

DYNAMICS IN GOVERNMENT

This booklet examines the system of government that has developed in Western Australia since it was established as a British Colony. Prior to establishment of the colony, the land had been inhabited by the Aboriginal people, who had their own laws, customs and traditions. This booklet does not attempt to examine what happened to the Aboriginal people and their laws, customs and traditions following the establishment of the Swan River Colony. Without doubt this is an important aspect of the State's history, but it is beyond the scope of this booklet.

1. THE DEMOCRATIC TRADITION

The word 'democracy' is derived from ancient Greek and means, literally, 'rule by the people'. The system of State government in Western Australia is parliamentary democracy broadly based on the British Westminster model. There are three arms of government; the Parliament (the legislature), the Executive, and the Judiciary. Under this system the people of the State elect the legislature (the Members of Parliament) and from them an Executive (the Ministry) is formed. The Executive is responsible for proposing, implementing and administering the laws passed by Parliament and is accountable to the Parliament for its actions. Ours is, therefore, a democratic system because government derives its authority from the people through an elected Parliament.

1.1 The Road to Self Government

Western Australia was not established as a British Colony until 1829, although a military garrison had been established at King George Sound (Albany) as early as 1826.

The new Colony inherited the United Kingdom statutes in force in 1829 and the common law. However, with the first Governor of Western Australia, Governor James Stirling, being given wide powers by the British Government, the system of government was not democratic in the sense that we understand it today. The Colony had to wait until 1870 before there was any form of representative government in Western Australia. From that time, 12 elected Councillors together with six nominated by the Governor, made up the Legislative Council which enacted laws for the Colony. It was not until 1890 that 'responsible' government (with a fully elected Legislative Assembly) was achieved.

During this evolutionary period in Western Australia, the British system of government, the Westminster system, was also developing. The franchise (the right to vote) was being expanded as the notion of government representing all the people, not just certain classes of people, was gaining acceptance.

When Western Australia was granted self government in 1890, the system established was based on the Westminster tradition. However, unlike the Westminster system where the members of the Upper House (the House of Lords) were not elected but were appointed by hereditary right, the Upper House in Western Australia was, from 1893, elected.

1.2 The Right to Vote

The history of voting rights in Western Australia is that of gradual removal of restrictions on those eligible to vote --- restrictions that were based on ownership of land (property), gender and ethnicity.

While the first formal elections were held in 1870, voters needed to own property of a certain value before they could vote. Although the value of the property required changed several times, it was not until 1964 that property ceased to be a qualification for Legislative Council elections. Property of a certain value was also necessary in order to vote in the first Legislative Assembly elections following the establishment of responsible government in 1890. In 1893 the property qualification was abolished for Legislative Assembly electors.

Women in Western Australia gained the vote for both the Legislative Assembly and the Legislative Council in 1899, well ahead of those in Britain and other parts of the world. They were, however,

subject to the property qualification in Legislative Council elections. In 1921 Mrs Edith Cowan became the first woman to be elected to the Legislative Assembly. This was one year after legislation was passed to permit women to be members of the Western Australian Parliament. In February 1990 the Dr Carmen Lawrence became the first woman Premier of Western Australia.

Aboriginal people were granted the right to vote in 1962. However, it was not until 1983 that it became compulsory for them to enrol and vote. The first Aboriginal member of the Western Australian Parliament was Ernest Bridge, who was elected in 1980. The first Aboriginal woman to be elected to an Australian Parliament was Carol Martin who was elected to the Legislative Assembly in 2001 when she won the seat of Kimberley in the north-west of Western Australia.

The most recent significant change to voting rights in Western Australia was the lowering of the voting age from 21 to 18 years of age in 1970. (1)

Apart from a few disqualifications, such as prisoners serving sentences of more than one year, the right to elect members of the Legislative Assembly and the Legislative Council is held by any person who:

- is an Australian citizen; or was a British subject who was on the State or Commonwealth Electoral Roll in the three months preceding 26 January 1984;
- has reached 18 years of age; and
- has lived for at least one month in the district for which enrolment is claimed.(2)

Both enrolment for and voting at State and Commonwealth elections are compulsory.(3)

1.3 The Constitution

1.3.1 A Constitution as a Higher Law

In a community that values individual freedom and the rule of law, a constitution is a set of basic rules designed to ensure that the government acts in the interest of all people. It establishes and defines the powers of the institutions of government and sets out the basic rules and procedures that it must follow for its actions to be lawful. But a constitution is more than a description of the structure of government. The government holds power only on trust for the people and must be accountable to the people. A constitution is a 'higher' law in that it grants power to the government to carry out the collective wishes of the people. At the same time, it confines the power of government by specifying the procedures that the government must follow if its legislative enactments are to be valid. A constitution reflects a belief in the importance of setting limits on the power of government and ensuring it is responsive and accountable to the people.

1.3.2 The State Constitution

There is no single document containing all of the constitutional laws of our State. Our primary constitutional documents are the *Constitution Act 1889 (the Constitution Act)* and the *Constitution Acts Amendment Act 1899 (the Constitution Acts Amendment Act)*. Apart from these Acts, there are other statutes of a constitutional character which go to make up the constitutional framework in Western Australia, including:

- the Commonwealth *Constitution*;
- the *Australia Act 1986 (UK)*, the *Australia Act 1986 (Cwlth) (the Australia Acts)*;
- other Western Australian legislation (for example, the *Electoral Act 1907*, [the *Electoral Distribution Act 1947*, was repealed by S.8 of the *Electoral Amendment and Repeal Act 2005*

and the relevant provisions inserted into the Electoral Act], *Supreme Court Act 1935*, *Parliamentary Privileges Act 1891*, *Financial Administration and Audit Act 1985*);

- United Kingdom statutes such as the *Bill of Rights 1688*.

In addition, the common law - such as, the prerogative powers of the Governor and the case law concerning the effect and interpretation of the above constitutional sources - and constitutional conventions are also relevant.

When Western Australia gained self-government, *the Constitution Act 1889*, set out the basic elements of parliamentary government. That Act was enacted as a schedule to an 1890 United Kingdom Act. The *Constitution Act* vests the legislative power of the State in the Parliament and provides for the Parliament to make laws for the 'peace, order and good government' of the State.(4) In 1899, the Western Australian Parliament passed the *Constitution Acts Amendment Act 1899* which amended and consolidated changes made to the *Constitution Act 1889*, increased the number of members in both houses, reduced the property qualifications for the Legislative Council and increased from five to six the number of 'principal executive officers liable to retire on political grounds'.

Despite many changes in the State and the role of government since 1890, the constitutional structure of Western Australian has remained largely unchanged.

Upon the establishment of the Commonwealth of Australia in 1901, State Constitutions were not replaced. The Commonwealth Constitution specifically recognises their continued existence and it has been suggested that it may also be a source of their constitutional authority.(5) The Commonwealth Constitution and laws validly made under it, prevail over the State Constitution and State laws where there is any inconsistency. However, the Commonwealth Constitution says very little about State Constitutions or the system of government at State level, leaving this to the State Parliaments.(6)

The Commonwealth Constitution gives the Commonwealth Parliament exclusive powers to make laws about certain matters (for example, all places acquired by the Commonwealth for public purposes, or the coining of money).(7) If the State Parliament attempts to make laws concerning any of these matters, the State law is invalid.

