12. Legislation

Introduction—the Territory's laws

12.1. The Self-Government Act empowers the Assembly to make laws for the peace, order and good government of the Territory.[1] This extends to the exercise of the powers of the executive to make laws as provided for by s 37 and Schedule 4 of the Act. Those powers are subject to the provisions of Part VA of the Act relating to the judiciary (inserted into the Act in 1992) and s 23, which lists specific matters excluded from the Assembly's power to make laws.[2]

12.2. In addition, s 21 of the Self-Government Act empowers the Assembly, subject to the provisions of the Act, to make rules and orders with respect to the conduct of its business. The Assembly is thus authorised to make standing and other orders covering the introduction and consideration of proposed laws. The Assembly may also make laws relating to its own privileges and immunities, but it has yet to do so.[3]

12.3. A range of laws other than those made by the Assembly are in force in the Territory. The notes to Part 1.3 of the Legislation Act summarise those sources of law:

> Note 1 The laws in force in the ACT consist of the written law and various unwritten laws known as the principles and rules of common law and equity.
>
> Note 2 The written law of the Territory consists primarily of laws, known as Acts, made by the Legislative Assembly. It also includes regulations, rules of court and other legislative instruments made under specific powers given by Acts. (Written laws made under an Act are commonly called 'subordinate' or 'delegated' legislation.)

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1 Self-Government Act, s 22.

2 Section 3A of the Australian Capital Territory (Self-Government) Regulations (Statutory Rules 1989 No 96 as amended) excludes certain matters from paragraph 23(1)(h) of the Self-Government Act. Other provisions of the Self-Government Act that relate to the Assembly's lawmaking powers are: s 25 (Notification of enactments—now superseded by s 28 of the Legislation Act (see under the heading 'Certification and notification of enactment' in this chapter)); s 26 (Special procedures for making certain enactments (see under the heading 'Entrenching laws' in this chapter)); s 29 (Avoidance of the application of an enactment or part of an enactment to the Commonwealth Parliament); s 31 (Publication of enactments (the responsibility actually rests with the executive, not the Assembly)); and s 57 (Public money), s 58 (Withdrawals of public money) and s 65 (Proposal of money votes).

3 Self-Government Act, s 24. See also Chapter 2: Parliamentary privilege—The powers and immunities of the Assemby.

> Note 3 Before self-government, ordinances made by the Governor-General under the *Seat of Government (Administration) Act 1910* (Cwlth) were the main form of legislation made for the ACT. Most of the ordinances in force at self-government have been converted into Acts (see the Self-Government Act, s 34). However, the Governor-General (in practice, the Commonwealth Government) retains the power to make ordinances for the ACT on a limited number of topics (see *Seat of Government (Administration) Act 1910* (Cwlth), s 12).
>
> Note 4 The written laws in force in the ACT also include the Commonwealth Constitution, Commonwealth Acts, and regulations and other legislative instruments made under Commonwealth Acts. As a general rule, Commonwealth Acts and legislative instruments apply in the ACT in the same way as they apply in other parts of Australia. Commonwealth Acts and instruments prevail over the Acts made by the Legislative Assembly to the extent to which they are inconsistent (see Self-Government Act, s 28).
>
> Note 5 Certain Acts of New South Wales and the United Kingdom also formed part of the written laws in force in the ACT.[4] Because of the *Interpretation Act 1967*, s 65, these are now taken to be laws made by the Legislative Assembly as if they had been enacted by the Assembly. (Section 65 has expired, but its previous operation was saved – see s 65 (3)).[5]

Bills

12.4. A bill is a proposed law presented to the Assembly for its consideration. Though the Self-Government Act does not use the term 'bill' to denote proposed laws, the term has a long history of parliamentary usage, is commonly used in Australia and has been adopted throughout the Assembly's standing orders.[6] The adoption of the term is not without historical significance; 'bills' replaced 'petitions' as the term for proposed laws in England in the fifteenth century and marked an important step in the development of an independent parliament. As *Redlich* describes it:

> … the essence of the change was that the basis for discussion and the matter for determination in the House were no longer requests, but drafts of the desired enactments free from any formula of asking.[7]

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4 For example, the *Bill of Rights 1688 (UK)*, which includes the guarantee of freedom of speech in Parliament, has, via New South Wales and the Commonwealth, become a law of the ACT.

5 These Acts are listed in Schedule 1 (to the Legislation Act), and see s 34 of the Self-Government Act. For a summary of the sources of law in the Territory, see the ACT Legislation Register at www.legislation.act.gov.au.

6 In fact, with the exception of standing orders 193 and 194, the term 'proposed law' does not appear in the standing orders. Standing order 193 sets out the procedures for certification of a bill once it has passed and requires the Speaker to request Parliamentary Counsel to notify 'the making of the proposed law'.

7 *Redlich*, Vol I, pp 16-17, ix, and Lord Campion, *An introduction to the procedure of the House of Commons*, 3rd edn, Macmillan, London, 1958, pp 10-14, 22-25. Bills had been first adopted for legislative proposals

12.5. In Assembly usage, a bill is a proposed law which, if agreed to by the Assembly (and notified on the ACT Legislation Register by Parliamentary Counsel at the request of the Speaker), becomes law.

