

PUBLIC SECTOR ETHICS AMENDMENT BILL 1999

EXPLANATORY NOTES

GENERAL OUTLINE

The Bill provides for the establishment of a Queensland Integrity Commissioner.

The proposed office was first canvassed in the ‘*Good Government*’ policy by the Government prior to the 1998 State election. Established under the *Public Sector Ethics Act 1994*, the Integrity Commissioner will form part of the statutory public ethics framework in Queensland.

The purpose of the measure is to provide for a source of confidential advice on conflict of interests and related ethics and integrity matters, on request, to Ministers, Parliamentary Secretaries, Chief Executives, and a small range of other “designated persons”, in the interests of avoiding personal conflicts of interests.

Policy Objectives of the Bill

The major policy objective of the Bill is to assist senior elected Government officials and senior appointed public officials (defined in the Bill as “designated persons”) to avoid conflicts of interest, and thereby to improve the standards of integrity and probity in Government and public administration. In consequence, the measure is seen as making a positive contribution raising community confidence in public institutions.

The Integrity Commissioner is not to be regulatory body, and will provide advice only in relation to conflict of interest issues, and only by way of a response to a specific request by a designated person.

In recognition of the determinative character of the Commissioner’s considered advice in relation to a conflict of interests matter, an official who substantially complies with the Commissioner’s advice is to be accorded conditional protection against liability in a civil action or administrative process. In relation to the giving of that advice, the Integrity Commissioner is to receive comparable protection against liability.

Reasons for Policy Objectives

The measure proposed will complement the purposes of the *Public Sector Ethics Act 1994* and the *Criminal Justice Act 1989* in various ways, by providing a confidential source of consistent and expert advice on conflict of interest issues, and encouraging senior public officials to seek advice from the Commissioner proactively.

In providing advice, the Integrity Commissioner will be required to have regard to established ethical standards, including any standards expressed in legislation or a formal *Code of Conduct* enacted by the Premier or the Parliament, as relevant to the case. If warranted in the circumstances of a particular case, the Integrity Commissioner will be enabled to take account of other relevant standards of ethical conduct which have broad endorsement in the community at large.

The Commissioner will also have a role in contributing to public understanding of public ethics policy and practice, by contributing to public discussion of such matters. The Commissioner will not be empowered to comment publicly on particular cases, or to conduct any form of investigation into an official's interests or an allegation about a conflict of interests.

The Bill reflects a growing practice in overseas jurisdictions towards the independent provision of proactive advice in relation to a conflict of interest issue to senior officials in Government and the Public Service, as a means of preventing conflicts from arising.

The functions of the proposed Integrity Commissioner are generally comparable with similar institutions in the United Kingdom, Ireland, Canada, and the United States. In particular, the proposed office is similar to the well-regarded "Ethics Counsellor" model in the federal sphere in Canada

Ways in which Policy Objectives will be Achieved by the Bill

The policy objectives of the proposed framework for the provision of advice through an Integrity Commissioner will be achieved by:

- providing conditional protections (for example, protections of confidentiality and procedural fairness) for those officials who in good faith seek the advice of the Commissioner about a conflict of interest issue; and

- providing conditional protection from liability to those officials who substantially comply with the advice of the Commissioner in resolving a conflict of interest.

Providing senior elected Government officials and senior appointed public officials with indemnified and confidential advice on whether a particular personal interest (not limited to a pecuniary interest) gives rise to a conflict of interest, and what action should be taken to resolve the conflict, lies at the core of the Integrity Commissioner's role. The Commissioner's advice is to be based on matters covered in the relevant Parliamentary standard or other *Code of Conduct*.

The Premier, Minister, Parliamentary Secretary or Chief Executive may, to the extent that the provisions will allow, request the Integrity Commissioner provide advice in relation a personal conflict of interest matter in relation to another designated person: in such a case the advice would be provided to the designated person concerned, and, as appropriate, to the Premier, the Minister, the Parliamentary Secretary or the Chief Executive. The advice will remain confidential and may be published only by the designated person concerned (for example, to settle a dispute about whether the Integrity Commissioner's advice had been followed in a particular case).

To enable the Integrity Commissioner's advice to be regarded as determinative, the Commissioner's advice will be conditionally indemnified such that a designated person following the advice will be immune from further action. To be indemnified, the designated person will be required to provide information to the Commissioner which is truthful, comprehensive and not misleading, and substantially comply with the advice of the Integrity Commissioner. To ensure that the Integrity Commissioner is able to fulfil his or her functions, the office is to be appropriately protected from liability in a civil or administrative action.

The Government's policy objectives will also be promoted by a requirement that to be qualified for appointment as Integrity Commissioner, a person must have relevant knowledge, experience, personal qualities and standing in the community relevant to the office.

