

CHAPTER 6

OFFICE HOLDERS AND ADMINISTRATION OF THE LEGISLATIVE COUNCIL

The Legislative Council relies on a number of key office holders who perform specific functions to enable the orderly and regular conduct of proceedings. They include notably the President, the Deputy President and Chair of Committees, the Assistant President and the Clerk of the Parliaments.

OFFICE HOLDERS

President

Section 22G of the *Constitution Act 1902* provides:

There shall be a President of the Legislative Council, who is the Presiding Officer of the Legislative Council and is recognised as its independent and impartial representative.¹

Origins of the position

The office of the President of the Council derives from the office of the Speaker of the British House of Commons.²

The first Speaker of the British House of Commons was Sir Peter de la Mare, appointed in 1376 during the last year of the reign of Edward III,³ although the first to be recorded on the Parliament's Rolls was his successor Sir Thomas Hungerford.⁴ The main function of these early 'Speakers' was to act as the mouth-piece of the Commons and to communicate their resolutions to the King.

1 Section 22G(1) as inserted by the *Constitution (Amendment) Act 1992* No 106, Sch 1(1).

2 The Speaker of the House of Lords is the Lord Chancellor.

3 Plucknett T, *Taswell-Langmead's English Constitutional History*, 11th edn, Sweet and Maxwell, London, 1960, p 164.

4 McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, p 13.

Until the 17th century, the Speaker was seen predominately as the 'King's man', charged with looking out for the interests of the King in the Commons. As Speaker Finch rebuked the House in the early years of the reign of King Charles I: 'I am not less the King's servant for being yours'. However, during the conflict between Charles I and the Commons the principle that the Speaker's first duty was to the House gradually took form. As noted in Chapter 3 (Privilege), by 1642, when the King came to the House of Commons attended by an armed escort, demanding that the Speaker surrender to him five members accused of treason, Speaker Lenthall famously replied:

May it please Your Majesty, I have neither eyes to see, nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here, and I humbly beg Your Majesty's pardon that I cannot give any other answer than this to what Your Majesty is pleased to demand of me.⁵

Attempts on the part of the Crown to interfere with the appointment of the Speaker did not entirely cease after this, but they no longer met with any significant success.⁶

History in New South Wales

As indicated in Chapter 2 (The New South Wales Legislative Council), the first Council in New South Wales was presided over by the Governor. This early Council could not initiate legislation and the Governor had the power to override its decisions. However, in 1842 changes to the Council were introduced through the *Australian Constitutions Act (No 1) 1842*,⁷ as part of which the Governor was replaced with an elected Speaker to preside over meetings of the Council. Alexander Macleay was elected as the first Speaker of the reconstituted Council on 1 August 1843.⁸

From the advent of responsible government in 1856 up until the reconstitution of the Council in 1934, the Council was a nominee House and the President was appointed by the Governor by Instrument under the Great Seal of the Colony.⁹ Section 7 of the *Constitution Act 1855* provided:

The Governor of the Colony shall have power and authority from time to time by an Instrument under the Great Seal of the said Colony to appoint one member of the said Legislative Council to be President thereof and to remove him and appoint another in his stead and it shall be at all times lawful for the said President to take part in any debate or discussion which may arise in the said Legislative Council.

5 Wilding N and Laundy P, *An Encyclopaedia of Parliament*, Cassell & Company, London, 1958, p 544.

6 *Ibid.*

7 5 & 6 Vic, c 76 (1842) (Imp).

8 *LC Minutes* (1/8/1843) 1.

9 *Constitution Act 1855*, s 7; *Constitution Act 1902*, s 21.

The first President appointed by the Governor after the 1856 reconstitution was Sir Alfred Stephen, Chief Justice. He was appointed President of the Council on 20 May 1856. The Council met for the first time on 22 May 1856.¹⁰ At the opening of the first session, Sir Alfred observed that he considered his position *primus inter pares* (first among equals) and that he was not in the position to direct and control but merely to regulate the debates:

For myself, I have to solicit of those who hear me and are able to share in discharging the duties which we have this day undertaken, that they will look with indulgence on the many deficiencies of which I am conscious. Placed in this chair, not to direct and control but simply, as *primus inter pares*, to assist in regulating the debates of the House, it will be obvious that I cannot hope for success without your ready support.

It is, and ever will be my earnest, my most anxious desire, so at all times to shape my course, in the high and honourable post for which I have been selected, and in contributing to the legislation of the country, as to be of use to my fellow-colonists; and, finally to obtain your approval and that of my Sovereign and the community. In these efforts I know that not sincerity alone, and singleness of purpose will be required; but ability, experience and sound judgment. The inattention of an hour, the incaution of a moment, might be fatal to them. But of one thing, gentlemen, you may be assured. He of whom I speak will ever remember – nor would those with whom he is associated permit him to forget – that in becoming President of the Council he did not cease to be a Judge. And it is assuredly not necessary to the duties of a legislator, nor naturally incident to the full and most efficient discharge of them, to share in any degree in the disputes of partisanship, or descend to the contests of political warfare.¹¹

In 1934, following the second reconstitution of the Council, the Council was empowered to ‘choose one of their number to be President’, and to elect a new President ‘as often as the office of the President becomes vacant’.¹² The President could also be removed from office by a vote of the Council, and could resign the office in writing addressed to the Governor. Sir John Peden was elected as President of the reconstituted Council when it first met on 24 April 1934.¹³

Since the 1934 reconstitution enabling the Council to choose its own President, the rules for the conduct of proceedings in choosing the President have changed many times. They were initially provided under sections 41 and 42 of the *Constitution Further Amendment (Legislative Council Elections) Act 1933*. Following the 1978 reconstitution, they were provided under the authority of Schedule 4 to the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*. Members would nominate a candidate for President, motions were seconded and voting was carried out in the manner of a division in the House. Following the enactment

10 LC Minutes (22/5/1856) 1.

11 *Sydney Morning Herald*, 23 May 1856, p 2.

12 *Constitution Act 1902*, s 21, as substituted by the *Constitution Amendment (Legislative Council) Act 1932*.

13 LC Minutes (24/4/1934) 5.

of the *Constitution (Legislative Council) Further Amendment Act 1991*, until the adoption of the revised standing orders in 2004, the President was elected according to the Senate procedures for choosing the President of the Senate.¹⁴ The rules for the conduct of proceedings in choosing the President are now set out in standing orders 12 and 13. Under these procedures the voting is conducted by ballot.

