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THE LEGISLATIVE ASSEMBLY, ITS ESTABLISHMENT, ROLE AND MEMBERSHIP

1.1 The *Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act) passed by the Commonwealth Parliament establishes the Australian Capital Territory (ACT)¹ as a body politic under the Crown.² Parts III and IV of the Act (sections 8 to 35) create the Legislative Assembly for the Australian Capital Territory and make a number of provisions in relation to the constitution of the Assembly, its procedures and powers. Part VIII sets out the broad principles that govern elections to the ACT Assembly.

1.2 The ACT executive, the government of the Territory, is established by Part V of the Self-Government Act. Part VII makes provisions relating to the finances of the ACT, notably that 'no public money of the Territory shall be issued or spent except as authorised by enactment'.³ Section 37 of the Self-Government Act sets out the general powers of the executive, principally the responsibility of governing the Territory with respect to matters listed in Schedule 4 of the Self-Government Act.⁴

1.3 The ACT Supreme Court already existed at the time of the granting of self-government. Part VA of the Self-Government Act defines the extent of its jurisdiction and makes provisions with regard to the retirement of judges of the Court. This part also provides for the establishment of a judicial commission and the removal of judicial officers.

POWERS OF THE LEGISLATIVE ASSEMBLY

1.4 The Legislative Assembly undertakes the basic functions of legislatures: making laws for the Territory, scrutinising the executive's administration of the Territory, and considering and legitimising revenue and expenditure proposals. The Assembly does not have the responsibility for governing the ACT. That lies with the executive.⁵ However, the executive is a product of the Assembly and accountable to it.

1.5 Key provisions of the Self-Government Act stipulate that:

- the Assembly is vested with the power to make laws for the peace, order and good government of the Territory;⁶
- the receipt, spending and control of the public money of the Territory is subject to laws enacted by the Assembly;
- the Chief Minister (head of the executive) is elected by the Assembly from among its own number;

1 Throughout this work the Australian Capital Territory is referred to as 'the Territory' or 'the ACT'.

2 *Australian Capital Territory (Self-Government) Act 1988*, section 7. The Australian Capital Territory (Self-Government) Bill was introduced in the House of Representatives (by the Minister for the Arts and Territories) on 19 October 1988 as part of a package of four bills introduced by the then government to establish self-government in the Territory. The other bills were the Australian Capital Territory (Electoral) Bill 1988 (the government's third attempt at introducing an electoral system for the Territory), the Australian Capital Territory (Planning and Land Management) Bill 1988 (aimed at establishing a framework for funding and administering national capital concerns separately from municipal and territorial concerns), and the A.C.T. Self-Government (Consequential Provisions) Bill 1988.

3 'Enactment' means a law made by the Assembly or certain specified Commonwealth Acts or other Acts in force in the Territory.

4 Schedule 4 is reproduced at Appendix 23.

5 Self-Government Act, sections 36-7.

6 Self-Government Act, section 22.

- other members of the executive (Ministers) are appointed by the Chief Minister from among the Members of the Assembly; and
- the executive is answerable to the Assembly.⁷

These powers are substantial and will be discussed in detail elsewhere in the *Companion*.

1.6 The Assembly is also empowered to make legislation regulating its own affairs, including:

- declaring the powers of the Assembly and of its Members and committees, but so that the powers so declared do not exceed the powers for the time being of the House of Representatives or of its Members or committees;⁸ and
- providing for the manner in which powers so declared may be exercised or upheld.⁹

1.7 The Assembly has not made such a law with respect to its non-legislative powers (including privileges and immunities). Thus, with two exceptions, its powers are the same as those of the House of Representatives, its Members and committees, including the key immunity of freedom of speech and the power to conduct inquiries by compelling the attendance of witnesses, the giving of evidence and the production of documents.¹⁰

CASUAL VACANCIES IN THE SENATE

1.8 The *Commonwealth Electoral Act 1918* imposes a particular duty upon the Assembly. If the place of a Senator for the Australian Capital Territory becomes vacant before the expiration of his or her term of service, the Assembly must choose a person to hold the place until the expiration of the term.¹¹ The precedents and procedures adopted by the Assembly are outlined at paragraphs 9.105 to 9.107.

POWER TO MAKE LAWS

1.9 With certain qualifications, the Assembly may make laws for the ACT, that power extending to the power to make laws with respect to the exercise of powers by the Australian Capital Territory executive.¹² Schedule 4 of the Self-Government Act lists those matters; they may be described as ‘domestic’ matters relating to the Territory, encompassing matters that are the direct responsibilities of both state governments and local governments elsewhere in Australia.

1.10 In introducing the Australian Capital Territory (Self-Government) Bill 1988 into the House of Representatives, the responsible Minister advised the House that the ACT would have the same legislative and executive powers as the states and the Northern Territory.¹³ Subsection 23(1) of the Self-Government Act sets out specific matters where

⁷ Self-Government Act, sections 40-1 and 48.

⁸ Self-Government Act, section 24.

⁹ Self-Government Act, section 24.

¹⁰ Self-Government Act, section 24. The powers do not include the power to imprison or fine a person. See also *House of Representatives Practice*, Chapter 19 and pp. 643-8, and *Odgers*, 12th edn, pp. 59-61.

¹¹ *Commonwealth Electoral Act 1918*, section 44.

¹² Self-Government Act, section 22.