Reasonable Alternative Ways of Achieving the Policy Objectives

The fundamental basis of the proposal is that in order to encourage officials to approach the Integrity Commissioner for advice in relation to their personal interests, such approaches, and required actions taken in response to the advice of the Integrity Commissioner in order to resolve an unacceptable conflict of interests, must be effectively protected.

The minimum protection envisaged involves workable confidentiality and secrecy provisions, and limited conditional immunity from consequential civil and administrative action. Such protections can only be provided if enshrined in legislation.

Therefore, no reasonable alternative ways of introducing an effective Integrity Commissioner function are considered to exist.

Administrative Costs to Government of Implementing the Bill

The administrative costs of implementing the function will be minimal.

The Integrity Commissioner is to be a part-time appointee, with a small administrative support staff (of 1.5 full-time equivalent) which is to be provided from within the resources of the Office of the Public Service Commissioner.

Consistency with Fundamental Legislative Principles

Proposed sections 35 and 36 of the Bill provide that no action may be brought against the Integrity Commissioner for advice given in good faith in relation to a conflict of interest issue or against a designated person who discloses all relevant information about a conflict of interest issue and acts in accordance with the Commissioner's advice.

The Bill makes it clear that no protection is offered to a designated person for acts or omissions done before seeking the Commissioner's advice.

It may be argued that a designated person who follows the Commissioner's advice is in a more favourable position than someone else (say a company director) faced with a conflict of interest issue who seeks similar advice from a professional and acts in accordance with that advice.

However, there is a significant public interest in designated persons avoiding conflict of interest issues, and, given the conditions that must be complied with before the immunity operates, it is considered that there is adequate justification for the immunity provided.

Consultation

The proposal to establish an office of Integrity Commissioner has been developed in the Office of the Public Service Commissioner, with consultation with all Ministers. Comments have either been resolved or incorporated into the Bill. An advance of the Bill has been provided to officers of the Department of the Premier and Cabinet.

The Bill has been drafted by the Office of the Parliamentary Counsel.

At the time of the Bill's approval by the Executive Government, there were no material objections to the Bill.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 provides the short title of the Bill.

PART 2—AMENDEMENT OF PUBLIC SECTOR ETHICS ACT 1994

Clause 2 provides that Part 2 amends the *Public Sector Ethics Act 1994*.

Clause 3 amends the title to provide for an Integrity Commissioner.

Clause 4 amends section 2 by providing for and defining the dictionary and relocating the existing definitions of particular words used in the Act within the dictionary.

Clause 5 renumbers the heading of Part 7 of the Act (Miscellaneous) as Part 8.

Clause 6 renumbers section 25 of the Act (Regulation-making power) as section 44.

Clause 7 inserts a new Part 7 (Integrity Commissioner), as follows:

PART 7—INTEGRITY COMMISSIONER

Division 1 – Purpose of part

Proposed section 25 declares that the purpose of the legislative amendment is to provide assistance to Ministers, and to other specified elected and appointed public officials, to assist them to avoid conflicts of interests and in so doing to encourage public confidence in public institutions such as the Parliament and the Public Service. In summary, the assistance to be provided by the Integrity Commissioner is limited to confidential advice, provided on request, which is intended to be preventative. The protections attaching to the advice are not retroactive. The Commissioner is to have no power of independent inquiry.

Division 2—Integrity commissioner

Proposed section 26 creates the office of Queensland Integrity Commissioner.

Division 3—Designated persons

Proposed section 27(1) establishes the classes of persons who may seek advice from the Commissioner under this Act. Broadly stated, ‘designated persons’ are the most senior elected officials (for example, Ministers and Parliamentary Secretaries) and appointed public officials (for example, Chief Executives of departments and public service offices and statutory office holders) who exercise significant powers or management responsibilities on behalf of the Government. Following nomination by the relevant Minister, Chief Executives of government entities also become designated persons. The advisers to Ministers and Parliamentary

Secretaries are included among the classes of persons who may obtain advice from the Commissioner. Other staff in the offices of Ministers and Parliamentary Secretaries may be nominated as designated persons at the discretion of the Minister or Parliamentary Secretary. Senior executive officers and senior officers in the Public Service and their equivalents in government entities, subject to them being nominated as such by the relevant Minister, are defined as designated persons who may seek the advice of the Integrity Commissioner (provided that each such request is authorised in writing by the relevant Chief Executive).

Proposed section 27(2) requires that where a Minister or Parliamentary Secretary nominates a person or class of person to be a designated person, that nomination must be given in writing to the Integrity Commissioner.

Division 4—Functions of integrity commissioner

Proposed section 28 provides that the functions of the Integrity Commissioner are to provide advice, on request and subject to confidentiality provisions—

- to all designated persons in relation to specific conflicts of interest matters;
- to the Premier on ethics and integrity matters generally; and
- to contribute to public understanding of ethics and integrity issues by contributing to discussion of public discussion of relevant policy and practice.

