

Chapter 2 The Constituent Parts of Parliament

The “constitution” of New South Wales is drawn from several diverse sources, including certain Imperial, Commonwealth and State statutes, such as the *Statute of Westminster 1931*; the *Commonwealth of Australia Constitution Act 1900*; the *Australia Act 1986*; the Letters Patent and the Instructions to the Governor; an element of inherited English law; the New South Wales *Constitution Act 1902* and certain other State statutes; numerous legal decisions; and a large measure of English and local convention.

The legislature, or law-making entity in New South Wales is composed of the Sovereign, the Legislative Council and the Legislative Assembly.

Subject to the *Commonwealth of Australia Constitution Act*, the Legislature has the power to make laws for the peace, welfare and good government of New South Wales.

Where any inconsistency arises between Commonwealth and State laws, the State law is invalid to the extent of the inconsistency.

2.1 The Governor

In New South Wales, the Governor is the local representative of the Crown. The Governor performs the formal and ceremonial functions which attach to the Crown.

The constitutional functions of the Governor are regulated by various statutes, the Letters Patent constituting the office, and the Instructions to the Governor. The present Letters Patent were given under the Royal Sign Manual in 1900 and amended in 1909, 1935 and 1938. The present Instructions were issued in 1900 and amended in 1909 and 1935.

The functions of the Governor cover a wide range of important duties and the Governor’s Instructions require that “in the execution of the powers and authorities vested in him the Governor shall be guided by the advice of the Executive Council”. This provision is however modified by the further direction that if in any case the Governor should see sufficient cause to dissent from the opinion of the Council, they may act in the exercise of their powers and authorities in opposition to the opinion of the Council, reporting the matter to Her Majesty without delay.

The Governor possesses important spheres of discretionary action, e.g. in regard to dissolution of Parliament. Moreover, the Governor is entitled to full information on all matters to which their assent is sought and may use personal influence for the good of the State. The general nature of the Governor’s position is such that he or she is guardian of the Constitution and is bound to see that the powers with which he or she is entrusted are not used otherwise than in the public interest. In extreme cases, the Governor’s discretion constitutes a safeguard against malpractice.

The Governor’s more important constitutional duties are to appoint the Executive Council and to preside at its meetings; to summon, prorogue¹, and dissolve the

¹ On one occasion the House presented an address to the Governor requesting the Governor not to prorogue the Parliament prior to the statutory date of 3 March 1995 given that it still had important business outstanding. See VP 24/11/1994, pp. 561-2.

Legislature; to assent to, or refuse to assent to, bills passed by the Legislature; to keep and use the Public Seal of the State; to appoint all Ministers and officers of State and, in appropriate cases, to remove and suspend officers of State. The Governor exercises the Sovereign's prerogative of mercy, but only on the advice of the Executive Council.

According to law laid down in the last century, the Governor is not a viceroy and cannot claim as a personal privilege, exemption from being sued in the courts of the State. In State politics the Governor usually acts on the advice of the Ministers and they take the responsibility for their advice.

The circumstances in which the Governor may grant a dissolution of Parliament are not clearly defined. Strictly speaking, only the Legislative Assembly is dissolved and the Legislative Council prorogued; nonetheless Parliament is ended, because both Houses are necessary for it to be constituted.

Under the *Constitution Act 1902*, the Governor may fix the time and place for holding every session of the Legislative Council and Assembly, and may change or vary such time or place as is judged advisable and most consistent with general convenience and the public welfare after giving sufficient notice. The Governor may also prorogue the Legislative Council and Assembly by proclamation or otherwise whenever it is deemed expedient.

The Governor does not usually attend in person for the opening of a new Parliament, but may open a subsequent session, after the Legislative Council and Legislative Assembly have been constituted, the Presiding Officers elected and members have taken the pledge of loyalty. Since 2006 the *Constitution Act 1902* has provided that a member of either House cannot sit or vote in the House to which the member has been elected until the member has taken the pledge of loyalty before the Governor or other person authorised by the Governor for that purpose.² In practice, commissioners are appointed by the Governor for the opening of Parliament. The Governor issues such a commission under the Public Seal of the State. The Commission empowers certain members, usually the Premier, the Deputy Premier and the next senior Minister, to administer the pledge of loyalty to other members.³ (See Chapter 3.1 of Part One).

Unless a session is opened by commissioners, on the first sitting day of a new session, the members assemble to hear the Governor's proclamation and then attend the Upper House to hear the Governor's speech opening the session. (see Chapter 3.2 of Part One).⁴

Should the Legislative Assembly wish to communicate with the Governor or

² Section 12 of the *Constitution Act 1902*.

³ The pledge of loyalty was introduced with the *Constitution Amendment (Pledge of Loyalty) Act 2006*. The pledge of loyalty is to be in the following form: "Under God, I pledge my loyalty to Australia and to the people of New South Wales". A member may omit the words "Under God" when taking the pledge of loyalty. Prior to this members had to subscribe to an oath or affirmation prior to being able to sit or vote in the House to which they were elected.