¹³ H.R. Deb. (19.10.1988) 1923. Certain transitional provisions were put in place and the Commonwealth retained powers in relation to the establishment of courts, the provision of police services and the control of legal practitioners, companies and securities.

the Assembly has no powers to make laws¹⁴ and subsection 23(2) provides that the regulations may omit any of the paragraphs in subsection (1) or reduce the scope of any of those paragraphs.

1.11 Neither of these categories is closed. Since the enactment of the Self-Government Act the Commonwealth has used its powers both to extend and to limit the legislative and executive responsibilities of the Territory. Regulations have been made to exclude paragraphs 23(1)(g) and (h) of the Self-Government Act¹⁵ and to add matters to Schedule 4 of the Act extending the range of matters for which the ACT executive is responsible.¹⁶

1.12 The *Euthanasia Laws Act 1997* (Cwlth) was passed in response to Northern Territory legislation (*Rights of the Terminally Ill Act 1995*) legalising euthanasia in that jurisdiction. It declared the Northern Territory law void and amended the Self-Government Acts of the Northern Territory, the ACT and Norfolk Island, removing from their Assemblies the power to make certain laws with respect to euthanasia and mercy killing.¹⁷

1.13 The Euthanasia Laws Bill provoked considerable debate on two distinct grounds. The Senate Standing Committee for the Scrutiny of Bills, in its Fourth Report of 1997 argued that:

The Commonwealth Parliament having given the Legislative Assembly of each Territory the power 'to make laws for the peace, order and good government' of each Territory, would, by this bill, negate the valid exercise of that legislative power by one of them, and by doing so ... creates a situation where some Australians are treated in a way different from other citizens because it curtails their present right to self-government in circumstances where, were they to live in the States, it could not do so.

1.14 A further objection made by the Senate committee was that:

The Commonwealth Parliament, by this bill, proposes to intrude on the law-making function of the Territories not in accordance with a general principle but on an ad hoc basis. This threatens the certainty which ought exist for its citizens when any one or more of the Territories passes a valid law.¹⁸

1.15 The ACT Legislative Assembly identified itself with the views of the Senate committee, resolving on 25 September 1996 that:

... this Assembly endorses the findings of the Senate Standing Committee for the Scrutiny of Bills in relation to the Euthanasia Laws Bill 1996.¹⁹

14 Subject to this section, the Assembly has no power to make laws with respect to:

- (a) the acquisition of property otherwise than on just terms;
- (c) the provision by the Australian Federal Police of police services in relation to the Territory;
- (d) the raising or maintaining of any naval, military or air force;
- (e) the coining of money; and
- (g) the classification of materials for the purposes of censorship.

15 Australian Capital Territory (Self-Government) Regulations 1989, Statutory Rules 1989 No. 86 as amended—section 3A. These paragraphs referred to the admission and regulation of legal practitioners and companies, acquisitions and securities.

16 Australian Capital Territory (Self-Government) Regulations 1989. The matters added to Schedule 4 were 'Law and Order', 'Legal practitioners', 'Magistrates Court and Coroners Court' and 'Courts (other than the Magistrates Court and Coroners Court)'.

17 Sections 23(1A) and 23(1B) of the Self-Government Act (ACT).

18 Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 1997, 19 March 1997, pp. 59-60. This report also contains the response of the bill's proposer to the committee's comments.

19 Assembly Debates (25.9.1996) 3406-17. The resolution of the Assembly referred to preliminary comments made on the bill by the committee in its *Alert Digest* which were repeated in its final report quoted above.

1.16 The Assembly also supported a Remonstrance from the Northern Territory Legislative Assembly presented to the Speaker of the House of Representatives and the President of the Senate on 27 October 1996.²⁰

1.17 The power of the Commonwealth Parliament to pass the Euthanasia Laws Act was not questioned and neither the territories' nor the Senate committee's reservations persuaded the Parliament that the matter should be left to the territories' own legislatures. The concern remains that the Commonwealth Government can intervene to alter the legislative authority of a territory, not on a matter of general principle, but because of an objection to a specific measure passed by a territory legislature.

1.18 In this case it was not disputed that the Northern Territory Assembly had acted within its powers when it passed the *Rights of the Terminally Ill Act 1995*. This was distinct from the circumstances in which the Commonwealth in 2006 disallowed the ACT's *Civil Unions Act 2006* on the grounds that it was in conflict with Commonwealth legislation.

1.19 Section 28 of the Self-Government Act provides that an Assembly enactment²¹ is subordinate to laws of the Commonwealth in force in the Territory or instruments of a legislative character made under those laws. This means that a Territory enactment has no effect to the extent that it is inconsistent with a Commonwealth law. Subsection 35(2) of the Self-Government Act gives the Governor-General, acting on the advice of the Federal Executive Council—in practice the Commonwealth government of the day²²—the power to disallow an enactment of the Assembly.

1.20 As mentioned above, the power to disallow an enactment of the Legislative Assembly was, controversially, used in 2006 to disallow the ACT's *Civil Unions Act 2006*, apparently on the grounds of inconsistency with the Commonwealth's Marriage Act:

We have consistently said ... that we would indeed reserve our right to act on this matter if the ACT act, once enacted, continued to contravene, in our view, the clearly stated position in relation to marriage as defined by the *Commonwealth Marriage Act 1961*.²³

1.21 The law stated at subsection 5(2) that, 'A civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage.' The Act applied only to ACT legislation and did not purport to give couples who entered into a civil union rights under Commonwealth laws—for example, with regard to taxation or immigration.

