



16 COMMITTEES

16.1 The systematic use of standing and select committees¹ to scrutinise proposed legislation, to monitor the activities of the executive and to examine public policy issues in a more detailed way but, at the same time, in a less formal atmosphere than is possible in a parliamentary chamber, has become an accepted and well-established practice in all Australian parliaments. With the creation of the ACT's Legislative Assembly in 1989, provision was made for a comprehensive committee system.² Despite the ACT being a small jurisdiction, the combination of 'state' and 'local government' functions at the one level has resulted in governments having a very broad range of responsibilities and significant legislative programs.³ Thus the demands on the committees have been significant.

16.2 There are two types of Assembly committees: standing committees and select committees. Standing committees are created at the commencement of an Assembly and remain in operation for the life of the Assembly, while select committees are created to consider specific matters, generally within specified timeframes.

16.3 Standing committees fall into the following categories:

- there is an internal administrative committee, the Standing Committee on Administration and Procedure, which is the only committee created directly under the standing orders; and
- there are general purpose committees with responsibility for a broad range of government activity, they also have certain statutory responsibilities.

16.4 The Standing Committee on Administration and Procedure's role is to consider the practices and procedures of the Assembly and to advise the Speaker on such matters as Members' entitlements and internal Assembly operations. For this reason, it is supported from within the Chamber Support Office. All other committees (with the exception of the Scrutiny of Bills and Subordinate Legislation Committee) are supported from within the Committee Office.

16.5 General purpose standing committees consider a range of matters allocated across specified portfolio areas. These matters are determined by their resolutions of appointment, while specific terms of reference apply to individual inquiries. Over the years differing committee structures have been established, but some committees are longstanding, albeit with title variations. Assembly standing committees also have significant statutory responsibilities, particularly the Standing Committee on Public Accounts and the Standing Committee on Planning and Environment.

1 The titles of committees vary between jurisdictions. In Australia 'standing committee' normally refers to a committee that has a continuing life throughout the term of a parliament. 'Select committee' refers to a committee that is established for a defined term, normally with a limited remit to examine a specific subject, and ceases to exist once it has reported.

2 The authority of the Legislative Assembly to establish committees can be said to flow from section 49 of the Constitution, which provides that the '... powers, privileges and immunities of the Senate and of the House of Representatives ... shall be those of the Commons House of Parliament of the United Kingdom,' via the House of Representatives and the Self-Government Act.

3 The ACT Government has responsibility for a range of 'state' and municipal functions—education, health, social welfare, housing, justice and policing, land management, licensing, public transport, water and power supply, and household waste management.

16.6 A select committee is established each year to consider the annual appropriations bills. Select committees are also established to consider matters which are considered to be highly topical, and matters which the Assembly considers need to be accorded specific and timely consideration.

16.7 The titles and areas of responsibility of the general purpose standing committees and the structure of the committee system have varied over time. These changes have reflected the views of Members and the evolution of a system appropriate to the Assembly's needs. At various times there have been proposals that committees take responsibility for broad policy areas, that they track ministerial portfolios and that they focus on key areas of government activity. In practice, no one system has been adopted.

COMMITTEES IN THE FIRST ASSEMBLY

16.8 General purpose standing committees were established at the commencement of the First Assembly in an *ad hoc* way. Non-government Members complained of a lack of consultation. They claimed that there was no consensus on the number of committees and their areas of responsibility, and concerns emerged very early about the implications for Members in meeting the demands of an extensive committee system.

16.9 Three general purpose standing committees were established on 23 May 1989⁴ (the second sitting day), each of four members. Their terms of reference reflected contemporary Commonwealth and state parliamentary practice. On 25 May 1989 a further standing committee was established. The motion to establish this committee proposed that it have only three members. The mover indicated that this reflected a concern about the demands that the committee system would make on Members' time. The motion was amended to give the committee four members. The Chief Minister opposed the establishment of the committee because of the implications for both Members' time and the resources available to the Assembly. She indicated that the governing party 'favoured a rather more streamlined approach to committees'.⁵

16.10 In August 1989 the ACT Chief Minister wrote to the Speaker of the Assembly noting that:

Members of the Assembly have expressed concerns regarding various aspects of the Assembly committee system ... these concerns appear to have their foundation in the fact that no overall examination of Assembly committees has been attempted.⁶

16.11 The Chief Minister sought the Speaker's comments on a discussion paper 'The Role of Assembly Committees',⁷ which was also provided to party leaders in the Assembly. In fact, the paper did little more than propose a fifth standing committee on legal affairs. It would include the scrutiny of bills and delegated legislation function to 'fill the gap' in the existing areas of responsibility of standing committees. It also proposed that a select committee be established each year to examine the appropriation bills and recognised that select committees might also be created to look at specific bills or other clearly limited subjects. There was no discussion of the implications of the proposals for either the demands on Members' time or the staffing and financial resources of the Legislative Assembly's Secretariat.

4 Standing Committee on Public Accounts, Standing Committee on Planning, Development and Infrastructure and Standing Committee on Social Policy.

5 Assembly Debates (25.5.1989) 167.

6 Standing Committee on Administration and Procedures, *Restructuring the committee system*, dated March 1990, p.14.

7 Standing Committee on Administration and Procedures, *Restructuring the committee system*, dated March 1990, p.15-7.

16.12 The Speaker's response was somewhat more substantial.⁸ It recognised the constraints placed on the Assembly by the small number of Members available to serve on committees and, without making any substantive proposals, foreshadowed the need for 'careful assessment' of staffing and resource issues. The Speaker proposed the establishment of five general purpose standing committees having responsibility for broad subject areas.⁹ The standing committees would also have individual responsibility for the estimates function (scrutinising appropriation bills), for considering legislation, and they would be expected to develop a broad expertise in their subject areas. The use of select committees was to be kept to an absolute minimum. It was also proposed to adopt flexible rules with regard to the membership of standing committees to accommodate the interests of individual Members who wished to participate in a particular inquiry.

16.13 In response to pressure from Members, a Standing Committee for the Scrutiny of Bills and Subordinate Legislation was established on 18 October 1989 with three members.¹⁰ It was noted that this was an interim measure 'pending Government consideration of suggestions for a broad reorganisation of standing committees'.¹¹

16.14 The Australian Labor Party, by then in opposition, responded to the Speaker's paper on 8 February 1990, broadly supporting the proposed structure. Mr Kaine, the new Chief Minister, provided a government response on 1 March 1990. The government proposed four general purpose standing committees. It also proposed that a single Select Committee on Estimates consider appropriation bills, mainly because the responsibilities of the standing committees did not correspond to the distribution of ministerial portfolios, which would result in Ministers and their officials having to appear before a number of committees.

16.15 On 12 March 1990 the various proposals were referred to the Standing Committee on Administration and Procedures for examination and report to the Assembly. That committee reported on 22 March 1990 and recommended that the existing general purpose standing committees be retained with minor adjustments to their areas of responsibilities. In making this recommendation, the committee rejected the broad consensus of proposals from the Speaker, the government and the opposition that the Standing Committee on Conservation, Heritage and Environment be subsumed into a modified planning and environment committee. The proposals to create an education committee, separate from the social policy committee, or to reduce the number of standing committees by one, as suggested by the government, were also rejected.

16.16 The administration and procedure committee also recommended that the Assembly establish a legal affairs committee separate from the scrutiny of bills and delegated legislation committee. This was done on 27 March 1990. It was argued that the latter committee, which was largely concerned with technical legal issues, benefited from a tradition of bipartisanship which might be compromised if it was combined with a committee which might 'travel down more controversial paths'.¹²

16.17 Three characteristics of the Assembly's committee system were already apparent and of concern to Members:

8 Standing Committee on Administration and Procedures, *Restructuring the committee system*, dated March 1990, p.18-9.

9 Education and Community Affairs; Legal Affairs (including the scrutiny of bills and delegated legislation function); Public Accounts; Planning, Environment and Infrastructure; and Social Policy.

10 The Scrutiny of Bills and Delegated Legislation Committee is not considered to be one of the general purpose standing committees. It has a very specific remit and its secretariat support is provided by the Chamber Support Office of the Assembly.

11 Chief Minister, *Assembly Debates* (19.10.1989) 1863.

12 Standing Committee on Administration and Procedures, *Restructuring the committee system*, dated March 1990, p. 9.

- the limited number of Members available to serve on standing and select committees¹³ imposed a heavy burden on those Members, particularly from the governing party;
- with a small number of standing committees, the areas of responsibility of those committees were very wide, bringing into question their ability to oversee a particular area; and
- the lack of correspondence between the committees' remit and the portfolio responsibilities of Ministers limited the effectiveness with which the executive could be scrutinised.

COMMITTEES OF LATER ASSEMBLIES

16.18 At the commencement of the Second Assembly (March 1992 to February 1995), the five general purpose standing committees from the previous Assembly were re-established and an additional Standing Committee on Tourism and ACT Promotion was created. A further standing committee, the Standing Committee on the Public Sector, was created in June 1994 to continue the work of a select committee. With that exception, all the general purpose standing committees were established on the first sitting day of the new Assembly. In the Third Assembly (March 1995 to February 1998), six general purpose standing committees were established on the first sitting day. The Standing Committee on Conservation, Heritage and the Environment, the Standing Committee on Tourism and ACT Promotion and the Standing Committee on the Public Sector were not re-established. The Assembly set up a new committee, the Standing Committee on Economic Development and Tourism, which took on some of the functions of the discontinued committees, with other functions being allocated to other standing committees.

16.19 The first significant attempt since 1990 to restructure the committee system was made early in the Fourth Assembly (March 1998 to October 2001). The *Review of the Governance of the Australian Capital Territory* (the Pettit Review) examined inter alia the structure of the committee system. It concluded that:

... [a] weakness in the current committee system is that the spread of Committees does not match the spread of policy areas covered by Government Departments ...

and recommended:

The Standing Committees of the Assembly should be restructured so that there is a committee to track each of the main agencies – and in particular, each of the main policy areas – of government.¹⁴

16.20 At the commencement of the Fourth Assembly the motion to establish the standing committees proposed, citing Pettit, that the committees track ministerial portfolios. In practice, given the small number of Ministers and their diverse responsibilities in the ACT system, this proposal replaced one broadly based approach with another. It had become apparent that creating committees to track ministerial portfolios did not produce a coherent structure because ministerial responsibilities changed regularly both within and between Assemblies. Five general purpose standing committees were therefore established with the public accounts function subsumed into a new Standing Committee for the Chief Minister's Portfolio (renamed Standing Committee on Finance and Public Administration on 25 November 1999) and the functions of the scrutiny of bills and subordinate legislation committee being taken into the Standing Committee on Justice and Community Safety.

¹³ There were 11 select committees in the First Assembly, seven in the Second, eight in the Third, 11 in the Fourth, 10 in the Fifth and six in the Sixth.

¹⁴ *Review of the Governance of the Australian Capital Territory* (Canberra, 1998), pp. 48-50.

16.21 It might be argued that the Assembly's early history, which was characterised by minority governments and by a diverse range of Members, including many independents, minor parties and Members opposed to the ACT's system of self-government, meant that there was a lack of broad consensus on the structure and responsibilities of the Assembly's committee system. As a result, decisions on the structure of the committee system and other institutional questions were heavily influenced by the small number of Members available to serve on committees and the political exigencies of the moment rather than by a clear perception of the institution's long-term needs.

