

QUALIFICATION AND DISQUALIFICATION

4.1 The Self-Government Act provides that the qualification of a person to be elected and to take a seat as a Member of the Assembly shall be as provided by an enactment made by the Legislative Assembly.¹ In addition, it provides, at section 14, disqualification provisions where a Member vacates his or her office as a Member. These are general provisions relating to absence from the Assembly or the acceptance of remuneration for services rendered in the Assembly. The *Electoral Act 1992* contains a range of provisions relating to the eligibility of persons to nominate for election to the Assembly and eligibility (together with ineligibility) provisions for Members.

4.2 Apart from the provision that a Member must make and subscribe an oath or affirmation before taking his or her seat as a Member,² there are now no provisions specifically setting down the qualifications required of a person before 'taking his or her seat as a Member'.³

NOMINATION

4.3 A person is not eligible to be nominated for election to be a Member of the Assembly unless, at the hour of nomination, the person is eligible to be a Member or would, apart from certain disqualification provisions relating to paid office under the Crown (as set out in paragraph 103(2)(b) of the *Electoral Act*; see also paragraph 4.8), be eligible to be a Member.⁴ These provisions relating to paid office under the Crown do not prevent a person from nominating for election as a Member but do preclude the person from being eligible to be an MLA.

4.4 In the event of a casual vacancy, the *Electoral Act* sets out conditions for candidature for a seat in relation to which a casual vacancy has occurred. In addition to the requirement that a person was a candidate at the last election for the electorate in question and was not elected, the person must be an 'eligible person'—that is, a person who is eligible to be an MLA or who would, apart from the provisions relating to paid office under the Crown, be eligible to be an MLA.⁵

ELIGIBILITY FOR MEMBERSHIP

4.5 To be eligible to be a Member of the Assembly a person must be:

- an Australian citizen;
- at least 18 years old; and
- an elector or entitled to be an elector.⁶

1 Self-Government Act, section 67. Subsections 67(2) to (5) of the Act set out qualification and disqualification provisions on an interim basis.

2 Self-Government Act, section 9.

3 Subsection 67(4) of the Self-Government Act, as originally enacted, set out provisions whereby a person was not qualified to take a seat as a Member.

4 *Electoral Act 1992*, section 104. A person must also be nominated in accordance with the provisions of section 105 of the Act.

5 *Electoral Act 1992*, section 192.

6 *Electoral Act 1992*, subsection 103(1).

4.6 The Self-Government Act, at section 67C, sets out the qualifications of electors;⁷ in addition, the *Electoral Act 1992* makes provision for enrolment of electors.⁸

4.7 A person is entitled to be enrolled for an electorate in the Territory if the person is entitled to be enrolled on the Commonwealth electoral roll (otherwise than as a person who has made a claim for age 17 enrolment) and the person's address is within the electorate.⁹ Subject to certain provisos, all persons who have attained 18 years of age and who are Australian citizens or British subjects who were on a Commonwealth of Australia electoral roll before 26 January 1984 are entitled to enrolment.¹⁰

INELIGIBILITY PROVISIONS

4.8 A person is not eligible to be a Member of the Assembly if that person is a Member of the Parliament of the Commonwealth or the legislature of another state or territory.¹¹ In addition, he or she is ineligible to be a Member if he or she:

- holds an office or appointment (other than a prescribed office)¹² under the law of the Territory, the Commonwealth, a state or another territory; or
- is employed by the Territory, the Commonwealth, a state or another territory or by a Territory authority or a body (whether corporate or not) established by a law of the Commonwealth, a state or another territory; and
- is entitled to any remuneration or allowance (other than reimbursement of expenses reasonably incurred) in relation to the office, appointment or employment.¹³

4.9 In addition, a person is not eligible to be a Member of the Assembly for a disqualification period of two years after a conviction or finding in the following circumstances:¹⁴

- if the person is convicted of an offence against:
 - section 285 of the *Electoral Act 1992*, for the electoral offences of offering, soliciting or accepting an electoral bribe or section 288 of the Act dealing with the offence of hindering or interfering with the free exercise of a right or the free performance of a duty under the Electoral Act by violence and intimidation; or
 - section 28 of the *Crimes Act 1914* (Cwlth), which deals with the offence of hindering or interfering with a person's free exercise or performance of any political right or duty by violence or by threats or intimidation of any kind; or
 - Part 2.4 of the Criminal Code (Cwlth), which relates to the extensions of criminal responsibility¹⁵ relating to an offence against section 28 of the Crimes Act referred to above; or

7 Persons who are entitled to vote at a general election (of Members of the Assembly); see Self-Government Act, section 3.

8 The Electoral Act defines an elector as a person who is enrolled or is taken to be enrolled for an electorate. See *Electoral Act 1992*, dictionary.

9 *Electoral Act 1992*, subsection 72(1); *Commonwealth Electoral Act 1918*, section 100.

10 *Commonwealth Electoral Act 1918*, section 93. The provisos relate to persons who are not entitled to enrolment due to holding a temporary visa within the meaning of the Migration Act or being an unlawful non-citizen under that Act, persons of unsound mind, persons serving a sentence of three years or longer for offences against Commonwealth, state or territory law, and persons convicted of treason or treachery who have not been pardoned. Also of direct relevance is Part VIII of the Commonwealth Electoral Act, which deals in detail with enrolment procedures.

11 *Electoral Act 1992*, paragraph 103(2)(a).

12 'Prescribed office' means an office of Speaker, Deputy Speaker, Chief Minister, Deputy Chief Minister, Minister or MLA; see *Electoral Act 1992*, paragraph 103(2)(b)(i).

13 *Electoral Act 1992*, paragraph 103(2)(b).

14 *Electoral Act 1992*, subsection 103(5).

15 Dealing with the offences of attempting to commit a criminal offence, complicity and common purpose, procuring the conduct of an innocent agency, incitement, conspiracy and references in Acts to offences.