1.22 The introduction of legislation on civil unions had been part of the platform of the recently elected ACT executive, representative of a party that was the first to command a majority in the Assembly in its own right, and was viewed by many as a valid exercise of the Assembly's legislative power. In response to the threat of disallowance, the Legislative Assembly unanimously adopted an Address to the Governor-General which noted the unusual position

20 A remonstrance is a petition making a declaration of grievances. On 27 October 1996 the Speaker, the Chief Minister and other Members supported the Speaker of the Northern Territory Legislative Assembly and the Chief Minister of the Northern Territory and their delegation in presenting the remonstrance to the President of the Senate and the Speaker of the House of Representatives. *Secretariat annual report 1996-97*, Part A, p. 4.

21 Section 3 (Interpretation) of the Self-Government Act defines an 'enactment' as meaning (a) a law (however described or entitled) made by the Assembly under the Self-Government Act; or (b) a law, or part of a law, that is an enactment because of section 34 (Certain laws converted into enactments) of the Self-Government Act. See also footnote 3.

22 See footnote 40 of Chapter 3: Elections and the electoral system.

23 Senator the Hon N Minchin, Minister for Finance and Administration, Sen. Deb. (15.6.2006) 19. The Minister also said, 'it is clear that the intent and purpose of that act is to equate a civil union with a marriage. In that sense we regarded it as repugnant', (Sen. Deb. (15.6.2006) 18), suggesting that the Commonwealth Government's objection was to the policy rather than any conflict with existing Commonwealth law.

of the Governor-General who 'neither represents the Crown in relation to the Australian Capital Territory nor acts on advice of the Executive of the Australian Capital Territory' and asserted that:

The *Civil Unions Act 2006* is a lawful exercise of the legislative power of the parliament of the Australian Capital Territory, made in pursuance of a political mandate given the parliament by the people of the Australian Capital Territory.²⁴

1.23 The Address went on to indicate that the ACT believed that the power to disallow was constrained by the conventions pertaining to intervention by the Crown in the legislative process and that the ACT stood 'ready to consider amending the Act in accordance with any recommendation made by the Governor-General under subsection 35(4) of the *Australian Capital Territory (Self-Government) Act 1988*.' Subsection 35(4) gives the Governor-General the power to make recommendations to the Legislative Assembly with regard to possible amendments to any enactment. No formal approach to the Territory under subsection 35(4) was made.²⁵

1.24 In the explanatory statement to the Instrument of Disallowance issued by authority of the Commonwealth Attorney-General it was argued that the Act passed by the Assembly:

... created a statutory scheme for the recognition of relationships which bore a marked similarity to the Commonwealth's scheme for the regulation of marriage. This legislation appeared to undermine marriage, attempted to circumvent the *Marriage Act 1961* (Cth), and may have created ambiguity between civil unions and marriages.

1.25 The statement claimed that the Commonwealth's action 'supports the fundamental institution of marriage' which would be 'undermined by any measures that elevate other relationships to the same or similar level of public recognition or status'.²⁶

1.26 The explanatory statement also took issue with the claims made in the Legislative Assembly's Address to the Governor-General, arguing that:

... the power of the Governor-General to disallow an enactment under section 35 of the Act is at large and is not constrained by the policy considerations set out in that Address. The ACT Self-Government Act specifies no conditions that need to be satisfied before the power to disallow an enactment may be exercised.²⁷

1.27 A subsequent bill, the Civil Partnerships Bill 2006, ostensibly drafted to overcome objections to the first Act, was introduced into the Assembly in late 2006 but not proceeded with in the Assembly after the Commonwealth's Attorney-General indicated that he would recommend to the Governor-General that it also be disallowed.²⁸ The bill passed the Assembly with amendments (that were in line with the Commonwealth Attorney-General's comments) on 9 May 2008.

²⁴ MoP 2004-08/738.

²⁵ MoP 2004-08/738-9. It should be noted that, in debate in the Senate, the Minister for Finance and Administration, Senator Minchin, stated that the Commonwealth 'gave the ACT every opportunity to restructure its Civil Unions Act to ensure that it did not contradict the Commonwealth's responsibility for and its definition of the institution of marriage.' (Sen. Deb. (14.9.2006) 80).

²⁶ Explanatory Statement, issued by the Authority of the Attorney-General for the Minister for Local Government, Territories and Roads, 13 June 2006.

²⁷ Explanatory Statement, issued by the Authority of the Attorney-General for the Minister for Local Government, Territories and Roads, 13 June 2006.

²⁸ Catherine Naylor, 'Feds quash second gay bill', *The Canberra Times*, 7 February 2007, p. 1.

1.28 In June 2006 a private Senator's bill was introduced in the Senate to amend the Self-Government Act to remove the power of the Governor-General to disallow Territory legislation. The Australian Capital Territory (Self-Government) Amendment (Disallowance Power of the Commonwealth) Bill 2006 sought to replace that power with a requirement that Territory legislation could only be overturned by an Act of the Commonwealth Parliament.

1.29 Senator Brown, in speaking to the bill, acknowledged that the Commonwealth had the power to override Territory legislation but argued that it was inappropriate that legislation properly made by a democratically elected legislature should be subject to disallowance by government fiat.²⁹ The bill was adjourned at the second reading in September 2006 and proceeded no further.

1.30 The histories of the Northern Territory's Rights of the Terminally Ill Act and of the ACT's Civil Unions Act are reminders that the powers vested in the territories are not entrenched 'constitutional' rights analogous to the powers of the Commonwealth and states.