The High Court of Australia adjudicates on disputes about the powers of the Commonwealth and State Parliaments.(8) The High Court, as interpreter of the Commonwealth Constitution, strikes down Commonwealth, State and Territory legislation which is contrary to the Commonwealth Constitution.

State constitutions are affected by the *Australia Acts*. *The Australia Acts* (which are identical statutes passed by UK and Commonwealth Parliaments) are part of a United Kingdom, Commonwealth and State legislative scheme passed by all eight Parliaments, which severed the constitutional links between Australia and the United Kingdom. The Acts sought to eliminate the legal ties to Western Australia's colonial past by terminating such things as appeals from State Courts to the judicial committee of the Privy Council; the ability for the United Kingdom Parliament to legislate for Australia; and the obligation to reserve some State bills for Royal Assent.(9)

Another source of law governing the State Constitution is the various decisions of the Courts concerning constitutional questions. While there have been few cases that directly relate to the Western Australian Constitution, some have been particularly significant, including:

Western Australia v Wilsmore (1982) 149 CLR 7 which unsuccessfully challenged the validity of the law disqualifying prisoners from voting in elections;

McGinty v State of Western Australia (1996) 186 CLR 140, which was an unsuccessful challenge to the validity of the laws governing the distribution of electorates for both the Legislative Assembly and the Legislative Council; and

Attorney General v Marquet (2003) 217 CLR 545, which concerned the lawfulness of presenting two Bills, which sought to change the electoral distribution in Western Australia, to the Governor for assent when they had not been passed by an absolute majority in the Legislative Council.

Cases relating to other state constitutions, the Commonwealth Constitution and some overseas cases can be useful in interpreting the Western Australian constitutional laws.

2.0 THE GOVERNOR

2.1 The Role of the Governor

The constitutional laws of Western Australia provide for a Governor to represent the Sovereign as Head of State.(10)

The Governor's role includes important constitutional, ceremonial and community functions. In performing these functions the Governor is required to act in an entirely apolitical way.

Before the granting of self-government to Western Australia, governors were appointed by the Sovereign on the advice of the United Kingdom Government. Since the Australia Acts the Governor is appointed by the Sovereign on the advice of the Premier and may only be dismissed by the Sovereign on the advice of the Premier. (11) The Governor is now no longer subject to the control, supervision or veto of the United Kingdom Government. Since the Australia Acts were passed by the Commonwealth Parliament (1985) and the Parliament of the United Kingdom (1986) at the request of all State Parliaments, the Governor acts on the advice of the Premier, Ministers and Executive Council.

The Governor's powers and functions are set out in the Letters Patent under which the Governor is appointed and the *Constitution Act 1889*. These include:

- appointing Ministers, Judges, Magistrates and Justices of the Peace;
- presiding over Executive Council;
- fixing the time and place for each session of the Legislative Assembly and the Legislative Council; and the proroguing and dissolving of the Legislative Assembly and proroguing the Legislative Council;
- accepting the resignation of members of the Legislative Council;
- appointing the President of the Legislative Council;
- issuing writs for general elections; and
- taking, or authorising some person to take, the oath or affirmation of allegiance from members of the Houses of Parliament.

The Governor also signs Treasury authorities for the appropriation of funds for the running of the State government. A vote, resolution or Bill for the spending of public money cannot be passed by the Western Australian Parliament unless the Governor 'sends a message' to the Legislative Assembly recommending it. (12) In each of these things the Governor acts on the advice of the Premier, Ministers and Executive Council.

All Bills passed by the Western Australian Parliament require the Governor's signature before they become law (that is, an Act) and the appointment of the most important officials in the public sector also require the formal approval of the Governor in Executive Council.

As well as the constitutional duties of the Governor, there are important community, ceremonial and promotional functions associated with the position, such as the opening of the Western Australian Parliament.

2.2 Powers of the Governor

In virtually all instances the wide powers of the Governor are exercised on the advice of Western Australian Ministers, principally the Premier, who have the support of a majority of Members of Parliament in the Legislative Assembly. While the Governor has many important symbolic and community functions to perform, our system of representative government requires that the Governor generally exercise the constitutional duties of the office in conformity with the wishes of the elected government of the day. By convention, however, the Governor retains the right to be consulted, 'to encourage and to warn' the Premier and Ministers of the day.

There may be occasions, however, when the Governor may act independently or without the advice of the Premier, Ministers or Executive Council. In these cases the Governor is said to be exercising the reserve powers.

These powers may be used only on extraordinary occasions and then within limits established by constitutional convention. They relate to the Governor's ultimate authority to terminate the commission of a Premier and the Government in exceptional circumstances or to refuse or to force a dissolution of Parliament. The Governor might consider exercising the reserve powers in the following circumstances:

- where the Government refuses to resign or to advise a dissolution of the Legislative Assembly even though it no longer has the support of a majority in the Legislative Assembly, as for example, indicated by a successful no confidence motion in the Legislative Assembly;
- where the Government refuses to resign or to advise a dissolution even though it is unable to secure necessary supply;
- a situation where the Premier is advising a dissolution but where an alternative government may be formed and the circumstances justify the Governor in following that course; and
- in circumstances where the Premier is doing something which is manifestly criminal or illegal in the function of his or her office.

These situations can be complex and many factors would need to be taken into account before the reserve powers were invoked. The reserve powers would only be exercised as a last resort. The Governor may also seek legal advice (usually from the Solicitor General) to assist in deciding whether to exercise reserve powers.

The reserve powers to dismiss a Premier or Prime Minister have only been used twice in Australia: in 1975, when the Governor General dismissed the Prime Minister Gough Whitlam on the basis that he was unable to secure supply; and in 1932 when Governor Game of New South Wales dismissed Premier Jack Lang on the grounds that he had acted unlawfully.

3.0 THE LEGISLATURE

3.1 The Role of the two Houses

The Parliament of Western Australia (the legislature), like all Australian Parliaments and those of many Commonwealth countries, is based on the Westminster style of parliamentary democracy.

The functions of the Western Australian Parliament include the following:

- the provision of an executive government that is responsible (accountable) to the Parliament. According to convention (tradition) all Ministers must be Members of Parliament;
- making laws (legislation) which must be agreed to by both the Legislative Assembly and the Legislative Council;

- examining the work of government. Parliamentary questions are an important way to examine the Government's administration;
- approving finance for government operations. Only the Western Australian Parliament can give permission for the Government to collect taxes. It is the Western Australian Parliament which decides what State taxes shall be collected and also how the money should be spent; and
- representing the interests of Western Australians by raising issues of public concern and providing a forum for public debate. This may happen through Parliament receiving petitions and through debate on the floor of either House.

The Western Australian Parliament comprises the Sovereign and two houses, the Legislative Assembly and the Legislative Council.(13) When a parliament has two houses it is called bicameral. In Australia all States except Queensland have bicameral parliaments. The Northern Territory and the ACT have one house and the federal Parliament has two houses, the House of Representatives and the Senate.

The parliamentary leader of the political party or coalition of parties that can command a majority of votes in the Legislative Assembly (sometimes called the 'Lower House') will be asked by the Governor to form a government. Typically, this happens after every general election, although governments can change at by-elections or even between elections if they lose their majority of support in the Legislative Assembly. A party or coalition of parties can continue in government even though they may not have a majority of members in the Legislative Assembly. For instance, a government may be able to maintain the support of a majority of the Legislative Assembly with the help of independent or members of minor parties, who may support the government on major issues such as the budget and questions of confidence, but may not support other aspects of the government's platform. This is called a minority government.