16.22 Committee responsibilities may be very generally defined—for example, social policy—or may combine a general remit with responsibility for a specific task. For example, each Assembly has had a standing committee with responsibility in the areas of planning, infrastructure, development and the environment which has also discharged the specific legislative requirement that variations to the ACT's land use plan must be referred to an appropriate committee of the Legislative Assembly.¹⁵ Later Assemblies combined the specific responsibility for commenting on the reports of the Auditor-General with the general oversight of matters relating to finance and public administration.

¹⁵ Section 73 of the *Planning and Development Act 2007*:

Consideration of draft plan variations by Assembly committee

The Minister may, not later than 20 working days after the day the Minister receives the draft plan variation, refer the draft plan variation documents to an appropriate committee of the Legislative Assembly together with a request that the committee report on the draft plan variation to the Legislative Assembly.

Table 16.1: Legislative Assembly for the Australian Capital Territory Committee Structure, up to and including the Sixth Assembly

| First Assembly | Second Assembly | Third Assembly | Fourth Assembly | Fifth Assembly | Sixth Assembly |
|--|--|--|---|---|---|
| Standing Administration and Procedures Conservation, Heritage and the Environment Legal Affairs Planning Development and Infrastructure Public Accounts Scrutiny of Bills and Subordinate Legislation Social Policy | Standing Administration and Procedures Conservation, Heritage and Environment Legal Affairs Planning Development and Infrastructure Public Accounts Public Sector Scrutiny of Bills and Subordinate Legislation Social Policy Tourism and ACT Promotion | Standing Administration and Procedure Economic Development and Tourism Legal Affairs Planning and Environment Public Accounts Scrutiny of Bills and Subordinate Legislation Social Policy | Standing Administration and Procedure Education, Community Services and Recreation Finance and Public Administration (incorporating the Public Accounts Committee) Health and Community Care Justice and Community Safety (also performing the duties of a scrutiny of bills and subordinate legislation committee) Planning and Urban Services | Standing Administration and Procedure Community Services and Social Equity Education Health Legal Affairs (also performing the duties of a scrutiny of bills and subordinate legislation committee) Planning and Environment Public Accounts | Standing Administration and Procedure Education, Training and Young People Health and Disability Legal Affairs (also performing the duties of a scrutiny of bills and subordinate legislation committee) Planning and Environment Public Accounts |

| First Assembly | Second Assembly | Third Assembly | Fourth Assembly | Fifth Assembly | Sixth Assembly |
|--|---|--|---|--|---|
| <p>Select</p> <p>Cultural Activities and Facilities</p> <p>Establishment of a Casino</p> <p>Estimates 1989-90</p> <p>Estimates 1990-91</p> <p>Estimates 1991-92</p> <p>HIV, Illegal Drugs and Prostitution</p> <p>Hospital Bed Numbers</p> <p>Occupational Health and Safety Bill 1989</p> <p>Police Offences (Amendment) Bill 1989</p> <p>Self-Government</p> <p>Tenancy of Commercial Premises</p> <p>Amalgamation of Territory Institutions</p> | <p>Select</p> <p>Budget Performance and Outcomes for 1993-94</p> <p>Community Initiated Referendums</p> <p>Drugs</p> <p>Establishment of an ACT Public Service</p> <p>Estimates 1992-93</p> <p>Estimates 1993-94</p> <p>Estimates 1994-95</p> <p>Euthanasia</p> | <p>Select</p> <p>Additional Estimates 1995-96</p> <p>Competition Policy Reform</p> <p>Estimates 1995-96 and Budget Review</p> <p>Estimates 1996-97</p> <p>Estimates 1997-98</p> <p>Establishment of a New Private Hospital</p> <p>Petrol Pricing</p> <p>Workers' Compensation Provisions</p> | <p>Select</p> <p>2001-2002 Budget</p> <p>Estimates 1998-99</p> <p>Estimates 1999-2000</p> <p>Estimates 2000-2001</p> <p>Estimates 2001-2002</p> <p>Gambling</p> <p>Government Contracting and Procurement Processes</p> <p>Public Housing</p> <p>Report of the Review of Governance</p> <p>Territory's Superannuation Commitments</p> <p>Workers' Compensation System</p> | <p>Select</p> <p>Estimates 2001-2002</p> <p>Estimates 2002-2003</p> <p>Estimates 2003-2004</p> <p>Estimates 2003-2004 (No 2)</p> <p>Estimates 2003-2004 (No 3)</p> <p>Estimates 2004-2005</p> <p>Privileges 2002</p> <p>Privileges 2003</p> <p>Privileges 2004</p> <p>The Status of Women in the ACT</p> | <p>Select</p> <p>Estimates 2005-2006</p> <p>Estimates 2006-2007</p> <p>Estimates 2007-2008</p> <p>Estimates 2008-2009</p> <p>Privileges</p> <p>Working Families in the Australian Capital Territory</p> |

COMMITTEE WORKLOAD

16.23 In terms of output of reports, the standing committees that have been most prolific have been those with a specific function imposed by legislation or their resolution of appointment. Between the Second and Fifth Assemblies, the planning committee averaged 48 reports, mainly on variations to the ACT's Territory Plan. The public accounts committee (later the finance and public administration committee) averaged 24 reports over the same period, largely in response to reports by the ACT's Auditor-General. The scrutiny of bills and subordinate legislation committee, which averaged 62 reports, comments on all legislation introduced into the Assembly and all disallowable legislative instruments made under ACT legislation.

16.24 The need to respond to an external demand has produced two responses in committees. On the one hand, the members of the committee responsible for planning variations—a matter of active public concern—have tended to devote the bulk of their time and energy to those inquiries, perhaps at the expense of other matters within the committee's broad remit.¹⁶ On the other hand, the committee responsible for the scrutiny of bills and subordinate legislation function, which deals with technical issues related to the drafting of legislation and the legitimate exercise of legislative authority, has relied heavily on specialist legal advisers for research, advice and drafting of reports. Thus, its members have been able to devote more time and resources to the general inquiry function of the standing committee that is responsible for legal issues.

16.25 The scrutiny committee is an example of the response to the constraints imposed by having a limited number of members. In most parliaments its functions are discharged by two committees, one responsible for bills and the other for delegated legislation. In the ACT this is simply not practicable; so combining the responsibilities has become accepted practice. The committee has also had a chequered history. In the first three Assemblies it was a separate committee while more recent practice has been for the standing committee with responsibility for legal matters generally—law reform; the administration of justice; policing—to perform the role of the scrutiny committee. In recognition of the fact that the scrutiny of legislation is a function of the Assembly as a whole, the Chamber Support Office provides secretariat support for the scrutiny role while the Committee Office supports the general inquiry role.

16.26 The Standing Committee on Administration and Procedure similarly combines functions that are the responsibility of a number of committees in larger parliaments. In the standing orders prepared for the First Assembly, two committees were envisaged but on the second sitting day of that Assembly the proposed orders were set aside and replaced by one providing for a single committee.

POWERS OF COMMITTEES

16.27 The Self-Government Act provides that:
Until the Assembly 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 and its Members and committees.¹⁷

16.28 Thus, the Assembly has the power to establish committees which share its powers and privileges. The Assembly's devolved inquiry powers, including those of its

¹⁶ For an example, see paragraphs 16.144 and 16.145 where the planning and environment committee discharged an inquiry into an environmental issue citing the workload imposed by its planning responsibilities.

¹⁷ Self-Government Act, subsection 24(3).

committees, might be limited to matters within its legislative responsibility, but this has not been tested.¹⁸ The powers of committees broadly fall into two categories. The first, which *House of Representatives Practice* more accurately characterises as authorisations, is the ability to conduct hearings, move from place to place, authorise publication of evidence and present reports to the Assembly. The real power of committees, which underpins their inquiry function, is 'to call for persons, papers and records'—to require the attendance of witnesses and the production of documents.

16.29 The extent of these powers with regard to the Commonwealth Parliament has been the subject of debate and some judicial comment.¹⁹ However, the question is unresolved and is likely to remain so. The courts are generally wary of questioning parliaments' use of their powers and, equally, parliaments tend to assert their powers with discretion and exercise their authority through the voluntary cooperation of witnesses and by negotiation.

16.30 In the Legislative Assembly, having regard to the reservations above, there has been no significant challenge to the powers of committees to conduct inquiries, call witnesses or require the production of papers.²⁰ Equally, committees have not explored the limits of their powers to call for the production of documents.

STATUTORY REQUIREMENTS

16.31 Certain Acts require Assembly committees to undertake tasks. The *Human Rights Act 2004* requires a committee nominated by the Speaker to report to the Assembly about human rights issues raised by bills presented to the Assembly.²¹ The *Planning and Development Act 2007* requires a committee nominated by the Speaker to report on certain draft plan variations and draft plans of management.²²

16.32 The *Legislation Act 2001* requires a Minister to consult the appropriate Assembly committee, as determined by the Speaker, before making a statutory appointment—that is, an appointment to a position created by an Act.²³ A committee may make recommendations with regard to a proposed appointment and a Minister is required to consider any such recommendations prior to making an appointment. There are various reservations within this section; it does not apply to ordinary positions within the ACT Public Service, to short-term appointments or to appointments of ministerial staff. The Minister may proceed to make the appointment if the committee does not respond to the initial consultation within 30 days.²⁴

16.33 In practice, the limited resources available to standing committees preclude any but the most cursory consideration of proposed appointments and committee consideration of statutory appointments concentrates on what might be described as formal compliance—whether the Minister has met the statutory requirements with regard to consulting the relevant Assembly committee. The normal form of consultation is for the Minister to write to the committee advising it of the proposed appointment and providing a brief resume for the appointee. While it was extremely rare for committees to request further information, in the

¹⁸ *Odgers'*, pp. 57-8.

¹⁹ For a thorough consideration of this question, see *House of Representatives Practice*, pp. 645-8 and *Odgers'*, Chapter 16 (powers of committees) and pp. 437-42 (orders for the production of documents).

²⁰ There are reasonable claims—for example, based on crown privilege (or public interest immunity). While parliaments may acknowledge the validity of such claims on a case-by case basis they have resisted conceding them as general principles.

²¹ *Human Rights Act 2004*, section 38.

²² *Planning and Development Act 2007*, section 73.

²³ *Legislation Act 2001*, division 19.3.3, section 228. The *Territory-owned Corporations Act 1990*, subsection 12(2), has a similar requirement in relation to the appointment of the directors of such corporations. These appointments are referred to the Standing Committee on Public Accounts.

²⁴ *Legislation Act*, subsection 228(3).

Sixth Assembly a number of committees have requested further information on appointments from the relevant Minister. The usual response from committees is that appointments are 'noted'.

STANDING ORDERS RELATING TO COMMITTEES

16.34 The standing orders relating to committees are expressed in general terms. To understand fully the areas of responsibility, membership, reporting requirements and even powers of individual committees it is necessary to read the standing orders in conjunction with the resolution of appointment of individual committees, which may vary the general provisions quite considerably, and any relevant resolutions of the Assembly. Where the Assembly's own orders, practices and procedures are insufficient, the practices of the House of Representatives, the Senate and other parliaments should also be considered.

APPOINTMENT OF STANDING COMMITTEES

16.35 Standing order 215 requires that standing committees be established for the life of the Assembly. The practice of the Legislative Assembly is to appoint general purpose standing committees on the first or second sitting days of a 'new' Assembly. In the first Assembly (1989 to 1991) standing committees were created at various times as the Assembly developed a clearer view of how it would proceed. In the second and subsequent Assemblies, standing committees were generally established at the beginning of the Assembly.