1.31 The Commonwealth Minister for Finance and Administration made that clear during debate on a motion to disallow the instrument that disallowed the Civil Unions Act:

... the constitutional fact is that the territories are not states and that the territories are subject to the Commonwealth's authority, as set out clearly in section 122 of the Constitution ... We seek to grant a degree of autonomy to the territories but, at the end of the day, to the extent that territories, which are ultimately answerable to this Commonwealth, contravene positions of the Commonwealth then we have the obvious authority—and indeed in this case, in our strong view, the responsibility—to act.³⁰

1.32 Senator Ludwig, speaking on behalf of the Labor Party in the Senate, articulated an alternative position:

If self-government in the ACT is to have any meaning at all, it must mean that the ACT legislature can determine policy of this sort. It has no bearing on what happens outside the ACT and it has no bearing on the ACT's special role as the seat of the Commonwealth government. It will only affect the way certain relationships are treated within the Canberra community and under territory law. It has no further effect than that.³¹

1.33 Senator Ludwig noted the differences between marriage as described in the Commonwealth Marriage Act and civil unions as described in the ACT legislation. He argued that the two pieces of legislation were not in conflict and that the Commonwealth Government's objection was to the specific policy, not to the exercise of legislative authority by the Assembly.

1.34 In introducing the Self-Government Bill into the House of Representatives in 1988, the then Minister for the Arts and Territories asked what were assumed at the time to be rhetorical questions:

Are these people somehow different from other Australians? Are they second-class citizens in some way? Do they not understand, or have opinions on, the issues that confront them daily? Can they not be trusted with their own destiny?

29 Senator Bob Brown, Sen. Deb. (14.9.2006) 59-61.

30 Senator N Minchin, Sen. Deb. (15.6.2006) 19-20.

31 Senator J Ludwig, Sen. Deb. (15.6.2006) 21.

1.35 The Minister also stressed that the powers retained by the Commonwealth over the ACT were ‘instruments of last resort’.³² This suggests an intention to give the ACT a high degree of autonomy in dealing with its own affairs. Clearly the Minister’s questions remain to be answered and the real extent of self-government in the ACT remains subject to the fluctuations of the political process.

NON-INTERFERENCE WITH THE COMMONWEALTH PARLIAMENT

1.36 Section 29 of the Self-Government Act also gives each House of the Commonwealth Parliament the power to resolve that particular enactments or parts of an enactment of the Assembly do not apply to that House, to the Members of that House or within the parliamentary precincts. Such resolutions cannot operate retroactively and have effect as if the enactment was repealed by another enactment.³³

SIZE OF THE ASSEMBLY

1.37 Subsection 8(2) of the Self-Government Act states that the Assembly shall consist of 17 Members. This number may be varied by joint action of the Commonwealth and the Territory. The Assembly must pass a resolution requesting a change in the number of its Members but any such regulations would be made by the Governor-General acting with the advice of the Federal Executive Council. Such regulations would be laid before each House of the Commonwealth Parliament and be subject to scrutiny and the disallowance provisions set out in the Acts Interpretation Act of the Commonwealth.³⁴

1.38 Although the possibility of increasing the size of the Assembly has been mooted from time to time,³⁵ no proposed resolution to vary the number of Members in accordance with section 8 of the Self-Government Act has been considered by the Assembly.³⁶ It is relevant to note that should the Commonwealth devolve to the Assembly the power to legislate for the number of Members of the Assembly, any such legislation would be subject to the entrenching provisions adopted by the Assembly pursuant to the relevant section of the Self-Government Act.³⁷

32 Hon C Holding, Minister for the Arts and Territories, H.R. Deb. (19.10.1988) 1922.

33 Self-Government Act, section 29. The provision was inserted during Senate consideration of the self-government legislation, there having been concern within the Territory, within the Parliament and on behalf of some officers of the Parliament that the Assembly could inadvertently make laws that could detrimentally affect the functioning of the Commonwealth Parliament; domestic matters such as shopping hours and parking were referred to as examples—see Sen. Deb. (24.11.1988) 2817-8. This is clearly an issue of long standing. In 1714, as the House of Lords dealt with the Hanoverian succession, it nevertheless found time to direct the High Steward of the City of Westminster to ensure that no hackney coaches, carriages, drays or carts obstructed access to Parliament during its sittings—see House of Lords Journals, Vol 20, 9 August 1714.

34 Self-Government Act, sections 8 and 74; *Acts Interpretation Act 1901* (Cwth), sections 16A and 48.

35 See, for example resolution passed by the Assembly, MoP 2001-04/24-5. The resolution requested the Chief Minister to discuss with the Commonwealth Minister for Territories the possibility of amendments to the Self-Government Act to give the Assembly the power to determine the number of Members. The resolution also referred to the Standing Committee on Legal Affairs for inquiry and report the matter of the appropriateness of the size of the Legislative Assembly and options for changing the number of Members, electorates and other related matters. The number of Members of the Assembly is discussed in Chapter 3: Elections and the electoral system, paragraphs 3.36 to 3.46.

36 On 25 September 2002 the Chief Minister gave notice of a motion proposing to increase the number of Members from 17 to 25 and calling on the Chief Minister to communicate the resolution to the Commonwealth Government with a request that the necessary regulations be made. The notice was never called on and lapsed at the expiration of the Fifth Assembly. NP (26.9.2002) 476; NP (26.8.2004) 2631.

37 Section 26 of the Self-Government Act allows the Assembly to pass legislation prescribing restrictions on the manner and form of making particular enactments—entrenching laws. See Chapter 3: Elections and the electoral system, paragraphs 3.36 to 3.46 for further discussion of the application of this section to the number of Members of the Assembly.