At the first Legislative Assembly elections in 1890 there were 30 Assembly districts which each elected one member. By 1901, when Western Australia joined the federation, there were 50 districts. Today there are 59 elected members chosen by the preferential voting method each holding their seats for a maximum of four years between elections.(14)

The Legislative Council (sometimes called the "Upper House") dates back to 1832 when a Legislative Council (and Executive Council) was established in the Swan River Colony with Captain Stirling as Governor. Although the first Council had four appointed members and had very limited powers, it marked the beginnings of a parliamentary system of government. In recent years the Legislative Council has developed a role as a house of review. This means that the Legislative Council functions as a check to critically review the operations of government and the legislation passed by the Legislative Assembly. One method of achieving this is through an extensive system of parliamentary committees.

The two houses also have slightly different powers. The most important of these relates to the passage of Money Bills. Measures such as the raising of revenue (including taxation and government charges) and the granting of supply or funds to the Government (typically through annual budgets) can only be introduced in the Lower House.(15) If such Bills are passed by the Assembly, they cannot be amended by the Council, although they can be rejected or sent back to the Assembly with a request that amendments be made. Such amendments, however, cannot *'increase any proposed charge or burden on the people'*. (16)

When the Western Australian Parliament is sitting the public can watch debates from the public galleries of either House. Journalists from the media report proceedings from the press galleries.

3.2 Passage of Legislation

Legislation, or future laws, start in draft form called a Bill. Bills may be initiated in either the Legislative Assembly or the Legislative Council unless they are Money Bills. However, most Bills are introduced

into the Legislative Assembly, the House in which the Government is formed and in which most Ministers sit.

Most of the Bills are Government Bills and are introduced by the Minister whose portfolio responsibilities cover the subject matter of the Bill. Bills that are introduced by a non-ministerial Member are known as a Private Member's Bill.

A Bill must pass through a number of stages in both Houses before it becomes an Act and so part of the law of the State.(17)

These include:

- Introduction and First Reading. The House must grant permission to a Member to introduce a Bill and then the Clerk of the House reads the title of the Bill.
- Second Reading. The responsible Minister or Member in charge of the Bill delivers the second reading speech which outlines the general context of the Bill. This is followed by a general debate on the legislation. Following this debate a vote is taken for the Bill to proceed to the next stage.
- Consideration in Detail and the Committee of the Whole. The Bill is considered in detail, often clause-by-clause. In the Legislative Assembly this is called the Consideration in Detail stage. In the Legislative Council this is called the Committee of the Whole stage. Amendments to the Bill may be moved. In either House a Bill may be referred to a Standing Committee for detailed examination, which then reports back to the House.
- Third Reading. This is usually a just a formality, although there is provision for further debate.

The Bill is then transmitted to the other House of Parliament where it passes through the same stages. If the Legislative Council and the Legislative Assembly cannot agree on the final form of the Bill each of them can appoint a number of members to meet and attempt to resolve the disagreement. This is known as a Conference of Managers. In the event of a continuing disagreement the Bill does not proceed.

After a Bill has been passed by both Houses of Parliament and certified as correct by the Clerk of the Parliaments it is presented to the Governor for Royal assent. Once the assent is given, the Bill is an Act. Unless otherwise stated in the Act, the legislation will come into effect on the 28 days after the assent is given.(18)

Before some bills may be presented to the Governor for Assent, they require the approval of electors at a State referendum. The Bills that need such approval are set out in section 73(2) of the *Constitution Act 1889*. To date this has not taken place but it would be required if there was a proposal to abolish the Office of the Governor, or reduce (or abolish) the membership of either House of the Parliament.

3.3 Responsible Government

One of the foundations of the Westminster system of government is the notion of responsible government. Under responsible government the Ministers (the Executive) are responsible or accountable to the Parliament and the Parliament is, in turn, accountable to the electors. A more detailed discussion of the nature of this responsibility follows.

3.4 Purpose of Debate

The Houses of Parliament are sometimes referred to as 'houses of debate'. It is important to understand the role of debate in our system of government.

When legislation is passed Members of Parliament debate the merits or shortcomings of the Bill before the House. Despite the fact that generally political party allegiances may decide the voting outcomes of many pieces of legislation, there are times when rigorous and robust debate may convince Members to change their expected voting intentions. This is particularly so when a government does not have a large majority or when party disciplines on voting do not apply (such as with 'conscience' votes on certain issues).

Debate is also important in the Committee stage of a Bill, when legislation can be amended and a compromise might be needed to ensure the passage of legislation.

Debate in Parliament may be used as a tactic to criticise a party or individual member or to defend a party or member from criticism. Given the robust nature of such exchanges, it is not surprising that parliamentary debate is sometimes heated. Despite these occasions, much legislation is passed in Parliament with the support of both the Government and the Opposition.

3.5 Members of Parliament

Members of Parliament are elected to represent the interests of their constituents. This is the principle of representative government, which along with responsible government, are the foundation stones of the Westminster system. However, for many years representative government in Western Australia was marred by electoral malapportionment, brought about by the unequal distribution of voters in electoral districts and regions throughout the State. In 2005 the Western Australian Parliament sought to remedy this situation by altering the State's electoral laws to allow for greater electoral equality.

For the Legislative Assembly the State is now divided into 59 electoral districts each of which returns one Member of Parliament. Those people resident in each electoral district who are entitled to vote elect the Member for their district at an election conducted by secret ballot. The Members hold their seats for a maximum of four years between elections. Members are elected by a system of preferential voting. Under this system, voters are required to rank candidates in order of preference.

For the Legislative Council the State is now divided into six regions, each of which return six Members. Members are elected by the electors in each region at an election conducted by secret ballot. Members are elected by a system of proportional representation. The Members hold their seats for a fixed four year term.

Voting is compulsory at elections for both the Legislative Assembly and the Legislative Council.

Members of Parliament have three main roles. First, the Members are legislators. When Parliament is sitting they speak in debates, serve on committees, and vote on legislation.

Secondly, the Members are advocates. They listen to the problems, questions, opinions, and ideas of the people who elected them. This may involve asking questions in Parliament, contacting Ministers or public servants, or directing constituents to the people most qualified to deal with a particular issue.

Finally, the Members are usually members of a political party and they represent the party's interests in Parliament by attending meetings of the party or by promoting the party's policies and ideas. In some cases, however, people become Members of Parliament without the support of a political party or they may resign from a political party after being elected. These Members are known as 'Independents'.

3.6 Political Parties

A political party is a group of people with similar ideas or aims who have formed together to try to gain election to Parliament in the hope that its elected representatives will be able to form a government, or influence a government. Political parties are not recognised in the State's constitutional documents. However, in practice, political parties are acknowledged as part of the parliamentary system and the system of government. They help to determine the decision making activities of the Parliament and Government . Since 2000, provisions have been made for the registration of political parties in Western Australia. This procedure is administered by the Western Australian Electoral Commission. Registration requires evidence of 500 financial members and compliance with certain specification, including the name of the party. Candidates of unregistered parties are not able to use a political party name on a ballot paper for either House of the Parliament.(19)

3.7 Forming a Government

Once the outcome of an election is known, the Governor will invite the parliamentary leader of the political party or coalition of parties which has a majority of seats in the Legislative Assembly to form a government. That government will remain in power until the next election, unless the members of the Legislative Assembly lose confidence in the government, in which case the Governor may invite the leader of some other party to form a government. If a vote of no confidence in the government is passed and no party or coalition of parties is able to command majority support in the Legislative Assembly the Governor would usually require that a fresh election be called.