- if the person is found by the Court of Disputed Elections to have contravened, within the meaning of Part 16 of the *Electoral Act 1992* (Disputed elections, eligibility and vacancies), section 285 or section 288 of the *Electoral Act 1992*, as referred to above.¹⁶

DISQUALIFICATION PROVISIONS

4.10 Section 14 of the Self-Government Act provides that a Member vacates his or her office as a Member if he or she:

- is not qualified to take a seat as a Member at any time after the beginning of the first meeting of the Assembly after a general election;¹⁷
- is absent without permission of the Assembly from four consecutive meetings of the Assembly;¹⁸ or
- takes or agrees to take, directly or indirectly, any remuneration, allowance, honorarium or reward for services rendered in the Assembly, otherwise than under section 73 of the Self-Government Act, which makes provision for the payment of remuneration and allowances in respect of services in certain offices, including the offices of Member of the Assembly, Presiding Officer (Speaker) and Deputy Presiding Officer (Deputy Speaker) of the Assembly, Minister, Chief Minister and Deputy Chief Minister.¹⁹

A person who has vacated an office of Member may be re-elected.²⁰

4.11 The Assembly does not possess the power to expel one of its Members.²¹ The Supreme Court, as the Court of Disputed Elections, has jurisdiction to hear and determine questions referred to the Court by resolution of the Assembly relating to the eligibility of persons who have been declared elected to be Members of the Assembly or vacancies in the membership of the Assembly.²² Where such a resolution is adopted, the Speaker is required to give the Registrar of the Supreme Court a statement of the question and any supporting documentation in the possession of the Assembly.²³

¹⁶ *Electoral Act 1992*, section 103.

¹⁷ Thus, whilst a person who held paid office under the Crown as set out in paragraph 103(2)(b) of the *Electoral Act* (see paragraph 4.8) would be eligible to be nominated for election as a Member (*Electoral Act 1992*, section 104), he or she would be disqualified if they held such an office and were entitled to remuneration or allowance in relation to the office, appointment or employment at any time after the beginning of the first meeting of the Assembly after a general election.

¹⁸ Or such number of consecutive meetings as is specified by enactment for the purposes of paragraph 14(1)(b)(i) of the Self-Government Act. No such specification has been made.

¹⁹ Self-Government Act, section 73. In the section, 'office' includes an office declared by an enactment to be an office to which the section applies. The provision (Self-Government Act, paragraph 14(1)(c)) does not apply to a superannuation scheme that is established by or under an enactment and under which certain prescribed benefits are provided. The *Superannuation (Legislative Assembly Members) Act 1991* makes provision for superannuation benefits for Members of the Assembly and, in accordance with the provisions of paragraph 73(2)(a) of the Self-Government Act, the Assembly has enacted the *Remuneration Tribunal Act 1995* which has established a tribunal to determine the remuneration and allowances to be paid, and the entitlements to be granted, to the holders of certain offices including the office of Member.

²⁰ Self-Government Act, subsection 14(2).

²¹ As outlined above (see paragraph 2.5), section 24 of the Self-Government Act provides that, until it makes a law with respect to its powers, the Assembly and its Members and committees have the same powers as the powers for the time being of the House of Representatives, its Members and Committees. Section 8 of the *Parliamentary Privileges Act 1987* (Cwlth) provides that a House of the Commonwealth Parliament does not have the power to expel a Member from its membership.

²² *Electoral Act 1992*, section 252.

²³ *Electoral Act 1992*, section 276.

OATH OR AFFIRMATION OF ALLEGIANCE

4.12 Section 9 of the Self-Government Act requires Members to make and subscribe an oath or affirmation before the Chief Justice of the Supreme Court of the Australian Capital Territory or some person authorised by the Chief Justice ‘before taking his or her seat’ in the Assembly.²⁴

4.13 The wording of the oath and affirmation is set out in Schedule 1 to the Self-Government Act and is the same as in Schedule 1A, Part 1A.1, of the Oaths and Affirmations Act quoted in footnote 25. Subsection 9(3) of the Self-Government Act provides, however, that section 9 has effect subject to any amendment made by an enactment of the Legislative Assembly.

4.14 Section 6A of the *Oaths and Affirmations Act 1984* (ACT) provides:

Notwithstanding subsection 9(1) of the *Australian Capital Territory (Self-Government) Act 1988* of the Commonwealth, a Member of the Legislative Assembly, before taking his or her seat, shall make and subscribe—

- (a) an oath or affirmation in accordance with the form specified in Part 1A.1 of Schedule 1A; and/or
- (b) an oath or affirmation in accordance with the form specified in Part 1A.2 of Schedule 1A.²⁵

4.15 This was inserted into the Oaths and Affirmations Act in 1995. The Assembly considered the Oaths and Affirmations (Amendment) Bill 1995 which sought to remove from the oath or affirmation any reference to the Queen and her heirs and successors, and replace it with an oath or declaration to serve the people of the Australian Capital Territory.²⁶ During consideration of the bill an amendment was proposed that would require Members to make and subscribe an oath or affirmation in the form set out in Part 1A.1 of the current Act and an oath or affirmation set out in Part 1A.2 (see footnote 25). The proposed amendment was itself amended by the Assembly by inserting ‘/or’ after ‘and’. The amendment, as amended, was agreed to, as was the bill, as amended.²⁷

4.16 A further change made by the 1995 amendments is that all Members must now make and subscribe an oath and/or affirmation before the Chief Justice of the Supreme Court or a judge of the court authorised by the Chief Justice.²⁸

24 The practice of requiring an oath from Members of parliament in England arose during the politico-religious conflicts of the 16th century. There is no record of a particular oath being required of Members of the House of Commons in the Middle Ages. The original oath required Members to subscribe to the religious settlement of the English Reformation; it was supplemented by a specifically anti-Roman Catholic oath in the early 17th century, repudiating any claims of Papal authority. Various forms of the oath used by the Commons continued to exclude Roman Catholics (until 1829), Jews (until 1866), freethinkers and those with a religious objection to swearing an oath. In 1888, after an extended campaign in support of the English secularist Charles Bradlaugh, who was elected to the House of Commons on a number of occasions but did not take the oath, the Oaths Act (UK) permitted Members to make an affirmation, finally removing any religious test. See *Redlich*, Vol II, pp. 62-4.

25 Schedule 1A of the Oaths and Affirmations Act specifies the following wording: Part 1A.1—‘I, A.B., solemnly affirm [swear] that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth, Her heirs and successors according to law. [So help me God]’; Part 1A.2—‘I, A.B. solemnly affirm [swear] that I will faithfully serve the people of the Australian Capital Territory as a Member of the Legislative Assembly and discharge my responsibilities according to law. [So help me God]’.

