Amendment (Abolition of Life Tenure) bill 2007. This bill introduces fixed term appointments and compulsory retirement for a range of statutory offices in the New South Wales justice system. These statutory offices are: the Director of Public Prosecutions, the Deputy Director of Public Prosecutions, the Solicitor for Public Prosecutions, Crown Prosecutors, Public Defenders, and the Solicitor-General. The law currently provides most of these offices with life appointments.

Life tenure is an anachronistic concept. Appointments for life are a remnant of a bygone age that has well and truly passed; they are out of step with community expectations and are all but extinct in Australia. Life tenure fails to provide an incentive for continuous performance improvement. It also fails to acknowledge that turnover can be appropriate, particularly in positions as difficult, demanding and high profile as those covered by this bill. In fact, New South Wales is Australia's last bastion of life tenure for senior legal officers such as the Director of Public Prosecutions. Most other Australian jurisdictions have recognised that fixed terms for these positions are appropriate and desirable. Overwhelmingly, the law in the Commonwealth and the other States and Territories either specifies a term of appointment for these positions, or allows for fixed terms. In many cases, these are long-standing provisions that received bipartisan support.

The position in New South Wales is an anomaly. This bill will address this anomaly and bring New South Wales into line with the rest of Australia. Fixed terms will further enhance the accountability of statutory officers by providing an opportunity for continuous improvement. The Government has consulted widely and openly on the concept of fixed term appointments with current office holders, the Law Society, the Bar Association, the judiciary and victims groups. I then commissioned the Hon Greg James QC to review stakeholder submissions and prepare an independent report making recommendations as to the term of any future appointment of the offices in question. In preparing his report, Mr James reviewed the submissions, engaged in further discussions and correspondence with stakeholders, and reviewed comparative and other research material. The amendments in the bill reflect the views and advice of Mr James and many stakeholders on the appropriate architecture of a fixed term scheme for these offices.

I would like to make the very important point, however, that the changes the Government proposes will not affect current office holders. The bill will also ensure that the approach taken to future appointments is consistent with the approach taken to other senior statutory appointments in New South Wales. New South Wales has already introduced fixed terms for the Crown Advocate, the Ombudsman, the President of the Mental Health Tribunal, the Independent Commission against Corruption Commissioner and the Privacy Commissioner, the Senior Public Defender has a seven-year term and the Deputy Senior Public Defender has a five-year term. It is appropriate that statutory offices such as the Director of Public Prosecutions, Crown Prosecutors, Public Defenders and the Solicitor General are treated in the same way.

I will now outline the key provisions in the bill and deal firstly with amendments to the Director of Public Prosecutions Act 1986. Schedule 1 to the bill makes amendments to the Director of Public Prosecutions Act 1986. The Director of Public Prosecutions Act currently provides the Director of Public Prosecutions, the Deputy Director of Public Prosecutions and the Solicitor for Public Prosecutions with life appointments. These offices are appointed by the Governor and the appointment only ends when the office holder dies, resigns or is removed from office by the Governor. The statutory grounds for removal from office are limited to circumstances such as incapacity, bankruptcy, or a conviction for an offence carrying a penalty of imprisonment of 12 months or more.

New South Wales is the only Australian jurisdiction to provide the Director of Public Prosecutions with an automatic grant of life tenure. All other Australian jurisdictions either specify a term of appointment or allow for fixed terms for the Director of Public Prosecutions. The maximum terms of appointment range from five years in Western Australia to 20 years in Victoria. Tasmania, the Northern Territory and the Australian Capital Territory all have a compulsory retirement age for the Director of Public Prosecutions as well. When the Victorian provisions regarding the appointment of the Director of Public Prosecutions were enshrined in the State Constitution in 1999, Mr Merton MP, member of the Liberal Opposition commented:

The notion of appointing a DPP for life has disappeared. None of us now believes the life appointment of a DPP is appropriate.

