

ELECTORAL AMENDMENT BILL 2008

EXPLANATORY MEMORANDUM

Section 16B of the *Electoral Act 1907* currently provides for the Chief Justice to be *ex officio* chairman of the Electoral Distribution Commissioners. The Chief Justice has raised concerns regarding his role in the electoral distribution process. He has referred to academic writings which express the view that the conferral of such a role upon judicial officers is inconsistent with the independence and neutrality of the judiciary, perhaps even to the point of constitutional invalidity. He has also noted that given the importance of the electoral process, it would be preferable if the Chief Justice were in a position to sit in any litigation relating to that process, without being precluded from doing so by any perceived conflict of interest. Furthermore, he has also pointed out that in the *Marquet* case questions were raised by some members of the High Court about the propriety of the Chief Justice participating in litigation relating to electoral distribution when he was himself part of the process.

In no other Australian jurisdiction is the Chief Justice required to be a member of the equivalent of our Electoral Distribution Commission, let alone be its chairman. However, most other State and Territory jurisdictions provide that a current judge or a retired judge is to be a member of and to chair the equivalent of our Electoral Distribution Commission.

The Government accepts that the Chief Justice should not be required to serve on and chair the Electoral Distribution Commission. However, there are obvious advantages in terms of public confidence in the electoral distribution process in having a judge or retired judge fulfilling that role.

In order to address the concerns raised by the Chief Justice and in line with the practice adopted in other States and Territories, it is proposed that the *Electoral Act* be amended to provide that the chairman of the Electoral Distribution Commissioners be a judge or a retired judge of the Supreme Court, the District Court or the Family Court of Western Australia or a retired judge of the Supreme Court of another State or Territory or of a Commonwealth Court. This is acceptable to the Chief Justice.

It is envisaged that a retired judge may be appointed to fill the position. However, if no retired judge is available or willing to take the appointment, it will be possible to appoint a current member of the judiciary to fulfil the role.

NB: This Bill will require an absolute majority of each of the Houses, as required by section 16M of the *Electoral Act*.

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CLAUSE NOTES

- Clause 1** Provides the title for the Act.
- Clause 2** Provides that sections 1 and 2 are to commence from the date of Assent and that the remainder of the Act is to commence on a date to be proclaimed.
- Clause 3** Provides that this Act amends the *Electoral Act 1907*.
- Clause 4** Amends section 16A of the *Electoral Act* by inserting a new definition “person with judicial experience”, which means a person who is a judge or former judge of the Supreme Court, the District Court or the Family Court of WA; or a person who is a retired judge of the Supreme Court of another State or Territory or of a Commonwealth Court.
- Clause 5** Deletes sub-section 16B(1)(a) and inserts a new sub-section which provides for the appointment by the Governor of a person with judicial experience as the chairman of the Electoral Distribution Commission.
- Repeals sub-section 16B(2) and replaces it with a new sub-section providing for the appointment of an acting chairman if the chairman is absent or unable to act.
- Inserts a new sub-section 16B(4a) which provides for the Premier to consult the relevant head of jurisdiction if a serving judge is to be recommended for appointment.
- Inserts 4 new sub-sections after sub-section 16B(5):
- Sub-section (5A) which provides for the appointment of the chairman to be for a term not exceeding 5 years and an entitlement to be re-appointed once;
 - Sub-section (5B) which provides that the appointment of a serving judge as chairman does not affect the tenure or status of that person as a judge or the payment of their salary and other entitlements;
 - Sub-section (5C) which provides that where a retired judge is appointed as chairman, the conditions of their service, including remuneration and allowances are to be determined by the Governor from time to time; and
 - Sub-section (5D) which preserves the pension entitlements of a retired judge who is appointed as chairman.