26 Assembly Debates (21.6.1995) 969-71.

27 MoP 1995-97/159; Assembly Debates (18.10.1995) 1779-93. The Bible usually made available for Members wishing to make an oath is the new revised standard version, though other texts may be used.

28 Oaths and Affirmations Act 1984, section 10A. Prior to the commencement of the *Oaths and Affirmations (Amendment) Act 1995* it was the practice that once Members made their oath or affirmation after being elected at a general election the Chief Justice authorised the Speaker, pursuant to the provisions of subsection 9(2) of the Self-Government Act, to administer the oath or affirmation to Members elected to fill casual vacancies. See MoP 1992-94/663.

4.17 The term of office of a Member of the Legislative Assembly commences at the end of the day on which the polls are declared.²⁹ The phrase 'before taking his or her seat' used in the Self-Government Act is interpreted to mean that a Member, duly elected, cannot participate fully in the Assembly—for example, take part in debate, vote, be appointed to committees³⁰—until they have taken the oath or affirmation.³¹

TITLES

4.18 Various questions have arisen with regard to the mode of address of Members of the Assembly. In the House of Representatives Chamber, Members are referred to by the names of their electorates—for example, 'the Member for Woolloomooloo'. Members of the Senate are referred to by adding the prefix 'Senator' to their surnames—for example, 'Senator Smith'. Where a Member has an official title such as Prime Minister, that can also be used. In the ACT, because Members are elected from multi-Member electorates, the electorate name is not a useful identifier and the practice in the Chamber is to refer to Members by name or, if appropriate, official title. Other titles, such as professional designations or military ranks, may be used if appropriate.³²

4.19 The use of the designation 'Member of Parliament (MP)' rather than 'Member of the Legislative Assembly (MLA)' was considered in discussions with the Clerk in early Assemblies. The advice received was that state and territory Members used a variety of appellations, usually MLA. In Victoria, New South Wales and South Australia, MP, is used, largely on the basis of practice established in the 19th century. Members of the ACT Legislative Assembly use the postnominal 'MLA'.

4.20 The use of the title 'Honourable', either by Ministers or by all Members of the Assembly, has been raised with successive Clerks of the Assembly. The title 'Honourable' can be used by a range of public office holders: Commonwealth and state Ministers; the Presiding Officers of the Commonwealth and state parliaments; Members of the Legislative Councils of state parliaments; and judges of various federal and state courts. The title 'Honourable' has never been used by ACT Government Ministers or the Speaker³³ of the Legislative Assembly.

4.21 The traditional justification for the use of the title by Ministers is that Commonwealth, state and Northern Territory Ministers are appointed by the Monarch's representative in their respective jurisdictions and are members of an executive council. This is not the case in the ACT where Ministers are appointed from among the Members of the Assembly by a Chief Minister elected by the Assembly. Nor does the ACT have a 'head of state' analogous to the Governor-General, state Governors or the Territory's Administrator. Thus, with regard to Ministers, the case for use of the title is not strong.

29 Self-Government Act, section 196.

30 For an alternative view, see *Odgers*, p. 133: '... the Senate appoints senators to committees, and senators may participate in the proceedings of those committees before they have been sworn in.' *May* (p. 286, n. 5 and p. 740 n. 5), notes that, on three occasions on which there were 'special circumstances', Members have been appointed to committees without having taken the oath.

31 In the House of Commons there are examples of Members, particularly members of Irish nationalist parties, being duly elected but refusing to make an oath or affirmation. In 2001 the House of Commons reaffirmed the practice (which had been temporarily abandoned) whereby Members who had not taken their seats nevertheless had access to the services of the parliamentary departments and 'support for their costs'. See *May*, p. 286.

Note that a Member, duly elected to the Legislative Assembly, may be appointed as a Minister prior to taking an oath or affirmation; for example, a Member was appointed to fill a casual vacancy on 5 April 2006 and was appointed a Minister on 6 April but did not make the oath or affirmation until 2 May 2006.

32 Assembly Debates (22.11.1989), Statement by Speaker Prowse.

33 The use of the term 'Speaker' for the Presiding Officer was adopted in the First Assembly and formally confirmed by the resolution of the Assembly of 27 March 1992, pursuant to subsection 11(2) of the Self-Government Act.

4.22 It is probable that the Speaker of the Assembly would have a stronger case for seeking to adopt the title, with the Presiding Officers of the Northern Territory and Norfolk Island providing precedents. In both these cases the title could only be adopted after a decision by the Governor-General. Advice suggests that if Ministers wished to use the title, the appropriate course would be for the Chief Minister to raise the matter with the Prime Minister, who would then provide advice to the Governor-General. Should a Speaker of the Assembly, who is independent of the ACT executive, wish to raise the matter, he or she could, presumably, deal with the Governor-General directly.

4.23 A further question that has been asked but is contingent on the right to use the title being granted is under what terms would former Ministers and Presiding Officers be entitled to retain the title after they ceased to hold office. There are various rules applying to this matter in the different Australian jurisdictions. Some office holders retain the title for life; others have to apply to the Monarch's representative for permission to do so.

ATTENDANCE AND LEAVE OF ABSENCE

4.24 In addition to keeping a Members' roll (see paragraph 7.20), the Clerk is obliged to record the attendance of Members at each sitting of the Assembly in the *Minutes of Proceedings*.³⁴ Members' attendance is recorded in the *Minutes of Proceedings* just above the printed signature of the Clerk. The entry usually states that 'All Members were present at some time during the sitting except', with the names of those absent then being recorded. Where a Member has been granted leave, it is so indicated.

4.25 The Assembly, on motion without notice, may give leave of absence to any Member and such a motion has priority over all other business. A Member who has leave of absence is excused from service in the Assembly or any committee and the leave is forfeited should the Member attend the service of the Assembly before the expiration of the leave granted.³⁵

4.26 The Self-Government Act provides that a Member vacates his or her office if he or she is absent without permission of the Assembly from four consecutive meetings of the Assembly.³⁶ To date, this rule has not been invoked. The number of meetings required to trigger this clause could be varied by an enactment of the Assembly but no such enactment has been made.