3.8 Premier

By convention, the Premier is a Member of the Legislative Assembly, elected by political party colleagues and commissioned by the Governor to be the leader of a Ministry supported by a party or coalition of parties holding the majority of seats in the Legislative Assembly. In other words, the Premier is effectively the Head of Government in the State. The Premier has the final political responsibility for the administration of the State. The Premier is able to allocate Ministerial responsibilities, chairs Cabinet meetings and is responsible for Cabinet's operation.

Although the State Constitution provides that the Governor determines the dates for elections and the sitting or proroguing of the Parliament, it is the Premier who makes these decisions and provides advice to the Governor in Executive Council accordingly.

The *Australia Acts* provide that the appointment of the Governor is made by the Sovereign on advice of the Premier.

3.9 Cabinet

By convention the Cabinet of Western Australia comprises the Premier and of all the Ministers meeting together, chaired by the Premier. The Government of the day decides its system of operation. Cabinet decisions have no legal standing until they are put into effect, either by a decision of the Governor in Executive Council or by the responsible Minister.

Cabinet's role is to make the major decisions of the Government. These include:

- matters which affect the portfolios of more than one Minister;
- significant policy decisions;
- authority to draft legislation;
- action in respect of Parliamentary or Cabinet committees;
- matters affecting relationships with other governments; and
- certain senior appointments.

It is a convention of the Westminster system of government that Cabinet members must be Members of Parliament, although the *Constitution Act 1889* only provides for at least one Minister to be a member of the Legislative Council. Traditionally, in the main most Ministers in Western Australia have come from the Legislative Assembly.

There are a number of conventions which are regarded as very important for the operation of Cabinet. The convention of collective responsibility is common to Westminster systems of government. Under this convention, Cabinet is collectively answerable to Parliament for all its actions, programs and policies.

Collective responsibility implies that each Minister will keep confidential all discussion that takes place in Cabinet. It is argued that Cabinet confidentiality is necessary for robust debate in Cabinet and because of the sensitive nature of the issues being discussed. Another convention of Cabinet is that Ministers should publicly support Cabinet decisions and, if they cannot do so, they should resign.

3.10 Ministers

A Minister is the principal executive officer of departments and agencies of government as well as a Member of Parliament.

There is only limited and indirect mention of the role of Ministers in the *Constitution Act 1889*. There is a limit of 17 Ministers, one of whom must be a member of the Legislative Council.⁽²⁰⁾ Our system of government assumes that Ministers are individually responsible for the administration of the Western Australian departments and agencies within their portfolios, and are collectively responsible with others Ministers for the decisions and operation of the Cabinet.

Although Ministers are responsible for the departments under their control, they are not expected to be involved in the detailed administration of a department. Day to day administration is handled by the department itself, usually headed by a Chief Executive and supported by a number of public servants. The Minister is however accountable for the department and may be called on to answer parliamentary questions concerning its operations.

3.11 The Opposition

The political party, or coalition of parties that are in the minority in the Legislative Assembly, is known as the Opposition. The person elected as the leader of that party or parties is known as the Leader of the Opposition.

The opposition plays an important role in the Westminster system by scrutinising and publicly commenting on the activities of the Executive. As part of this role, the Opposition often proposes amendments to government legislation and in some cases votes against it. The Opposition also offers that electorate an alternative government by formulating policies and by developing links with interest groups seeking political support.

At general election, the Opposition will seek to gain a majority of seats in the Legislative Assembly so that it can be invited by the Governor to form a government. If that happens the Leader of the Opposition would normally become the Premier.

3.12 Minor Parties and Independents

There are political parties which do not have sufficient elected Members of Parliament to form a Government or which are not in coalition with the Government or Opposition parties. These parties are known as the 'minor parties'. They will often represent special interest groups, such as those interested in the preservation of the natural environment. In recent years, minor parties have been represented in the Legislative Council, where the voting system favours the election of representatives from minority groups.

Occasionally, persons independent of any political party will be elected to Parliament. Sometimes, Members of Parliament who belonged to a political party when elected will resign from their party and

remain in Parliament. These Members of Parliament are known as 'Independents' and as the name suggests they will act independently of the political parties represented in the Parliament.

3.13 Parliamentary Committees

The Parliament has two types of committees which it may use to undertake its work. These are Standing Committees and Select Committees.

A Select Committee is a group of Members selected by either the Legislative Council or the Legislative Assembly or by both Houses in the case of a Joint Select Committee, to carry out a single issue inquiry (for example land conservation, rural education or youth affairs) on behalf of the House and to report back to the House. Once the Committee has reported, the Committee ceases to exist. A Bill may also be referred to a Select Committee after the second reading.

There are also Standing Committees of the Parliament. Either House (or both Houses, as in the case of the Legislation Committees) may establish a Standing Committee, or there may be a Joint Standing Committee made up of Members of both Houses, which operate for the term of the Parliament. These Committees look at matters connected with the receipt and expenditure of public money, legislation, government agencies or delegated legislation (rules, regulations and by-laws made by a delegated authority, for example, local government by-laws). Both Houses also have Standing Committees which consider, and make recommendations on, the Standing Orders of each house.

Select and Standing Committees have wide powers and may compel people to appear before them for questioning and demand that records and documents be produced.

3.14 Parliamentary Privilege

Parliamentary privilege is a term used to describe the various rights, powers and immunities of parliament, its members and committees. They include:

- the right to free speech in Parliament, without the threat of being sued for defamation for any statements made when in Parliament or being questioned in a Court or Royal Commission for any statements made in parliament or incurring any legal liability for anything said in parliament;
- immunity of members from molestation and arrest and imprisonment for civil causes while attending Parliament; and
- immunity of Parliamentary witnesses from being questioned about or impeached for evidence given before either House or its Committees.

It is asserted that without its privileges, Parliament and its Members could not function properly. This view has prevailed since the earliest days of Parliament, long before the establishment of the Western Australian Parliament. It arose from the struggle waged by the House of Commons to establish its authority relative to the Crown. The struggle was resolved in the United Kingdom after much conflict, with the passage of the *Bill of Rights 1689*.

The immunities and powers conferred by parliamentary privilege were considered fundamental in Western Australia at the time of self-government and were written into s.36 of the *Constitution Act 1889*.⁽²¹⁾ In 1891 the Western Australian Parliament enacted the *Parliamentary Privileges Act*. It is through that Act that article 9 of the *Bill of Rights* came to apply to our system of government.⁽²²⁾ Other legislation which is relevant to the immunities of Parliament and its Members includes the *Parliamentary Papers Act 1891*⁽²³⁾ and s.351 of the *Criminal Code*.⁽²⁴⁾

A constitutional change in November 2004 has linked the scope of parliamentary privilege in Western Australia to that enjoyed by the United Kingdom House of Commons as at 1989.

3.15 Key Office Holders in Parliament

The Speaker in the Legislative Assembly and the President in the Legislative Council preside over debates in their Houses. They are elected by their fellow members.⁽²⁵⁾ They are the custodians of the dignities, practices and privileges of their respective Houses.

The job of the Presiding Officers is to chair the debates and to ensure that the Standing Orders are followed. The Presiding Officers call on members who wish to speak and decide upon points of order and give rulings when required.