The bill will amend law of New South Wales to reflect this contemporary realisation. Clauses 4 and 5 of schedule 1 of the bill amend the Director of Public Prosecutions Act to provide a non-renewable fixed term appointment of 10 years for the office of Director of Public Prosecutions, with compulsory retirement at the age of 72. A 10-year term compares favourably with terms offered to Directors of Public Prosecutions in other Australian jurisdictions and is of sufficient length to attract a suitably qualified candidate to the office. A 10-year term also ensures the Director of Public Prosecutions will continue to be eligible for the judicial pension at Supreme Court level. As non-renewable term for the Director of Public Prosecutions avoids the possibility or perception that an office holder

might modify his or her behaviour in order to secure reappointment. It also ensures regular turnover, which the Government believes is necessary given the pressures and high profile nature of this office. It was supported by a number of stakeholders during consultation.

The compulsory retirement age of 72 mirrors the retirement ages for judges, which is again appropriate given the Director of Public Prosecutions enjoys the same salary as a Supreme Court judge and is covered by the judicial pension scheme. The bill allows a shorter term of appointment to be made if the office holder is over 62 years of age, so that he or she retires no later than 72. Clauses 4 and 5 of schedule 1 also amend the Director of Public Prosecutions Act to provide the offices of Deputy Director of Public Prosecutions and Solicitor for Public Prosecutions with a renewable fixed term appointment of seven years, with compulsory retirement at the age of 65. A shorter term of appointment may be made so that the office holder retires no later than 65.

A fixed seven-year term for a Deputy Director of Public Prosecutions and the Solicitor for Public Prosecutions provides certainty and compares favourably with terms attached to similar offices in other jurisdictions and New South Wales. Enabling the terms to be renewed provides an incentive for performance improvement and allows for some continuity and development in these offices. A compulsory retirement age of 65 restores the retirement age for these offices, which was originally instated in the Director of Public Prosecutions Act. It will provide a mechanism for some turnover at an appropriate stage in these highly demanding offices. Clause 11 of schedule 1 provides that these officers' right of return to public sector employment, which is currently exercisable upon resignation, will also be exercisable once their term appointment has expired. Clauses 9 and 10 of schedule 1 make amendments to the provisions governing the pension of the Director of Public Prosecutions that are consequent on the introduction of a compulsory retirement age of 72 for the Director of Public Prosecutions. Clause 2 of schedule 1 provides that these amendments will not apply retrospectively to a person holding the office of Director of Public Prosecutions, Deputy Director of Public Prosecutions or Solicitor for Public Prosecutions at the time of the bill's assent.

I turn to amendments to the Crown Prosecutors Act 1986. Schedule 2 to the bill makes amendments to the Crown Prosecutors Act 1986. The Crown Prosecutors Act currently provides that Crown Prosecutors are appointed for life. Their appointment only ends when they die, resign or are removed from office by the Governor. The statutory grounds for removal of a Crown Prosecutor are identical to those applying to statutory offices under the Director of Public Prosecutions Act. The Commonwealth and Victoria are the only other Australian jurisdictions to have a statutory office of Crown Prosecutor or equivalent. In both jurisdictions, Crown Prosecutors are appointed for renewable fixed terms. In the Commonwealth, Special Prosecutors are appointed for fixed terms of up to five years, renewable. In Victoria the Chief Crown Prosecutor and the Senior Crown Prosecutor may be appointed for a fixed term of between 10 and 20 years, renewable, Crown Prosecutors may be appointed for up to 10 years, renewable, and Associate Crown Prosecutors for up to five years, renewable. Clause 4 of schedule 2 to the bill amends the Crown Prosecutors Act to provide that Crown Prosecutors may be appointed for a term of seven years, renewable at the expiry of the term.