CONDUCT OF PROCEEDINGS

1.39 Subject to the provisions of the Self-Government Act, the Assembly may make rules and orders with respect to the conduct of its business.³⁸ Standing orders were adopted by the Assembly on 11 May 1989 and have been amended from time to time since. The Assembly has also adopted temporary orders for specified periods and has adopted resolutions and orders to have effect for specified periods or to continue in force unless and until amended or repealed.

GOVERNOR-GENERAL

1.40 The Self-Government Act makes no provision for an Administrator or Governor of the ACT, who has powers analogous to the Northern Territory Administrator or state Governors.³⁹ However, the Governor-General of the Commonwealth retains significant powers with regard to the ACT.

1.41 The Self-Government Act makes provision for the Governor-General to dissolve the Assembly if, in the opinion of the Governor-General, the Assembly:

- is incapable of effectively performing its functions; or
- is conducting its affairs in a grossly improper manner.⁴⁰

This is the only provision for dissolution of the Assembly⁴¹ and, to date, the Assembly has never been dissolved.

1.42 In reaching the decision to dissolve the Assembly, the Governor-General would act on the advice of the Federal Executive Council. The Self-Government Act provides no guide as to the criteria to be applied in reaching the decision, other than the general grounds cited above. However, subsection 16(8) of the Self-Government Act does require the responsible Commonwealth Minister to publish a statement of reasons in the *Commonwealth Gazette*.⁴²

1.43 Where the Assembly is dissolved, the Self-Government Act makes provision requiring the Governor-General to appoint a commissioner and provides that the Governor-General may, at any time, give directions to the commissioner about the exercise of the powers of the executive. Subsections 16(4) to 16(6) of the Self-Government Act make a number of provisions concerning the appointment and exercise of power by the commissioner and his or her remuneration and allowances and term of office.

1.44 In addition, a general election for the Assembly must be held on a day specified by the Commonwealth Minister by notice published in the *Commonwealth Gazette*. The date of the general election for the Assembly must be between 36 and 90 days after the dissolution of the Assembly.

38 Self-Government Act, section 21.

39 Note that as a consequence of this the Territory does not have a process of assent to legislation by the Monarch or her representatives as is found in other Australian jurisdictions. The process of certification and notification of Acts is discussed in Chapter 11: Legislation, at paragraphs 11.114 to 11.119.

40 Self-Government Act, section 16. The Governor-General does not perform executive acts alone but does so 'in Council' (that is, acting on the advice of the Federal Executive Council (effectively the Federal Government) as required by section 63 of the Constitution; *House of Representatives Practice*, p. 13.

41 The Legislative Assembly currently has a fixed term of four years. See Term of the Assembly in Chapter 7: Sittings and adjournment of the Assembly, paragraphs 7.3 to 7.7.

42 Paragraph 16(8)(b) of the Self-Government Act also requires that the statement of reasons be laid before each House of the Federal Parliament within 15 sitting days of that House after the day of dissolution.

1.45 As discussed above, the Governor-General can also disallow an enactment or part thereof and recommend an amendment to an enactment of the Assembly.⁴³

1.46 Assembly standing orders make provision for Addresses to the Queen and to the Governor-General, an Address being a method traditionally employed by a legislature for making its desires, feelings and opinions known to the Crown.⁴⁴ Standing orders provide that whenever it is deemed proper to present an Address to Her Majesty or the Governor-General, a motion on notice stating the terms of an Address shall be moved. Addresses to Her Majesty shall be transmitted by the Speaker to the Governor-General to be forwarded for presentation. Addresses to the Governor-General are presented by the Speaker, and standing orders require that the response to any Address shall be reported by the Speaker to the Assembly.⁴⁵

1.47 Addresses to the Monarch tend to be largely formal—for example, the Address expressing condolences on the death of the Queen Mother.⁴⁶ Addresses may also deal with matters of substance relating to government matters relevant to the ACT or the Governor-General's exercise of powers under the Self-Government Act.

1.48 In August 1990 the Assembly requested that the Speaker 'address the Governor-General in the terms of' a resolution concerning the Commonwealth fixing, by regulation, an increase in the number of Ministers (in accordance with the then provisions of the Self-Government Act).⁴⁷ The Speaker, however, did not proceed as requested, advising the Assembly that, having considered the nature of the relationship between the Assembly and the Governor-General, he had concluded that:

... we do not have the same constitutional link between the Governor-General and the Assembly as there is between the Governor-General and the House of Representatives and the Senate, nor are there the same traditional ceremonial links.

I therefore propose not to proceed with the presentation of the address ... In conclusion, I understand that the Chief Minister will be conveying the terms of the resolution to the Commonwealth Government.⁴⁸

1.49 As discussed in paragraphs 1.22 to 1.26, the Legislative Assembly sent an Address to the Governor-General with regard to the possible disallowance of the *Civil Unions Act 2006*.

1.50 In communicating the views of the Assembly to the Commonwealth on matters for which the Commonwealth has constitutional responsibility, it may be considered more appropriate for the ACT executive, in response to a direction or request from the Assembly, to communicate directly with the relevant Minister—for example, the Minister responsible for the administration of the Self-Government Act.

1.51 On occasion the Legislative Assembly has had direct communication with the Commonwealth Parliament by an exchange of correspondence between the Presiding Officers. In 1992 the Commonwealth Parliament was considering amendments to the Self-Government Act. The Legislative Assembly adopted a resolution inviting the Commonwealth Parliament to

43 See Chapter 11: Legislation.

44 *House of Representatives Practice*, p. 324.