In each House there is a Clerk. This is the non-elected official who heads the administrative, clerical and general staff in the respective Houses. This officer is also the chief executive officer to the Presiding Officer (Speaker or President) and advises on procedural matters.

3.16 Petitions and Public Involvement in Parliament

It is sometimes said that Parliament 'belongs to the people' because it represents them and is open to them. Both Houses have public galleries where the public can watch the proceedings, and some meetings of parliamentary committees are also open to the public. The media also is able to attend and report on activities in the Chambers and some Committee meetings.

Another mechanism for public involvement is through petitions. If an individual or group of people have a concern about a matter they can petition the Parliament. Petitions in Western Australia are addressed to the Presiding Officers and members of either House can request that the House give consideration to the issues they raise. The Petition is presented by a Member of Parliament to the House. The purpose of a petition is to highlight concern over an issue. Often petitions, particularly those with a large number of signatures, receive attention in the media.

4.0 THE EXECUTIVE

The Executive is that part of government that carries out or administers the law. The Executive is usually controlled by those Members of Parliament who have a majority in the Legislative Assembly. By convention, the Executive is led by the Premier with the support of Cabinet. This means that those who control the Executive, principally the Ministers, are also a part of the Parliament. The leaders of the Executive are therefore held accountable in Parliament for their actions.

Under the control of the Executive are government departments, agencies, statutory authorities and government trading authorities. This collection of publicly funded or supported organisations are sometimes described as making up the 'public sector' and they must all be accountable to a Minister who in turn is accountable to the Parliament. Should the Parliament lose confidence in the performance of the Executive, a motion of 'no confidence' may be moved in the Legislative Assembly and if successful a new government must be formed or elections held.

4.1 Executive Council

Executive Council is a very important part of the governmental decision making and approval process. Its principal purpose is to advise the Governor on matters relating to the government of the State and to formalise decisions made by the State Government. It is chaired by the Governor, includes at least two members of the Ministry and has as its secretary the Director General of the Ministry of the Premier and Cabinet. Executive Council meets at least fortnightly, and will convene for special meetings when requested by the Premier⁽²⁶⁾.

Some of the issues considered by Executive Council include:

the allocation to Ministers of responsibilities for Acts, departments and instrumentalities;

- the proclamation of Acts passed by Parliament;

- the appointment of members of the judiciary and senior public officials ;
- appointments to government boards and committees; and
- the formal approval and making of orders, regulations, by-laws and local laws.

The current practice followed by Executive Council is for papers to be submitted for consideration by the Governor five days before the Council meeting. This gives an opportunity for the Governor to raise questions and to seek clarification if necessary. In rare cases a paper might be withdrawn with the relevant Minister's approval for further departmental and ministerial consideration. This process enables the actual meetings of Council to flow smoothly.

Sections of the *Constitution Act 1889* and the *Constitution Acts Amendment Act 1899* refer to the responsibilities of the Governor in Council. Section 60 of the *Interpretation Act 1984* (WA) provides that, in most instances, a reference to the "Governor" in any Act means the Governor in Executive Council.(27) Accordingly, it is generally necessary to seek Executive Council approval for any matter referred to in legislation as requiring the approval of the Governor.

Upon being appointed to the Executive Council, a Minister takes an oath or affirmation not to reveal matters discussed in Executive Council.(28)

4.2 Government Departments and Agencies

Government delivers goods and services and regulates activities through departments and agencies. There are a number of different forms government departments and agencies can take. These include ministries, departments, statutory authorities, government trading authorities and boards and committees. Sometimes the term 'public sector' is used to describe the various forms of government administration. A characteristic of the public sector is that its agencies are funded in whole or in part by money allocated by Parliament or they rely on the state's ability to borrow money.

Departments are established by the Governor on the recommendation of the Minister for Public Sector Management. Departments can be created, amalgamated, broken up, abolished or have their names and duties changed. A statutory authority is an agency of government established by Act of Parliament. Statutory authorities include the Lotteries Commission, the Disability Services Commission and the Library and Information Service of Western Australia. State-owned companies that engage in commercial activities are generally referred to as government trading enterprises (GTEs). Examples of GTEs include Western Power and the Water Corporation.

Westminster-derived systems of government have a tradition, dating back to the early nineteenth century, of a politically neutral public service to give advice to Ministers, handle day to day administration and to provide government services.

4.3 Financing Government

Government must raise money to pay for the goods and services it provides. This is primarily done through taxes and charges. In broad terms the State government receives money from two sources. Firstly, the Commonwealth Government provides funds to the State Government to be spent in any way the State wishes, or there may be conditions attached to how the funds may be spent. Secondly the State is able to raise money itself through State taxes or it can levy charges for licences or the provision of services such as power, water or transport.

In Westminster-style parliaments, no legislation dealing with expenditure or taxation can be considered unless it has been recommended by the Government. This is known as the financial initiative of the Crown. Section 46 of the *Constitution Acts Amendment Act 1899* establishes the Legislative Assembly as the only house where Money Bills may be introduced.(29) While the Government has control over financial measures, it must obtain Parliament's approval to spend public money.(30) The Legislative Assembly grants the appropriation, while the Legislative Council agrees to that grant. The budget, contains financial information about all government departments and

agencies. It details expenditure in the previous financial year and spending estimates in the forthcoming one.

The Government must allocate resources for services across the whole public sector, such as education, health, police and housing. It does so within tight budgetary constraints, balancing competing priorities for government funds.

4.4 Royal Commissions

Royal Commissions are established by the Government to conduct inquiries into particular matters on behalf of the Government. They are called 'Royal' because the Governor appoints one or more people to be a Commissioner. The legal basis for the Commission's powers and functions can be found in the *Royal Commissions Act 1968* (WA). The field of inquiry of any Royal Commission is strictly controlled by the terms of reference which are drawn up by the Government. However, once set on their course, Royal Commissions are free from government interference and act impartially and independently.

In order to ensure their effectiveness, Royal Commissions are conferred with considerable powers to summon and examine witnesses, obtain documents and issue search warrants. Statements made in the course of hearings are subject to the same protection from defamation proceedings as if they were made in the Supreme Court.

The scope of activities inquired into by a Royal Commission may be very broad. Some inquiries are set up to advise government on policy issues, such as the Royal Commission into Parliamentary Deadlocks in 1984/5, whereas others are inquisitorial and are set up to determine the facts surrounding an incident or series of incidents. These incidents often involve allegations of illegal, improper or corrupt behaviour. An example of such a Royal Commission was the Royal Commission into the Commercial Activities of Government and Other Matters in 1992.

Reports of Royal Commissions may sometimes contain findings that affect the reputations of certain people and may lead to charges being laid for criminal offences. Therefore, Royal Commissions are required to act fairly and impartially, and to observe the rules of natural justice (for example, by giving those against whom adverse findings may be made, an opportunity to respond). Hearings at a Royal Commission are generally open to the public, although evidence may be heard in private.

Reports of Royal Commissions are presented to the Governor and then to the Government. They are usually then tabled in Parliament and made public. Where findings have the potential to lead to criminal prosecution, they may remain confidential so as to ensure that those charged are not prejudged and will have a fair trial.