Division 5—Advice

Proposed section 29(1) establishes the conditions under which a designated person may request advice from the Integrity Commissioner.

Proposed sub-section 29(1)(a) provides that only a designated person may request and receive advice.

Proposed sub-section 29(1)(b) provides that a request for advice must be in writing, and that if the advice is sought by a senior officer, the request must be authorised in writing by the officer's Chief Executive.

Proposed section 29(2) defines senior officer for the purposes of the section.

Proposed section 30(1) provides that a designated person may seek advice about a matter relating to their own personal interests.

Proposed section 30(2) provides that the Premier can seek advice about a conflict of interest issue arising in the case of any designated person.

Proposed section 30(3) provides that a Minister can seek advice about a conflict of interest issue arising in the case of a statutory office holder whose office is established under an Act administered by the Minister, the Chief Executive of a department or public service office administered by the Minister, the Chief Executive of a government entity for which the Minister has responsibility, a person employed in the office of a Minister or engaged to give advice to a Minister and any other person, not otherwise provided for, who is nominated by a Minister.

Proposed section 30(4) provides that a Parliamentary Secretary can seek advice about a conflict of interest issue arising in the case of a member of staff in their office, or a person nominated by the Parliamentary Secretary.

Proposed section 30(5) provides that a Chief Executive of a department or public service office can seek advice about a conflict of interest issue arising in the case of a designated person employed in the department or public service office.

Proposed section 30(6) provides that the Chief Executive of a government entity can seek advice about a conflict of interest issue arising in the case of an officer of the entity who has remuneration equivalent to or greater than a senior officer of a department or public service office (a senior executive equivalent).

Proposed section 30(7) provides that advice may not be sought by or about a conflict of interest issue arising in the case of a person who was but is not presently a designated person.

Proposed section 31(1) requires a designated person seeking advice to provide all necessary information to the Integrity Commissioner.

Proposed section 31(2) enables the Integrity Commissioner to seek additional information from a designated person in relation to their request.

Proposed section 31(3) allows the Integrity Commissioner to refuse to give advice in relation to a conflict of interest issue, where, for example, the Commissioner is not satisfied that he or she has sufficient information, or that the request is made in good faith.

Proposed section 31(4) provides that the Integrity Commissioner's advice must be provided in writing.

Proposed section 32 provides that the Integrity Commissioner in giving advice must have regard to relevant established codes of conduct, ethical standards or codes of conduct adopted by the Legislative Assembly and to other ethical standards the Commissioner considers appropriate.

Division 6—Confidentiality and protection

Proposed section 33(1) provides generally that the information provided to the Commissioner under this Act may not be recorded, used or disclosed.

Proposed section 33(2) exempts from proposed section 33(1) persons using the information provided to the Commissioner for the administration of the Act.

Proposed section 33(3) provides that persons involved in the administration of the Act are not compellable in any proceeding to disclose information provided to the Commissioner under the Act. This provision does not affect the right of a person receiving advice from the Commissioner about a personal conflict of interest matter in relation to their personal interests to publish that advice to the world at large, if they so choose.

Proposed section 34(1) provides generally that the Integrity Commissioner may make particular disclosures of information related to his or her advice to a designated person.

Proposed section 34(2) provides, in effect, that only a person, who is or who was a designated person and who has requested and received advice from the Commissioner about a personal conflict of interest matter in relation to their personal interests, may publish that advice to the world at large.

Proposed section 34(3) provides that the Integrity Commissioner may disclose relevant documents and information to a person who is or who was a designated person about a personal conflict of interest matter relating to their personal interests. (“Relevant documents” are defined in *proposed section 34(9)*, and include the request for advice, information provided to the Commissioner, and any advice provided by the Commissioner.)

Proposed section 34(4), sub-sections (a) to (c) provide respectively for the Integrity Commissioner to disclose documents and information to the Premier, a Minister or Parliamentary Secretary about a conflict of interest matter relating to another designated person. For example, the Premier may request and be provided by the Commissioner with a copy of the documents containing a request for advice and the advice provided by the Commissioner in relation to any designated person (other than a senior executive officer or senior officer in a department or public service office or the nominated senior executive equivalent in a government entity). Likewise, a Minister or Parliamentary Secretary may request and be provided by the Commissioner with a copy of a request for advice and the advice provided in relation to a limited range of designated persons for whom the Minister or Parliamentary Secretary, as the case may be, has a responsibility. In each case, the Premier, Minister and Parliamentary Secretary are not empowered to further disclose the documents and information involved to any person other than the designated person who is the subject of the advice.