16.36 In the Second Assembly (1992 to 1995) the Standing Committee on the Public Sector was established in June 1994 to continue the work of a select committee. The justification offered at the time (rather than simply extending the life of the select committee) was that a standing committee would indicate the Assembly's commitment to continuing oversight of the newly established ACT Public Service. However, the committee was not re-established in subsequent Assemblies.

16.37 The number of standing committees has varied between six and nine; in four of the six Assemblies to date there have been seven standing committees. This number includes the Standing Committee on Administration and Procedure, which is appointed under standing order 16. Standing order 16 requires the committee to be appointed, defines its responsibilities and names the Speaker as its presiding member.

16.38 The Assembly's standing orders are silent on the number of committees to be established, their areas of responsibility and, other than in the most general terms, their membership. In contrast, the House of Representatives and the Senate both specify the titles of the standing committees that are to be established, the number of members and the 'source' of members—that is, the number to be nominated by the government party, the opposition party or from among independent Members. However, the Assembly has developed the practice of adopting a comprehensive resolution at the start of each Assembly. It establishes the general purpose standing committees, sets out their areas of responsibility, defines the membership (by party) and specifies some of their powers.²⁵

JOINT INQUIRIES

16.39 There has been one example of an attempt to have two standing committee meet jointly to conduct an inquiry. At issue was a major change in the ACT's land development system. It was argued that because of the significant implications for both the Territory's future planning and its public finances, a joint committee combining the Standing Committee on Planning and Environment and Standing Committee on Public Accounts should examine the proposal.²⁶ After extensive debate, which did not go to the structure of the proposed committee, narrower terms of reference relating strictly to the relevant legislation were given to the Standing Committee on Planning and Environment. The record does not reveal why a joint committee was proposed rather than a select committee comprising the members of the two standing committees

16.40 In 2007 the Standing Committee on Planning and Environment made an approach to the Commonwealth Parliament's Joint Standing Committee on the National Capital and External Territories to conduct joint inquiries on some matters that necessitated amendments to the National Capital Plan and Territory Plan. In its response to the Assembly committee's letter, the chair of the Commonwealth joint committee advised that the proposal had been considered by the committee, but rejected after receiving advice.²⁷

16.41 Any such proposal for a joint committee would need the concurrence of the Assembly. Should a committee go ahead without the required order of the Assembly (and possibly legislative protection in the latter case), the 'joint' committee or inquiry would not be properly constituted.

INQUIRIES BY STANDING COMMITTEES

16.42 In addition to matters referred to standing committees by the Legislative Assembly and their undertaking their statutory responsibilities, committees can themselves initiate inquiries that relate to their areas of responsibility. The resolutions appointing standing committees which were adopted by the Assembly on 7 December 2004 included the following power:

... to inquire into and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community.²⁸

In March 2008 the Assembly amended standing order 216 to explicitly give the committees the power to self-refer.²⁹

16.43 This is a more extensive power than is available to committees of either the House of Representatives or the Senate, which do not have the power of self-referral.³⁰ Self-referral is used extensively by Legislative Assembly committees. References come from four main sources:

²⁶ MoP 2001-04/198-9, 227, 275-6. If authorised by the Assembly such a committee could be established and have access to the papers of both the constituent committees.

²⁷ Assembly Debates. (23.8.2007) 1923-4.

²⁸ MoP 2004-08/12.

²⁹ See standing order 216.

³⁰ The House of Representatives' standing committees may inquire into any matter referred by the House or a Minister, or any aspect of an agency annual report which falls within its responsibilities. Senate legislative and general purpose references committees can inquire into matters referred to them by the Senate. Annual reports of departments and agencies are also referred to the appropriate committee for examination. The relevant Senate standing order (Chapter 5, standing order 25- 21) sets out the detailed responsibilities of committees with regard to annual reports.

- a recurring requirement imposed in resolutions of appointment or in the practices of the Assembly—for example, to review Auditor-Generals reports, agency annual reports and the conduct of community consultation on the annual budget;
- legislation—for example, the consideration of planning variations (see footnote 15);
- a reference from the Assembly (including the reference of a paper presented by a Minister or the Speaker, pursuant to standing order 214), and
- self-referral by the standing committee.

16.44 Referral by the Assembly of a specific matter within a standing committee's general remit is the exception. For example, in the Fifth Assembly three standing committees—the Standing Committee on Health, the Standing Committee on Education and the Standing Committee on Community Services and Social Equity—produced 13 reports on references. Of these, 10 were on matters that the committees had self-referred and two were references from the Assembly.³¹ The committees also produced seven reports arising from the budget or agency annual reports.

16.45 Given the small number of standing committees, each having diverse responsibilities, there has sometimes been debate as to which committee is the most appropriate to undertake an inquiry. For example, in 2001 debate on a motion to refer a question with regard to the sale, use and general safety of fireworks in the ACT was adjourned after the Speaker intervened to point out that the proposed terms of reference 'include[d] matters within the responsibility of another standing committee', and suggested that the debate be adjourned while the matter was considered by the proponent of the reference. At a later hour on the same day, debate was resumed and the motion was amended to send the reference to a different standing committee.³² Committees can negotiate formally and informally both before a reference is adopted and after the inquiry has been referred.

16.46 The reference of a matter to a committee does not preclude the Assembly from considering the same or a similar matter. In 1996 a matter was referred to a standing committee. On the same day, debate on the motion that a bill be agreed to in principle was resumed. The bill related to a matter which was central to the committee reference. The Speaker declined to uphold a point of order that the reference to a committee precluded the Assembly from considering the bill. He noted that at the completion of the debate the Assembly could, pursuant to standing order 174, refer the bill to the same committee. In fact, the bill was taken through all its stages in the Assembly and passed.³³

16.47 References to committees by either the Assembly or by the committees themselves should relate to matters within the competence of the Assembly and the executive.

SELECT COMMITTEES

16.48 In the Australian parliamentary tradition, select committees, in contrast to standing committees, are established with specific terms of reference and set reporting dates. Select committees respond to issues that fall outside the remit of standing committees or are of such importance or urgency that a specific committee is considered necessary to examine them.

31 One self-reference, by the Community Services and Social Equity Committee, generated two reports.

32 Assembly Debates (13.12.2001) 203-5 and 219-20.

33 Assembly Debates (27.6.1996) 2374.

16.49 The Legislative Assembly has made extensive use of select committees,³⁴ particularly to consider the annual appropriation bill. Select committees have also been established to consider three matters of privilege in the Fifth Assembly. In earlier Assemblies, privilege matters had been considered by the Standing Committee on Administration and Procedures. In recent Assemblies the use of select committees to inquire into matters of public policy, a common practice in earlier Assemblies, has become less frequent. There was only one such committee in the Fifth Assembly and only one 'public policy' inquiry was established in the Sixth Assembly.

16.50 The requirement for a select committee to avoid matters within the competence of a standing committee is in practice unrealistic. The scope of the responsibilities of the standing committees is such that virtually any matter relevant to the ACT which could be referred to a select committee will fall within the competence of one of the standing committees. The Assembly seeks to avoid establishing a select committee to inquire into a matter that overlaps with a current inquiry by another committee. In March 2008 the Assembly amended standing order 217 to provide that standing committees should take care not to inquire into any matters which are being examined by a select committee.³⁵

Report from select committees

16.51 A distinguishing feature of select committees is that they have a fixed reporting date. While standing committees may seek an extension of time to report, Assembly select committees have generally completed their inquiries within the time limits set.

FIRST MEETING

16.52 Standing order 219 provides that the secretary of a committee, under the general direction of the Speaker, shall fix the time of the first meeting of a committee. It is a somewhat more formal practice than applies in other parliaments. In both the House of Representatives and the Senate it is the responsibility of the secretary of the committee, in consultation with the members, to arrange the first meeting and advise all members in writing of the time and place of the meeting.

16.53 In the House of Representatives the process is simply an established practice: If, as is normally the case, it is left to a committee to elect its own chair, the committee secretary must call the first meeting.³⁶

16.54 The Senate, in standing order 30(1), requires the secretary to organise the first meeting if the 'mover of a committee' is not a member. In practice, the committee secretary liaises with committee members to arrange the first meeting.

16.55 The normal process in the Assembly is for committee secretaries to ascertain Members' availability before advice is provided to the Speaker to enable the first meetings of committees to take place. In March 2008 the Assembly amended the relevant standing order to provide that the first meeting must be within seven days of the establishment of the committee.³⁷ The standing orders were also amended to make it clear when subsequent meetings can be held and under what authority they can be called.³⁸

³⁴ First Assembly, 11 reports; Second Assembly, 7 reports; Third Assembly, 8 reports; Fourth Assembly, 12 reports; Fifth Assembly, 10 reports. There were six select committees established in the Sixth Assembly.

³⁵ See standing order 217.

³⁶ *House of Representatives Practice*, p. 690.

³⁷ See standing order 219.

³⁸ See standing order 219A.

MEMBERSHIP

16.56 The standing orders provide only the most general guidance to the membership of committees; even the upper limit of five members may be varied by a specific motion in the Assembly.³⁹ The number of members on a committee has generally been defined by the resolution establishing it. The resolution may do no more than state that the committee shall consist of those Members of the Assembly who nominate; it may specify the number of members; or it may go into some detail, naming the presiding member and some or all of the other members. In the Third Assembly and the Sixth Assembly—in the latter case, a single party held a majority for the first time—the resolutions appointing the committees specified the number of members and the grouping within the Assembly that would nominate them to each committee.⁴⁰ In the Second Assembly the motion to establish the committees was followed immediately by a motion appointing the membership, which had been agreed in prior negotiation.⁴¹

16.57 Membership of standing committees varied considerably in early Assemblies, with one committee having as few as two members while another had five. In the First Assembly the standing committees initially had four members each.⁴² The established practice currently is to have three members on each standing committee.⁴³ Specifying the membership in the resolution of appointment rather than in the standing orders provides flexibility to accommodate the shifting political balance in the Assembly, particularly when there are a number of independent Members. During the Fifth Assembly a Member moved from the major opposition party to the crossbenches, with the result that two standing committees had their membership increased to four for part of that Assembly to accommodate the Member's wish to serve on those committees. In the Sixth Assembly, membership of general purpose standing committees stood at three.

16.58 Select committees also generally have three members except in the case of select committees on estimates which, in recent Assemblies, have had five or six members. The number is specified in the resolution of appointment. In the First Assembly the Select Committee on Estimates 1989-90 had no limit placed on its membership. The resolution establishing the committee nominated the Leader of the Opposition as presiding member and stated that the committee 'also comprise such members of the Assembly who notify their nominations in writing to the Speaker'. Eleven Members, in addition to the presiding member, nominated to the committee. The committee therefore comprised every Member of the Assembly other than the Speaker and the four Ministers. The following year the resolution establishing the select committee limited the membership to five, but in 1991 the resolution of appointment returned to the form adopted in 1989, again resulting in a 12-member committee.⁴⁴ In the Second Assembly 12 Members were appointed to the select committee to consider the Appropriation

39 The resolutions establishing committees often include a 'catch all' clause; '... the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders'; see, for example, MoP 1998-2001/306.

40 MoP 1995-97/10; MoP 2004-08/14.

41 MoP 1992-94/7, though one member refused to accept his nomination. See Assembly Debates (27.3.1992) 21-5 and footnote 36 above.

42 MoP 1989-91/9. Note, as previously mentioned, that the Standing Committee on Conservation, Heritage and the Environment, established on 25 May 1989, was proposed with three members but that was increased to four during debate. In December 1989 three standing committees and two select committees had their membership reduced to three; MoP 1989-91/164. The Standing Committee on Legal Affairs was established on 27 March 1990 with three members; on the same day the membership of the Standing Committee on Conservation, Heritage and the Environment was increased to four; see MoP 1989-91/204.