Clause 5 of schedule 2 provides a statutory basis for the appointment of a Senior Crown Prosecutor and Deputy Senior Crown Prosecutors, also for renewable fixed terms of seven years. These positions currently exist in practice and are recognised for the purposes of Statutory and Other Officer Remuneration Tribunal determinations. However, they are not referred to in the Crown Prosecutors Act. Both the amendments in clause 5 of schedule 2, as well as those in clauses 6 to 12 and clause 14, ensure that the Crown Prosecutors Act reflects this administrative structure. Crown Prosecutors, Deputy Senior Crown Prosecutors and the Senior Crown Prosecutor will also be subject to compulsory retirement at 65. This is provided for in clause 6 of schedule 2 to the bill. Fixed but renewable terms of seven years will provide these office holders with certainty and security, but also promote conscientious performance. A retirement age of 65 restores the position under the original Crown Prosecutors Act and will ensure turnover in these offices at an appropriate time. A retirement age of 65 also accords with superannuation considerations and was supported by several stakeholders during consultation.

Clause 15 of schedule 2 provides that the existing right of Crown Prosecutors to return to public sector employment—currently exercisable upon resignation—may also be exercised at the expiry of a term appointment. Clause 16 of schedule 2 makes provisions of a saving and transitional nature. Importantly, it provides that the compulsory retirement and fixed term amendments will not apply retrospectively to a person holding the office of Crown Prosecutor at the time of the bill's assent. Furthermore, existing Crown Prosecutors that take up another Crown law office for a term will be able to revert to their life appointment as a Crown Prosecutor following resignation from or expiry of the term appointment. This is to ensure that Crown Prosecutors are not discouraged from applying for other statutory offices. In relation to amendments to the Public Defenders Act 1995, schedule 3 to the bill makes amendments to the Public Defenders Act 1995. The Public Defenders Act currently provides that the Senior Public Defender is appointed for a renewable fixed term of up to seven years. A Deputy Senior Public Defender is appointed for a renewable fixed term of up to five years. Public Defenders hold office until they die, resign or are removed from office by the Governor. The statutory grounds for removal of a Public Defender are similar to those applying to Crown Prosecutors and statutory offices under the Director of Public Prosecutions Act. A Public Defender who is appointed to the position of Senior Public Defender or Deputy Senior Public Defender maintains their status as a Public Defender and reverts to that office at the expiry of their term of appointment to the more senior post.

Clauses 5 and 6 of schedule 3 to the bill amend the Public Defenders Act to provide the offices of Public Defender, Deputy Senior Public Defender and Senior Public Defender with a renewable fixed term of seven years, with compulsory retirement at the age of 65. A shorter period of appointment may be made so that the office holder retires no later than this age. Renewable terms of this length will again provide office holders with security and independence, but at the same time ensure they have an incentive to strive for continuous performance improvement. The proposed retirement age of 65 restores the retirement age for Public Defenders prior to 1990 and will serve the purpose of achieving some appropriate turnover in the office. Clause 10 of schedule 3 to the bill extends to Public Defenders, Deputy Senior Public Defenders and the Senior Public Defender the right to return to public sector employment upon either resignation or expiry of their term appointment. Clause 11 of schedule 3 to the bill inserts provisions of a savings and transitional nature. They ensure that people holding the office of Public Defender, Deputy Senior Public Defender or Senior Public Defender at the time of the bill's assent will not be subject to the amendments and will continue to hold office under the current arrangements. Furthermore, existing Public Defenders who take up another Crown law appointment for a term will be entitled to revert to their life appointment as a Public Defender on resignation from or expiry of the fixed term appointment. Again, protecting the life tenure of current Public Defenders aims to ensure that they seek appointment to other Crown law offices.