12.6. As is the practice in the House of Representatives, all bills in the Assembly are treated as 'public bills'—that is, bills relating to matters of public policy. The Assembly standing orders do not contain provision for 'private bills'—that is, bills for the particular interest or benefit of any person or persons, public company or corporation—as recognised in the United Kingdom House of Commons and certain other legislatures derived from Westminster. Again, as in the House of Representatives, there is no recognition of what are termed 'hybrid bills'—that is, public bills to which some or all of the procedures relating to private bills apply.[8]

12.7. The subject matter of bills is restricted by the power of the Assembly to make laws as set out in the Self-Government Act[9] and standing order 200, in line with s 65 of the Self-Government Act, requiring that bills appropriating money be proposed by a minister. Other than these requirements, there is no restriction on the subject matter of bills introduced by executive and non-executive members.

12.8. Assembly bills may originate from any member (that is, executive members, private members, the Speaker and, previously, crossbench executive members).[10] The distinction denoting the status of the member introducing the bill determines the listing of the business on the *Notice Paper* and its precedence in the order of consideration.

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brought forward at the instance of the Crown (it being convenient to supply parliament with drafts of the new statutes). *Redlich* sees the great step in advancement being taken when petitioners who approached parliament from without began to make use of the same form, and when the Commons began to replace their own petitions to the Crown by complete drafts of laws. A survivor from this earlier procedure is that private bills must be accompanied by a petition signed by the parties (or some of them) who are the promoters for the bill.

8 See *House of Representatives Practice*, pp 343-344 and *May*, pp 965-967. There is no obvious constitutional bar to the Assembly adopting such procedures (provided the subject of the proposed laws falls within the provisions of s 22 of the Self-Government Act). Standing rules and orders for the consideration of private bills have been proposed to the House of Representatives by standing orders committees but not adopted. (See the reports of the Standing Orders Committees of the House of Representatives of 9 October 1902, 14 October 1903, and 19 September 1905).

9 Sections 22-24 of the Self-Government Act.

10 On 24 September 1998, the Assembly amended standing orders 77 and 78 by temporary order to create 'executive members' business', being business introduced by a member of the executive that was not government business. See MoP, No 22, 24 September 1998, pp 186-187; Assembly Debates, 24 September 1998, pp 2213-2219. Over the course of the Fourth Assembly, seven bills were introduced under this category (pursuant to notice as an executive member), four of which were enacted. See MoP, No 50, 6 May 1999, p 419; MoP, No 79, 2 March 2000, p 760; MoP, No 82, 9 March 2000, p 772; MoP, No 88, 11 May 2000, p 850. This provision reflected the unusual circumstances of the coalition that formed the executive in the Fourth Assembly in which a minister was not bound by conventions of 'cabinet solidarity' regarding matters outside his portfolio responsibilities and who retained the right to introduce bills in his private capacity. The category was reintroduced in the Eighth and Ninth Assemblies (and renamed crossbench executive members' business in the Ninth Assembly). The Tenth Assembly discontinued this practice with amendments to the standing orders; see MoP, No 7, 30 March 2021, p 87. For further details see Chapter 6: The ACT Executive.

12.9. Table 2 below lists the percentages of bills introduced and enacted in each Assembly, by category of member. Of the bills introduced to the end of the Ninth Assembly, 2133 were introduced by the executive, 487 were introduced by private members (18.3 per cent of all bills introduced) and 34 were introduced by others (for example, the Speaker and executive members/crossbench executive members). Of the 2189 bills enacted, 91.0 per cent were executive bills, 8.4 per cent were private members' bills and 0.6 per cent were other bills.

Table 2 – Bills introduced and passed

	Bills introduced			**Bills passed**		
Assembly	**Executive**	**Private members'**	**Others**[11]	**Executive**	**Private member's**	**Others**
1st	81.4%	18.2%	0.3%	93.9%	6.1%	
2nd	81.9%	18.1%		91.5%	8.5%	
3rd	81.6%	18.4%		87.1%	12.9%	
4th	72.6%	25.8%	1.7%	82.0%	16.8%	1.2%
5th	73.4%	25.0%	1.6%	89.8%	10.2%	
6th	80.4%	18.1%	1.5%	95.9%	4.1%	
7th	76.8%	20.3%	2.9%	87.8%	11.8%	0.5%
8th	92.7%	3.6%	3.6%	96.0%	0.4%	3.6%
9th	88.4%	11.1%	0.5%	94.5%	5.0%	0.5%
Average	**81.0%**	**17.6%**	**1.3%**	**91.0%**	**8.4%**	**0.6%**

12.10. The Assembly offers non-executive members generous opportunities to introduce business when compared with other Australian parliaments. However, the proportion of private members' bills introduced and passed has varied from Assembly to Assembly. Further details are given at Appendix 12.

11 Bills introduced by the Speaker, executive members or crossbench executive members.

Form of a bill

Long title

12.11. A bill begins with a long title that sets out its purposes in brief terms. A short description of the scope of the bill may also be provided.[12] A bill also has a short title that serves as a convenient name for the proposed law. This short title is usually placed in the first clause of a bill. Any reference in the standing orders to the 'title' of a bill is a reference to the long title, as is any procedural reference, without being qualified, to the 'title' of a bill.[13] The usual terms of the long title are 'A Bill for an Act to …' or 'A Bill for an Act relating to …'

12.12. The long title is significant. It describes the proposed law and any relationship with existing legislation. Procedurally, it is important in the context of the relevancy rule and the scope of amendments that may be moved. The rules of procedure have never treated the title as a casual or unimportant matter. It is part of a bill; it is capable of amendment; and it must be agreed to by the Assembly.[14] The provisions and powers contained in a bill must be covered by the description given in the title. If a bill contains clearly extraneous matter, then the bill should be withdrawn.[15] Standing orders require that the title of a bill must be specified in (and agree with) the notice of presentation. A bill may not include a clause that does not come within its title.[16] Bills not complying with these requirements have been ordered to be withdrawn.[17] Further, any amendments which are proposed to a bill must be relevant to its subject matter, as specified by the long title.