4.27 It is the practice that Members who anticipate being absent from the Assembly move a motion seeking leave of absence for a specified period. Until 2008 Members were not compelled to state the reasons for leave of absence being sought. On one occasion the grounds were omitted from the motion by way of amendment.³⁷ In 2008 a new standing order was inserted requiring Members to state the reason for leave.³⁸

4.28 Should a Member be inadvertently absent—for example, through illness—a colleague will often move that he or she be granted leave of absence.³⁹ When the Assembly has resolved that it not meet for a long period (usually the Christmas and winter breaks) it is

34 Standing orders 21 and 25.

35 Standing orders 23 and 24.

36 Self-Government Act, paragraph 14(1)(b).

37 MoP 1989-91/212-3; Assembly Debates (29.3.1990) 1123-33. The Member seeking leave had given reasons which precipitated a long debate on the need to seek leave at all in the particular circumstances. The debate also canvassed whether the Member needed to participate in the activity for which he was seeking leave.

38 MoP 2004-08/1388-9.

39 MoP 2001-04/319; Assembly Debates (24.9.2002) 319.

Common practice for the Manager of Government Business to move that leave of absence (for the period of the break agreed to in the resolution setting the days of meeting) be given to all Members.⁴⁰ Thus, Members who are absent from the Territory or Australia retain leave should the Assembly be recalled at short notice.

MEMBERS' INTERESTS

4.29 There are a number of statutory provisions and orders of the Assembly that regulate the propriety of Members' behaviour in relation to their pecuniary and other interests. The Assembly has also adopted a code of conduct⁴¹ for Members which complements the statutory and other requirements (see paragraphs 4.47 to 4.58).

4.30 As discussed above with regard to qualifications of Members, Members may not be Members of other Australian legislatures, nor may they hold certain offices or appointments or be employed by the Crown if there is any remuneration or allowance involved. In addition, penalties apply if Members neglect their Assembly duties or accept payment or benefits for advocacy or services rendered in the Assembly. A Member vacates his or her office should he or she, with stipulated exceptions, take or agree to take, directly or indirectly, any remuneration, allowance, honorarium or reward for services rendered in the Assembly.⁴²

4.31 Should a Member render himself or herself ineligible for membership, their seat in the Assembly would automatically become vacant. However, were there to be a dispute over whether the circumstances fell within the terms of the legislation, the matter would have to be referred by resolution of the Assembly for decision by the Court of Disputed Elections.

4.32 The Assembly has ordered that Members declare the private interests⁴³ of themselves and their immediate families and has also addressed the issue in the code of conduct for Members. The code of conduct states that 'Members' actions and decisions should be transparent ... In accordance with this transparency, Members are required to disclose their pecuniary interests pursuant to the resolution of the Assembly'.⁴⁴

Conflict of interest

4.33 The Self-Government Act requires that a Member who is party to, or has a direct or indirect interest in, a contract made by or on behalf of the Territory or a Territory authority shall not take part in a discussion of a matter, or vote on a question, in a meeting of the Assembly where the matter or question relates directly or indirectly to that contract. The Assembly must decide any question concerning the application of this provision and any contravention of the provision does not invalidate anything done by the Assembly.⁴⁵

40 MoP 2004-08/45.

41 'Code of Conduct for all Members of the Legislative Assembly for the Australian Capital Territory', Resolution agreed to by the Assembly, 25 August 2005 (as amended).

42 Self-Government Act, section 14. During Senate consideration of the self-government legislation in 1988 an amendment seeking to disqualify from taking a seat as a Member of the Assembly persons who were undischarged bankrupts, had taken or applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, were in the course of compounding with creditors or making an assignment of remuneration for the benefit of creditors. The amendment was negated; see Sen. Deb. (24.11.1988) 2819-22.

43 'Declaration of Private Interests of Members', Resolution agreed by the Assembly, 7 April 1992, (as amended).

44 'Code of Conduct for all Members of the Legislative Assembly for the Australian Capital Territory', Resolution agreed to by the Assembly, 25 August 2005 (as amended), pp. 1-2.

45 Self-Government Act, section 15. During consideration of the Australian Capital Territory (Self-Government) Bill the Senate agreed to an amendment to ensure that this provision would stand as a separate section (it was originally a subclause of the preceding clause of the bill (now section 14 of the Self-Government Act)), the proposer of the amendment emphasising the importance of dealing with conflict of interest separately in the legislation and stating that the clauses were so important to probity in government operations that they should be separated out in their own right. See Sen. Deb. (24.11.1988) 2738.

4.34 The terms of standing order 156 are almost identical to those of section 15 of the Self-Government Act. Standing order 156 provides that:

A Member who is a party to, or has a direct or indirect interest in, a contract made by or on behalf of the Territory or a Territory authority shall not take part in a discussion of a matter, or vote on a question, in a meeting of the Assembly where the matter or question relates directly or indirectly to that contract. Any question concerning the application of this standing order shall be decided by the Assembly.

4.35 In relation to participation in committee proceedings, standing order 224 states:
A Member may not sit on a committee if that Member has any direct pecuniary interest in the inquiry before such committee.

4.36 The terms of standing order 156 are similar to those of House of Representatives standing order 134, though the Assembly provision is broader in its application. Critical differences are that the House of Representatives restriction is limited to 'a particular direct pecuniary interest' and, perhaps more importantly, that it does not apply to questions of public policy.⁴⁶

4.37 The Members' code of conduct states that 'Members are individually responsible for preventing personal conflicts of interest or the perception of a conflict of interest' and that they should arrange their affairs to prevent a conflict arising or to resolve a conflict should one arise.⁴⁷

4.38 There have been two motions in the Assembly challenging the right of Members to propose matters or participate in deliberations on matters on the ground of conflict of interest. On each occasion the motion was negated. On the first occasion on 17 June 1992, a point of order was taken concerning a Member's sponsorship of a bill (seeking to allow pharmacists to prescribe methadone) when the Member was President of the Pharmacy Guild in the Territory and it was understood that the sponsor conducted a pharmacy business.