Role and functions

The President's role in the House is to maintain order, put questions after debate and conduct divisions. In maintaining order the President interprets and applies the standing orders and practice of the House by making rulings and decisions. The President's decisions are subject to the will of the House and may be challenged on a motion of dissent (SO 96). The President may also issue practice notes on the procedures and practice to be followed under any standing order. These practice notes are also subject to disallowance, in whole or in part, by motion on notice (SO 3). The President is also charged with upholding the rights and privileges of the House and its members. More detailed aspects of the role of the President in the House are dealt with in Chapter 8 (Conduct of Proceedings), Chapter 10 (Resolutions, Motions and Amendments) and Chapter 11 (Rules of Debate).

The President is also the spokesperson of the House. For example, the President communicates messages from the House to the Governor, to the Assembly and to persons outside of the Parliament. In addition the President performs various ceremonial duties relating to the opening of Parliament and visits from foreign Heads of State, receives foreign delegations, leads some parliamentary delegations overseas and represents the Council at various national and international conferences. The President is an *ex officio* member of the Procedure Committee and is usually elected Chair of the Committee (SO 205(3)).

The President must take the chair of the House whenever present in the House,¹⁵ and exercises a casting vote only during divisions.¹⁶ Under section 22G of the *Constitution Act 1902*, the President may take part in any debate or discussion in the House. When the President takes part in debate, they do so from the floor of the House (SO 86). The President may also participate in proceedings in committee of the whole and vote as an ordinary member. The President may leave the chair at any time to suit the convenience of members, such as for lunch and dinner breaks (SO 23).

14 See the former s 22G(2A) of the *Constitution Act 1902*. Senate procedures have provided for the election of a President by secret ballot since 1901; see Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 113.

15 In this context, the term 'House' is distinguished from 'Committee of the Whole House' which is chaired by the Deputy President as Chair of Committees. Committee of the whole occurs when bills and other matters are being considered in detail.

16 *Constitution Act 1902*, s 22I and standing order 116.

The President also has extensive administrative functions within the Parliament and is responsible, with the Speaker, for the overall operation of the Parliament. Under the *Parliamentary Precincts Act 1997* the President and Speaker are jointly responsible for the control of the parliamentary precincts. The President has sole responsibility for the operation of the Department of the Legislative Council, including the appointment and dismissal of staff.

Members should not direct questions in the House to the President relating to the administration of the Department of the Legislative Council. Such questions may be addressed to the President privately.¹⁷

The President is entitled to use the title ‘Honourable’ and when leaving office after three years service the title may be retained if authorised by the Governor.¹⁸ The President is ranked 10th in the State table of precedence.¹⁹

Election

A person is to be chosen as President of the Council before the Council proceeds to the dispatch of business at its first meeting following any periodic Council election²⁰ and at any other time when the office becomes vacant.²¹ The conduct of the election is governed by standing orders 12 and 13.

The person chosen as President ceases to hold office:

- immediately before the Council assembles for the dispatch of business at its first meeting following a periodic Council election;²²
- if the person ceases to be a member of the Council;²³
- if the person is removed from office by a vote of the Council;²⁴
- if the person resigns from office in writing addressed to the Governor.²⁵

If the President’s term of service as a member expires under section 22B(2) of the *Constitution Act 1902* – that is on the expiry of their elected term of service being two terms of the Assembly – they cease to hold the office of President.²⁶ This means

17 *LC Debates* (11/10/1995) 1541, (2/11/2000) 9585.

18 Letter from Secretary of State for the Colonies to Governor Duff, 22 March 1894.

19 *Government Gazette*, No 116, 16 August 1991.

20 *Constitution Act 1902*, s 22G(2)(a). This provision was inserted by the *Constitution (Legislative Council) Further Amendment Act 1991*, Sch 1(1). Before this amendment the President held office until the office became vacant.

21 *Ibid*, s 22G(2)(b).

22 *Ibid*, s 22G(3).

23 *Ibid*, s 22G(3)(a).

24 *Ibid*, s 22G(3)(b). On 3 July 1991, President Johnson was removed from office, *LC Minutes* (3/7/1991) 32-34.

25 *Ibid*, s 22G(3)(c). On 29 June 1998 President Willis resigned from office, *LC Minutes* (29/6/1998) 610.

26 *Ibid*, s 22G(3)(a).

that on occasion the Council can be without a President from early March before a periodic Council election until the House meets again after the election, which can be as late as early May.

There is no corresponding provision in the *Constitution Act 1902* regarding the expiry of the Office of Speaker of the Assembly. Section 31(2) of the Act provides that the Speaker continues to hold office, except in the case of death, resignation or removal from office, until the election of a new Speaker following a general election.

Whenever the office of President becomes vacant the Clerk acts as Chair of the House for the election of the President, with the powers of the President under the standing orders while acting.²⁷ When conducting the election, the Clerk calls for nominations for the office of President and any member wishing to nominate a candidate for the office proposes a motion: that the member do take the Chair as President. A member must be present in the House to be proposed as President. Any member may speak to the motion for not more than 15 minutes regarding the candidate nominated, although, in practice, there is usually little or no debate. Candidates accept the nomination by stating: 'I submit myself to the will of the House'.

If only one member is proposed as President, the member so proposed is declared elected without any question being put and, after expressing a sense of the honour proposed to be conferred on them, is conducted to the Chair, by the member proposing the motion and another member.²⁸

If two or more members are proposed as President, each member so proposed expresses a sense of the honour proposed to be conferred on them and may if they wish address the House. Any member may speak to the motion for not more than 15 minutes. Under standing order 13, a ballot is then conducted. Ballot papers are printed in advance, on different coloured paper for second and successive ballots if required, and initialled by the Clerk. Before the ballot takes place, the bells are rung and the doors are locked as in a division. Ballot papers are distributed by the Clerks to all members in their places. The members write on the ballot paper the name of the candidate for whom they wish to vote.

When all members present have cast their vote, the Clerk asks the nominator of each candidate to act as a scrutineer during the counting of the votes. The ballot box is opened in the chamber and the votes counted by the Clerk, witnessed by

27 The election to replace President Willis, held on 29 June 1998, saw a number of unusual occurrences. Prior to the House meeting, a new member (the Hon Dr Arthur Chesterfield-Evans) was sworn at the Governor's office to allow him to participate in the election of the President. Another member, the Hon Alan Corbett, was delayed by a rail transport disruption. When the House convened at 11.00 am, the vacancy in the office of President was announced and Dr Chesterfield-Evans signed the roll of the House. The Leader of the Government then suggested that the Clerk leave the Chair until 2.30 pm to allow Mr Corbett to attend.