5.0 THE JUDICIARY

5.1 The rule of law

It is a fundamental tenet of our system of government that everyone should be treated equally before the law. It is also fundamental that power should not be exercised in an arbitrary manner but according to law. This means that a Premier, a Minister or any public officer cannot simply arrest and imprison someone because it suits them. The use of power must always be exercised according to the law. This concept is sometimes referred to as the rule of law. There is a system of courts in the State, presided over by judges and magistrates, whose function it is to ensure that the rule of law is observed and that the laws of the state are enforced.

5.2 The Court Hierarchy

The Court system has evolved into a hierarchy in order to enable appeals from various levels in the court system to more senior courts. Another function of the court hierarchy is that it enables an effective allocation of criminal and civil cases between the courts.

The High Court

The High Court is Australia's highest court. There are seven Justices of the High Court, including the Chief Justice, who is head of the Court. Its primary role is to decide matters relating to Australia's Federal Constitution. However, it also decides appeals from other Australian courts in both civil and criminal cases. Today the number of constitutional cases heard each year by the High Court is less than ten per cent of its caseload.

The High Court will only hear appeals if they involve questions of general importance and there are strong legal arguments to warrant its attention.

The High Court also hears a limited range of cases at first instance (i.e. without an earlier hearing in a lower court) including disputes:

in which the Commonwealth Government is a party;
between state Governments; and
between people living in different States.

Until 1980 the High Court sat mainly in Sydney and Melbourne, with occasional visits to other State capitals. The High Court now has a permanent home in Canberra, but it continues to sit in the various State capitals during the year, usually for a week at a time.

Originally it was possible to appeal from the High Court and other Federal courts to the Privy Council in the United Kingdom, but these appeals were abolished in two stages in 1968 and 1975. Appeals to the Privy Council from State Courts were abolished by the Australia Acts in 1986.

The Supreme Court of Western Australia

The Supreme Court is the 'superior' court in Western Australia. It is now divided into two divisions, the General Division and the Court of Appeal. The Court of Appeal was established in February 2005 following the proclamation of the Acts Amendment (Court of Appeal) Act 2004.

The Judges of the General Division are responsible for the trial and other non-appellate work of the Supreme Court, although they continue to handle single judge appeals.

The Court of Appeal is the highest appeal court in the State. It hears criminal and civil appeals from other courts in Western Australia; as well as appeals from a single judge of the General Division of the Supreme Court.

The head of the Supreme Court is the Chief Justice, who is a member of both Divisions. There are currently 19 other puisne (associate) Judges. Of those, one is the President of the Court of Appeal and six others are Judges of Appeal. The remainder make up the General Division. The Supreme Court mainly sits in Perth. However, it also goes on circuit from time to time to some eleven regional locations.

Originally judges and lawyers wore wigs and gowns in all proceedings in the Supreme Court. However, since 1999 judges and lawyers have ceased to wear wigs in civil proceedings and wigs are not worn at all in the Court of Appeal. Wigs are still worn by judges and lawyers in criminal proceedings in the General Division and by judges at ceremonial sittings of the Court.

The Supreme Court deals with the more serious criminal trials, such as for wilful murder and armed robbery. A jury of twelve community members decides whether a person, accused of a criminal offence, is guilty or not guilty. In some cases an accused person may choose to have a trial by judge alone rather than a jury.

The Supreme Court has unlimited jurisdiction in civil matters, but will usually only deal with monetary claims of more than \$500 000. Under its probate jurisdiction the court may also grant authority for the administration of deceased estates and resolve disputes over Wills. The Supreme Court also handles disputed elections and corporate law matters.

The District Court

The District Court is the intermediate court in Western Australia. The head of the District Court is the Chief Judge. There are currently 24 other District Court Judges. This Court deals with the majority of serious criminal trials, such as for serious assaults, breaking and entering and stealing and receiving stolen property. Once again, a jury of twelve community members decides whether the accused is guilty or not guilty, although in some cases the accused may choose to have a trial by judge alone.

In civil cases, the court deals with monetary claims between \$50 000 and \$500 000, but it has unlimited jurisdiction in relation to claims for damages for personal injury. Some appeals from the Magistrates Court are heard by the District Court. The Supreme Court hears appeals from the District Court.

The Magistrates Court

In May 2005 a new Magistrates Court was established in Western Australia. This resulted in the merger of the Court of Petty Sessions, the Local Court and the Small Claims Tribunal into a single Magistrates Court of Western Australia.

The Magistrates Court has both criminal and civil jurisdiction. It deals with criminal offences known as 'simple offences' and some more serious offences, known as 'indictable offences'. However, the District or Supreme Courts must hear the most serious criminal charges. In civil law, the court deals with matters generally involving claims up to \$50 000, including consumer claims over the sale, supply or hire of goods and services and claims for the recovery of 'real property up to a gross value of \$50 000.

The Magistrates Court sits at multiple locations in Western Australia and is presided over by the Chief Magistrate and other Magistrates. It deals with the vast majority of civil and criminal cases in the State and is the Court with which members of the community are most likely to come into contact.

The Family court of Western Australia

Western Australia is the only State in Australia to have a State Family Court to deal with family law matters. Elsewhere in Australia, family law matters are dealt with by the Family Court of Australia, which is a Federal Court.

The Family Court of Western Australia, which was established in 1976, is presided over by Judges and Magistrates. It is vested with State and Federal jurisdiction in matters of family law. The jurisdiction of the Family Court includes proceedings relating to divorce, parental responsibility and maintenance and property settlements arising out of the breakdown of a marriage or de facto relationship. As well as married couples the Court has jurisdiction over separated and de facto couples.

The Court has a counselling service for people seeking assistance with regard to marriage difficulties and matters affecting the welfare of children.

The Family Court mainly sits in Perth. However, Judges and Magistrates of the Family Court travel to regional centres at various times during the year.

Appeals from the Family Court go to the Full Court of the Family Court of Australia if the case is in Federal jurisdiction and to the Court of Appeal if the case is in state jurisdiction.

The Children's Court

The Children's Court deals with offences by or against children, or juveniles, under the age of 18 years. If an alleged offender turns 19 after the charge is laid, the case may still be heard in the Children's Court.

The Children's Court does not only deal with criminal matters. If a child has been seriously abused or neglected, an application can be made by the Chief Executive Officer of the Department of Community

Development for the Court to make a protection order in respect of that child. The Court may order that the child be placed under the parental responsibility of the Chief Executive Officer or some other person approved by the Court.

The President of the Children's Court is a Judge, who has the same status as a Judge of the District Court. In addition to the President, who only deals with the most serious charges brought before the Court, there are a number of full-time and part-time Magistrates, who deal with the majority of the Court's caseload. In some instances cases in the Children's Court can be heard by Justices of the Peace.

A Judge of the Children's Court has the same powers in sentencing as a Supreme Court Judge and can also hear appeals from decisions of the Magistrates. Generally, the maximum sentence a Magistrate can impose is six months detention or three months imprisonment. This means that a Judge must deal with any matter that calls for a greater sentence of detention or imprisonment. Justices of the Peace do not have the power to impose a sentence of detention at all.

Hearings in the Children's Court are not generally open to the public and there are restrictions on the publication of the names of juvenile offenders and victims by the media.

Drug Court

In Western Australia pilot Drug Courts have been introduced to address substance abuse within a criminal justice framework.

These specialist Courts in the Perth Children's Court, the Perth Magistrates Court and the District Court at Perth can help break the cycle of substance abuse and offending by nominating a treatment program – and making treatment a part of the court process.