4.39 The Speaker ruled that either the Member could withdraw the bill of her own accord or the Assembly, once it had seen the bill, could decide whether its presentation was a contravention of standing order 156 (and section 15 of the Self-Government Act). After the presentation of the bill and the sponsor's agreement in principle speech, the Assembly considered a motion (moved by leave) to discharge the bill. Following debate, the motion was negated.⁴⁸

4.40 On the second occasion on 9 April 1997, a motion was moved urging certain named Members to abstain from any Assembly proceedings related to the gambling industry, which included the operation of gaming machines. The preamble to the proposition noted that

46 For background on the evolution of the rule, see *House of Representatives Practice*, pp. 142-3; 'Declaration of Interests', *Report of the Joint Committee on Pecuniary Interests of Members of Parliament*, AGPS, 1975, pp. 9-10; and Dr Robert Kaye, *Regulating Bribery, Conflict of Interest and Corruption in Westminster*, ESRC Centre for Analysis of Risk and Regulation, London School of Economics and Political Science, <www.polisci.berkeley.edu/courses/coursepages/ps277/Regulating%20Bribery.Conflict%20Of%20Interest.Kaye.doc>. The rule was based on a 1666 resolution of the House of Commons and an 1811 ruling by Speaker Abbot which applied to private bills. The Assembly, like the House of Representatives, has no provision for private bills in its current practices and procedure.

47 'Code of Conduct for all Members of the Legislative Assembly for the Australian Capital Territory', Resolution agreed to by the Assembly, 25 August 2005 (as amended), p. 1.

48 During discussion of the initial point of order and debate on the motion, issues raised included whether a contract was yet in place (it being stated that there was no direct contract but what was occurring was in effect an attempt to set up the circumstances where a contract could be made between the Territory and pharmacists) and whether the sponsor should consider her participation on the drugs committee when it considered these matters. See MoP 1992-94/61; Assembly Debates (17.06.1992) 914-5, 919-28.

one Member received a substantial remuneration primarily derived from gaming machines and six Members (as members of a particular party) received a substantial financial benefit primarily derived from gaming machines. Following extensive debate covering a range of issues, the motion was negated.⁴⁹

4.41 There are other precedents relating to conflicts of interest:

- Following presentation of the Second-Hand Dealers and Collectors (Amendment) Bill 1995 a Member advised the Assembly, in accordance with standing order 156, that he was a licensed general auctioneer in the Territory.⁵⁰
- Following the presentation of two bills addressing issues dealing with rural leases in the Territory, a Member informed the Assembly that he would not be taking part in the debate or voting on the bills as he was a rural lessee.⁵¹
- On the resumption of consideration of a bill to restrict times for gaming machine operations, a Member, identifying himself as a director of a licensed club and noting the provisions of standing order 156, stated that he intended to participate in the debate and vote on the question. He sought the guidance of the Assembly as to whether he was 'in conflict'. The Chair, stating that he would allow the House 'to sort it out', took the unusual course of seeking the views of Members present and, there being support for the Member participating in the proceedings, called upon the Member to carry on.⁵²
- During consideration of the Long Service Leave (Cleaning, Building and Property Services) Amendment Bill 2001 (which provided for a portable long service scheme for employees in the contract cleaning industry), a Member advised the Assembly that, though she was closely related to a person who had a business 'of this nature', she proposed to participate in debate and vote on the question.⁵³
- A Member having declared an interest in a bill that had been already considered by the Assembly,⁵⁴ the Assembly (on the following sitting day) noted the declaration and its timing and resolved that her participation in the debate was a failure to comply with subsection 15(1) of the Self-Government Act but noted that her participation was in the public interest.⁵⁵ On two later occasions the Assembly resolved that, notwithstanding the fact that the Member had a residential tenancy agreement with the ACT Government, it was in the public interest to allow her to participate in any future discussion or vote on a question related to specific orders of the day,⁵⁶ though, immediately prior to the second occasion, the Assembly had negated a motion that had proposed that, notwithstanding her residential tenancy agreement, it was in the public interest to allow her to participate in any future discussion of a matter, or vote on a question, in relation to public housing issues.⁵⁷
- Prior to consideration of a notice of a motion proposing to amend the resolution notwithstanding an employment contract a Member had with a family member, it was in the public interest to allow the Member to participate in any future discussion of a matter, or vote on a question, in relation to the code of conduct for Members.⁵⁸

49 MoP 1995-97/625, 627; Assembly Debates (9.4.1997) 756-67, 808-24. See also Chapter 16: Committees, where a similar issue is discussed.

50 The Member did not participate in debate on the bill. See MoP 1995-97/65; Assembly Debates (1.6.1995) 692-3, Assembly Debates (22.6.1995) 1136-7.

51 MoP 1998-2001/537; Assembly Debates (2.9.1999) 2777.

52 MoP 2001-04/1659; Assembly Debates (22.8.2001) 3174.

53 MoP 2001-04/1856; Assembly Debates (30.8.2001) 3868.

54 MoP 2004-08/277.

55 MoP 2004-08/291.

56 MoP 2004-08/324, 452.

57 MoP 2004-08/451-2.

58 MoP 2004-08/772-3.

4.42 In 1994 the Assembly also considered a motion proposing that it endorse the principles that Members are elected to serve the Assembly in a full-time capacity and that Members so elected should not engage in the activities of any business, trade or profession in the course of their term in the Assembly. This motion was negated.⁵⁹

4.43 Following concerns raised in the Assembly regarding the participation in a government auction of taxi licence plates of a family company linked to a Member of the Assembly,⁶⁰ the Chief Minister wrote to the Auditor-General seeking advice on guidelines to assist MLAs and government officials in making decisions on matters which may affect or be influenced by members of their families, her specific query being 'what should the guidelines be for commercial dealings with companies, partnerships or individuals who are partners of family members of MLAs?'⁶¹ In his report *1995 Taxi Plates Auction*,⁶² the Auditor-General found that the selection of the auctioneer in question was fair and unbiased and that there was no evidence the selection process was influenced by the Member or the responsible Minister.

Declaration of interests

4.44 The Assembly, by order, also requires Members to disclose certain of their interests by providing to the Clerk declarations of their private interests of themselves and those of their immediate families. These declarations are open to inspection by the public.