28 *LC Minutes* (2/5/1995) 6.

the scrutineers. When a candidate has achieved a majority of votes of the members present, the result of the ballot is announced by the Clerk and the successful candidate is invited to take the Chair. When there are more than two nominees and no candidate gains a majority vote of the members present on the first ballot, the Clerk withdraws the name of the candidate with the smallest number of votes and conducts a second ballot. This continues until one member achieves a majority.

If there is an equality of votes, the votes are taken again and, if again there is an equality of votes, the Clerk determines by lot which of the candidates, having the same number of votes, will be withdrawn, as if that candidate had obtained the lesser number of votes. When conducting the lot, the names of the two candidates are placed in a hat and the Clerk draws out one name. The name drawn by the Clerk is the unsuccessful candidate and the member whose name is remaining in the hat is declared elected.

By repeatedly calling out his or her name, all members of the House call the President-elect to the chair. He or she is escorted from the benches and conducted to the Chair by the member who proposed that nomination and another supporter. The President-elect stands on the upper step of the dais and makes a short speech expressing gratitude. The President then takes the Chair. Some members, such as party leaders, may then make speeches of congratulations to the newly elected President, who expresses gratitude for the congratulatory remarks.

Following the election of the President, the Leader of the Government informs the House of the date and time at which the Council will proceed to Government House to present their President to the Governor. At that meeting, the President claims on behalf of the House the undoubted rights and privileges of the Council, particularly freedom of speech in debate.²⁹

Removal from office

Before 1991, the President only ceased to hold office when they ceased to be a member, they resigned in writing to the Governor or when they were removed from office by vote of the House.

On 20 April 1988 the Liberal/National Government, by a vote of the House, unsuccessfully sought to remove President Johnson, a member of the Labor Party, from office. On that occasion, contingent on the President having read the prayer and before proceeding to the calling of formal business, the Leader of the Government in the House moved a motion to remove the President from office. The Leader of the Opposition successfully amended the motion to express the House's highest respect for the President and for the impartial manner in which he discharged the duties of his office.³⁰

²⁹ See *LC Debates* (24/4/1934) 6. More recently, see *LC Minutes* (8/5/2003) 72, (27/9/2007) 253.

³⁰ *LC Minutes* (28/4/1988) 22-23.

In 1991 a second attempt to remove President Johnson from office was successful. On 3 July 1991, following a periodic Council election in May, the Liberal/National Party Government again moved a motion for the removal of the President from office. An opposition amendment to substitute an alternative proposition expressing the highest respect for President Johnson was further amended by the Government so that, while the House expressed its highest respect for the President and the impartial manner in which he discharged his duties, he was nonetheless removed from office to allow the House to elect a new President following the recent general election. Mr Willis (Liberal Party) and Mr Johnson were both then nominated as candidates for the vacant office and Mr Willis was elected.³¹

The *Constitution (Legislative Council) Further Amendment Act 1991* subsequently amended section 22G of the *Constitution Act 1902* to require an election for the office of President following each periodic Council election.

Deputy President and Chair of Committees

Origins of the position

The development of committee of the whole in large measure dates back to the House of Commons in the 16th and 17th centuries. The concept of committee of the whole developed in part out of the growing view that no members should be excluded from committee proceedings on certain kinds of business. From 1610, the Speaker in the Commons retired from the House during committee proceedings. There are two views about why this development occurred. The first suggests that, as the Speaker was at this time expected to look after the interests of the King in the Commons, his removal during committee was necessary to secure greater freedom of debate. However, this has been questioned on the grounds that it ignores the fact that the Speaker, like any other member, was entitled to attend debates in committee of the whole and to vote if he wished. As such the second view suggests that it was simply the less formal procedures of the committee which prompted the Speaker's removal as presiding officer during committee proceedings in the House.³²

Role and functions

Section 22G(7) of the *Constitution Act 1902* provides that the Chair of Committees shall act in the place of the President in his or her absence from the House, and may exercise and perform all the powers, authorities, duties and functions of the President.³³ This is the only reference to the Chair of Committees in the

31 *LC Minutes* (3/7/1991) 32-34.

32 Pettifer JA, *House of Representatives Practice*, 1st edn, Australian Government Publishing Service, Canberra, 1981, p 228.

33 When the President is absent from the State, and the Chair of Committees is acting in the President's place under s 22G(7), the Chair of Committees must take the Chair as Acting President whenever present in the House.

Constitution Act. The Chair of Committees is also the Deputy President of the Council,³⁴ although there is no reference to a Deputy President of the Council in the *Constitution Act*. However, the standing orders do refer to the position of Deputy President, and the office holder is referred to as Deputy President when presiding over the House in the absence of the President.

As indicated, when presiding in the House, the Deputy President exercises the same authority and has the same duties and powers as the President. As Chair of Committees, the Chair presides over all committees of the whole House, taking the Chair between the Clerk and the Deputy Clerk at the table of the House, and is responsible for the committee stage of bills and other matters referred to the committee of the whole House. If the Chair wishes to leave the Chair in committee, any Temporary Chair may take the Chair and, if no Temporary Chair is present, the Chair may appoint any other member to take the Chair (SO 174).

The Chair is the sole judge in all matters arising in committee and may direct a member to discontinue speaking for continued irrelevance or tedious repetition, name a member for disorderly conduct, order the removal of a member repeatedly called to order and order the withdrawal of strangers in committee. However, there are certain restrictions on the authority of the Chair of Committees when presiding over a committee of the whole House. In the case of disorderly behaviour by a member in the committee, the Chair may not take action but must report the fact to the House, which then takes the matter into consideration (SO 175). Also, if there is objection (dissent) from a ruling by the Chair of Committees, the Committee may decide that the objection must be reported to the President in the House, who then makes a ruling on the matter (SO 178). There are certain precedents where the Chair automatically reports to the House, but standing order 177 provides that resolutions reported to the House may be either agreed to or disagreed to.