To be considered, offenders must enter an early plea of guilty. The Court then uses its judicial authority to manage the offender in appropriate treatment. Offenders referred to the Drug Court are subject to specific bail conditions encouraging abstinence and rehabilitation.

Coroner's Court

When a person dies apparently from non-natural causes or where the cause of death is not known, a doctor may not issue a death certificate and the Coroner must be advised.

Once such a death is reported, usually by the police, doctors, or hospital authorities, the Coroner has legal control over the body of the deceased, who must establish:

- the manner in which the death arose;
- the cause of death;
- the particulars needed to register the death; and
- the identity of the deceased.

Doctors are able to certify the cause of death in about 85% of cases without the intervention of the Coroner.

5.3 State Administrative Tribunal

As well as settling disputes through the existing Court structure, the State Administrative Tribunal (SAT), which was established in 2004, makes and reviews a range of administrative decisions. Individuals, business, public officials and vocational boards may bring many different types of applications before SAT. SAT has a very wide jurisdiction governed by more than 130 Acts. Its jurisdiction is divided into four streams: human rights; development and resources; vocational regulation; commercial and resources, occupational misconduct, strata title and commercial tenancy disputes. SAT reviews a variety of decisions made by other authorities, including decisions made by the Mental Health Review Board and state Revenue.

The approach of SAT is similar to a court but the process for the determination of each application is more informal and flexible than that of a court. Similar to a court, in most cases SAT holds hearings in public and provides reasons for all its decisions, most of which are published on the Internet.

A Supreme Court judge is the President of SAT. Two Deputy Presidents, who are District Court judges, and a number of members who are experienced in relevant fields, assist the President in the disposition of the Tribunal's work.

5.4 Independence of the Judiciary

The independence of the judiciary from the Executive and Parliament is a fundamental principle of our system of government. The judiciary is required to exercise its functions and administer justice in accordance with the law in a fair and impartial manner, without fear or favour and free from government or official influence or threat. Sometimes citizens will seek redress from the courts in relation to arbitrary or illegal activities by government, or even Ministers of the Crown. If government was able to influence the outcome of such cases, justice could not be done. The law of the land must apply equally to all people.

Independence is considered to be achieved through mechanisms such as the permanent tenure for judges (until they reach mandatory retirement age of 70 years) and protection from arbitrary removal. Under ss 54 and 55 of the *Constitution Act 1889*, Supreme Court judges retain office during good behaviour and may be removed from office only by the Governor on an address (request) by both the Legislative Council and Legislative Assembly. (31) A similar method of removal is provided for District Court Judges and Stipendiary Magistrates.

5.5 Openness of Judiciary

All Courts, other than the Children's Court, are open to the public. In some circumstances, due to the particular nature of some evidence, an order is made excluding the public. Openness is a hallmark of accountability and assists in ensuring that justice is done. The keeping of accurate records is another mechanism to ensure openness. A verbatim transcript of the proceedings is also made. In addition, reasons for judgment are published and are available to the public. Another method of ensuring accountability is the appeals system where a decision from a lower court can be appealed to a higher court.

6.0 INDEPENDENT AGENCIES AND OFFICERS OF GOVERNMENT

6.1 Role of Independent Agencies of Government

Independent Agencies of Government have an important role to play in acting as a check and balance against improper or illegal activities by government. They are called independent because no-one in government, such as a Minister or senior public servant, can influence their activities. This means those working for these agencies can be critical of government without fear of losing their job or suffering some other penalty.

Although Independent Agencies of Government are independent of government, they are usually required to report to Parliament to ensure that they are accountable themselves in their expenditure of funds and the way they carry out their functions. This ensures that Parliament provides the ultimate accountability mechanism in our system of government. Reporting to Parliament also ensures that Parliament is fully informed of the activities of government and is therefore able to effectively scrutinise government activity.

Over the last 25 years the number of Independent Agencies of Government has increased as the public has demanded greater accountability from government. The key Independent Agencies of Government are listed below. (32)

6.2 The Auditor General

The Auditor General's role is to annually audit the financial records of government and to carry out examinations of the efficiency and effectiveness of government agencies. The independence of an auditor is critical to ensure the credibility of the audit as the Auditor General must be free from any influence, bias or prejudice. It is essential therefore, that the Auditor General be independent of government and not be subject to the direction of a Minister or other public servant. The Auditor General is appointed until the age of 65 and may only be removed from office by the Governor on the address of both Houses of Parliament. This provides some protection for the Auditor General against politically motivated dismissal.

6.3 Corruption and Crime Commission

At the beginning of 2004, the Corruption and Crime Commission (CCC) replaced the Anti-Corruption Commission (ACC), which had been established in 1996. The first Commissioner of the CCC was Commissioner Kevin Hammond, who was formerly the Chief Judge of the District Court.

The CCC's general purpose is to oversee the reporting and investigation of misconduct in the Western Australian public sector, to improve the integrity of the public sector and to reduce the incidence of misconduct and organised crime. When misconduct is identified the CCC may conduct an investigation, which can involve both public or private hearings and the application of the CCC's coercive powers. The CCC differs from the ACC in that it has more comprehensive powers, including the power to compel witnesses to give evidence and the power to hold public examinations. Importantly, the CCC is accountable to the Parliament through an independent Parliamentary Inspector and a Parliamentary Committee, which may investigate and review any aspect of the CCC's activities.

The Parliamentary Inspector of the CCC audits the operations of the CCC to ensure compliance with the laws of the State including investigating complaints against the CCC or its officers. Importantly, the Parliamentary Inspector may assess the effectiveness and appropriateness of the CCC procedures and may make recommendations to the Commission, independent agencies and appropriate authorities. The Parliamentary Inspector reports and may make recommendations to the Parliament and the Parliamentary Committee. The Parliamentary Committee is made up of members from both Houses of Parliament. It monitors and reports to Parliament on the exercise of the functions of the CCC and the Parliamentary Inspector. The Parliamentary Inspector may act at the instigation of the Inspector, at the request of the Minister, in response to a matter reported to the Parliamentary Inspector, or in response to a reference by either House of Parliament, the Standing Committee or the CCC itself. Malcolm McCusker, QC, an experienced lawyer was appointed as the first Parliamentary Inspector.

6.4 Commissioner for Public Sector Standards

The Commissioner for Public Sector Standards is required to establish, and to monitor compliance with, public sector standards. These standards relate to human resource issues such as recruitment, selection, appointment, transfer, secondment, performance management, redeployment, discipline and termination of employment in the public sector. In addition, the Commissioner is required to establish and monitor compliance with codes of ethics setting out minimum standards of conduct and integrity to be complied with by public sector bodies and employees as well as assisting public sector bodies develop and monitor compliance with codes of conduct.

The Commissioner may investigate the activities of any public sector body and has special powers for this. The Commissioner is required to act independently, as clearly the investigation of unethical or illegal behaviour by public officers requires independence from government influence. The Commissioner is required to report to Parliament on the non-compliance by any public sector body with public sector standards, codes of ethics and codes of conduct. The Commissioner may only be removed from office by the Governor on the address of both Houses of Parliament but may be suspended from office by the Governor in certain circumstances.

6.5 Electoral Commissioner

The Electoral Commissioner is responsible for the maintenance of the electoral rolls and the proper conduct of elections as well as for promoting public awareness of electoral and parliamentary matters. The Commissioner is also one of the three Electoral Distribution Commissioners who divide the State into electoral districts and regions.