4.45 The order of the Assembly setting out the requirement was first adopted on 24 May 1989,⁶³ adopted on a continuing basis (unless amended or repealed) on 7 April 1992⁶⁴ and amended on 27 August 1998⁶⁵ and 17 March 2005.⁶⁶

4.46 The order of the Assembly now reads:

That—

- (1) within 28 days of the making and subscribing of an oath or affirmation as a Member of the Legislative Assembly for the Australian Capital Territory each Member of the Legislative Assembly shall provide to the Clerk of the Legislative Assembly a declaration of the private interests of themselves and their immediate family in the form as presented to the Assembly on 17 March 2005 and shall notify any alteration of those interests to the Clerk within 28 days of that alteration occurring;
- (2) under the general direction of the Speaker, the Clerk shall store the declarations of private interests made by each Member in a secure manner and shall include all declarations made by each Member. When a Member vacates his or her seat and is not re-elected at the next general election for the Assembly, the Clerk shall destroy all declarations made by that Member in his/her custody;

59 MoP 1992-94/809; Assembly Debates (7.12.1994) 4654-9.

60 MoP 1995-97/181-2; Assembly Debates (26.10.1995) 2064-98, 2102, 2105, 2114, 2115-24.

61 The company concerned was established by the father of a serving Member and included the name of the Member though the Member no longer held any shares in the company. See *Review of Auditor-General's Report No. 2 1966*, Standing Committee on Public Accounts, Report No. 18, August 1996, p. 3.

62 Report No. 2 of 1996, dated 26 March 1996.

63 MoP 1989-91/15; Assembly Debates (24.5.1989) 114-8.

64 MoP 1992-94/13.

65 MoP 1998-2001/134; Assembly Debates (27.8.1998) 1514.

66 MoP 2004-08/122, 124; Assembly Debates (17.3.2005) 1145.

- (3) any declaration stored by the Clerk be made available for perusal to any person on request subject to the Member concerned being advised by the Speaker of the name of the person to whom the information is made available and the reasons why it has been requested, in each case; and
- (4) that this resolution has effect from the commencement of the Second Assembly and continue in force unless and until amended or repealed by this or a subsequent Assembly.

CODE OF CONDUCT

4.47 Questions about the regulation of the behaviour of Members of the Assembly, and specifically whether the Assembly should adopt a code of conduct for Members, were debated almost from the beginning of self-government in the ACT.⁶⁷ The Standing Committee on Administration and Procedure first considered a code of conduct in an inquiry initiated in September 1990.⁶⁸ The committee's report recommended the adoption of a code and included a draft.⁶⁹ The recommendation was not taken up. Resolutions of the Assembly on freedom of speech and citizen's right of reply in May 1995 also reflected a concern that Members not abuse their powers and privileges.

4.48 The Auditor-General, in his report *1995 Taxi Plates Auction* (see paragraph 4.43), also addressed the issue of conflicts of interest and potential conflicts of interest. He reviewed codes of conduct in various Australian jurisdictions, finding that Queensland's draft codes for elected Members and public officials provided a useful guide and cited examples of activities and relationships which required specific attention by Members as they could give rise to conflicts of interest.⁷⁰

4.49 The Auditor-General also concluded that the prominent positions enjoyed by Members (and senior public officials) by virtue of their status and/or influential role in public sector activities and their access to the community at large should not be used to advance the interests of any person related to the Member or official or any group, company, association, etc, in which the Member or official may have a pecuniary or personal interest.⁷¹

4.50 On 28 August 1996 the Standing Committee on Public Accounts presented report No. 18, which reviewed the Auditor-General's Report No. 2 of 1996.⁷² The committee recommended, inter alia, that the government develop a draft code of conduct for Members when dealing with matters that may affect or be influenced by family connections and commercial relations with companies and individuals that are partners or family members of MLAs and guidelines for government officials in dealing with businesses associated with Members of the Assembly. Though the government supported the development of a code of conduct, it expressed concern with the recommendation, being of the view that this was a role for the legislature,⁷³ not the executive, to develop and institute a code of conduct.

67 A resolution providing for a register of Members' interests was adopted by the Assembly in May 1989. A similar resolution of continuing effect was agreed in April 1992 and continues in force, as amended in August 1998 and March 2005.

68 MoP 1989-91/305-6; Assembly Debates (19.9.1990) 3413-45.

69 *Inquiry into the Proposed Ethics Committee/Code of Conduct*, Report of the Standing Committee on Administration and Procedures (May 1991).

70 The draft codes provided, inter alia, that official powers or positions are not used improperly for personal advantage; conflict between personal interests and public duty are resolved in favour of the public interest; and the potential for conflict between public interests and the requirement of public duty are minimised.

71 *1995 Taxi Plates Auction*, Auditor-General, Report No. 2 of 1996, dated 26 March 1996, pp. 30-1.

72 MoP 1995-97/422, 754; Assembly Deb (28.8.1996) 2731-2.

73 *Government Response to Standing Committee on Public Accounts Report No. 18—Review of Auditor General's Report No. 2 1996—Taxi Plates Auction*, MoP 1995-97/543; Assembly Debates (11.12.1996) 4707. A corrigendum was presented on 10 April 1997; see MoP 1995-97/636.

4.51 In September 1996 the Assembly referred the development of a code of conduct for all Members of the Legislative Assembly to the Standing Committee on Administration and Procedure for inquiry and report with particular reference to parliamentary and personal conduct, conflict of interest (including a Member's affiliation or membership of any organisation or association that could potentially constitute a conflict of interest), gifts, use of public office, the application of section 14 of the Self-Government Act and a complaints and investigation procedure.⁷⁴ The committee did not report in the Third Assembly.⁷⁵

4.52 The report of the Select Committee on the Report of the Review of Governance supported the adoption of a code of conduct and the appointment of an ethics commissioner.⁷⁶

4.53 The matter was again referred to the Standing Committee on Administration and Procedure in the following (Fourth) Assembly⁷⁷ together with a discussion paper entitled *A Parliamentary Ethics Adviser for the ACT Legislative Assembly*.⁷⁸ The draft code of conduct appended to the committee's report included provisions related to conflicts of interest, disclosure of pecuniary interests, receipt of gifts, payments and rewards, and advocacy/bribery.⁷⁹

4.54 A further inquiry of the Standing Committee on Administration and Procedure,⁸⁰ arising out of a privilege matter, reported in August 2004 and again recommended the adoption of a code of conduct based on its earlier report on the subject (see paragraph 4.53) with inclusions relating to Members' conduct as employers and appropriate conduct for Members' staff.⁸¹ With a general election due in a matter of weeks, the Fifth Assembly took no further action on the report. The code of conduct recommended in this report was adopted by the Sixth Assembly, on the motion of the Speaker, with minor amendments, on 25 August 2005.