43 The Standing Committee on Administration and Procedure, appointed under standing order 16, is an exception. Standing order 16(b) states that 'The committee shall consist of the Speaker and no more than five other members; ...'.

44 MoP 1989-91/91, 301, 495.

Bill 1992-1993.⁴⁵ The motion to appoint the committee named the presiding member and placed no limit on the membership. The select committees on the appropriation bills for 1993-94 and 1994-95 each comprised 11 members.

16.59 A major influence on the membership of committees has been the small size of the Assembly. With Ministers generally not available to serve on committees, and the Speaker by convention chair of the Standing Committee on Administration and Procedure only, the government backbench typically comprises three or fewer members. This can make it difficult for the governing party to maintain representation on all committees, potentially undermining the representative character of the committee system. This problem was compounded, particularly in early Assemblies, by an electoral system which tends to favour the election of minor parties and independent Members and to produce minority governments.⁴⁶ Like most other Australian parliaments, Ministers generally do not serve on Assembly committees. However, during the Fifth Assembly a Minister was appointed as a member of the Select Committee on Privileges.⁴⁷

16.60 The most extreme example of the difficulties that can arise occurred in the Fourth Assembly when a minority government was formed by the six members of a party, with the support of one independent (who held a ministerial portfolio), leaving only one government party backbench Member.⁴⁸ As a result, the sole backbencher was a member of five of the six standing committees and of seven select committees (out of 10 formed prior to February 2001). The Speaker, in addition to chairing the Standing Committee on Administration and Procedure, represented the government party on one standing committee and three select committees.

16.61 Complying with standing order 221 has on occasion also been extremely difficult for Members of the non-government parties and independent Members. In earlier Assemblies there tended to be significant numbers of minor party or independent Members representing diverse political views.⁴⁹ Thus, it was not easy to accommodate the full range of views on committees comprised of three or four members. As a result, ballots for membership were not uncommon. An alternative response has been to increase the number of committee members. In the First and Second Assemblies, which were perhaps the most politically diverse, as noted above, the select committees on estimates comprised all or almost all the available Members. In the Second Assembly the Standing Committee on Planning, Development and Infrastructure and the Standing Committee on Social Policy were both established with five members. In the Fifth Assembly the two independent Members cooperated to share committee duties. However, as mentioned above, when a former member of a party sat as an independent that arrangement had to be modified.

16.62 Standing order 221 is generally interpreted as a 'holistic' requirement. For example, not every committee membership can mirror the proportionate representation of the Assembly membership, but overall committee membership should be representative of the membership of the Assembly. At the beginning of the Sixth Assembly, when there was only

45 MoP 1992-94/92, 378, 563.

46 The Sixth Assembly is the first occasion on which an ACT Government formed by a single party has had a majority in the Assembly.

47 MoP 2001-04/805.

48 Until February 2001. With the resignation of the Chief Minister, Ms Carnell, the Ministry was reduced to four members, the backbench increased to two and committee responsibilities were reallocated. During the First Assembly, the then Labor Government was in a similar position.

49 There is a case of a Member refusing to serve on standing committees, causing some debate among Members as to whether participation in committees was a duty inherent in membership of the Assembly. The Member refused to accept nomination to two standing committees. As a result, one committee, legal affairs committee, was established with only two members (restored to three in February 1993) and the public accounts committee had its membership increased to four to accommodate two additional Members from the government and main opposition parties. See Assembly Debates (27.3.1992) 21-5, 53.

one crossbench Member, the resolution to appoint the standing committees stipulated three-member committees and specified that the crossbench Member, representing the Greens, would be a member of two committees—legal affairs and public accounts. In debate on the resolution of appointment, the crossbench Member proposed to increase the membership of committees to which she had not been nominated by one to enable her to sit on them.⁵⁰ She argued that those committees—education, training and young people; health and disability; and planning and the environment—were her party’s areas of particular interest. The government party opposed the amendment on grounds of proportionality; ‘we think it is very difficult to justify that a party with only one member in this place should be represented on each and every standing committee’. The opposition party supported the amendment on the grounds that committees should reflect the ‘perspective of the whole community’. The amendment was defeated on party lines.⁵¹

Membership reported

16.63 Standing order 222 provides for a ballot to be conducted when the number of nominations to membership of a committee exceeds the number of members set by the Assembly.⁵² Ballots were more common in earlier Assemblies with a number of independent Members competing for a limited number of places.⁵³ In recent Assemblies, with larger representation of the major parties, committee memberships have tended to be resolved by negotiation prior to the establishment of the committees rather than by ballot.

Discharge of members and replacement

16.64 There are many reasons for changes in committee membership; for example, promotions to ministerial office, shifting ‘shadow’ responsibilities or changing party allegiance. Because most Members are involved in committees, a single change may have a ‘knock on’ effect on all the committees. In March 2008 the Assembly amended the standing orders to provide that when a change to committee membership is required and the Assembly is not sitting for two weeks, the relevant Whip or crossbench Member may write to the Speaker suggesting any appointment or discharge of a Member of a committee. The Speaker may approve the change if he or she considers it necessary to the functioning of the committee, and the change in membership takes effect from the time the Speaker responds to the Member who requested the change. At the next meeting of the Assembly, the Speaker reports the change of membership of the committee to the Assembly, and the Assembly resolves the membership of the committee.⁵⁴

50 MoP 2004-08/15.

51 Assembly Debates (7.12.2004) 52-5.

52 The rules with regard to balloting are set out in standing orders 265-7.

53 See, for example, MoP 1989-91/27, describing a situation where ballots were conducted to decide the membership of the Standing Committee on Public Accounts and Standing Committee on Social Policy. In both cases the nominees from the major parties received overwhelming support; the real contest was between independent members for the final place available. In 1990 two rounds of balloting were required to determine the membership of the Select Committee on Estimates; see MoP 1989-91/307.

54 See standing order 223.

PECUNIARY INTEREST

16.65 Standing order 224, which relates to pecuniary interest in the context of committee membership, is expressed in very similar terms to House of Representatives standing order 231. 'Pecuniary interest' tends to be interpreted broadly. For example, it could be argued that a Member has pecuniary interests as a ratepayer, homeowner or parent of school-age children attending schools in receipt of public funding. However, to require a declaration of such interests, which are, in a sense, contingent on being a resident of the ACT, would render the work of committees impossible.

16.66 Direct pecuniary interest is interpreted narrowly. For example, a declaration of interest would be expected from a member who was a property owner likely to gain directly from a proposed planning variation or from a member who sat on the board of governors of a school that was one of a class of schools the subject of a committee inquiry. These types of interest might preclude these members from participating in committee inquiries dealing with planning or school-related issues.⁵⁵

16.67 Conflict of interest conventions are wider in scope than the strict requirements of the standing orders. Members are required to have regard not only to an actual conflict of interest but also to 'the perception of a conflict of interest'.⁵⁶ A personal interest giving rise to a possible conflict need not be pecuniary but may go to personal relationships or other interests. For example, *House of Representatives Practice* cites the example of a member withdrawing from a privileges committee inquiry because he was also a member of the committee in which the issue of privilege had first arisen.⁵⁷

16.68 In the first instance, a potential conflict of interest in a committee is a matter for the committee to resolve. A committee may decide that a declaration of a possible conflict is sufficient or, at the other extreme, may require a member to withdraw for the duration of the relevant inquiry and ask the Assembly to replace that member. Only where a committee cannot reach agreement on the appropriate course is the matter referred to the Assembly. In practice, few examples of conflict of interest have arisen in committees. Generally, committees have relied on members' judgement in these matters. Requiring a member to be discharged, either temporarily or permanently, is highly unusual. For example, committees are consulted about proposed appointments to statutory offices in the ACT and may comment on them.⁵⁸ Members have on occasion taken no part in this activity because of personal acquaintances with proposed appointees. Should this situation arise, a member should declare the conflict at the first available committee meeting.

16.69 In 1992 the Legislative Assembly discharged a Member from service on the public accounts committee for the term of its consideration of an Auditor-General's report that commented on the salary and other payments to a former staff member of the Member. The motion to discharge the Member was moved in the Assembly by a Member who was not a member of the public accounts committee; the motion had not been discussed in the committee.⁵⁹

55 Note the Resolution of the Assembly, 'Code of Conduct for all Members of the Legislative Assembly for the ACT', 25 August 2005, as amended 16 August 2006, particularly with regard to Conflict of interest, Disclosure of pecuniary interest, Advocacy/bribery and Use of confidential information: 'A conflict of interest does not exist where the Member or other person benefits only as a member of the general public, or a broad class of persons.'

56 Resolution of the Assembly, 'Code of Conduct for all Members of the Legislative Assembly for the ACT', 25 August 2005, as amended 16 August 2006.

57 *House of Representatives Practice*, p. 636.

58 *Legislation Act 2001*, section 228.

59 *Assembly Debates* (17.12.1992) 4118.

16.70 In the Sixth Assembly a report of the Standing Committee on Planning and Environment raised a more substantial issue of pecuniary interest.⁶⁰ The committee was considering a variation to the Territory Plan which would directly benefit the Canberra Labor Club. The committee made no comment on the content of the variation, which was uncontroversial. However, the two Australian Labor Party members of the committee, comprising a majority of the committee, were former board members, and continuing ordinary members, of the club. The Labor Club is also a significant donor to the ACT Branch of the Australian Labor Party.⁶¹ The committee members acknowledged their potential conflicts of interest at the first meeting of the committee to consider the variation and the committee sought the advice of the Clerk of the Assembly on the matter.

16.71 The Clerk's advice put the matter back to the committee. If members felt that the conflict was serious, then the committee could request that the Assembly replace the relevant members for the duration of the inquiry. Alternatively, the committee, having noted the declarations of interest and concluded that they were not significant, could proceed with its inquiry. The two members concerned took the view that their former membership of the board of the Labor Club did not constitute a current conflict and nor did their continuing membership of the club purely as social members. With regard to the club's donations to the Labor Party, they argued that they did not benefit directly since the donations were made to the party, not to specific members. Since they formed a majority on the committee, their interpretation prevailed.

16.72 It can be inferred from the committee's report that the non-Labor member of the committee did not accept these arguments. The member withdrew from the committee for the duration of its inquiry. When the report was tabled he raised the matter in the Assembly but not in a manner that required the Assembly to make any decision with regard to the substance of the issue.⁶²

16.73 Social membership of an organisation that makes political donations, and even participation in the management of that organisation at some earlier date, may not constitute a current conflict of interest. However, it might be argued that donations to a political party that go to funding the operations of the party, including particularly election campaigns, are of direct benefit to the parliamentary candidates of that party. Thus, when a matter of direct benefit to a major donor comes before a committee a real conflict of interest could arise for members of the recipient party. If there is any doubt about the matter the members should withdraw from the committee.

16.74 In practice, however, this situation is a further example of the problems that a small legislature faces. The Members with a declared interest constituted a majority of the committee in question. This limited the options available to the third member of the committee to dispute their interpretation of the possible conflict. In the Sixth Assembly all the Labor Party Members faced a similar possible conflict. Convening a committee that was both representative of the balance of parties in the Assembly and that did not include any Members with a possible conflict was impossible.

16.75 The course that was followed was that the members acknowledged their possible conflict of interest, and conducted their inquiry with the maximum of transparency,

⁶⁰ Standing Committee on Planning and the Environment, *Draft Variation to the Territory Plan No. 258—Belconnen Labor Club Section 48 Belconnen*, (June 2005).