12.13. A developing trend in legislative drafting has been to include a 'catch-all' phrase in the long title of bills—'and for other purposes'. This practice must be viewed with some concern since it appears to reduce the importance of the title as a guide to the substantive matters being dealt with in a bill. The use of the phrase is often justified by the need to make consequential amendments to a series of other pieces of legislation which it would be cumbersome to include in the long title or to take the opportunity to make minor amendments to other Acts. The practice of

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12 For example, 'A bill for an Act to approve and provide for carrying out an agreement entered into between the Commonwealth, New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory with regard to the water, land and other environmental resources of the Murray-Darling Basin, and for other purposes'; short title, 'Murray-Darling Basin Agreement Bill 2007'. See also *House of Representatives Practice*, p 344.

13 *House of Representatives Practice*, p 344.

14 Standing orders 186 and 180(e). Standing order 179 provides that the title and any preamble stand postponed in the order of consideration of the bill in the detail stage.

15 Pursuant to standing order 170, which provides that 'Every bill not prepared according to the standing orders shall be ruled out of order by the Speaker and withdrawn from the Notice Paper'.

16 Standing orders 168(b) and 169.

17 See MoP, No 125, 5 December 2007, p 1309; MoP, No 41, 12 November 1009, p 459; MoP, No 143, 28 March 2012, p 1836. See also under the heading 'Irregular bills to be withdrawn' in this chapter. On occasion, bills have been withdrawn at this stage pursuant to standing order 169, which requires that the title of a bill agrees with that used in any relevant notices and orders and that the clauses of the bill be consistent with the title.

the Assembly is to read this phrase narrowly; the 'other purposes' should have a clearly demonstrable relationship to the main purpose of the bill.

Preamble

12.14. Following the long title, a bill may have a preamble which precedes (and, in the Territory, may include) the enacting formula. The preamble 'is to state the reasons why the enactment proposed is desirable and to state the objects of the proposed legislation'[18] though these matters are often encompassed in the explanatory statement. A preamble is often included in a bill regarded as being of particular significance. For example, the Native Title Bill 1994 included a preamble acknowledging pre-European settlement in Australia; the importance of land to Aboriginal people and Torres Strait Islanders and their circumstances since European occupation; the significance of the 1992 native title decision of the High Court; the objects of the *Native Title Act 1993* of the Commonwealth; and the intent of the Assembly to participate in the scheme enacted by the Commonwealth.

12.15. Examples of other bills that have included preambles have been the Human Rights Bill 2003, the Charter of Responsibilities Bill 2004, the Residential Property (Awareness of Asbestos) Bill 2004,[19] the Gungahlin Drive Extension Authorisation Bill 2004, the Hotel School (Repeal) Bill 2005, the Civil Unions Bill 2006 and the Family Violence Bill 2016. The Electoral Bill 1992 did not contain a preamble; however, one was inserted during consideration of the bill at the detail stage briefly outlining the background to the choice of the proportional representation (Hare-Clark) system by referendum and the wish of the Assembly to enact legislation to implement that system.[20] On occasion, where the legislation has been particularly controversial, the preamble may be a restatement of the proponent's justification for the legislation and have some of the character of an introductory speech to a sceptical chamber.

12.16. The preamble is part of a bill and can be amended by the Assembly.

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18 *House of Representatives Practice*, p 345.

19 The preamble was inserted during Assembly consideration of the bill; see MoP, No 117, 25 August 2004, pp 1684-1684.

20 Assembly Debates, 24 November 1992, pp 3348-3390; MoP, No 38, 24 November 1992, pp 213-220. Paragraph 5 of the original preamble (relating to the need to facilitate the implementation of that electoral system by the establishment of the offices and procedures necessary to enable the Territory to be divided into electorates) was omitted by s 5 of the *Electoral (Amendment) Act 1994*.

Enacting clause

12.17. The enacting formula precedes the other clauses of a bill and, as mentioned above, it has on occasions been included as part of the preamble to a bill. The formula,[21] reflecting the provisions of s 22 of the Self-Government Act, is:

> The Legislative Assembly for the Australian Capital Territory enacts as follows.[22]

12.18. The Assembly does not consider the enacting formula during its consideration at the detail stage (see under the heading 'Order of consideration during the detail stage' in this chapter).

Name of Act (short title)

12.19. The name of an Act is generally made up of a few words that describe in broad terms the area of law to be changed or affected. Previously the name of an Act was referred to as a short title or citation. Some ACT legislation, particularly national laws, still includes a short title. The Legislation Act provides that the name for an Act includes the Act's short title.[23]

12.20. Clause 1 of a bill contains the bill's name and is usually worded as in the following example: 'This Act is the *Financial Management Act 1996'.* If the intention of a bill is to amend a principal Act, the word 'Amendment' is usually included in the name. For example, the Financial Management Amendment Bill 2007 stated in its long title that it was 'A Bill for an Act to amend the *Financial Management Act 1996*'.