The Chair reports to the House all matters referred to the committee, and no bill which has been considered in committee of the whole can be read a third time without a certificate from the Chair that the bill is in accordance with the bill as reported from the committee. As with the President in the House, in committee of the whole the Chair exercises a casting vote only, and any reasons stated by the Chair when giving a casting vote may be entered in the proceedings of the committee (SOs 116, 119 and 173(7)).

As amendments to bills can only be made during committee of the whole, it is the responsibility of the Chair to ensure that all amendments are relevant to the bill under consideration, and do not reverse the principle of the bill as read a second time. Clerical and typographical errors in a bill may be corrected by the Chair of Committees or the Clerk (SO 150).

34 See the *Parliamentary Remuneration Amendment (Miscellaneous Offices) Regulation 2007*, which changed the title of the Chair of Committees to Deputy President and Chair of Committees; *Government Gazette*, No 46/2007, 16 November 2007, pp 8511-8513.

When not occupying the chair, the extent to which the Chair participates in debates or other proceedings of the House is a matter for the member holding the office to determine.

The Deputy President is also an *ex officio* member of the Procedure Committee (SO 205(3)).

Under standing order 19, the Chair of Committees and any Temporary Chair of Committees may be referred to as Chairperson, Chairman or Chairwoman.

Election

Unlike the election of the President, there is no reference in the *Constitution Act 1902* to the election of the Deputy President and Chair of Committees. The conduct of the election is governed by standing order 15.

The Deputy President and Chair of Committees is elected at the commencement of sittings following each periodic Council election and whenever a vacancy occurs.³⁵ The election is conducted by ballot according to the rules for the election of the President, except that the President conducts the election, and where there is an equality of votes, exercises a casting vote (SO 15(2)).³⁶ The Deputy President holds office for the life of the Parliament in which elected and until a successor is elected (SO 16). However, if the Deputy President's term of service as a member expires under section 22B(2) of the *Constitution Act 1902*, they cease to hold the office of Deputy President.

Removal from office

On 6 March 1969, the Hon Reg Downing, Leader of the Opposition in the Council, moved a motion on notice for the removal from office of the Hon Stanley Eskill, Chairman of Committees. Following a lengthy and personal debate, the motion was carried.³⁷ The reason given by Mr Downing was that 'the Honourable member no longer holds the confidence of other members of this chamber'. Mr Eskill at the time was facing possible criminal charges concerning allegations of giving false evidence in his divorce case. On 11 March 1969 the Government gave notice of a motion to appoint the Hon Thomas McKay as Chairman. When the motion was moved the following day the opposition unsuccessfully sought to amend the motion to substitute the name of the Hon Ernest Wright for Chairman. Mr McKay was subsequently elected.³⁸

In 1988 when the Coalition assumed Government, the balance of power passed to the cross-benches for the first time. With the support of the cross-bench members,

35 See, for example, *LC Minutes* (30/4/2003) 48-49, (8/5/2007) 7.

36 The procedure is different to the former practice of appointing the Deputy President and Chair of Committees by motion. See, for example, *LC Minutes* (11/5/1999) 34.

37 *LC Minutes* (6/3/1969) 369.

38 *LC Minutes* (12/3/1969) 386.

the Labor opposition successfully amended the government's motion to elect the Hon Max Willis as Chairman, to substitute the Hon Sir Adrian Solomons. Both Mr Willis (Liberal) and Sir Adrian Solomons (National Party) were members of the Coalition.³⁹

In 1967⁴⁰ and 1968⁴¹ two notices were given for the appointment of different members as Chairman of Committees. In both instances the procedure followed was that the two motions were submitted at the same time, with the questions on the motions put in the order in which they appeared on the Notice Paper.

Assistant President

On 28 June 2007, the Council adopted a sessional order with continuing effect for the House to elect a member to be Assistant President to hold office during the life of the Parliament in which elected.⁴²

The Assistant President is elected in a similar manner as the President. In the absence of the President and Deputy President on a day the House is sitting, the Assistant President will perform the duties of the President.

Temporary Chairs

At the beginning of each session, the President nominates a panel of not less than three members to be Temporary Chairs of Committees (SO 18).⁴³ They act for the President, the Deputy President and Chair of Committees and the Assistant President on a temporary basis whenever required. Any one of the Temporary Chairs may be called to take the chair in the absence of the President, Deputy President and Assistant President. When presiding over the House or committee of the whole, a Temporary Chair is referred to as Deputy President or Deputy Chair respectively, and exercises the full authority of the President or the Deputy President and Chair of Committees (SO 17(1)).

Ministers

Section 35 of the *Constitution Act 1902* provides for the appointment of the Premier and ministers of the Crown by the Governor from amongst the members of the Executive Council.

³⁹ *LC Minutes* (28/4/1988) 23-25.

⁴⁰ *LC Minutes* (1/8/1967) 19, (2/8/1967) 24.

⁴¹ *LC Minutes* (26/3/1968) 16, (28/3/1968) 23.

⁴² *LC Minutes* (28/6/2007) 197. The sessional order originally referred to the position of Assistant Deputy President rather than Assistant President. On 28 November 2007, following the gazettal of the *Parliamentary Remuneration Amendment (Miscellaneous Offices) Regulation 2007*, which referred to the Assistant President rather than Assistant Deputy President, the House passed a motion to change the name of the Assistant Deputy President to Assistant President. See *LC Minutes* (28/11/2007) 376.

⁴³ See, for example, *LC Minutes* (12/5/1999).

For many years, there was a limitation on the number of ministers that could be appointed by the Governor. This restriction initially applied under the Second Schedule to the *Constitution Act 1902*, repealed in 1987,⁴⁴ and subsequently under section 35F, which provided that the 'number of persons who may hold office as Ministers of the Crown shall not exceed 20 at any one time'. Section 35F was repealed in 1997,⁴⁵ since when there has been no restriction on the number of ministers.

There is no requirement for a member of the Executive Council to be a member of Parliament, although to date no one has been appointed to the Ministry who has not been a member of either the Council or the Assembly. In *Egan v Willis* in the New South Wales Court of Appeal, it was noted by Gleeson CJ that it is a 'conventional requirement' that ministers be chosen from amongst the members of one or other of the Houses of Parliament.⁴⁶ In practice, ministers are appointed on the advice of the Premier and continue to hold office until they resign or, in some cases, a new minister is sworn in. Following a general election there have been instances where ministers have continued to hold office after they have retired from Parliament and until a successor has been appointed.⁴⁷

In New South Wales all ministers are members of Cabinet. Cabinet is the name given to a meeting of the ministers, although Cabinet itself has no legal status.