4.55 The code of conduct (see Appendix 20) supplements the statutory obligations placed on Members and the provisions of standing orders and resolutions of the Assembly. It reminds Members of their general obligations to act in the interests of the electorate and to ensure that their actions do not diminish the reputation of the Assembly. Specific requirements with regard to conflict of interest, pecuniary interests, receipt of gifts, advocacy and the use of confidential information consolidate various existing statutory and other requirements.

4.56 The code also sets standards for the conduct of Members as employers. For example, it reminds them of the need to conform to community standards with regard to terms and conditions of employment and treatment of staff and to avoid any appearance of nepotism in the appointment of staff. Members are also reminded of the need to 'extend professional courtesy and respect to all staff of the Assembly'. Lastly, Members are reminded that the entitlements, services and other resources that they receive in their public capacities must be used appropriately and for legitimate purposes.

74 MoP 1995-97/470; Assembly Debates (26.9.1996) 3426-46.

75 On 4 December 1997 the Speaker, as Presiding Member, made a statement concerning the inquiry. In the statement the Speaker outlined the progress of the inquiry and the matters that the committee had considered and indicated that one of the catalysts for the inquiry had been the Auditor-General's report on the taxi plates auction. See MoP 1995-97/930; Assembly Debates (4.12.1997) 4613-4.

76 Report of the Select Committee on the Report of the Review of Governance, June 1999.

77 MoP 1998-2001/129-30; Assembly Debates (27.8.1998) 1429-30.

78 MoP 1998-2001/462; Assembly Debates (1.7.1999) 2024-5.

79 Report of the Standing Committee on Administration and Procedure, August 2001.

80 MoP 2001-04/490; Assembly Debates (12.12.2002) 4386-9. The reference was one of three made in the aftermath of the report of the Select Committee on Privileges *Unauthorised diversion and receipt of a Member's e-mails*.

81 MoP 2001-04/1599; Assembly Debates (5.8.2004) 3557-8.

4.57 Ministerial codes of conduct have been in existence and have been presented in the Assembly in May 1995,⁸² August 1998⁸³ and February 2004.⁸⁴ These codes have not been instituted or endorsed by the Assembly.

4.58 A motion requesting that the Speaker appoint an Ethics and Integrity Adviser for Members of the Legislative Assembly was agreed to by the Assembly on 10 April 2008 and an Adviser was appointed late in the life of the Sixth Assembly.⁸⁵

Other provisions impacting on the conduct of Members

4.59 It should be noted that the Assembly could treat misconduct by a Member as a contempt of the Assembly and that, should a Member commit any offence whilst a Member, he or she is subject to the laws in force in the Territory as are all other residents of the Territory. Also, Chapter 3 of the *Criminal Code 2002* includes Members and Ministers in its definition of 'territory public official' and 'public official' together with provisions relating to offences such as abuse of public office by public officials, conspiracy to defraud and intention to dishonestly influence a public official in the exercise of his or her duty as a public official.⁸⁶

TERM OF OFFICE

4.60 The current term of office of Members elected at a general election of the Assembly is approximately four years.⁸⁷ This was the term originally proposed when the self-government legislation was introduced into the Commonwealth Parliament in 1988.⁸⁸ At self-government the term was three years,⁸⁹ being extended to three years and eight months as a result of the amendment to the Electoral Act which deferred the date of the election for the Fifth Assembly from February to October 2001. The current term of four years was set by the *Electoral Amendment Act 2003*.⁹⁰

4.61 Section 10 of the Self-Government Act provides:

The term of office of a member duly elected begins at the end of the day on which the election of the member is declared and, unless sooner ended by resignation or disqualification, or by dissolution of the Assembly, ends on the polling day for the next general election.

'Ends on the polling day' is interpreted to mean the end of that day.⁹¹

82 MoP 1995-97/14; Assembly Debates (2.5.1995) 52-60.

83 MoP 1998-2001/124; Assembly Debates (26.8.1998) 1370-1.

84 MoP 2001-04/1 122; Assembly Debates (12.2.2004) 308-9.

85 MoP 2004-08/1445-7. See also MoP 2004-08/1548.

86 *Criminal Code 2002*, Chapter 3.

87 In fact, it is usually slightly less than four years as it commences on the day the election of Members is declared. It can be more or less than four years in the event of:

- an ordinary election being deferred due to an election of Senators or a general election of Members of the House of Representatives being held on the day set out in the Electoral Act (the third Saturday in October in the fourth year after the year in which the last ordinary election was held); or
- an extraordinary general election occurring should (a) a general election be required (i) following a dissolution of the Assembly (pursuant to section 16 of the Self-Government Act); (ii) pursuant to the provisions of section 48 of the Self-Government Act, or (b) the Court of Disputed Elections declares an election void (section 275 of the Electoral Act); or (c) a supplementary election being required pursuant to section 126 of the Electoral Act.

88 See H.R. Deb. (19.10.1988) 1922. The provision was amended in the Senate to provide for three year terms; see Sen. Deb. (24.11.1988) 2824.

89 Though the term of office of Members of the First Assembly was less, being from 8 May 1989 to 15 February 1992.

90 Act No. 54 of 2003. The amendments applied from each ordinary election after the ordinary election held on 16 October 2004. For a summary of proposals to alter the term see *Changing the term of Assembly Members from three years to four years*, Report 7 of the Standing Committee on Legal Affairs, 14 October 2003.

91 Advice of the Deputy Law Officer, Constitutional and Law Reform Branch, Attorney-General's Department, 10 October 1991.

4.62 Members of the Assembly who are officeholders—the Speaker,⁹² Chief Minister or Ministers—retain those offices until the newly elected Legislative Assembly elects a Speaker and, in the case of the Chief Minister and Ministers, a Chief Minister⁹³ unless they vacate those offices at an earlier date by resignation, disqualification as a Member or pursuant to a vote of the Assembly.

4.63 Where the term of office of a Member ends on the polling day for a general election and the Member is re-elected, for the purposes of section 73 (remuneration and allowances) of the Self-Government Act, the person is taken to have continued to serve as a Member until the day on which the election of the Member is declared.⁹⁴

RESIGNATION

4.64 A Member may resign his or her office as a Member and do so by written notice delivered to the Speaker or, during the absence of the Speaker from the Territory or from duty, to the Deputy Speaker.⁹⁵ The person receiving a notice of resignation must arrange for it to be presented to the Assembly as soon as practicable after its receipt.