12.21. When more than one bill is introduced in the same year with effectively the same name, the second and any subsequent bill introduced will include (No 2), (No 3) et cetera in the name.[24] If a bill is dealing with matters contained in a principal Act or is seeking to add or delete provisions to the principal Act, it is usual practice to place words in parenthesis within the name—for example, the Environment Protection (Fuel Sales Data) Amendment Bill 2007—which, if passed, would amend the *Environment Protection Act 1997.*

12.22. If a bill is introduced in one year and passed in a subsequent year, the bill is given a new citation with the name of the bill changing to reflect the year in which it

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21 The enacting formula in the United Kingdom House of Commons was developed in the 15th century (see *May*, pp 597-598) and the formula in Commonwealth legislation has changed several times since 1901 (see *House of Representatives Practice*, p 345).

22 When appearing in a preamble, the enacting formula reads 'The Legislative Assembly for the Australian Capital Territory therefore enacts as follows'.

23 Legislation Act, dictionary, part 1, definition of ***name***. There is a trend in some jurisdictions to adopt a title for legislation which appears to promote its claimed benefits; thus, a 'Taxation Amendment Bill' becomes the 'Fairer Taxation System Bill'.

24 If two bills with the same short title are presented, it is the practice to differentiate them in sequence by the use of square brackets at the end of the short title.

was agreed to by the Assembly.[25] For example, the Plastic Reduction Bill 2021 originated in the Assembly as the Plastic Reduction Bill 2020 but, as it was not passed until 2021, the name was amended prior to notification pursuant to the provisions of standing order 191 (see under the heading 'Certification and notification of enactment' in this chapter). This fact, and any other amendment to the title, is recognised by the Clerk in certifying that a bill has passed pursuant to the provisions of standing order 193.

12.23. For much of its consideration during the detail stage, the Human Rights and Equal Opportunity Bill 1991 was without a short title, the question 'That clause 1 be agreed to' having been negatived at an early stage in the Assembly's consideration of the bill. At the conclusion of the detail stage consideration of the bill, the Assembly ordered that clause 1 be reconsidered and the clause was agreed to following its amendment.[26]

Commencement clause

12.24. The commencement clause sets the day on which the law will come into effect. Such clauses are expressed in a range of ways. Commencement may occur on the day the Act is notified, on a particular date specified in the clause, on a date to be fixed by the minister by written notice or on a date contingent on some other specified event—for example, the passage of another piece of legislation. The main appropriation bill each year commonly does not pass until August and so its commencement clause usually states 'This Act commences, or is taken to have commenced, on 1 July 20XX', the first day of the financial year.[27]

12.25. The Legislation Act, chapter 9, sets out the legislative framework for the operation of commencement provisions, including limitations that apply in relation to retrospective commencement. Section 77 provides that different dates or times may be set for the commencement of different parts of an Act. Section 79 also provides that, if an Act or any provision has not commenced within six months of notification, that Act or provision automatically commences on the completion of the six-month period. This section is designed to avoid the uncertainty that is caused by having open-ended commencement provisions.

Dictionary clause

12.26. The dictionary clause indicates that the dictionary included at the end of the Act is part of the Act. The dictionary defines certain terms used in an Act and may include cross-references to definitions in other pieces of legislation. A definition

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25 The citation change is made by the Clerk under standing order 191. See under the heading 'Clerical, grammatical or typographical amendments' in this chapter.

26 MoP, No 132, 19 November 1991, pp 571-572; MoP, No 137, 27 November 1991, pp 598-599, 599-602 and 603-607; MoP, No 138, 28 November 1991, pp 611-614 and 615-619.

27 Legislation having retrospective effect is undesirable. However, in this case it is acceptable for reasons relating to the supply provisions that operate in the ACT. See under the heading 'Money bills' in this chapter.

in the dictionary to an Act or statutory instrument applies to the entire Act or instrument unless the Act or instrument provides for the definition to have a more limited application.[28] If a dictionary clause is included in a bill it usually appears early in the bill, while the actual dictionary is located towards the end of the bill. Prior to 1999, the 'dictionary' clause of a bill had also been referred to as the 'definitions' clause and the 'interpretation' clause.

Notes, headings, examples and diagrams

12.27. Notes are included in a bill to assist with its interpretation or to provide additional information that is not necessarily contained in its provisions. Along with footnotes, endnotes and tables of contents, notes do not form part of a bill.[29]

12.28. Headings to a chapter, part, division, subdivision and schedule, as well as examples and diagrams, do form part of a bill. Headings to sections or subsections are part of the bill if the bill was enacted or the heading was amended or inserted after 1 January 2000.[30]

Main body clauses

12.29. Thereafter comes the main body of a bill, in which the substantive matters that the bill deals with are set out. After the clauses, a bill may include a schedule or schedules which list relevant matters. For example, Schedule 1 of the *Public Pools Act 2015* lists decisions made under the Act that are reviewable decisions.

Consideration of bills by the Assembly

12.30. The more familiar stages of consideration of bills in other legislatures often follow the pattern of a first reading, a second reading, consideration of the bill clause by clause in committee of the whole and a third reading. While the Assembly's procedure is structurally similar, though with different terminology and emphasis, it does not utilise the committee of the whole procedure.

12.31. The major stages that a bill must pass from introduction, Assembly consideration and up to enactment are as follows:

- initiation and presentation in the Assembly;[31]
- agreement in principle;[32]
- standing referral to relevant standing committee (or possible reference to a select committee);[33]

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28 Legislation Act, s 156.