Each minister has such powers as are vested in the office under those Acts administered by them, as allocated by the Premier and approved by the Governor and notified in the Gazette. Seniority of ministers is determined by the order in which the ministers are called by the Governor to take the oath of office.⁴⁸ The portfolios themselves do not carry seniority.

Traditionally the Premier is a member of the Assembly. This is based on the convention that, since governments are formed by the party which commands a majority in the lower House the Premier, as the leader of the government, should reside in that House. In the British Parliament, Prime Ministers since 1902 have been elected from, and resided in, the House of Commons.⁴⁹ Sir Ivor Jennings argues that the British Prime Minister should always reside in the House of Commons because government is formed and dissolved there:

The Government owes a responsibility to the House of Commons alone.
The composition of that House determines the nature of the Government.
A vote in that House can compel the Government either to resign or to

44 See the *Constitution (Amendment) Act 1987*.

45 See the *Constitution and Parliamentary Electorates and Elections Amendment Act 1997*.

46 (1996) 40 NSWLR 650 at 660.

47 For example, the Hon Ian Causley was a Minister in the Fahey Government until 4 April 1995, following the defeat of the government in the March 1995 election.

48 The authority for the determination of seniority is found in clause IV of the Instructions to the Governor; see Rose LJ, *The Framework of Government in New South Wales*, Government Printer, Sydney, 1972, p 74.

49 Jennings I, *Cabinet Government*, 3rd edn, Cambridge University Press, 1959, p 23.

advise a dissolution ... It is, in practice, essential that the Prime Minister should have his finger on the pulse of Parliament; and that is in the House of Commons. The most important reason is, however, that the Opposition would insist on having the Prime Minister in that House in order that he could be cross-examined and criticised. He, in his turn, would want to be in that House in order that he might defend himself and his Government in the forum in which he was most strongly attacked.⁵⁰

There have, however, been instances of a Premier or Leader of the Government sitting in the Council. The first was in 1884 when William Bede Dalley, Attorney General in the Council, was also appointed as Acting Colonial Secretary (the former title for Premier) from 7 October 1884 to 11 May 1885 during the illness of the Colonial Secretary. For two brief periods in 1904 the Hon Bernhard Wise was Acting Premier in the Council. More recently, on 4 July 1986, following the resignation of the Hon Neville Wran as Premier, the Hon Barry Unsworth, the then Leader of the Government in the Council and Minister for Health and Vice President of the Executive Council, was appointed as Premier. He resigned as a member of the Council on 15 July 1986 and successfully sought election to the Assembly at a by-election for the seat of Rockdale in August that same year. However, there was no legal or constitutional requirement for him to do so in order to remain as Premier.

There is also no constitutional requirement for any ministers to be members of the Council. However, since the advent of responsible government in New South Wales, there has always been a representative of the executive government, in the person of the Vice President of the Executive Council, in the Council, although there have been a few occasions when there have been no ministers appointed from the House. In recent times a significant number of ministers have been members of the Council.⁵¹ The presence of a minister in the Council is discussed in more detail in Chapter 8 (Conduct of Proceedings).

The standing orders give ministers certain exclusive powers concerning the management of government business in the House. Ministers may:

- arrange the order of their notices of motions and orders of the day on the Notice Paper (SO 43);
- move a motion connected with the conduct of government business at any time without notice (SO 37);
- declare bills urgent (SO 138);
- make statements regarding government policy (SO 48);
- table and publish documents (SO 55);
- reply to matters raised on the adjournment at a previous sitting (SO 33);
- move the adjournment of the House at any time (SO 31).

⁵⁰ *Ibid*, p 24.

⁵¹ The number of ministers in the Council reached seven in 2003 with the opening of the 53rd Parliament on 29 April 2003. See *LC Minutes* (29/4/2003) 15-17.

However, there are certain restrictions placed on ministers in the Council. They may not move the closure of debate (SO 99), and any document relating to public affairs quoted by a minister may be ordered to be laid on the table, unless the minister states that the document is of a confidential nature or should more properly be obtained by order (SO 56(1)).⁵²

Ministers in the Council represent one or more ministers who are members of the Assembly for the purposes of answering questions without notice, tabling documents and taking charge of bills. These ministerial arrangements are notified to the House by the Leader of the Government at the commencement of a session following a periodic Council election and whenever changes occur in the Ministry.⁵³

Any minister who is a member of the Assembly may, at any time, on motion agreed to by the Council under section 38A of the *Constitution Act 1902*, sit in the Council for the purpose of explaining the provisions of any bill relating to or connected with the department administered by that minister. While the minister may take part in debate or discussions, they may not vote. This has happened only once in the Council when in 1990 the Hon John Fahey, as Minister for Industrial Relations and Employment, sat in the Council during debate in committee of the whole on the Industrial Relations Bill and cognate bills.⁵⁴

Assistant ministers

The Governor may appoint a minister or ministers to assist a minister with primary responsibility for a particular portfolio. For example, following the March 2007 general election and periodic Council election, the Governor appointed a Minister Assisting the Minister for Finance, a Minister Assisting the Minister for Health (Mental Health), a Minister Assisting the Minister for Health (Cancer), a Minister Assisting the Minister for Climate Change, Environment and Water (Environment) and a Minister Assisting the Premier on Citizenship.⁵⁵

There is no restriction on the number of ministers who may be appointed to administer a government department. As was observed by Gleeson CJ in *Re Patterson; Ex parte Taylor*, 'the concept of responsible government does not require that there be only one person answerable to Parliament for the administration of a Department'.⁵⁶

The appointment of assistant ministers dates back to the appointment of the first Greiner Ministry on 27 April 1988.⁵⁷ There is no reference to assistant ministers in the *Constitution Act 1902* or the standing orders.

52 See, for example, *LC Minutes* (7/9/2006) 185-186.

53 *LC Minutes* (9/5/2007) 19-20.

54 *LC Minutes* (4/6/1990) 275, on motion of the Hon Elizabeth Kirkby, Australian Democrats. The committee proceedings lasted over 10 days from 23 August to 20 September 1990 during which 484 amendments were made to the Industrial Relations Bill.

55 *LC Minutes* (9/5/2007) 17-18.

56 (2001) 207 CLR 391 at [17] per Gleeson CJ.