⁶¹ In discussing this situation there is no implication that the Members involved allowed their membership of the Labor Club or their knowledge of the club's donations to the Labor Party to influence their deliberations on the substantive matters before the committee.

⁶² Assembly Debates (16.08.2005) 2708-10.

affording all reasonable access to dissenting views and on occasion including details of their private deliberation in the report to demonstrate that the committee's approach to the matter had been absolutely even handed. In this way any public concern about the process can be assuaged.

16.76 The application of this standing order must be read in the context of the provisions of standing order 156 and section 15 of the Self-Government Act, which relate to conflict of interest of Members of the Legislative Assembly.⁶³

ELECTION OF CHAIR AND DEPUTY CHAIR

16.77 Generally, the decision as to who will be the chairs and deputy chairs of committees is decided by negotiation before committees first meet. The party forming the government does not necessarily have a majority on committees even when, as in the Sixth Assembly, it has a majority in the Assembly itself. As discussed above, a governing party would be unlikely to have sufficient backbench Members available to provide chairs to all the committees even should it wish to do so. Thus, the office of presiding member on committees is shared between government, opposition and crossbench Members.⁶⁴

16.78 A rare example of a disputed chairmanship of a committee occurred in the Select Committee on Estimates 2006-2007. This committee had six members, three from the government party, two from the opposition and one crossbench Member. Under the committee's resolution of appointment, only a Member of the governing party was eligible for election as chair. A Member of the governing party was nominated by a party colleague and another Member of the governing party was nominated by the opposition. Both members accepted the nominations, with the matter being put to a vote. The vote was tied at three votes each. Under the standing orders, where there is an equality of votes the matter is resolved in the negative. A second ballot was then held and this time the second nominee declined the nomination. While this situation does not arise often, it highlights the problems that can arise when a committee has an even number of members and no mechanism exists to resolve tied votes.

16.79 It is also highly unusual for a committee to pass a vote of no confidence in its chair, leading to the chair's resignation. In the Fifth Assembly a matter of privilege arose in relation to the conduct of a committee chair who had appeared to pre-empt the findings of the committee by releasing a public statement on an inquiry. The statement favoured a specific outcome and invited people to write to the committee supporting that outcome.⁶⁵

16.80 As a result of this action, a member of the committee moved a motion of no confidence in the chair, which requested that she resign her position. The motion was carried and the chair resigned.⁶⁶

63 Self-Government Act, section 15:
Conflict of interest

(1) A member of the Assembly 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.

64 House of Representatives standing order 232(a) specifies that committee chairs shall be government Members. Senate standing order 25(9)(a) specifies that the legislation and general purpose standing committees will be chaired by government Members.

65 A privilege matter was considered by the Select Committee on Privileges. See *Report on whether the actions of the Chair of the Standing Committee on Planning and Environment with regard to the distribution of a flyer in her name at the Belconnen Markets did constitute a contempt of the Assembly*, 19 March 2004.

66 Standing Committee on Planning and Environment, Minutes of meeting No. 93, 2 April 2004.

16.81 In the Sixth Assembly, the opposition chair of the Standing Committee on Public Accounts lost a vote of no confidence and a new chair, a crossbench Member, was duly elected by the committee. The opposition therefore went from holding the customary two committee chair positions to one.

TITLE OF PRESIDING MEMBER AND DEPUTY PRESIDING MEMBER

16.82 Standing order 225A was adopted by the Assembly in August 1993 to enable committees to determine the title of the presiding member and deputy presiding member. The mover of the motion to amend the standing orders referred to the ‘confusion in the operation of ... committees, in particular with respect to the title of the committee chair’, and noted that a number of titles were used. In a rather light-hearted discussion valid points were made with regard to gender-neutral terms and the desirability of uniformity in the titles adopted. The new standing order was adopted without amendment even though, as written, it would not necessarily solve the problem its mover sought to address. Until 2008 the practice was that most committees called the presiding member the ‘chair’. In 2008 the Assembly amended the standing order to ratify that practice.⁶⁷

Absence of chair and/or deputy chair

16.83 Standing orders 226 and 227 provide for the deputy chair to act for the chair in the latter’s absence and for committees to appoint an acting chair if both officeholders are absent. Committees do undertake business in the absence of the chair but it is rare for standing order 227 to be invoked. Most Assembly committees have three members and could not form a quorum if two were absent. In cases where it could happen—for example, estimates committees—the chair also tends to be the senior member of the committee and it would be unlikely for a committee to carry on its business in his or her absence.

VOTING RIGHTS OF COMMITTEE CHAIRS

16.84 The voting rights of committee chairs vary considerably across the various Australian jurisdictions. In the House of Representatives, committee chairs have a casting vote only, while in the Senate the general rule is that chairs have a deliberative vote only. However, the chairs of legislative and general purpose standing committees of the Senate also have a casting vote.⁶⁸ The state parliaments accord various combinations of deliberative and casting votes.

16.85 In early Assemblies, the large proportion of crossbench Members on committees and the diversity of views they represented meant that tied votes were rare even if, for voting purposes, there were an even number of Members on the committee. In more recent Assemblies, committees generally have had an uneven number of members. Thus, the question of giving the chair a casting vote has not arisen. However, note the example in paragraph 16.78 where the Select Committee on Estimates 2006-2007 had an even number of members and the possibility of a tied vote was a substantial cause for concern. One member of the committee was required to return to Australia from overseas in order to maintain government numbers on the committee during the critical final stages of report consideration.

⁶⁷ MoP 2004-08/1388-9.

⁶⁸ House of Representatives standing order 232(a); Senate standing orders 31 and 25(10)(f). Procedures for joint committees of the two houses may vary.

SITTINGS, ADJOURNMENTS AND SUSPENSIONS OF COMMITTEES

16.86 Committees of the Assembly cannot sit during sittings of the Assembly without the specific authority of the Assembly. This is rarely sought. While members are generally physically present in the ACT, the problem for ACT committees is the limited availability of members. Committees generally adopt the practice of fixing a regular meeting time soon after their establishment, but additional time for both public and private meetings is often required and is subject to competing demands on members' availability. Assembly practice has been adopted that meetings of committees occur during lunch and dinner suspensions. In March 2008 standing order 229 was amended to clarify that committees are able to meet during Assembly suspensions.⁶⁹

Chair may adjourn or suspend sitting of a committee

16.87 Standing order 229A provides that 'in the case of grave disorder' the chair of a committee may adjourn or suspend a meeting of a committee.⁷⁰ Assembly committees have generally conducted their business without recourse to this standing order. Where there is a dispute within a committee about the conduct of business, the committee should consider the matter in private session.

16.88 In general, the power of the chair of a committee is, subject to the standing orders, similar to that of the Speaker in the Assembly. However, committee business is conducted in a less formal manner than is the practice in the Chamber and the requirement for the chair to make procedural rulings is correspondingly reduced. Generally, committees resolve issues of procedure by negotiation rather than by formal motions of dissent or by taking points of order.

CONSTITUTING A QUORUM

16.89 Ensuring the presence of a quorum is essential to the proper conduct of committee business. In the absence of a quorum, there is no properly constituted committee meeting. Thus, anything that the members present purport to undertake has no validity and the powers and privileges that apply to properly constituted committees do not apply. This is particularly important when taking evidence at public hearings. The absence of a quorum at a public meeting could mean that what is said by committee members and witnesses does not attract the protections of parliamentary privilege.

16.90 The provision of standing order 231, that the quorum for taking and authorising publication of evidence is two members, has effect unless explicitly overridden in a committee's resolution of appointment. For example, the resolutions of appointment of select committees have, on occasion, specified a quorum that is less than half of that committee's membership. For instance, the select committee on estimates in the First and Second Assemblies had a quorum of three with a membership of 11 or 12.

16.91 Standing order 232 stipulates that, if after the lapse of 15 minutes from the time appointed for the meeting a quorum is not present, the members shall retire and their names entered in the minutes. The reference in standing order 232 to the minutes is taken to refer to the secretary's notes, since there will be no minutes of a meeting where a quorum cannot be formed.⁷¹

⁶⁹ See standing order 229.

⁷⁰ Assembly Debates (20.3.1999) 542-5.

⁷¹ House of Representatives Practice, p. 693.

16.92 In practice a certain amount of flexibility is applied to very short absences from meetings, particularly public hearings. If a committee member whose presence is necessary to form a quorum leaves a meeting very briefly, but remains in the immediate environs of the committee room, the committee meeting need not necessarily be suspended. It is important that committee members and the committee staff are alert to any such brief absences and do not allow them to extend beyond an acceptably short period of time. No votes can be taken during such brief absences. If a member or a witness draws attention to even a very brief absence of a quorum, the meeting must be suspended until a quorum is formed. When a committee is deliberating on important matters or hearing evidence in public on a controversial matter, even the briefest lapse in maintaining a quorum should be avoided.

16.93 There have been occasions in other jurisdictions when committees have travelled interstate to take evidence at public hearings but found themselves unable to form quorums. In these circumstances, the only option open to the members present, apart from cancelling the meeting, is to have informal discussions with the scheduled witnesses after ensuring that they understand that those discussions, and any record of them, are not formal proceedings and do not attract the protections of parliamentary privilege.

PARTICIPATION IN MEETINGS BY ELECTRONIC COMMUNICATION

16.94 In the Fifth Assembly the question arose of members who were unable to attend committee deliberative meetings in person participating remotely by electronic communication—that is, by audio or audio-visual link. A Member who was to represent the Legislative Assembly at a meeting of the Commonwealth Parliamentary Association outside Australia proposed that the Assembly adopt a temporary order similar in wording to the relevant Senate standing order to permit this.⁷²

16.95 The Member in question was a crossbench Member of the Assembly and also the chair of a select committee facing a tight reporting deadline. Because the Member was a crossbench Member with no party colleagues, it was not practical to appoint a temporary replacement on the committee for the duration of her absence, nor was it possible to delay the committee's work.

16.96 In debate various objections were raised, principally that the ACT, as a small and compact jurisdiction, did not require such a procedure because the circumstances in which it would be required were both rare and foreseeable. Hence, allowances could be made to accommodate a Member's needs. Questions were also raised with regard to the definition of the circumstances that would constitute an acceptable reason for being unable to attend a meeting.

16.97 After debate, in which an amendment to refer the proposal to the Standing Committee on Administration and Procedure was defeated, a temporary order was adopted. It was used on a small number of occasions in the Fifth Assembly but was not renewed at the beginning of the Sixth Assembly.⁷³

72 Senate standing order 30(3) applies to both public hearings and deliberative meetings; thus subparagraph 30(3)(b) of that standing order was omitted from the motion moved in the Assembly.

73 MoP 2001-04/296. Temporary Order 230A stated: 'A committee may resolve to conduct deliberative meetings by electronic communications without the members of the committee being present in one place, *only when face to face meetings are impossible*, provided that:

- (a) when a committee deliberates, members of the committee constituting a quorum are able to speak to, and hear, each other contemporaneously; and
- (b) the Presiding Member of such a meeting takes care to ensure that a quorum is maintained during the meeting and that the standing orders and rules of the Assembly are observed.'

The words in italics were inserted into the original motion by amendment.

16.98 In May 2007 the Assembly again considered the issue following difficulties in a committee when a Member was absent overseas on Assembly business. An order was adopted for the life of the Sixth Assembly which went further than the previous temporary order. It allowed for both deliberative and public hearings to be conducted electronically.⁷⁴ There had previously been occasions in the Sixth Assembly when Members who were not in Canberra were precluded from participating in committee activity. The resolution also permits committees to hear from witnesses remotely. In March 2008 the Assembly adopted a new standing order 229B which allows committees to meet using electronic communication.