29 Legislation Act, s 127.

30 Legislation Act, s 126.

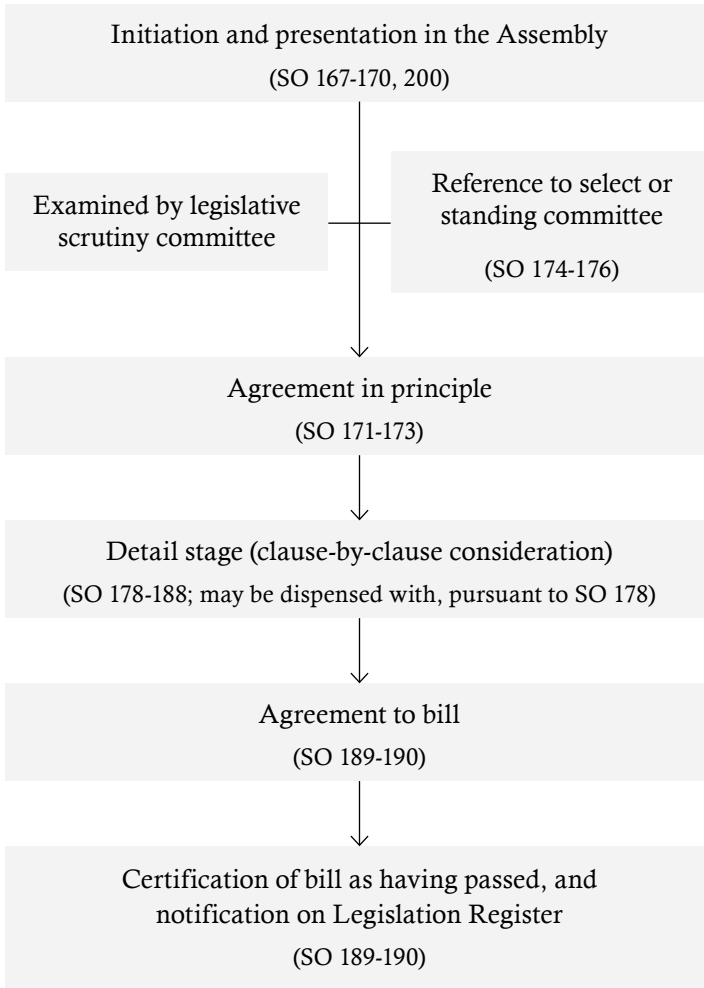
31 Standing orders 167-170.

32 Standing orders 171-173.

33 Standing orders 174-176. Following amendments to the standing orders in March 2021, standing order

- detail stage;[34]
- agreement to bill;[35]
- certification of bill as having passed.[36]

Figure 2 – The legislative process



174 now provides that all bills, upon presentation, stand referred to the relevant standing committee (it is up to each committee to decide whether or not to undertake an inquiry on a particular bill). However, if it is unclear by the subject matter of the bill, the Speaker will determine to which committee the bill should be referred. The resolution of appointment establishing Assembly standing committees in the Tenth Assembly provides that where a committee decides to undertake an inquiry into a particular bill, it has two months from the presentation of the bill to conclude its inquiry and report. The exception is those bills introduced in the last sitting week of the calendar year; in these cases, the committee has three months to report.

34 Standing orders 178-188.

35 Standing orders 189-191.

36 Standing order 193.

12.32. The procedure for consideration of bills may vary with the leave of the Assembly (for example, the detail stage may be bypassed) or by special order. In addition, standing orders contain specific provisions for:

- bills being declared urgent (see under the heading 'Urgent bill' in this chapter);
- bills for entrenching laws (see under the heading 'Entrenching laws and enabling laws' in this chapter); and
- money proposals (see under the heading 'Money bills' in this chapter).

Initiation and presentation

12.33. The most common means of introducing a bill into the Assembly is for either a minister or a non-executive member (or, if a co-sponsored bill, by other members whose names are on the bill) to give notice of their intention to do so. Standing order 168 provides that:

- a notice of intention to present a bill shall be given by a member by delivering a copy of its terms to the:
  - Clerk's Office by 12 noon on a Monday of the sitting week in which a bill is proposed to be introduced; or
  - Clerk in the chamber during a sitting;
- a notice of intention to present a bill shall specify the long title of the bill, and shall be signed by the member (and, if a co-sponsored bill, by other members whose names are on the bill); and
- on the calling on of the notice a member (or in the case of a co-sponsored bill, one of the co-sponsors) shall present to the Assembly two printed copies of the bill signed by that member (or in the case of a co-sponsored bill, one of the co-sponsors) and an explanatory statement to the bill.[37]

12.34. Bills are able to be initiated in the Assembly, as provided by standing order 167:

- by notice of presentation; or
- without notice, pursuant to standing order 200 (money bills).

12.35. Up until 2008, bills were also able to be initiated in the Assembly by motion for leave.[38]

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37 Standing order 168 also provides that the standing orders shall, to the necessary extent, be applied and read as if a notice of intention to present a bill were a notice of motion. Since 2011, under standing order 168(c) all bills have required an explanatory statement to be prepared and tabled. MoP, No 111, 30 June 2011, p 1401.