4.65 Section 13 of the Self-Government Act merely provides that a Member resigns by giving written notice to the person designated by the Assembly to receive it. The practice in the Assembly has been to follow that of the House of Representatives and consider that a Member's resignation takes effect and his or her seat becomes vacant from the time of its receipt. However, it must be noted that the terms of section 37 of the Constitution, which deals with resignations of Members of the Commonwealth Parliament, differ from those of section 13 of the Self-Government Act, the former providing that 'A member may by writing ... resign his place, which thereupon shall become vacant'.⁹⁶

DEATH WHILE IN OFFICE

4.66 To date, no Member has died whilst in office. Should that occur it would be expected that the Speaker would write to inform the Electoral Commissioner that a seat was vacant.⁹⁷

DISSOLUTION OF THE ASSEMBLY

4.67 In the event of dissolution of the Assembly by the Governor-General, the term of office of all Members would end at the time and date specified in the proclamation of dissolution.

92 Self-Government Act, section 12.

93 Self-Government Act, section 46.

94 Self-Government Act, section 73.

95 Self-Government Act, section 13. See also resolution of the Assembly of 27 March 1992: MoP 1992-94/5; standing order 24A.

96 Oral advice of 16 March 1989 from the Commonwealth Department of Territories (ACT Government Unit) was 'Unless specifically stated to be otherwise in the written advice of resignation a Member's resignation takes effect at the commencement of the delivery process whether that is the physical act of handing the notice to the person authorised to receive it; or posting the notice or using some other means of delivery'.

97 And see footnote 24 in Chapter 3: Elections and the electoral system.

REMUNERATION AND ENTITLEMENTS

4.68 Section 73 of the Self-Government Act makes provision for the payment of remuneration and allowances to persons holding the office of Member of the Assembly and a range of other offices including those of the Presiding Officer (Speaker), Deputy Presiding Officer (Deputy Speaker), Chief Minister, Deputy Chief Minister, Minister and any office declared by enactment to be an office to which section 73 applies.⁹⁸ Persons holding these offices are to be paid such remuneration and allowances as determined or specified by or under an enactment or, in any other case, as determined by the Remuneration Tribunal (Cwlth). These tasks are now performed by the ACT Remuneration Tribunal.⁹⁹

4.69 Section 9 of the *Remuneration Tribunal Act 1995* requires the tribunal to inquire into and determine the remuneration and allowances to be paid to and the entitlements to be granted to the Chief Minister, the Deputy Chief Minister and Ministers and the remuneration and allowances to be paid to and other entitlements to be granted to Members other than Ministers by reason of their membership of the Assembly or by reason of their holding particular offices or performing particular functions in relation to the Assembly. Currently these offices are:

- Leader of the Opposition in the Assembly;
- Deputy Leader of the Opposition in the Assembly;
- Government Whip in the Assembly;
- Opposition Whip in the Assembly; and
- the Presiding Member (however designated) of a committee of the Assembly.¹⁰⁰

4.70 The Tribunal is required to make determinations under sections 9 and 10 of the Act each year.¹⁰¹ Determinations must be in writing and presented to the Chief Minister. The Chief Minister must cause the determination to be laid before the Assembly within six sitting days after the day he or she receives it.¹⁰²

4.71 In addition to the basic rate of salary for Members and additional salaries for certain offices, the Remuneration Tribunal determines the payment of travelling allowance, accompanied travel entitlement, motor vehicle entitlement (or a supplementary general allowance in lieu) and travel for the purposes of studies or investigations.

4.72 There is a Legislative Assembly Members' superannuation scheme. The scheme is compulsory and Members pay 5% of their salary (including additional salary but not including allowances) into the Territory bank account in respect of superannuation benefits. The administration of the *Superannuation (Legislative Assembly Members) Act 1991* is the responsibility of the Australian Capital Territory Legislative Assembly Superannuation Board. It is constituted by the Speaker (chairperson), a government Member and an opposition Member elected

⁹⁸ Self-Government Act, paragraph 73(1)(g).

⁹⁹ The ACT Remuneration Tribunal was established by the *Remuneration Tribunal Act 1995*, which commenced on 21 December 1995. In exercising its powers and obligations under the Act, the Tribunal is independent of the government, and its determinations are not subject to disallowance by the Legislative Assembly. Prior to its establishment the responsibilities now undertaken by the ACT Tribunal were discharged by the Commonwealth Remuneration Tribunal. The Remuneration Tribunal Amendment Bill 1999 proposed to place restrictions on persons who could be appointed as members of the Tribunal and to make determinations of the Tribunal disallowable instruments. The question that the bill be agreed to in principle was negatived. See MoP 1998-2001/403, 1360-1; Assembly Debates (5.05.1999) 1327-8. Assembly Debates (2.05.2001) 1381-7.

¹⁰⁰ *Remuneration Tribunal Act 1995*, subsection 9(3).

¹⁰¹ *Remuneration Tribunal Act 1995*, section 9 relates to inquiries in relation to certain Members of the Assembly and section 10 relates to inquiries in relation to holders of certain [other] offices. Section 13 as amended requires the Tribunal to make the Determinations within one year of 21 December 1996 and at subsequent intervals of not more than one year.

¹⁰² *Remuneration Tribunal Act 1995*, section 12.

in accordance with specified procedures and the chief executive of the administrative unit responsible for the *Financial Management Act 1996*, who performs the role of Secretary.¹⁰³

4.73 The *Legislative Assembly (Members' Staff) Act 1989* makes provision for Members and officeholders to employ staff in accordance with arrangements made by the Chief Minister and subject to determinations and directions made by the Chief Minister. The arrangements for employment and the conditions determined by the Chief Minister for the staff of both officeholders and Members are disallowable instruments.¹⁰⁴

4.74 Furnished and equipped office suites are provided within the Assembly building to Members for their use and the use of their staff for parliamentary and electoral purposes.

¹⁰³ The scheme operates pursuant to the provisions of the *Superannuation (Legislative Assembly Members) Act 1991*.

¹⁰⁴ As such, they must be notified and presented to the Assembly pursuant to the provisions of the *Legislation Act 2001*.