I turn to amendments to the Solicitor General Act 1969. Schedule 4 to the bill makes amendments to the Solicitor General Act 1969. The Solicitor General Act currently provides that the Solicitor General may be appointed on such terms and conditions as the Governor determines. The Act therefore allows for fixed term appointments, although no maximum term is specified. The Act specifies the basis upon which the Solicitor General is deemed to have vacated office, including where the Solicitor General resigns, becomes bankrupt, becomes mentally incapacitated or engages in other paid work outside the duties of his or her office. Most other Australian jurisdictions enable the Solicitor General to be appointed for a fixed term and several set a maximum term of appointment. For instance, in both the Commonwealth and Western Australia the Solicitor General is appointed for a fixed term of up to seven years, the Queensland Solicitor General is appointed for a fixed term of up to five years, and in both Tasmania and the Northern Territory the Solicitor General is subject to compulsory retirement. The statutory functions of the Solicitor General are very similar to the functions of the Crown Advocate under the Crown Advocate Act 1979. The Crown Advocate Act provides that the Crown Advocate may be appointed for a fixed term of up to seven years, renewable. There is no discernible reason why the position of the Solicitor General should not also be subject to a fixed term.

Clauses 2 and 3 of schedule 4 to the bill amend the Solicitor General Act 1969 to provide the Solicitor General with a renewable fixed term appointment of 10 years, with compulsory retirement at the age of 72. A renewable term of this length will attract candidates of sufficient calibre. A term of 10 years and a retirement age aligned with that of judges is also appropriate given that the Solicitor General, like the Director of Public Prosecutions, is a member of the judicial pension scheme. Clause 6 of schedule 4 makes amendments to the provisions governing the Solicitor General's pension entitlements that are consequent on the introduction of a compulsory retirement age of 72. Clause 7 of schedule 4 extends to the office of Solicitor General the right to carry over accrued public sector entitlements, as well as a right to return to public sector employment upon resignation or expiry of the term. The amendments in clause 7 of schedule 4 also provide that the amendments in the bill will not apply retrospectively to the person holding the office of Solicitor General at the time of the bill's assent.

As to the amendments to the Anti-Discrimination Act 1977, schedule 5 to the bill makes an amendment to the Anti-Discrimination Act 1977 in order to give effect to the compulsory retirement provisions in this bill. Specifically, it exempts each of the offices in question from the prohibition on compulsory retirement in the Anti-Discrimination Act. The bill also replaces the term "Australian legal practitioner" with the term "Australian lawyer" in the Director of Public Prosecutions Act, the Crown Prosecutors Act, the Public Defenders Act and the Solicitor General Act. This will ensure that lawyers who do not have a practising certificate, such as judges, are eligible for appointment to these positions. It will also ensure that people who are inadvertently late in renewing their practising certificate are not automatically vacated from office as a consequence. These amendments are made by clause 3 of schedule 1, clause 3 of schedule 2, clause 4 of schedule 3 and clause 1 of schedule 4 to the bill.

As to the process of appointment and reappointment, the bill inserts a provision in each of the relevant Acts confirming the power of the Attorney General to issue guidelines regarding the appointment and reappointment of the statutory offices in question. In this regard, I refer members to the amendments in clause 1 of schedule 1, clause 2 of schedule 2, clause 2 of schedule 3, and clause 5 of schedule 4. In order to uphold the integrity and independence of these offices, it is crucial that the process of appointment and reappointment is fair, transparent, and objective. The proposed guidelines will help achieve this objective. In developing these guidelines, I will, as with the development of this bill, take into account the advice of Mr Greg James, QC, and the views of stakeholders who have provided constructive suggestions on this issue. The Government is keen to ensure that the appointment and reappointment process is a fair one that is based on considerations of merit and performance.

In conclusion, the introduction of fixed terms for these statutory office holders is timely and appropriate. It will ensure there is incentive for people in these offices to perform and allow for some turnover in highly demanding

positions. It will also bring New South Wales into line with other jurisdictions and with the approach taken to other senior statutory appointments in New South Wales. The Government believes this is a sensible and modern approach. It is consistent with the approach around the country and will ensure the community can have confidence in our State's senior legal officers and their independence. I commend the bill to the House.