38 This standing order had not been utilised and the procedure was removed from the standing orders when a major review was conducted in 2008. Although this procedure is still utilised in the Senate (see *Odgers'* pp 302-303), by the time of the publication of the first edition of *House of Representatives Practice* in

12.36. In addition, a bill has been presented pursuant to order of the Assembly.[39]

12.37. The usual form of a notice of presentation of a bill is 'I give notice that, on the next day of sitting, I shall present a bill for an Act to [long title of the bill]'.[40] The date the notice was lodged with the Clerk is indicated on the *Notice Paper.* A notice becomes effective only when it appears on the *Notice Paper.*[41]

12.38. Notices are not given openly (orally), as in some legislatures, nor are they reported to the Assembly by the Clerk on the day of their submission. A record of all notices lodged during a sitting is kept at the Table by the Clerks and is available for inspection by any member, thus ensuring that members have access to information on the bills and motions to be introduced before the information appears on the *Notice Paper.*

12.39. A member, in the absence of another member and at that member's request, may give a notice for that member, sign the notice and put their name on the notice.[42] The member who has given notice may alter its terms by notifying the Clerk in writing within such time as would enable the alteration to be made on the *Notice Paper.*[43] The member who has given the notice may withdraw the notice by notifying the Clerk in writing at any time prior to that proposed for presenting the bill.[44]

1981 the procedure had fallen into disuse in that chamber after the adoption of new procedures in 1963 in order to save the time of the House. The motion for leave, usually moved on notice, specified that the long title of the bill was capable of amendment and 'while this would not ordinarily be the appropriate time for long debate, the motion could be debated'. When the motion was moved, the objects of the bill could be explained, an amendment could be moved and the question could be put to a division. See *House of Representatives Practice*, First Edition, p 314.

39 On 25 July 1989, the Assembly agreed to a recommendation of the Select Committee on the Police Offences (Amendment) Bill 1989, 'That [the bill] be withdrawn and that [the member sponsoring the bill] be ordered to prepare and present a bill in accordance with the recommendations of this Committee'. Later, on 22 August 1989, the sponsoring member, pursuant to order, presented the Police Offences (Amendment) Bill 1989 [No 2]. MoP, No 14, 25 July 1989, p 55 (original bill withdrawn); MoP, No 17, 22 August 1989, p 67; Assembly Debates, 22 August 1989, pp 1188-1192.

40 During the Fourth Assembly, notice of presentation of a bill presented by a member of the executive as executive members' business was in the form 'I give notice, as an Executive Member, that on the next day of sitting, I shall present a bill for an Act to < *long title of the Bill* >'. On the notice was an indication from the Manager of Government Business that the Manager of Executive Business had determined that the matter was an item of executive members' business. The practice was not observed during the Eighth and Ninth Assemblies.

41 Standing orders 112, 168 (d).

42 Standing orders 168 and 104.

43 Standing orders 168 and 110. The fact that the notice has been amended and the date of the amendment or amendments is indicated on the *Notice Paper.*

44 Standing orders 168 and 111.

12.40. Money bills, which are covered by the provisions of standing order 200, may be introduced without notice and may be proposed only by a minister.[45] The Assembly has on many occasions granted leave to a member to present a bill (not being a money bill).[46] On occasion, leave having been denied, a motion to suspend standing orders to enable a bill to be introduced has been successful.[47]

12.41. The majority of bills are presented after notice has been given of their presentation. The determination of the precedence of notices on the *Notice Paper* is governed by standing order 77 (see Chapter 10: Motions).

12.42. In addition to the formal notice provision of the standing orders, the Assembly has, in the past, resolved that the executive should give advance notice of its legislative program.[48] It has been the practice for the Chief Minister to advise the Assembly of the government's legislative program.

12.43. When the Clerk calls upon a notice (for example, 'executive business, Notice No 3'), the member who has given notice rises and states 'I present the [short title of the bill]'. Standing order 168(c) requires that the member present 'two printed copies of the bill signed by that member' (or members, if a co-sponsored bill). The member is also required to present a printed copy of an explanatory statement to the bill[49] and, if the member presenting the bill is a minister, a copy of a Human Rights Act compatibility statement (now incorporated in the explanatory statement).[50]

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45 Standing order 200 refers to the introduction of money bills and is dealt with under the heading 'Money bills' in this chapter.

46 For example, MoP, No 100, 29 May 2007, p 1015; MoP, No 103, 5 June 2007, p 1042.

47 For example, MoP, No 26, 20 August 2002, p 243.

48 On 22 October 1989, the Assembly resolved:

> That the Assembly:
>
> (a) believes that a forward legislative program is essential to the effective scrutiny of government legislation and the good government of the ACT;
>
> (b) calls on the Government to provide Assembly Members with a forward legislative program at the beginning of each sitting session and that this program be regularly updated;
>
> (c) notes that on 6 July 1989 the Chief Minister made an undertaking in the Assembly to provide a forward legislative program and to update this program on a regular basis; and
>
> (d) demands that the Government corrects its failure to provide such a program.

See MoP, No 26, 24 October 1989, pp 105-106. See MoP, No 42, 9 December 1992, p 241, where the Assembly discussed a matter of public importance on 'The government's failure to implement its legislative program'.

49 Standing orders have been suspended to enable a member to present a bill without its explanatory statement. During debate on the motion, both the government and opposition agreed that this was not a precedent they wished to see in general. MoP, No 143, 28 March 2012, p 1834; Assembly Debates, 28 March 2012, p 1370.

50 Standing order 168(c). Section 37 of the Human Rights Act provides that the Attorney-General must prepare a compatibility statement for each bill presented by a minister, for presentation to the Assembly.