45 Standing orders 268-271.

46 MoP 2001-04/101. See also MoP 1995-97/61 (Condolences on the death of Diana, Princess of Wales); MoP 1995-97/831 (Response from the Royal Household to the Condolence Motion).

47 MoP 1989-91/286, 289.

48 Assembly Debates (20.9.1990) 3591.

make certain amendments to the Act (and consequential amendments to other legislation) and including the detailed terms of the proposed amendments. The resolution was transmitted to the Speaker of the House of Representatives and the President of the Senate by the Assembly Speaker with a request that the Presiding Officers inform all Members of its contents.⁴⁹

COURTS

1.52 When introduced into the House of Representatives in 1988, the Australian Capital Territory (Self-Government) Bill 1988 did not propose to transfer to the Territory responsibility for the court system, paragraph 22(1)(b) of the bill providing that the Assembly had no power to make laws with respect to the establishment of courts.⁵⁰ Amendments initiated in the Senate provided that the paragraph cease to have effect from 1 July 1990 (in its application to magistrates courts and coroner's courts) and the whole proviso from 1 July 1992 unless sooner omitted by regulations.⁵¹

1.53 Following a request from the Assembly in 1992,⁵² the Commonwealth Parliament enacted the *ACT Supreme Court (Transfer) Act 1992*,⁵³ an Act relating to the transfer of responsibility for the Supreme Court of the Australian Capital Territory from the Commonwealth to the Territory. As a consequence, Part VA, 'The Judiciary' (sections 48A to 48D), was inserted in the Self-Government Act.

1.54 Part VA sets out the jurisdiction and powers of the Supreme Court, makes provision for the retirement ages of the Chief Justice, judges and the Master of the Supreme Court and makes provision for the removal from office of a judicial officer. The Self-Government Act now sets out the requirements for any enactment relating to the establishment of a judicial commission for the Territory and any enactment relating to the removal from office of a judicial officer.⁵⁴

1.55 Key provisions of Part VA are that it effectively entrenches:

- the Supreme Court in that it is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory. In addition, further jurisdiction may be conferred by any Act, enactment (law made by the Assembly) or ordinance⁵⁵ or any law made under any Act, enactment or ordinance; and

49 MoP 1992-94/22-23; Speaker of the Legislative Assembly to the Presiding Officers of the Commonwealth Parliament, 10 April 1992. And see footnote 52 below.

50 It was proposed to transfer this and other responsibilities after a settling in period. H.R. Deb. (19.10.1988) 1924.

51 Sen. Deb. (24.11.1988) 2731-3; H.R. Deb. (29.11.1988) 3455.

52 MoP 1992-94/17-18, 22-3; Assembly Debates (8.4.1992) 122-6, (9.4.1992) 152-8. The resolution of the Assembly (sent to the President of the Senate and the Speaker of the House of Representatives) sought legislative action by the Commonwealth Parliament to provide, inter alia, for:

- the existence of the Supreme Court of the ACT having all original and appellate jurisdiction that is necessary to administer justice in the ACT;
- provision for the removal from office of a judicial officer or a member of a tribunal by the ACT executive, but only at the request, by resolution, of the Legislative Assembly acting in accordance with a report by a judicial commission which had found that the officer's behaviour or physical or mental capacity could amount to proved misbehaviour or incapacity such as to warrant removal from office; and
- provisions for the determination of judicial remuneration and retiring ages of judicial officers.

53 Act No. 49 of 1992. The Act amended the Self-Government Act, the *ACT Self-Government (Consequential Provisions) Act 1988*, the *ACT Supreme Court Act 1933* and the *Federal Court of Australia Act 1976*.

54 The Self-Government Act defines the term 'judicial officer' as meaning the Chief Justice of the Supreme Court; or a Judge (other than an additional judge) of the Supreme Court; or the Master of the Supreme Court; or the Chief Magistrate or a Magistrate; or any other judicial officeholder or member of a tribunal specified in an enactment relating to the establishment of a judicial commission for the Territory.

55 See paragraph 11.3 for an explanation of the term ordinance.

- the composition and core functions of a judicial commission and the procedures for the removal from office of a judicial officer.⁵⁶

1.56 The enactment of the *Supreme Court Amendment Act 2001*, together with the enactment of complementary legislation by the Commonwealth Parliament⁵⁷ to amend the *Federal Court of Australia Act 1976* and the *Judiciary Act 1903*, established the Australian Capital Territory Court of Appeal and removed the jurisdiction of the Federal Court in relation to appeals from the ACT Supreme Court.⁵⁸

APPOINTMENT OF JUDICIAL OFFICERS

1.57 The appointments of the Chief Justice, justices and the Master of the Supreme Court are made by the executive, as are the appointments of the Chief Magistrate and magistrates.⁵⁹ It should be noted that these appointments are not subject to the Assembly's scrutiny and the disallowance provisions of division 19.3.3 of the *Legislation Act 2001*.⁶⁰

COMPLAINTS CONCERNING THE CONDUCT OR CAPACITY OF JUDICIAL OFFICERS AND THEIR REMOVAL FROM OFFICE

1.58 There are procedures for dealing with complaints against judicial officers in the Legislative Assembly and they are discussed here at some length. They are complex but that complexity reflects a desire to protect the judiciary from interference either by the executive or the legislature. As outlined above, the Self-Government Act entrenches certain provisions for any enactment relating to the establishment of a judicial commission to investigate complaints concerning the conduct or the physical or mental capacity of a judicial officer and any enactment relating to the removal from office of a judicial officer.⁶¹

1.59 Legislation relating to the examination of complaints in respect of judicial officers and to provide for their removal from office in certain circumstances was considered and agreed to by the Second Assembly.⁶² The *Judicial Commissions Act 1994* sets out the procedure for making complaints against judicial officers⁶³ (including an Assembly motion to have an allegation in respect of a judicial officer examined by a judicial commission), the constitution and appointment of a judicial commission, the proceedings of commissions and the removal of judicial officers (following an appropriate Assembly resolution).