57 *LC Minutes* (27/4/1988) 11-12.

The appointment of assistant ministers with responsibility for a certain part of a portfolio raises the issue of whether questions concerning the assistant minister's responsibilities should be directed to the principal minister or the assistant minister. For example, should questions concerning mental health be addressed to the Minister for Health or the Minister Assisting the Minister for Health (Mental Health)?

The practice in the House has been that questions may be directed to either the principal minister or the assistant minister as the member asking the question thinks fit, but that the principal minister can refer a question to an assistant minister if the matter falls within the particular responsibilities of the assistant minister.⁵⁸ Assistant ministers who are asked a question in relation to their particular responsibilities may respond directly to the question.⁵⁹ However, assistant ministers should be asked questions only in relation to their particular portfolio responsibilities. They should not be asked a question ranging across a whole portfolio in the manner that a principal minister may be asked.⁶⁰

Parliamentary secretaries

Parliamentary secretaries are appointed by the Premier under section 38B of the *Constitution Act 1902*. They must be a member of one or other of the Houses of Parliament. Their functions are determined from time to time by the Premier, although under section 38C they may not perform functions reserved for a minister or Executive Council member under any Act, instrument or other law. Parliamentary secretaries are appointed to undertake the sorts of tasks which may be delegated without affecting the essential responsibility and authority of a minister. These include such things as the answering of correspondence, dealing with delegations, assisting with written replies to questions and helping with the passage of legislation through the Parliament. The office lacks formal responsibility and authority, but is part of the executive government.

A parliamentary secretary may act as a minister in the House in all respects, except in relation to answering questions with and without notice (SO 25). A sessional order adopted on 22 June 2005 also prevented a parliamentary secretary from speaking on a motion for adjournment under standing order 31(4)(a).⁶¹ This sessional order has not been readopted.

58 See, for example, *LC Hansard* (30/8/2006) 1095.

59 See, for example, *LC Hansard* (25/2/2004) 6496.

60 McGee D, *Parliamentary Practice in New Zealand*, 3rd edn, Dunmore Publishing, Wellington, 2005, p 558.

61 *LC Minutes* (22/6/2005) 1487. Standing order 31(4)(a) provides that the motion for the adjournment to terminate a sitting will be put no later than 30 minutes after the motion has been moved or, when a minister wishes to speak or is then speaking, at the conclusion of the minister's remarks.

Party leaders

Party leaders in the Council are only recognised where there are two or more members of the party represented in the House (SO 26).⁶² Both the Leader of the Government and the Leader of the Opposition are *ex officio* members of the Procedure Committee (SO 205(3)) and may nominate their respective members to serve on Council committees (SO 210). The Leader of the Opposition, or their nominee, also has the right to respond to ministerial statements in the House (SO 48(2)).

Party whips

The term ‘whip’, an abbreviation of ‘whipper-in’, derives from the 18th century vocabulary of fox-hunting, where a whipper-in kept the hounds from straying from the pack.⁶³

The whips are responsible for liaising with ministers regarding the business of the House, for securing the attendance of members in the chamber, for arranging speakers for debates, for arranging ‘pairs’ and generally for acting as intermediaries between the party leaders in the House and backbench members.

THE DEPARTMENT OF THE LEGISLATIVE COUNCIL

The Clerk

The administrative head of the Department of the Legislative Council is the Clerk of the Parliaments who also has the title of Clerk of the Legislative Council. The Clerk is responsible to the President of the Council for the efficient and effective administration of the department. The Clerk provides expert advice on the proceedings of the Council to the President, Deputy President, ministers and members of the Council and committees on parliamentary law, practice and procedure. As Chief Executive Officer, the Clerk manages Parliament House and everything within its precincts separately or jointly with the Clerk of the Assembly.

The Clerk is appointed by the Governor by letters patent, on the recommendation of the President to the Premier.

In the House, the Clerk sits at the table of the Council on the President’s right. The Clerk is responsible for calling each item of business as it is reached and keeps watch generally over the conduct of business. The Clerk is also responsible for the preparation and publication of the Minutes of Proceedings, Notice Paper and Questions and Answers Paper (SO 49). The Clerk has custody of the journals, records and documents tabled in the House and they may only be taken from the office of the Clerk by resolution of the House (SO 50). The Clerk also ensures that

62 This was first adopted as a sessional order on 17 September 1997. See *LC Minutes* (17/9/1997) 38.

63 Wilding and Laundry, above n 5, p 603.

a Hansard record is kept of debates in the House (SO 51). Orders for the production of documents are also signed by the Clerk (SO 52).

Whenever the office of President becomes vacant, the Clerk acts as Chair of the House for the election of the President and has the powers of the President under the standing orders when so acting (SO 12).

The Clerk also certifies bills sent to the Assembly (SO 151) or returned to the Assembly, with or without amendment (SO 155). A bill originated in the Council which has finally passed both Houses is certified by the Clerk before presentation to the Governor for assent (SO 160).

The title 'Clerk of the Parliaments' was first conferred on the Clerk of the Legislative Council by the Governor on 15 February 1864. The Government Gazette the following day announced:

His Excellency the Governor, with the Advice of the Executive Council, has been pleased to direct that the Clerk of the Legislative Council shall henceforth be also officially styled and use the designation of 'Clerk of the Parliaments'.

The conferring of the title was a 'Constitutional analogy'. The Clerk of the House of Lords is also styled Clerk of the Parliaments, a position which carries certain distinct duties, especially in relation to Acts of Parliament. It appears that, when the office of Clerk of the Legislative Council was first created, those responsible were under the mistaken impression that there were two distinct offices of the Clerk of the Parliaments and the Clerk of the House of Lords. When the mistake was eventually realised, it was determined appropriate that the title Clerk of the Parliaments be also conferred on the Clerk of the Legislative Council. There have been a number of unsuccessful attempts, initiated by various Speakers of the Assembly, to have the title abolished, although to do so would require the amendment of various statutes.

The role and functions of the Department

The Department of the Legislative Council provides procedural, administrative and other support services to assist the members of the Council in performing their parliamentary duties, including their work within the House, on various committees and within the community.

Under the Council's charter, the three principal program areas of the department are procedure, committees and corporate support. Services provided within these program areas fall within the broad categories of advisory and procedural services, administrative and support services, and corporate management:

- Advisory and procedural services include provision of advice to members on parliamentary practice and procedure, preparation of documentation for use in the House and production of records of proceedings of the House and its committees.