12.44. On one occasion, a member was granted leave to present two bills together (as both bills dealt with the creation of a new criminal offence in the Territory)[51] and it is not unusual for a package of bills relating to the same subject matter to be presented in sequence on the same sitting day.[52] In November 1991, standing orders were suspended to permit the presentation together of 10 bills (of which notice had been given and which proposed the implementation of certain policies in Territory statutory authorities) and for one motion to be moved and one question put regarding, respectively, the agreement in principle, the detail stage and agreement to the bills.[53]

12.45. It is not unusual for a minister to present a bill on behalf of an absent minister, pursuant to the provisions of standing order 80.[54] Bills have also been presented by an assistant minister.[55]

12.46. After the member presents their signed copies of the bill, the Clerk reads the long title of the bill and the member must then move, 'That this bill be agreed to in principle'.[56] The member may (and invariably does) speak to the motion for a period not exceeding 20 minutes (or, if the bill is the main appropriation bill for the year, for an unspecified period),[57] during which they will state the broad policy of the bill. The speech is referred to as the presentation speech.

12.47. In the Assembly's first instance of a co-sponsored bill,[58] the member first speaking presented the bill (and associated material) and moved the agreement in principle motion, which was then proposed to the Assembly by the Speaker. The member delivered his presentation speech, followed by the co-sponsor with his presentation

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51 Crimes (Amendment) Bill 1996 and Domestic Violence (Amendment) Bill 1996. MoP, No 42, 27 March 1996, p 289; Assembly Debates, 27 March 1996, pp 674-676.

52 Firearms Bill 1996 and Prohibited Weapons Bill 1996, see MoP, No 61, 29 August 1996, pp 427-429; Assembly Debates, 29 August 1996, pp 2766-2773. Children's Services (Amendment) Bill (No 3) 1998, Crimes (Amendment) Bill (No 6) 1998 and Magistrates Court (Amendment) Bill (No 3) 1998, see MoP, No 21, 23 September 1998, pp 169-170; Assembly Debates, 23 September 1998, pp 2041-2042. Human Rights Commission Bill 2005 and Human Rights Commission Legislation Amendment Bill 2005, see MoP, No 16, 7 April 2005, pp 141-142; Assembly Debates, 7 April 2005, pp 1508-1511. Family Violence Bill 2016 and Personal Violence Bill 2016, see MoP, No 139, 7 June 2016, pp 1577-1578; Assembly Debates, 7 June 2016, pp 1712-1714.

53 MoP, No 138, 28 November 1991, p 610. And see precedent of April 1992, when, standing orders having been suspended to enable the course to be followed, 10 bills which proposed the implementation in ACT statutory authorities policies of equal employment opportunity and the merit principle in respect of appointment and promotions were presented together, one motion moved and one question put in regard to, respectively, the agreement in principle, the detail stage and agreement to the bills. MoP, No 4, 9 April 1992, pp 20-21; MoP, No 8, 19 May 1992, pp 40-41 (in the detail stage the bills were, by leave, taken as a whole and amendments were made to all bills, on motion moved by leave).

54 See, for example, MoP, No 134, 21 November 1991, p 577. A motion to agree to a bill in principle, after the bill having been presented on behalf of another minister, has been moved by that other minister. MoP, No 19, 9 May 2013, p 182.

55 MoP, No 129, 18 February 2016, pp 1473-1474.

56 Standing order 171.

57 Standing order 69(d). See also under the heading 'Agreement in principle' in this chapter.

58 Discrimination Amendment Bill 2018.

speech. Debate then was adjourned in the usual manner.[59] When the debate was subsequently resumed, both co-sponsors were able to speak in closure.[60]

12.48. The requirement on a member not to digress from the subject matter of a question under discussion (standing order 58), sometimes referred to as the relevancy rule,[61] applies to the presentation speech. The presentation speech is important to Assembly members and the community because it outlines the purpose of the bill. The presentation speech also aids the chair in the application of the requirement that amendments must be relevant in subsequent debate and it provides a guide to the courts in the interpretation of the resulting Act.[62]

12.49. After the introduction and presentation speech, the Speaker then proposes the question 'That this bill be agreed to in principle', after which standing order 171 requires that debate on that question must be adjourned until a future day, on the motion of another member.[63] The question may not be determined by the Assembly during the sitting period in which the bill was first introduced—unless the bill has been declared to be an urgent bill.[64] Accordingly, a member moves 'That the debate be adjourned'.[65] The Speaker then puts the question and declares the result. If the question is resolved in the affirmative,[66] the Speaker next proposes the question 'That the resumption of the debate be made an order of the day for the next sitting' (unless the Speaker ascertains that there is a proposal for the debate to be adjourned until a specific day or occurrence in the future). This question is open to amendment and debate.

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59 MoP, No 79, 1 November 2018, p 1114.

60 Assembly Debates, 27 November 2018, pp 4883-4886. Standing order 69(d) enables each co-sponsor to speak to close the debate, perhaps addressing any concerns about being in conflict with standing orders 48 and 49.

61 The relevancy rule is also embodied in other standing orders, including in standing order 169, which is addressed further under the heading 'Agreement in principle' below.

62 Legislation Act, s 142.

63 It is not in order for the member moving the adjournment motion to 'make a few remarks' beforehand. MoP, No 63, 1 August 2018, p 910; Assembly Debates, 1 August 2018, p 2578.

64 Standing order 172.

65 Commonly, though not necessarily so, it is the relevant opposition spokesperson on the matter in respect of government bills, or the appropriate minister in relation to other members' bills.

66 Following the presentation of the Publications Control (Amendment) Bill (No 2) 1990 (and a point of order having been taken that the bill contravened the provisions of standing order 136) and no member having moved the motion to adjourn the debate, the Speaker, having addressed the point of order, advised the Assembly that the debate stood adjourned under the provisions of standing order 171. See MoP, No 90, 12 December 1990, p 375; Assembly Debates, 12 December 1990, pp 5044-5045. Strictly speaking, the Assembly having declined to make an order setting a time for future consideration of the bill, its further consideration should not have been listed on the *Notice Paper*. However, the Speaker was constrained by, and sought to comply with, the provisions of standing order 171.