The holding of elections and the dividing of the State into electoral districts requires that the Electoral Commissioner be impartial and independent from government as electoral advantage could be gained if it were possible to influence the Commissioner. The Electoral Commissioner may only be removed from office by the Governor on the address of both Houses of Parliament.

6.6 Information Commissioner

The Information Commissioner is required to deal with complaints regarding decisions of government agencies regarding applications for access to documents, and applications for amendment of personal information, held by government agencies.

Excessive government secrecy may hide improper or even illegal activity by government and therefore it is seen as essential that the Information Commissioner be independent of government influence. Furthermore, it is critical that government's records on individuals be accurate and that there be a mechanism independent of government for ensuring that any errors are corrected. The Information Commissioner may only be removed from office by the Governor on the address of both Houses of Parliament.

6.7 Parliamentary Commissioner for Administrative Investigations (the State Ombudsman)

The function of the Parliamentary Commissioner for Administrative Investigations (also known as the Ombudsman) is to carry out an independent and impartial investigation of a complaint relating to 'a matter of administration'. For example, a member of the public may complain to the Ombudsman that they are unhappy with the way a State government department is handling their application for a certain approval, perhaps because the department is taking too long or even that the department was unreasonable in its decision. The Ombudsman can investigate matters in a wide range of government agencies including the Police Force. When investigating Police Force matters the Ombudsman is not restricted to maladministration issues.

The Ombudsman may make recommendations concerning complaints, but has no power to enforce any recommendations. The Ombudsman can, however, report to Parliament on the outcome of investigations and possible criticisms in the Parliament by the Ombudsman is a strong incentive for government agencies to comply with any recommendations made. Reports to Parliament are public and usually receive considerable attention on the media.

Because the exposure of maladministration could be politically embarrassing for a government, the Ombudsman needs to be independent from government. Similar to other Independent Agencies of Government, the Ombudsman is accountable to the Parliament and may only be removed from the office by the Governor on the address of both Houses of Parliament.

6.8 Solicitor General

The Solicitor General is the principal legal adviser to the Western Australian Attorney General, and through the Attorney General, to government and its agencies. In addition, the Solicitor General appears in Court as Counsel for the State and, when requested by the Attorney General, for agencies of the State and other bodies. The Solicitor General also provides advice to the Governor.

The first law officer of the State is the Attorney General. The second law officer of the State is the Solicitor General. There is an interconnection between the two roles, and the Attorney General may delegate functions to the Solicitor General.

It is critical for the Attorney General and the Government to be able to receive independent legal advice. This is why the office of Solicitor General is established as an independent, statutory office. The Solicitor General has the same security of tenure as a judge of the Supreme Court.

6.9 Director of Public Prosecutions

The central objective of the Director of Public Prosecutions (DPP) is to provide the people of Western Australia with an independent and effective criminal prosecution service which is fair and just.

The DPP initiates and conducts criminal prosecutions in the Supreme and District Courts. In addition, the DPP conducts all appellate work flowing from those prosecutions and manages a range of matters arising from the *Criminal Property Confiscation Act 2000* and the *Misuse of Drugs Act 1981*. The DPP also has jurisdiction over indictable offences triable summarily in Courts of Petty Sessions and assumes responsibility for the more serious indictable offences in the Children's Court.

Under some circumstances it could be politically advantageous for a government to be able to control the course of a criminal prosecution. For this reason it is critical that the DPP be independent from government influence. Accordingly the *Director of Public Prosecutions Act 1991* provides that the Director may receive directions as to policy, but cannot be directed in a particular case, and functions independently from the Attorney General and the Executive.

Footnotes to Text

- (1) s.17 *Electoral Act 1907 (WA)*
- (2) s.17 *Electoral Act 1907 (WA)*
- (3) s.156(1) *Electoral Act 1907 (WA)*
- (4) s.2(1) *Constitution Act 1889 (WA)*
- (5) s.106 *Commonwealth Constitution*
- (6) s.109 *Commonwealth Constitution*
- (7) s.51 *Commonwealth Constitution*
- (8) s.75 & 76 *Commonwealth Constitution*
- (9) s.11 *Australia Acts 1986*
- (10) s.50 *Constitution Act 1889 (WA)*
- (11) s.11 *Australia Acts 1986*
- (12) s.46(8) *Constitution Acts Amendment Act 1899 (WA)*
- (13) 2(2) *Constitution Act 1889 (WA)*
- (14) s.3 *Electoral Distribution Act 1947 (WA)*
s.19 *Constitution Acts Amendment Act 1899*
s.144 *Electoral Act 1907*
- (15) s.46(1) *Constitution Acts Amendment Act 1899 (WA)*
- (16) s.46(3) *Constitution Acts Amendment Act 1899 (WA)*
- (17) s.34 *Constitution Act 1889 (WA)*
- (18) s.20(2) *Interpretation Act 1984*
- (19) *Mulholland v Australian Electoral Commission (2004) 220 CLR 181*
- (20) s.43 *Constitution Acts Amendment Act 1899 (WA)*
- (21) s.36 *Constitution Act 1889 (WA)*
- (22) s.1 *Parliamentary Privileges Act 1891 (WA)*
- (23) s.3 *Parliamentary Papers Act 1891 (WA)*
- (24) s.351 *Criminal Code (WA)*
- (25) s.11 & s.23 *Constitution Acts Amendment Act 1899 (WA)*
- (26) Letters Patent (WA, Government Gazette, 28.2.1986: 684-685)
- (27) s.60 *Interpretation Act 1984 (WA)*
- (28) Letters Patent (WA Government Gazette 14/2/1986)
- (29) s.46(1) *Constitution Acts Amendment Act 1899 (WA)*
- (30) s.72 *Constitution Act 1889 (WA)*
- (31) s.54 & s.55 *Constitution Act 1889 (WA)*
- (32) *Financial Administration and Audit Act 1985 (WA)*
Anti-Corruption Commission Act 1988 (WA)
Public Sector Management Act 1994 (WA)
Electoral Act 1907 (WA)
Freedom of Information Act 1992 (WA)
Parliamentary Commissioner Act 1971 (WA)
Solicitor General Act 1969 (WA)
Director of Public Prosecutions Act 1991 (WA)

ACKNOWLEDGMENTS

The updates to legislation and legal matters for the 2006 revised edition of Dynamics in Government were kindly provided by Mr Robert meadows QC, Solicitor General of WA

The following organisations are thanked for the provision of information used in the compilation of this publication:

- Commission on Government (Report Nos. 1 - 5 and Discussion Papers 1 -15 and Background Paper, 1995 - 1996)
- Western Australian Electoral Commission (Electoral History in Outline, 1990 and 1993 State General Election Report)
- Parliament Information and Education Office (Education Sheets and Worksheets)
- Francis Burt Law Education Centre (Student Resource Material)

The following individuals are thanked for their contributions and suggestions to the contents of this publication:

- Mr Brad Williamson, Office of the Solicitor General
- Mr Kevin Skipworth, Governor's Official Secretary
- Justice Robert Nicholson, Federal Court of Australia
- Mr Robert Meadows QC, Solicitor General of WA
- Mr Stephen Wood, Ministry of the Premier and Cabinet
- Dr Harry Phillips, Adjunct Professor, Edith Cowan University and Curtin University
- Dr Jim Thomson, Attorney General's Office
- Mr Laurie Marquet, Clerk of the Legislative Council & Clerk of the Parliaments.