- Administrative and support services include provision of support staff and equipment for members, administration of members' salaries, allowances and entitlements, provision of advice and staff to committees and effective delivery of other services available to members both within and outside the parliamentary building.
- Corporate management services include corporate/strategic management, budget development, monitoring and reporting, personnel and training, industrial/employee relations and the provision of consultancy type services relating to all these functions to the Parliamentary Joint Service Departments.

The department is accountable to the President. The department is also independent of the New South Wales public service, although many public sector policies and practices are adapted or followed by the department.

A key challenge in this context is to ensure that the constitutional independence of the House is not compromised or made subservient by reasons of administrative or budgetary arrangements, including the provision of resources by the executive government. Further challenges arise from the bicameral nature of the Parliament, which cannot readily be compared to an executive government department with a central administrative structure supporting a single minister.

Additional factors affecting the administration of the House include the elective nature of its membership, which has produced increasing diversity in membership of the House in recent years. Broader societal factors affecting government as a whole also play a role, including increasing expectations that government intervention is appropriate to address issues of community concern resulting in higher volumes of legislation and regulations dealt with by the House, the increasing complexity of public policy issues impacting on committees of the House in particular, and changing community expectations concerning consultation, accountability and involvement in the processes of government.

Council appropriations

With the introduction of program budgeting in 1984, the budget estimates for the Parliament were set out in several program areas for which a single appropriation was made in the annual appropriation bill. There were two programs for the Council within the parliamentary government program area: parliamentary representation, which included members' salaries, entitlements and staffing; and operations, which included the Clerk and administrative staff supporting the operations of the Council. Committees were included in another program area of special services.

Until 1993 the practice had been to include appropriations for the Parliament in the annual appropriation bill for the recurrent services and capital works of the Government. This practice changed in 1993 when appropriations for the

Parliament were contained in a separate parliamentary appropriation bill, which was cognate with the general appropriation bill.

In 1996, an amendment was moved by the opposition to the Appropriation (Parliament) Bill 1996, for an additional amount for a President's Contingency Fund for Committees.⁶⁴ This was the first instance where a suggested amendment had been moved to a money bill. The amendment was rejected by the Assembly and the bill sent to the Governor for assent under section 5A of the *Constitution Act 1902*. The Auditor-General subsequently sought advice from the Crown Solicitor on whether section 5A was applicable to an Appropriation Bill for the Legislature. The Crown Solicitor concluded that the bill was properly passed under section 5A.⁶⁵

The Appropriation (Parliament) Bill 1999 saw further changes to the budget estimates for the Parliament with a reduction to two program areas: Parliamentary Government, covering the sub-programs of the Council and the Assembly, and Parliamentary Support Services. The Council program now includes Council committee expenditure.

Proposals for reform of the administration of Parliament

The early 1990s saw a number of proposals for far-reaching structural reforms to the management of the Parliament, which were not, however, ultimately put into effect.

The process began in 1991 when the Greiner Coalition Government entered a memorandum of understanding, commonly known as the Charter of Reform, which was signed on 31 October 1991 by Premier Greiner and three non-aligned independents in the Assembly.⁶⁶ The agreement set out a number of elements for constitutional and parliamentary reform, including the creation of a Management Board for the Parliament to 'determine all matters pertaining to the running and finances of the Parliament subject to the Budget'.⁶⁷ Underpinning the agreement was a commitment by the then Premier to 'shift the balance of power and accountability between the Executive Government ... and members of the Legislature', including by establishing a system which would give greater control to members over their own institution.⁶⁸

Following that agreement, in March 1992, the Government published a report entitled *Managing the Parliament*, prepared by a government Minister, the Hon Tim Moore, and a senior Cabinet official, Mr Roger Wilkins, which included wide-ranging recommendations for reform. The most significant of these related to the

64 *LC Minutes* (26/6/1996) 275.

65 *Auditor-General's Report to Parliament 1996*, volume 2, pp 430-441.

66 *LA Debates* (31/10/1991) 4004-4038 contains a copy of the Memorandum of Understanding.

67 Memorandum of understanding between the Hon Nick Greiner MP, Premier, and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP (non-aligned independent members of the Legislative Assembly), 1991, p 3, 1(ii).

68 The Hon Nick Greiner, 'Managing the Parliament', March 1992.

establishment of a Parliament Commission and a new departmental structure for the Parliament. The Commission was to consist of 14 members of Parliament drawn equally from each House and chaired by the Speaker of the Legislative Assembly, with the President of the Legislative Council as Deputy Chair. Three departments were to service the Commission comprising the office of the Clerk of each House and a new single department for the provision of joint services. Each House department was to be managed by a management board comprising the members of the relevant House on the Parliament Commission. The joint department was to be managed by a chief executive officer reporting directly to the Commission.

To give effect to the Report's recommendations, the Government introduced the Parliament Management Bill 1992 and a cognate bill, the Parliamentary Remuneration (Amendment) Bill 1992. The Parliament Management Bill was subsequently referred to a joint parliamentary committee which reported in November 1992.⁶⁹

The Committee noted that concerns had been raised in relation to the Moore/Wilkins Report and the resulting provisions of the bill, including lack of consultation with the Presiding Officers and Clerks, undue complexity of the recommended arrangements, and the proposal of a management structure which would have subordinated the administration of the Council to that of the Assembly.⁷⁰ In light of such concerns, the Committee recommended that the bill be withdrawn. However, the Committee expressed support for the establishment of a new management body to improve the management of the Parliament and increase the involvement of members, and outlined certain features of such a body which it considered would be desirable. A majority of the Committee favoured the establishment of the management body by non-legislative means but the Committee referred that particular question to the Parliament.

On 2 December 1994 the Assembly passed a resolution providing for the establishment of a joint standing committee to be known as the 'Parliamentary Management Board'. The same resolution was passed by the Council on 5 December 1994, the final sitting day of the Parliament. However, the members of the committee were not appointed and the Committee ceased to exist at the expiration of the Parliament. Following the change in Government at the election, the proposal was not revisited.

OTHER DEPARTMENTS

The department of the Legislative Council is one of several departments and sections which provide services to members of the Parliament. The other departments are:

69 'Report of the Joint Select Committee on the Management of the Parliament', Parliamentary Paper 242/1992, November 1992; see also *LC Minutes* (26/11/1992) 476.