56 Insofar as they directly relate to Assembly procedures, the provisions stipulate that an enactment relating to the removal from office of a judicial officer must provide that the Assembly has determined that the facts found by a judicial commission amount to misbehaviour or physical or mental incapacity identified by the commission and has passed a motion requiring the executive to remove the officer on the ground of that behaviour or incapacity.

57 *The Jurisdiction of Courts Legislation Amendment Act 2002* (Cwlth).

58 The court operates as a division of the Supreme Court and comprises all ACT Supreme Court judges. However a judge cannot hear a matter on appeal from a decision he or she gave in the Supreme Court.

59 *Supreme Court Act 1933*, sections 4, 4A, 4B and 40; *Magistrates Court Act 1930*, subsection 7(2).

60 Pursuant to which certain statutory appointments require prior consultation with an Assembly committee nominated by the Speaker and are also disallowable instruments. Division 19.3.3 of the *Legislation Act 2001* applies 'if a Minister has the power under an Act to appoint a person to a statutory position'. The judicial appointments are made by the executive, established by section 36 of the Self-Government Act and comprising the Chief Minister and such other Ministers as are appointed by the Chief Minister. See paragraphs 11.221 to 11.271 for a discussion on Assembly scrutiny and disallowance provisions.

61 Self-Government Act, sections 48C and 48D.

62 MoP 1992-94/519-20, 539-40; Assembly Debates (16.12.1993) 4695-8, (1.3.1994) 342-54. Exposure drafts of the legislation were presented earlier in the Second Assembly, MoP 1992-94/125; Assembly Debates (20.3.1992) 1917-9.

63 The *Judicial Commissions Act 1994* defines 'judicial officer' as meaning a judge of the Supreme Court (other than a person who is an additional judge appointed under the *Supreme Court Act 1933*, section 4A); or the master of the Supreme Court; or a magistrate; or a member of the administrative appeals tribunal (other than a person who is also a member of the Commonwealth administrative appeals tribunal).

1.60 Part 4 of the *Judicial Commissions Act 1994* provides for persons to make a complaint against a judicial officer. It also sets out the steps that must be followed by the Attorney-General should he or she be satisfied on reasonable grounds that the complaint could, if substantiated, justify consideration by the Assembly of a resolution requiring the removal from office of the judicial officer who is the subject of the complaint. The provisions have a particular impact on Members and Assembly procedures in that the legislation contains particular procedures to be followed by a Member raising a matter in the Assembly that relates to the behaviour or capacity of a judicial officer.⁶⁴

1.61 Key provisions of the legislation are:

- persons may complain to the Attorney-General about a matter that relates or may relate to the behaviour or physical or mental capacity of a judicial officer;
- restrictions on Assembly Members raising such allegations in the Assembly (they must first give notice of the motion to the Attorney-General);
- unless the Attorney-General declines to take any action under the Act in respect of a complaint (or the allegation of a Member of which notice has been given),⁶⁵ he or she must inform the judicial officer (and, where appropriate, the relevant head of jurisdiction) of the subject of the complaint;
- if the Attorney-General is satisfied on reasonable grounds that the complaint (or allegation) could, if substantiated, justify consideration by the Assembly of a resolution requiring the removal from office of the judicial officer:
 - the Attorney-General must, in writing, request the executive to appoint a judicial commission to examine the complaint;⁶⁶ and
 - the executive must appoint a judicial commission to examine and report to the Attorney General on the complaint.⁶⁷

1.62 The provisions of the Act that constrain the manner in which a Member may raise a matter in the Assembly that may relate to the behaviour or physical or mental capacity of a judicial officer are as follows:

- it may be raised only by way of a motion to have a specific allegation in respect of the judicial officer (made in precise terms) examined by a judicial commission;
- the Member is obliged to give the Attorney-General not less than five sitting days notice of the motion; and
- the Member can proceed with the motion in the Assembly only if the Attorney-General declines to act on the complaint or, more precisely, if, within the period of notice, the Member has not been notified by the Attorney-General that the executive has been requested to appoint a commission to examine the allegation.⁶⁸

64 These restrictions are not a requirement of sections 48C and 48D of the Self-Government Act.

65 The Attorney-General may decline to take any action if he or she considers that the complaint has been made vexatiously, frivolously or without reasonable grounds; that it lacks relevant sufficient detail; or, even if the matter complained of were proved, that it could not amount to misbehaviour or incapacity such as to warrant removal of the judicial officer. Should the Attorney-General decline to take any action in respect of a complaint as set out in section 17 he or she must advise the complainant or the Member (as the case may be) accordingly. See *Judicial Commissions Act 1994*, section 17.

66 And must inform the complainant (or the Assembly Member who raised the matter), the judicial officer and, where appropriate, the relevant head of jurisdiction in writing of whether or not the executive has been requested to appoint a commission to examine the complaint.

67 *Judicial Commissions Act 1994*, section 16.