ADMISSION OF OTHER MEMBERS

16.99 Committee inquiries, particularly in a small and geographically compact jurisdiction such as the ACT, are often of interest to all Members of the Assembly. The standing orders enable Members who are not committee members to participate in committee hearings and question witnesses. As the standing orders make clear, such participation requires the unanimous consent of the committee. However, permission is usually given.

16.100 Non-committee Members participating in hearings should not do so to the disadvantage of committee members—for example, by taking up the time available for questioning thus denying committee members the opportunity to ask questions. It is the responsibility of the chair of a committee to ensure that committee members are given priority in asking questions.

16.101 The participation of non-committee Members in committee hearings is most common in the select committee on estimates and standing committees considering annual reports of ACT agencies. The estimates committees examine the appropriation bills for the forthcoming financial year and thus provide the Assembly with an opportunity to scrutinise virtually all activities of government. Accordingly, these committees are particularly useful to all Members, particularly opposition and crossbench Members, to fulfil their parliamentary responsibility of scrutinising the executive government's budget appropriations and the outcomes of ACT Government agencies as reported in their annual reports. As noted above, the First and Second Assemblies experimented with estimates committees composed of all (or almost all) the non-ministerial Members of the Assembly but the more usual practice has been to have a five- or six-member committee with extensive participation by non-committee Members, particularly in public hearing sessions where the non-committee Members are shadow spokespersons. Non-committee Members must withdraw when the committee is deliberating.

ADMISSION OF VISITORS

16.102 As far as is practically possible, committees gather their evidence at public hearings and publish transcripts of these hearings. Visitors would be excluded from a public hearing only if their behaviour threatened to disrupt the hearing. There have been occasions when members of the public have been asked to desist from making sotto voce comments on the proceedings of committees but disruption requiring a committee to exclude members

⁷⁴ Assembly Debates (3.5.2007) 913-5. The resolution read as follows:

- (1) when a public meeting or deliberative meeting is being conducted, an Assembly committee may resolve to conduct proceedings using audio visual or audio links with members of the committee or witnesses not present in one place;
- (2) if an audio visual or audio link is used, committee members and witnesses must be able to speak to and hear each other at the same time regardless of location; and
- (3) if the Chair is not present when the public hearing or deliberative meeting is being conducted, the Deputy Chair shall chair the meeting in accordance with standing order 226.

of the public has not occurred. Private deliberative meetings of a committee are open only to members and committee staff.

MINUTES OF PROCEEDINGS

16.103 The minutes of a committee are, like the Minutes of Proceedings of the Legislative Assembly, the legal record of the committee. They should record the time, place and date of meeting and the names of those present. The minutes should also record the business discharged and all decisions taken by the committee. If any question arises with regard to the committee's business—for example, what was resolved; who was present; whether documents were authorised for publication—the minutes provide the definitive answer. The proper conduct of committees requires that minutes are carefully recorded by the secretary, written up promptly after a meeting and confirmed by the committee at the next available opportunity.

16.104 Minutes should not record extraneous information. The content of discussion in reaching a decision is not recorded unless a member or members request that their views on a particular matter, where they are not reflected in a committee's decision, be recorded.

SPECIALIST ADVISERS

16.105 The use of specialist advisers by parliamentary committees is a well-established practice. Since its inception, the scrutiny committee has retained specialist legal advisers on a long-term basis to consider and report to the committee on legislation before it.

16.106 The Legislative Assembly's general purpose standing committees and select committees have not made great use of specialist advisers. The Select Committee on the Territory's Superannuation Commitments (1998 to 1999) did retain an adviser to provide actuarial advice, but in most cases where complex or technical advice is required by committees, it is obtained through the ordinary process of seeking written submissions and taking evidence at hearings.

16.107 When specialist advisers are appointed, their terms and conditions of appointment are determined by the Speaker.

POWER TO SEND FOR PERSONS, PAPERS AND RECORDS

16.108 Standing order 239, which empowers committees to send for persons, papers and records, is the basis of Assembly committees' evidence-gathering power. This is a very extensive power. It is supported by standing order 240, which enables committees to summon witnesses. They can also order the production of documents.⁷⁵ A refusal to appear as a witness, to provide a document or to answer a question may be found to be a contempt of the committee and be punishable by the Assembly.⁷⁶ In practice, committees of the Assembly have relied on cooperation and negotiation in gathering evidence and their powers have rarely been tested.

⁷⁵ The term 'document' is interpreted widely, see *Odgers*, p. 436.

⁷⁶ Committees do not make findings of contempt. Where a committee believes that a contempt may have occurred, the matter is reported to the Assembly, which decides the matter. Note that there are limitations to the power of the Assembly to punish contempts. The *Australian Capital Territory (Self-Government) Act 1988*, subsection 24(4), denies the Assembly the power to impose fines or imprison a person. These powers are available to the Houses of the Commonwealth Parliament; see *Parliamentary Privileges Act 1987* (Cwth), section 7.

16.109 As discussed in Chapter 2, a range of claims may be made by parties who do not wish to comply with a committee's request for documents. It is necessary for committees to deal with them on a case-by-case basis. The most common situation in which such claims arise is when a Minister of the ACT executive declines to provide a committee with documents or other information, claiming 'public interest immunity'. As the term suggests, the claim argues that it would not be in the public interest to make available the information in question. Issues such as the confidentiality of Cabinet deliberations, potential prejudice to law enforcement investigations, damage to commercial interests and unreasonable invasion of privacy can underpin such claims.

16.110 The Assembly and its committees should always consider whether there is a competing, and greater, public interest in information being made available. *Odgers'* summarises the issues concisely:

While the public interest and the rights of individuals may be harmed by the enforced disclosure of information, it may well be considered that, in a free state, the greater danger lies in the executive government acting as the judge in its own cause, and having the capacity to conceal its activities, and, potentially, misgovernment from public scrutiny.⁷⁷

16.111 Committees should, at the very least, require a Minister to provide a clear statement of the grounds on which a claim of immunity is being made. Where a committee decides that the grounds are reasonable it should explore with the Minister alternative means of gaining access to the information—for example, by editing out names or personal details and protecting or receiving material in confidence.

16.112 Where a committee does not accept a claim of immunity, it may persist with its request but the practical reality is that, in conflict with the executive, the coercive powers of committees and the Assembly are limited. The adverse publicity surrounding a Minister's refusal to cooperate with a committee or the threat of proceedings in the Assembly for contempt may lead the Minister to reconsider his or her position, but the outcome of such a dispute will often be determined by political circumstances rather than obscure considerations of the public interest.⁷⁸ It is always open for the committee to report the matter to the Assembly and recommend either that the executive provide the documents or that the chair move the appropriate motion.

16.113 A further area of contention in the ACT Legislative Assembly, and other parliaments, has been the capacity of the legislature and its committees to examine the management and operations of statutory authorities, government business enterprises and the like. These bodies operate at arm's length from government; they may not be accountable to the legislature through a responsible Minister; and the commercial areas of their activities may give rise to claims that they are not required to answer questions or provide documents in relation to their activities. These claims should be resisted by committees. If an agency is in public ownership, operates under a statutory scheme or is underwritten by the public revenue, its activities should be open to public scrutiny.⁷⁹

⁷⁷ *Odgers'*, p. 485.

⁷⁸ The Assembly has made a finding of contempt against a Minister for refusal to answer a question in an Estimates committee; see, Select Committee on Privileges, *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer questions in committee hearing and distribution of ACT Health document*, 3 November 2003. Note that in the Fifth Assembly the government did not have a majority.

⁷⁹ *Odgers'*, p. 309.

PUBLICATION OF EVIDENCE AND OTHER DOCUMENTS

16.114 Providing public access to parliament and informing the public are two of the most significant roles of parliamentary committees. Public participation in committee inquiries takes place primarily through the provision of submissions and participation in public hearings. Standing orders seek to balance the competing demands of necessary confidentiality and desirable public access and openness in the conduct of committee business.

16.115 Evidence and documents received by committees attract parliamentary privilege. Witnesses and authors have protection and immunity for anything in evidence and documents they present to committees, and committees collectively, and their individual members, cannot be sued for publishing such evidence or documents. To ensure that privilege attaches to the evidence received by, or reports of, committees, the publication of committee material must be in accord with standing orders and based on a decision of a committee or the Assembly. Committees are not obliged to receive all material sought to be submitted as evidence.⁸⁰

16.116 However, both committee members and witnesses should be aware of the limits of the protection provided. What the courts have described as 'effective repetition'—saying something in a parliamentary meeting to which privilege applies and repeating it even by implication outside the privileged environment—may not attract the protection of absolute parliamentary privilege.

16.117 Committees should conduct their business in public as far as is possible. Written submissions are normally authorised for publication by the committee as soon as is practicable after receipt.⁸¹ Hearings to gather evidence from witnesses are normally conducted in public.

16.118 There are, however, circumstances where witnesses may request the opportunity to provide a submission in confidence or to give evidence in private or where committees may wish this to be the case. Examples include when a committee is considering matters in relation to national security, where genuine concerns about individual privacy or commercial confidentiality exist or where the witness requires the protection of confidentiality. However, a committee should consider the matter very carefully before taking evidence in camera and should take evidence in this way only when it is considered absolutely necessary to its inquiries. As a general rule committees should be particularly wary of requests to give evidence in camera if that evidence involves allegations against other persons.

16.119 Taking evidence in private may create problems for both committees and witnesses. Before taking evidence in camera, committees should ensure that witnesses are aware that in camera evidence can be authorised for publication by a simple vote of either the committee or the Assembly. If so advised, witnesses may feel that the protection offered by the committee is insufficient and decline to give evidence.

16.120 Committees that take evidence in camera, are then faced with the question of how it can be used. It cannot be quoted extensively without defeating the object of taking private evidence in the first place. It is also unsatisfactory to put forward a significant argument or reach a conclusion on the basis of evidence that cannot be revealed. Detailed evidence

80 *House of Representatives Practice*, p. 667.

81 Committees do seek to ensure that submissions containing adverse reflections on named individuals, information to which confidentiality should apply or other inappropriate material are not published with the protection of parliamentary privilege.

provided in camera may support a general conclusion or recommendation by a committee but it is preferable for such supporting evidence to be public.⁸²

16.121 A committee's deliberations on its draft report and the contents of that report should remain confidential until the report is tabled in the Assembly or presented to the Speaker and its publication authorised. Confidentiality allows a committee to reach conclusions and negotiate necessary compromises free from external pressure, particularly where a matter is politically sensitive. This underpins the trust and goodwill that must exist among members if a committee is to function effectively. Confidentiality prior to tabling is also a mark of respect to the Assembly, given that the committee is a creation of the Assembly, its powers are derived from the Assembly and its report is directed to the Assembly.

16.122 Unauthorised release of documents or publication of evidence or drafts of reports may be found to be a contempt (and might also be considered a breach of privilege)⁸³ and may be punished by the Assembly. There have been a number of instances where unpublished submissions or details of the content of draft reports of committees have been released, usually to the media. When such matters have been drawn to the attention of the Speaker, precedence has been given to have them referred to a committee for investigation as a possible contempt. However, the establishment of a privilege inquiry to investigate the unauthorised release of documents by the Assembly is rare.