70 'Report of the Joint Select Committee', above n 69, pp 8-10.

- the Department of the Legislative Assembly, which provides procedural, administrative and other support services for members of the Assembly;
- the Department of the Parliamentary Library, which provides library, reference and research services to members;
- the Department of the Parliamentary Reporting Staff (Hansard), which provides transcripts of proceedings of both Houses and their committees;
- the Department of Building Services, which provides building management and maintenance;
- the Department of Food and Beverages, which provides catering services to members, their guests and staff;
- Joint Services, which provide security, information technology, printing, archives, accounts and education services to both Houses.

The Department of the Legislative Assembly is accountable to the Speaker of the Assembly. All other departments and sections are accountable to the President and Speaker jointly.

OTHER BODIES

The Council works closely with a range of other bodies, including Parliamentary Counsel, the Independent Commission Against Corruption, the Crown Solicitor, the Parliamentary Remuneration Tribunal, the Auditor-General and a number of independent legal advisers, as outlined below. The role of the Ethics Adviser was discussed in the Chapter 5 (Members).

Parliamentary Counsel

The principal role of the Parliamentary Counsel is to provide the Government with a comprehensive and integrated range of high quality services for the drafting and development of legislation, as well as the publication of legislation and the giving of advice and information about legislation.

The Parliamentary Counsel's Office is a vital link in the legislative process, working closely with Cabinet, Parliament and agencies to meet the parliamentary program. The subordinate legislation program follows a similar pattern. The office also works with other organisations to promote uniform legislation and plain language, and to further refine the content, appearance and availability of legislation. Since 1988, under an agreement with the government, Parliamentary Counsel also drafts bills and amendments for opposition and cross-bench members, as well as the executive government.

The Independent Commission Against Corruption

The ICAC exposes and minimises corruption involving the New South Wales public sector through investigation, corruption prevention and education. The

ICAC gathers information about suspected corrupt activities from public officials, the general public and from its own work. Heads of government departments are required by law to report to the ICAC any conduct they suspect may be corrupt. The Commission has significant powers under the *Independent Commission Against Corruption Act 1988* to gather information in relation to corruption involving the New South Wales public sector, local government and universities.

For the ICAC to have jurisdiction over a matter it must involve corrupt conduct as defined by the Act and it must involve a public official from the New South Wales public sector. A complaint must fall within jurisdiction if the ICAC is to consider it. A matter is not considered by the ICAC to be corrupt conduct unless it is one of the activities described in section 8 of the Act, and also meets the conditions described in section 9. These conditions are that the conduct could lead to the person or people involved being charged with a criminal offence or a disciplinary offence, or could constitute reasonable grounds for dismissing or otherwise terminating the services of a public official.

A significant limitation of the ICAC's powers was highlighted in 1992, when the Court of Appeal overturned an ICAC determination regarding corrupt conduct of members of Parliament.⁷¹ The decision revealed that, while the ICAC under section 9(1)(a) could investigate allegations which suggested that ministers or members had engaged in criminal activity, it was unable to investigate any matters under section 9(1)(b) or (c), since these did not relate to either ministers or members. The *ICAC Amendment Act 1994* was passed to overcome this limitation by expanding the definition of corrupt conduct to include, in the case of a minister or member of Parliament, a substantial breach of an applicable code of conduct. As noted in Chapter 5 (Members), Parliament first adopted a code of conduct for members in 1998.

The Crown Solicitor

The Crown Solicitor acts as solicitor for:

- the State of New South Wales;
- persons suing or being sued on behalf of the State;
- ministers of the Crown;
- a body established by a law of the State;
- an officer or employee of the Public Service or any other service of the State or of a body established by a law of the State;
- a person holding office under a law of the State or because of appointment to that office by the Governor or a minister of the Crown;
- any other person or body approved by the Attorney General.

71 *Greiner v ICAC* (1992) 28 NSWLR 125.

The Crown Solicitor's Office is engaged by government agencies to perform core legal work in respect of matters which:

- have implications for Government beyond an individual minister's portfolio;
- involve the constitutional powers and privileges of the State and/or the Commonwealth;
- raise issues which are fundamental to the responsibilities of Government;
- arise from, or relate to, matters falling within the Attorney General's area of responsibility.

From time to time the Crown Solicitor is asked by the Clerk to provide opinions on legal issues arising in the Council.

Independent legal advisers

From time to time the Council has been required to engage independent legal advisers. This has been the case when the Council has required legal assistance or representation in relation to matters involving the government, which as a matter of course retains the services of the Crown Solicitor. The Standing Committee on Parliamentary Privilege also retained the services of an independent legal adviser in relation to its inquiry into the conduct of the Hon Franca Arena in 1997 and 1998, cited in Chapter 3 (Privilege).

The Parliamentary Remuneration Tribunal

Under the *Parliamentary Remuneration Act 1989*, the Parliamentary Remuneration Tribunal consists of a judicial member or retired judicial member of the Industrial Relations Commission appointed by the President of the Commission on a part-time basis. The functions of the Tribunal are to make determinations of additional entitlements that are to be available to members and recognised office holders, and to approve proposed amendments to the *Parliamentary Contributory Superannuation Act 1971*.

The Auditor-General

The New South Wales Auditor-General is responsible for audits and related services under the *Public Finance and Audit Act 1983* and various other New South Wales Acts, as well as the *Corporations Act 2001* (Cth). The Auditor-General also provides certain assurance services in respect of Commonwealth grants and payments to the State under Commonwealth legislation.

The Auditor-General reports directly to Parliament. The Audit Office has key roles in performing financial and performance audits.

The Office also examines protected disclosures – allegations of serious and substantial waste of public money under the *Protected Disclosures Act 1994*. This Act protects public officers, including parliamentary officials, when they identify maladministration, corruption, or serious and substantial waste.

Independent legal arbiters

Under standing order 52, claims of privilege may be made in relation to any documents ordered by the House to be produced. Such documents are available only to members of the Council, and may not be published or copied without an order of the House (SO 52(5)). Where a member disputes the validity of the claim of privilege in relation to a particular document or documents, the President appoints an independent legal arbiter to evaluate the claim of privilege and provide a written report as to the validity of the claim. Only Queen’s Counsel, Senior Counsel and retired Supreme Court judges may be appointed as independent legal arbiters (SO 52(6) and (7)).