68 *Judicial Commissions Act 1994*, subsection 14(3). The terms of the paragraph are 'unless the member has given to the Attorney-General not less than 5 sitting days notice of the motion and the member has not been notified by the Attorney-General within that period ... that the Executive has been requested to appoint a commission to examine the allegation.'

1.63 Should a Member then proceed with the motion in the Assembly (the requirements of subsection 14(3) of the Act having been fulfilled) and the Assembly agree to a resolution for the examination of a judicial officer by a judicial commission, the executive must appoint a judicial commission to examine the complaint. The commission is required to submit to the Attorney-General a report of its examination within the period specified by the executive or within such further period that the executive, by notice in writing, allows.⁶⁹

JUDICIAL COMMISSION EXAMINATION AND REPORT

1.64 A judicial commission must conduct its examination as soon as practicable after being appointed to examine a complaint.

1.65 Of note is section 60 of the Act, which provides that no proceedings for an injunction, declaration or prerogative order must be brought in relation to, inter alia:

- a decision of an Assembly Member to propose a motion to have a specific allegation made in precise terms in respect of a judicial officer examined by a judicial commission in accordance with paragraph 14(3)(a) of the Act or to give notice of the motion to the Attorney-General in accordance with paragraph 14(3)(b) of the Act; or
- a resolution for the examination of a complaint in respect of a judicial officer by a judicial commission passed by the Assembly.

1.66 On completion of its examination of a complaint, a judicial commission is required to prepare a report of its examination and submit the report to the Attorney-General,⁷⁰ who is required to lay a copy of the report before the Assembly as soon as possible.⁷¹ On doing so the Attorney-General must give a copy to the judicial officer the subject of the complaint (and, where appropriate, the relevant head of jurisdiction).⁷²

1.67 The Act also makes provision for a separate report. Where the commission is of the opinion that any findings or evidence could prejudice a person (other than the judicial officer the subject of the complaint) in proceedings or the conduct of an investigation or the existence or identity of confidential sources, it may include those findings or that evidence in a separate report together with a recommendation that the report not be laid before the Assembly. The Attorney-General must accept the recommendation unless he or she is satisfied that there are compelling reasons of public policy why the relevant report should be laid before the Assembly.⁷³

1.68 Where the judicial officer delivers to the Attorney-General a written statement containing particulars of any matter relating to the commission's findings, the Attorney-General must lay a copy of the statement before the Assembly as soon as practicable after receiving it.⁷⁴

⁶⁹ *Judicial Commissions Act 1994*, section 18.

⁷⁰ *Judicial Commissions Act 1994*, subsection 22(1). Section 22 of the Act also makes provision for what must be included in the report.

⁷¹ *Judicial Commissions Act 1994*, subsection 23(1).

⁷² *Judicial Commissions Act 1994*, subsection 23(2).

⁷³ *Judicial Commissions Act 1994*, section 22. A copy of such a report may be given to the judicial officer the subject of the complaint: *Judicial Commissions Act 1994*, subsection 23(3).

⁷⁴ *Judicial Commissions Act 1994*, subsections 24(1), (2) and (3). The statement cannot contain references to persons or things inconsistent with the commission's reasons for submitting a separate report and must be delivered to the Attorney-General within 14 days after the Attorney-General has presented the report to the Assembly or, where the Assembly has by resolution fixed a longer period, within that period. *Judicial Commissions Act 1994*, subsections 24(2) and (3).

REMOVAL OF A JUDICIAL OFFICER

1.69 Should the Assembly pass 'in the appropriate manner' a resolution requiring the executive to remove a judicial officer from office on the ground of misbehaviour or physical or mental incapacity, the executive must, by instrument, remove the judicial officer from the office.⁷⁵ The Act sets out conditions for a resolution of the Assembly to be passed 'in an appropriate manner,' which includes the requirement of 'a formal process' that includes the Assembly granting the judicial officer, or a legal practitioner on the judicial officer's behalf, a reasonable opportunity to address the Assembly.

1.70 The Assembly shall be taken to have passed the resolution in the appropriate manner if it is passed pursuant to a motion of which notice has been given after completion of the formal process. The motion must be passed by a majority of the Assembly Members present and voting within 15 sitting days of the Attorney-General tabling the report of the commission appointed to examine the complaint in respect of the judicial officer.

1.71 The formal process shall be taken to have been completed when:

- the commission has submitted its report and has concluded that the behaviour or physical or mental capacity of the judicial officer concerned could amount to proved misbehaviour or incapacity such as to warrant removal from office and the Attorney-General has laid the report before the Assembly in accordance with the provisions set out in section 23 of the Act;
- following the submission of the report, the judicial officer has delivered to the Attorney-General a statement in relation to the report and the Attorney-General has tabled the statement in accordance with subsection 24(4) of the Act, or the period for delivering such a statement has expired and no such statement has been delivered by the judicial officer to the Attorney-General;
- the judicial officer has been given a reasonable opportunity by the Assembly to address the Assembly (whether in person or by a legal practitioner on the judicial officer's behalf) in relation to any matter relating to the commission's findings or conclusions (though the address may not contain any references to persons or things that are inconsistent with the commission's reasons for submitting a separate report) in accordance with subsection 22(3) of the Act; and
- the Assembly has determined that the findings by the commission amount to misbehaviour or physical or mental incapacity identified by the commission.

DISPUTED ELECTIONS

1.72 The Supreme Court of the ACT also acts as the Court of Disputed Elections for the ACT. This role is discussed in Chapter 3: Elections and the electoral system, paragraphs 3.26 to 3.31.

⁷⁵ *Judicial Commissions Act 1994*, subsection 5(1).