⁴ The Sovereign is excluded from the Legislative Assembly as the Lower House in New South Wales on the ancient principle that "the Crown should have no current knowledge of the proceedings in the House of Commons". That is to say that there should be no interference in the House going about its business. The only violation of this principle occurred on 4 January 1642 when Charles I and an escort entered the House in an attempt to arrest five members. Extract from *Balancing Tradition and Progress, Procedures for the opening of Parliament*, House of Representatives Standing Committee on Procedure, August 2001, p. 10.

Sovereign the standing orders of the House set out how such communication is to proceed.

Standing order 354 states that “all Addresses to the Governor shall be presented by the Speaker unless otherwise ordered”⁵ and standing order 355 provides that “when Addresses are presented to the Governor: (1) Members of the House may be present; (2) The Address shall be read by the Speaker and (3) The mover and seconder of the Address shall stand to the left of the Speaker.”

In the case of an Address to the Sovereign, the Speaker forwards the address to the Governor for presentation (S.O. 356). The standing orders also provide that the Governor’s answer to any Address presented shall be reported to the House by the Speaker (S.O. 357).⁶

2.2 The Legislative Council

The Legislative Council consists of 42 members elected for a term of eight years (Const. Act s. 17A; s. 17F).

Half of the members of the Legislative Council are elected at the time of the Legislative Assembly election (every four years). At such elections, the whole of the State of New South Wales is a single electoral district for the return of 21 members, with votes counted according to a proportional preference system (Const. Act ss. 17 & 22A). Until 1934 members of the Legislative Council were nominated by the Governor on the advice of the Executive Council and from 1934 until 1978 members were elected by the members of both Houses of Parliament. In 1978 legislation was enacted to provide for the Legislative Council to be elected by all citizens over the age of 18 years.

Casual vacancies are filled by a person elected at a joint sitting of both Houses called by the Governor. If the casual vacancy was previously filled by a member of a political party, only members of that party may be elected (Const. Act s. 22D).

The Presiding Officer of the Legislative Council is the President. They are elected by the members of the Council and hold office until the first meeting of the Council following a periodic election or until they cease to be a member, resign, or are removed from office by a vote of the Legislative Council. He or she may resign from office by letter addressed to the Governor (Const. Act s. 22G).

Eight members in addition to the member presiding is necessary for a quorum (Const. Act s. 22H). The President has a casting vote only (Const. Act s. 22I).

A member of the Legislative Assembly is not eligible for election to the Legislative Council (Const. Act s. 13C).

2.3 The Legislative Assembly

The Constitution Act 1855-6 (Imperial Act 18 & 19 Vic. C. 54) provided for a Legislative Assembly to consist of 54 elected members. The period since 1856 to

⁵ For example, see VP 24/11/1994, pp. 561-2 where a motion was agreed to that because important business was outstanding the Speaker request the Governor not to prorogue the Parliament prior to the statutory date of 3 March 1995.

⁶ See VP 1/12/1994, p. 616 for an example of the Governor’s response to an Address by the House.

1978 has been notable for the development of the Legislative Assembly as the House of the people. The period from 1856 until the mid 20th century also saw the rapid growth of the Cabinet system and Executive Government, the emergence of the party system within Parliament and the establishment of the Commonwealth of Australia.⁷

The Legislative Assembly for the 54th Parliament (the current Parliament, which commenced in 2007) consists of 93 members, each member representing an electoral district (Const. Act ss. 25 & 26).⁸

The term of the Legislative Assembly is fixed at four years unless the House loses confidence in the Government or fails to pass an appropriation bill for the ordinary annual services of Government or, if in accordance with constitutional convention and despite any advice of the Premier or Executive Council, the Governor decides to dissolve the Assembly (Const. Act ss. 24 & 24B).

Any person qualified to vote at an election may be nominated as a candidate for election (Parliamentary Electorates and Elections Act s. 79 (1)).

A member of the Legislative Council is not capable of being elected (s. 13C Const. Act).

The Speaker is the Presiding Officer. The position holder is elected by the members present at the first meeting of the House after a general election and retains office during that Parliament except in the case of death, resignation or removal by a vote of the Legislative Assembly. The Speaker may, when not presiding in the Chair, take part in any debate or discussion and may cast a deliberative vote in the House (Const. Act s. 31.).

During the absence from New South Wales of the Speaker, the Deputy Speaker acts in their place (Const. Act s. 31A).

Twenty members exclusive of the Speaker form a quorum. The member presiding has a casting vote only (Const. Act s. 32).

A member may by writing, addressed to the Speaker resign the member's seat. The resignation takes effect immediately it is received by the Speaker (Const. Act s. 33).

⁷ Extract from an address delivered to Members of the Royal Australian Historical Society by H. Robbins, Clerk of the Legislative Assembly, 23 June 1951, pp. 13-15.

⁸ The *Constitution and Parliamentary Electorates and Elections Amendment Act 1997* provided for the reduction of the Legislative Assembly from 99 to 93 members following the dissolution of the 51st Parliament.