16.123 In the first case of this type in 1990, the chairman of the Standing Committee on Conservation, Heritage and the Environment wrote to the Speaker advising a possible breach of privilege.⁸⁴ In a statement to the Assembly, the Speaker indicated that the complaint had substance and that he was prepared to give precedence to a motion by the committee chairman to refer the matter to the Standing Committee on Administration and Procedure.⁸⁵ The committee chairman then advised the Assembly that, as a result of discussion among committee members, he did not wish to proceed with the matter, noting that the unauthorised release was probably the result of 'insufficient understanding' and that no 'major damage' had been done. He also noted the comment in *House of Representatives Practice* that:

Committees have chosen, from time to time, to take no action on press articles partially disclosing the contents of their reports or commenting on committee deliberations during the drafting of reports. It has been thought counter-productive to give further publicity and credence to such articles.⁸⁶

⁸² The Senate faced the specific issue of the use of in camera evidence by senators lodging dissenting reports and in 1997 adopted a revised standing order 37 to address the issue. It is worth quoting at length because it illustrates the factors a committee may have to consider in using such evidence either in a report or a dissent:

37 (2) A senator who wishes to refer to in camera evidence or unpublished committee documents in a dissenting report shall advise the committee ... and all reasonable effort shall be made by the committee to reach agreement on the disclosure of the evidence or documents ... If agreement is not reached, the senator may refer to the in camera evidence ... only to the extent necessary to support the reasoning of the dissent. Witnesses who gave the evidence or provided the documents ... shall, if practicable, be informed in advance of the proposed disclosure ... and shall be given reasonable opportunity to object ... The committee shall give careful consideration to any objection by a witness ... Consideration shall be given to disclosing the evidence or documents in such a way as to conceal the identity of persons who gave the evidence ... or who are referred to in the evidence or documents.

⁸³ A breach of privilege relates to the specific rights or immunities of the Assembly and its Members—for example, the right of freedom of speech in a parliament free of the threat of legal action. An action may constitute a contempt if it is 'an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties' (*Parliamentary Privileges Act 1987* (Cwth), section 4). For example, the leaking of a draft report of a committee, particularly where the purpose of the leak was to bring pressure to bear on committee members to change their position with regard to a committee's conclusions, would be considered a contempt.

⁸⁴ Assembly Debates (13.2.1990) 17-8.

⁸⁵ Prior to March 1995, standing order 71 required privilege matters to be referred to the Standing Committee on Administration and Procedure. The standing order was amended to provide for privilege matters to be considered by select committees established for that purpose.

⁸⁶ Assembly Debates (13.2.1990) 18; from *House of Representatives Practice*, Second edn, p. 615.

16.124 On four subsequent occasions in 1990, matters relating to the unauthorised release of committee proceedings or evidence came before the Assembly. On two occasions the Speaker gave precedence to the relevant motion and on the other occasions motions to refer the matter of privilege to a committee were moved by leave. On all four occasions no further action was taken.⁸⁷

16.125 The first actual privilege inquiry in relation to the unauthorised release of a committee report occurred in 1993. The context of that inquiry is important. Sometimes, the desire to gain the maximum amount of exposure for a committee report or to facilitate public debate has resulted in a blurring of the requirements of the standing orders. In 1993 the Standing Committee on Planning, Development and Infrastructure sought, and received, the Assembly's approval:

... to release, prior to its presentation in the Assembly and pursuant to embargo conditions and to persons to be determined by that Committee, copies of its Report No 12 ...⁸⁸

16.126 The rationale for this was that the proposed changes to ACT planning which the committee was examining were of fundamental importance to the people of the ACT and the committee wished:

... to ensure that the widest and best informed views about the report are able to be made by the media [sic], it is proposed that we provide these copies on an embargoed basis ... that will include a requirement that the report not be reproduced, transmitted, distributed or in any way broadcast prior to the formal tabling ...⁸⁹

16.127 The Assembly, while noting that what was proposed was 'a little unusual', agreed to the motion. No questions were subsequently raised in the committee or the Assembly with regard to this procedure; thus, it must be assumed that the embargo conditions were complied with.⁹⁰

16.128 Later that year the motion to appoint the Select Committee on Estimates to consider the Appropriation Bill 1993-1994 included a similar provision to release embargoed copies and the precedent of the planning committee was cited in support of its inclusion.

... (6) the Committee is authorised to release copies of its report, prior to the Speaker or Deputy Speaker authorising its printing and circulation and pursuant to embargo conditions and to persons to be determined by the Committee ...⁹¹

16.129 Four copies of the draft report were provided to journalists under embargo on 12 November 1993.⁹² On the same day, a local newspaper, *The Canberra Times*, carried an

87 Two motions were defeated; one debate was adjourned and later discharged from the *Notice Paper*; and in the last no action was taken. In this case the Speaker deferred giving precedence to a motion to refer the matter to the Administration and Procedure Committee and proposed that the Assembly establish a select committee to consider the matter because of an overlap between the members of the committee in which the leak had occurred and the Administration and Procedure Committee.

88 Assembly Debates (18.5.1993) 1540.

89 Assembly Debates (18.5.1993) 1541.

90 It is debatable whether this 'unusual' procedure was either necessary or useful, given that the motion authorising release under embargo was agreed to on the evening of 18 May 1993 and the report in question was tabled on the morning of 20 May 1993.

91 MoP 1992-94/378.

92 Again, the rationale for this process is not apparent. The report of the Select Committee on Estimates was presented to the Deputy Speaker (pursuant to the committee's resolution of appointment) on the same day. Thus any advantage to media organisations in receiving an embargoed copy of the report must have been minimal.

article clearly reflecting the conclusions of the select committee contained in the draft report. A subsequent privilege inquiry by the Standing Committee on Administration and Procedure concluded that the unauthorised release of the committee's conclusions constituted a contempt but failed to identify the source of the leaked draft report. It found that the journalist who published the report was in contempt of the Assembly but, since the person responsible for providing him with the material could not be identified, the committee did not recommend any action against that person.

16.130 The practice of authorising select committees on estimates (though not other select committees) to release draft committee reports under embargo continued throughout the Second, Third and Fourth Assemblies but lapsed in 2001.⁹³ The adoption of a similar procedure was recommended in a report of the Select Committee on Privileges in December 2003.⁹⁴ In proposing a revision of standing order 241, that committee argued that committees should have a power of 'limited publication' of draft reports, evidence and other papers:

- to facilitate access to expert advice; and
- to facilitate informed debate by enabling Members who were not members of a committee, Ministers and the media to be aware of the contents of a report when it is tabled.

16.131 The first of these points is valid but the practice of seeking expert comment on evidence or possible conclusions can generally be accommodated within the existing rules. The second point is debatable. It was the practice of the ACT's House of Assembly, an advisory body that preceded self-government. But, as the report notes, that House sat only once a month, so the opportunity for Members to make informed comment on a report might be considerably delayed if pre-tabling confidentiality was strictly adhered to.

16.132 The House of Representatives has specific provision for committees to release reports under embargo.⁹⁵ There may be a requirement for the practice in the Commonwealth because Members, including committee members, are dispersed to their electorates when the House is not sitting; thus, the optimum use should be made of their time during sitting periods in Canberra. However, given that the ACT Legislative Assembly sits regularly and all Members live in Canberra, the need for such a procedure in the ACT for those reasons seems unnecessary.

16.133 Committee reports can be tabled in the Assembly at any time and may on specified occasions be presented to the Speaker (or Deputy Speaker) when the Assembly is not sitting.⁹⁶ There need be no unnecessary delay between a committee adopting a report and its publication. The Assembly has, in practice, been generous in providing time for debate on committee reports. Thus, tabling a report and then deferring debate for a period of time to enable other members to read it or the media to make comment on it is not difficult. There appears to be no great need for general provisions to release reports under embargo; to do so merely undermines the requirement that committee reports should be confidential until published by the Assembly.

16.134 There may be specific cases where providing Members and Ministers with some advance knowledge of a committee's conclusions is desirable. For example, where

93 It has been permitted in the House of Representatives since 1998. See *House of Representatives Practice*, p. 688. A committee may resolve to release a report or other material under embargo prior to its tabling in the House.

94 Select Committee on Privileges, *Possible unauthorised dissemination of committee material, standing order 71 (privilege). Ministerial refusal to answer questions in committee hearing and distribution of ACT Health document*, 3 November 2003, pp. 9-11.

95 See footnote 93.

96 The authority to do this may be provided by the resolution of the Assembly or by specific terms in a select committee's resolution of appointment.

the completion of the inquiry by a Select Committee on Estimates is close to the deadline for passage of the appropriation bills, the time available to the Assembly to debate the committee's report and to the government to consider and respond to its recommendations may be limited. Such cases are better handled by specific orders of the Assembly on a case-by-case basis.

16.135 In March 2008 the Assembly amended standing order 242 to make provision for committees to take certain action in the event that there appeared to be an unauthorised disclosure of proceedings, documents or evidence.⁹⁷

ACCESS TO OLDER COMMITTEE RECORDS AND DOCUMENTS

16.136 In March 2008 the Assembly adopted a new standing order authorising the Speaker to permit any person to examine and copy any evidence submitted to, or documents of, committees which has not been published and has been in the custody of the Assembly for at least 10 years.⁹⁸

EXAMINATION OF WITNESSES AND WITNESSES' RIGHT TO ADVICE

16.137 Standing order 245 provides a very formal statement of the procedure that may be adopted by a committee when questioning witnesses. The salient points are that the committee should agree on the practices to be followed at hearings and that during the hearings the chair will ensure that the practices are followed. It is important to ensure that all members have equal opportunity to ask questions, though they may not avail themselves of those opportunities. For example, the public hearings of select committees on estimates scrutinising government expenditure provide non-government Members with their best opportunity to pursue the policies and decisions of the executive and are the most explicitly party-political committee hearings. Government committee members may be less likely to use the estimates process to question ministers aggressively.⁹⁹

16.138 Standing order 246 restricts the right of witnesses before committees to be represented by counsel or advisers. It is the duty of both committee staff in preparing for a hearing and the chair at a hearing to ensure that witnesses are aware of their rights and obligations when appearing before a committee. Generally, committees wish to hear from witnesses in their own words. The role of committees in offering the public the opportunity to come to parliaments and speak to their elected representatives would be diminished if organisations and individuals were represented by paid counsel, advisers or lobbyists. Nor is there any great need for such representation.

16.139 Parliamentary committees, while formally having some procedural similarities to the courts, are, for the most part, not judicial processes. Witnesses are generally providing information and opinions on a voluntary basis about matters of public concern. Representation by paid advisers could make committee processes unnecessarily legalistic and bias access to the committee in favour of those with the resources to retain professional advisers.

16.140 The reference in the standing orders to witnesses being represented by counsel or consulting with advisers should be interpreted narrowly. Committees do need to hear expert advice in all sorts of areas and that expert advice may be available only from legal counsel or other professionals. Such people could, however, appear to give evidence on the subject

⁹⁷ See standing order 242.

⁹⁸ See standing order 243.

⁹⁹ Senate estimates committees are an even clearer example of this; government members frequently appear to be present to ensure that a quorum is formed and to support the chair if any issues arise requiring a decision of the committee.

before the committee on the basis of their expertise, and not to 'represent' a client in a manner analogous to representation in judicial proceedings.

16.141 In regard to planning issues, for example, the expertise which the planning committee requires to inform itself may lie not with the principals of a development proposal or their opponents but with their advisers—lawyers, engineers, architects and planners. A residents group concerned about a planning decision may retain advisers in town planning or the law in relation to property development to assist it in its campaign by providing expert knowledge which is not available within the membership of the group itself. If that residents group was invited to appear before the committee, it would be a disservice to both the committee and the residents group to prevent their specialist advisers from appearing as witnesses in their own right and giving evidence to the committee. Planning is the area in which this issue arises most commonly in the Legislative Assembly. However, it can arise in any area when a committee is examining a question involving a specific body of professional expertise.