Proposed section 34(5) specifies the conditions which must be satisfied before the Commissioner, of his or her own motion, may provide the Premier with a copy of relevant documentation in relation to a designated person (other than a senior executive officer or senior officer in a department or public service office or the nominated senior executive equivalent in a government entity). The proposed section provides that, where the Commissioner has formed the view that an actual and significant conflict of interests exists in relation to any such designated person who has sought the Commissioner’s advice, and the designated person has been advised of the Commissioner’s view and, having been given 7 days to resolve the conflict to the Commissioner’s satisfaction, has failed to do so, the Integrity Commissioner must advise the Premier of the matter. This situation is unlikely to arise frequently in practice, as actual and significant conflicts of interests would normally come to attention when a Minister or Chief Executive registers or declares their relevant pecuniary and other

interests in accordance with procedures laid down by the Parliament and the *Public Service Act 1996*, respectively.

Proposed section 34(6) provides that a Chief Executive of a department or public service office may request and obtain a copy of relevant documents in relation to advice provided by the Commissioner in relation to a senior executive officer or a senior officer in the department or office for which the Chief Executive is responsible.

Proposed section 34(7) provides that a Chief Executive of a government entity may request and obtain a copy of relevant documents in relation to advice provided by the Commissioner in relation to a nominated senior executive equivalent in the government entity for which the Chief Executive is responsible.

Proposed section 34(8) provides that the Commissioner's advice to a former designated person is not to be made available once the person is no longer a designated person under the Act.

Proposed section 34(9) defines 'designated person to whom the relevant documents relate' as meaning the designated person '...involved in a conflict of interest issue and to whom the relevant documents relate'. This section also defines 'relevant document' in relation to a request for advice by a designated person as including the request for advice and the advice itself, together with any additional information provided by the person making the request.

Proposed section 35(1) provides generally the conditions which must be met to attract protection from liability in a civil proceeding or under an administrative process from actions pursuant to the Commissioner's advice.

Proposed section 35(2) specifies that a designated person who complies with the conditions set out in this *proposed section 35(1)* is not liable in a civil action or an administrative process for an act to resolve a conflict.

Proposed section 35(3) specifies that the protection provided by complying with the Commissioner's advice does not extend to acts or omissions of a designated person occurring before the person received that advice. This provision is intended to ensure that the Commissioner's advice on a matter is determinative. It is intended that false or groundless allegations of a conflict of interests will be discouraged by this approach, which will thus encourage recourse to the Commissioner for advice. The

provision is cast in such a way as to encourage those who may be uncertain as to whether a particular relationship or interest constitutes a conflict of interests or not, to seek the Commissioner's advice on the matter.

Proposed section 36 provides that the Integrity Commissioner is not liable in a civil proceeding or under an administrative process for acts or omissions done or made in the performance of the Commissioner's functions, provided such are done or made in good faith.

Division 7—General

Proposed section 37(1) provides for the Integrity Commissioner to be appointed by the Governor in Council.

Proposed section 37(2) specifies that, to be qualified for appointment, the Integrity Commissioner is to have knowledge, experience, personal qualities and standing within the community suitable to the office.

Proposed section 37(3) provides for the Integrity Commissioner to hold office for a term not longer than 5 years.

Proposed section 37(4) provides that the Integrity Commissioner is to be appointed under the *Public Sector Ethics Act 1994* and not the *Public Service Act 1996*.

Proposed section 38(1) provides that the Integrity Commissioner is to be paid the remuneration and allowances decided by the Governor in Council.

Proposed section 38(2) provides that the Integrity Commissioner is to be appointed on terms decided by the Governor in Council where not otherwise provided by the Act.

Proposed section 39 allows the Minister to grant the Integrity Commissioner leave of absence.

Proposed section 40 provides for the Integrity Commissioner to resign by notice in writing to the Minister.

Proposed section 41 provides for the appointment of an Integrity Commissioner to be terminated for cause by the Governor in Council.

Proposed section 42 provides for the Governor in Council to appoint a person to act as the Integrity Commissioner when the position is vacant or the Commissioner is absent or otherwise unable to perform the duties of the office.

Proposed section 43(1) provides that the Commissioner must report annually to the Premier on the activities of the office.

Proposed section 43(2) provides that the report prepared by the Integrity Commissioner is to be in general terms which do not identify particular cases or advice.

Clause 8 inserts, after renumbered section 44, a schedule containing the dictionary to be used for the purposes of the Act.

PART 3—AMENDMENT OF THE FREEDOM OF INFORMATION ACT 1992

Clauses 9 and 10 amend the *Freedom of Information Act 1992* by making advice provided by the Integrity Commissioner under the *proposed Division 5* of the *Public Sector Ethics Act 1994*, and related documents and information, subject to the secrecy provisions giving exemption from access under the *Freedom of Information Act 1992*.