16.142 There are some, albeit rare, occasions on which the Assembly may consider allowing a witness to be accompanied by legal counsel or other adviser. If an inquiry is likely to have an adverse effect on a person's reputation or career, a committee will wish to ensure procedural fairness. For example, in 2002 the Assembly set up a Select Committee on Privileges to inquire into the unauthorised diversion and receipt of a Member's emails. The person who received the emails, without the authority or knowledge of the intended recipient, was a member of the staff of a Member of the Assembly. An adverse finding would clearly make his continued employment in that capacity untenable. In those circumstances, the committee had to be extremely careful in its conduct of the inquiry. Discussion did take place within the committee and between the person under investigation and the committee with regard to his being legally represented before the committee. In the event, the person in question did appear at hearings of the committee but was not accompanied by a legal adviser.

STATEMENTS AND DISCUSSION PAPERS

16.143 Committees can inform the Assembly of their activities in a variety of ways. In early Assemblies committee chairs, by leave, made statements with regard to committee business or, occasionally, presented discussion papers to the Assembly summarising the progress of an inquiry. Discussion papers tended to be presented towards the end of the life of an Assembly. This suggests that committees that did not have time to complete inquiries and produce comprehensive reports, presented discussion papers instead.¹⁰⁰ In presenting discussion papers, committees were explicitly trying to ensure that an issue was taken up in the subsequent Assembly.

16.144 In 1995 the Standing Committee on Administration and Procedure recommended the adoption of new standing orders to provide a formal procedure for the making of statements and the presentation of discussion papers. At the same time, the proposed standing orders would ensure that any such statements or discussion papers had been properly considered and adopted by the committee.¹⁰¹

¹⁰⁰ See, for example, MoP 1992-94/797, Standing Committee on Tourism and ACT Promotion, Discussion Paper on Options for a Future Inquiry; p. 784, Standing Committee on Conservation, Heritage and Environment, Discussion Paper on Container Deposits; 8 December 1994, p. 821, Statement by the chair of the Standing Committee on Conservation, Heritage and Environment.

¹⁰¹ Standing Committee on Administration and Procedure, *Standing Orders and Citizen's Right of Reply*, May 1995.

16.145 Standing order 246A provides a formal mechanism for committees to communicate decisions about potential inquiries or other activities within their terms of reference to the Assembly. This mechanism is used by all committees to advise the Assembly about the adoption of new inquiries, decisions not to proceed with inquiries, conference attendance and any other matter which the committee considers should be notified to the Assembly.

16.146 A committee may wish to advise the Assembly that it has decided not to proceed with an inquiry. If this occurs after a committee has self-referred a matter, a statement advising of a decision not to proceed with an inquiry is normally accompanied by an explanation or the reasons for the decision. When the inquiry resulted from an Assembly reference, a brief report would be expected.¹⁰² For example, in the Fifth Assembly the chair of the Standing Committee on Planning and Environment provided the following advice to the Assembly with regard to its inquiry into renewable energy and sustainability:

Although the committee has invested considerable time and effort into this inquiry, the terms of reference were ultimately too wide ranging. Considering the committee's heavy workload of draft variations and other matters, it was not able to produce a comprehensive report on the matter.¹⁰³

16.147 The chair also cited the rapid and significant changes in the subject as a reason why the committee would not be reporting. Another member of the committee suggested that the demands of the committee's responsibilities with regard to planning matters necessitated that either a separate environment committee be set up or the subject be referred to a select committee.¹⁰⁴

16.148 Statements made in accordance with standing order 246A have also alerted the Assembly to matters that have come to the attention of committees during inquiries or through their review of annual reports that committees consider to be of such urgency they should be addressed immediately. For example, the chair of the Standing Committee on Health made a statement to the Assembly with regard to the Aboriginal Health Service in the ACT which 'Despite all the public statements and commitments ... is still inadequately accommodated ... They need action.' The statement went on to note that the committee would maintain a watching brief on the Service and 'keep members informed of its work in this area'.¹⁰⁵ A brief report to the Assembly would also have served the same purpose.

16.149 The main reason for a committee to produce a discussion paper is to canvass various views on a matter that it believes requires further inquiry. The general purpose standing committees are more likely to direct such questions to the public, participants in an inquiry or potential witnesses than to the Assembly itself, although it is important for committees to keep the Assembly informed of all its activities.

16.150 The Standing Committee on Administration and Procedure has, on occasion, presented a discussion paper to the Assembly seeking the views of Members on proposed changes to procedures.¹⁰⁶ In one case, in moving that the paper be noted, a Member commented that:

The committee has not made any decisions ... on any of these submissions, but we have provided a discussion paper for this Assembly – and, we hope, for

¹⁰² The Assembly could decline to accept such a report and direct the committee to complete its inquiry.

¹⁰³ Assembly Debates (24.8.2004) 4017-8.

¹⁰⁴ Assembly Debates (24.8.2004) 4017-9.

¹⁰⁵ Assembly Debates (13.3.2003) 1020-3.

¹⁰⁶ MoP 2001-04/1713.

the next Assembly – as a starting point for a comprehensive review and possible changes to the standing orders.¹⁰⁷

However, the Speaker, as chair of this committee, can present a report or other paper to the Assembly in any break in proceedings without the requirement to seek leave and thus does not need to utilise this standing order.

REPORTS

16.151 The terms of reference for a committee inquiry normally charge it with inquiring into, investigating or examining, and reporting on a particular subject. The report is the culmination of an inquiry. In the case of a select committee, the presentation of the report normally marks the dissolution of the committee, although, as mentioned above, select committees may seek extensions of time and may present interim reports. Standing committees do not normally have reporting dates for particular inquiries set by the Assembly, although they may adopt them for their own internal management reasons. They can also determine their own program to a greater degree than select committees can.

16.152 An inquiry might result in a series of reports or interim and final reports though the general practice is to produce a single report. Standing committees charged with scrutinising legislation, reviewing the reports of the Auditor-General or commenting on planning variations table many more reports than those exercising their general inquiry role. Thus, their reports tend to adopt a standard format.

16.153 In practice, the draft report is usually prepared by the secretariat to the committee in consultation with the presiding member and other members. However, there is no set form in which a committee is required to report. Standing order 249 provides that any Member, other than the chair, can submit an alternative draft report, and the committee must then decide which report it will consider.

16.154 Reports may be a single page or a substantial volume. For example, it is not unusual for the scrutiny committee to note that it has no comment to make on a particular piece of legislation where it does not offend against any of the criteria that the committee applies to its review. Similarly, the Assembly committee responsible for planning variations may, in the case of uncontroversial changes, do no more than note that it has considered the variation and make no further comment.

16.155 Committee members who cannot agree with all or part of a report may dissent from it and present their own report or additional comments to the Assembly explaining the reasons for their dissent and, if they wish, make alternative recommendations. As standing order 251 states, any dissenting report or additional comments 'shall be added to the report agreed to by the committee'. The preparation of a dissenting report or additional comments is the responsibility of the member(s) dissenting. The reports or additional comments are not made available to, or considered by, the committee prior to tabling. The committee's secretariat is not involved in the preparation of a dissenting report. Members preparing a dissenting report must ensure that it is made available to the committee's secretary in a form that enables it to be added to the majority report of the committee and tabled in accordance with the committee's schedule.

16.156 The content of reports is a matter for committee members. However, committees should seek to ensure that their reports, and particularly their recommendations,

¹⁰⁷ Assembly Debates (26.8.2004) 4316.

deal with matters within the legislative competence of the Assembly. Recommendations in general purpose standing and select committee reports are usually directed to the executive and propose that some action be taken. Thus, the action proposed should clearly be within the legal competence of the executive.

16.157 Successive governments in the ACT have taken upon themselves the responsibility to respond to all Assembly committee reports within three months of their tabling. Such responses normally indicate which, if any, of the committee recommendations the government has accepted and will implement. The Legislative Assembly has also adopted procedures to enable it to follow up the recommendations of its committees. The resolution *Implementation of Committee Recommendations in Annual Reports* calls on the Chief Minister to require executive agencies to include in their annual reports details of progress made in the implementation of recommendations from committees that have been accepted by the government of the day. This resolution, adopted in 2002, is of continuing effect 'until amended or repealed',¹⁰⁸ and has been accepted by successive governments.

16.158 In 2007 the Speaker commenced a practice of tabling a schedule of government responses every six months.¹⁰⁹

Tabling of reports

16.159 The chair, or in the absence of the chair, the deputy chair, can present a committee report to the Assembly at any time (given a break in proceedings). Where a committee has been given a reporting date, as is usually the case with select committees and occasionally with specific inquiries of general purpose standing committees, the presentation of the report may be 'by order' of the Assembly.

16.160 Prior to March 2008, upon presentation of the report, the member presenting it would move one of the motions set out in standing order 254.¹¹⁰ Debate can follow on the motion moved. The most common motion moved with regard to the presentation of committee reports is 'that the report be noted'. A motion to take note of the report is the procedural trigger that provides the Assembly with the opportunity to debate the report.

16.161 When the Legislative Assembly does not sit for a long period, committees occasionally seek authorisation to present their reports to the Speaker rather than to the Assembly.¹¹¹ The Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) and the Standing Committee on Planning and Environment have the ability to report out of session in order to meet the requirements of the *Planning and Development Act 2007* and the pattern of Assembly sittings.

16.162 When debate has taken place but is not complete or it is the wish of the Assembly to defer debate, a motion is moved to adjourn the debate or to make consideration of the report an order of the day for a later hour or a subsequent day.

16.163 Reports of the scrutiny committee are generally not debated on tabling. No motions are moved with regard to them and the chair, by leave, makes a brief statement.

¹⁰⁸ MoP 2001-04/114.

¹⁰⁹ MoP 2004-08/1933.

¹¹⁰ In March 2008 the Assembly adopted a new standing order that authorised for publication all committee reports presented in the Assembly.

¹¹¹ MoP 2001-04/1089.

These reports normally cover a number of pieces of legislation. When the content of a report is relevant to a particular bill, it is debated when the Assembly considers that bill.¹¹²

16.164 Motions to agree to—that is to adopt—particular recommendations or to adopt committee reports are rarely moved. A motion in those terms in effect throws the weight of the Assembly behind a committee's findings and, as such, represents a much stronger statement by the Assembly than merely noting the report. Reports from the administration and procedure committee proposing specific changes to the Assembly's procedures or management which the Assembly wishes to endorse are commonly adopted whereas reports from the same committee that discuss issues are merely noted.¹¹³

16.165 In 2004 the administration and procedure committee, pursuant to the citizen's right of reply procedure, presented a report recommending that a person referred to in the Assembly not be granted an opportunity to reply. On the motion 'That the recommendation be agreed to' an amendment was moved that the Assembly reject the majority report of the Standing Committee' and reconsider the applicant's request. The proposed amendment was negatived.¹¹⁴

¹¹² See MoP 2004-08/185-7 on the tabling of a number of committee reports and a range of the procedures followed.

¹¹³ See MoP 2001-04/561, 1002 for examples of reports proposing changes to standing orders being adopted;

MoP 2001-04/1019 shows a Standing Committee on Administration and Procedure report into information technology services in the Assembly being noted. See also Chapter 11, Legislation, footnote 39.

¹¹⁴ MoP 2001-04, 1654, 1658.