12.50. Leave of the Assembly has been granted to enable consideration of the motion for the agreement in principle immediately after it was moved,[67] and a member has been permitted to move that the resumption of the debate be made an order of the day for a later hour that day. However, the normal practice of the Assembly is that bills are not introduced and passed on the same day, unless there are exceptional circumstances.[68]

Irregular bills to be withdrawn

12.51. Standing orders provide that:

- the long title of a bill must agree with the notice of presentation;[69]
- no clause may be included in a bill not coming within its title;[70] and
- any bill not prepared according to the standing orders shall be ordered to be withdrawn.[71]

12.52. The Speaker usually has no prior knowledge of the contents of bills introduced and cannot be expected to be aware of any irregularities that might be contained in them. Accordingly, should a point of order be taken as to whether the contents of a bill contravene the provisions of the standing orders, the Speaker will often allow its introduction to proceed and rule on the matter after considering the contents of the bill.[72]

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67 MoP, No 55, 2 July 1999, pp 477-478.

68 For instance, a number of bills were introduced and passed in the same sitting in connection with the public health emergency associated with the COVID-19 pandemic. See MoP, No 129, 2 April 2020, pp 1917-1918, 1924-1925.

69 Standing order 169. On one occasion where the inconsistency between the notice and the long title was considered to be minor (the omission of the word 'and' in the long title), the Assembly granted leave for the bill to remain on the Notice Paper. A second bill that day, however, was ordered to be withdrawn as the difference was more substantive. MoP, No 143, 28 March 2012, p 1836.

70 Standing order 169. Bills have been presented pursuant to notice, as amended, by leave. See MoP, No 72, 8 December 1999, p 663; Assembly Debates, 8 December 1999, p 3949; MoP, No 100, 6 September 2000, pp 989 (2) and 990.

71 Standing order 170.

72 See, for example, comments by Speaker Prowse at Assembly Debates, 22 October 1991, p 4110.

12.53. Bills have been ordered to be withdrawn because they contravened the provisions of standing order 136 (same question rule)[73] or standing order 169 (clauses to come within title).[74] On occasions when bills contravened the then provisions of standing order 200 (money proposals), debate on the motion to withdraw the bills was adjourned and the orders of the day for the resumption of debate were eventually discharged.[75] However, on other occasions when bills have been ruled out of order for contravening standing order 136, different procedures have been followed, for example: [76]

- the Assembly has agreed to suspend the standing orders to enable the order of the day for the consideration of the bill to remain on the *Notice Paper*;[77]
- the Speaker has permitted debate to proceed as standing orders had been suspended in relation to the bill;[78] and

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73 Publications Control (Amendment) Bill (No 2) 1990. See MoP, No 87, 28 November 1990, pp 355 and 357; Assembly Debates, 28 November 1990, pp 4689-94 and 4773-4774 (the Speaker, having considered the contents of the bill, made his ruling later in the day). See ruling and order to withdraw on later attempt to introduce the bill: MoP, No 90, 12 December 1990, p 375 and MoP, No 91, 13 December 1990, p 392; Assembly Debates, 12 December 1990, pp 5044-5045 and Assembly Debates, 13 December 1990, p 5339. Road Transport (Safety and Traffic Management) Amendment Bill 2001, see MoP, No 130, 20 June 2001, p 1493; Assembly Debates, 20 June 2001, pp 2138-2141. A motion proposing to suspend so much of standing orders as would prevent the member presenting the bill was negatived. See also later proceedings when standing orders were suspended to enable the member to present his Road Transport (Safety and Traffic Management) Amendment Bill 2001 (No 2). See MoP, No 136, 22 August 2001, pp 1655-1656; Assembly Debates, 22 August 2001, pp 3120-3124.

74 On 30 May 1995, two bills were reintroduced in the Assembly, the minister sponsoring the bills indicating during his presentation speech that, due to a discrepancy between the description on the long title in the notice for presentation of one of the earlier bills and the one that had appeared on the bill itself, it was necessary for both bills to be presented again. See MoP, No 8, 30 May 1995, pp 51-52; Assembly Debates, 30 May 1995, p 532. The Assembly then ordered that the original bills be withdrawn from the *Notice Paper*: MoP, No 8, 30 May 1995, p 52; Assembly Debates, 30 May 1995, p 533. See also MoP, No 125, 5 December 2007, p 1309.

75 Ainslie Transfer Station Bill 1990 and Royal Canberra Hospital Bill 1990, see MoP, No 63, 6 June 1990, p 255; MoP, No 66, 8 August 1990, pp 271-272; MoP, No 113, 21 June 1991, p 478; Assembly Debates, 6 June 1990, pp 2131 and 2136 and Assembly Debates, 8 August 1990, pp 2563-2583. Schools Authority (Amendment) Bill 1990, see MoP, No 66, 8 August 1990, p 271; MoP, No 69, 15 August 1990, p 284; MoP, No 113, 21 June 1991, p 478; Assembly Debates, 8 August 1990, pp 2546-2557 and Assembly Debates, 15 August 1990, pp 2854-2877. Human Rights Bill 1990 and Landlord and Tenant (Rental Bonds) Bill 1990, see MoP, No 72, 12 September 1990, p 293; MoP, No 73, 13 September 1990, p 299; MoP, No 92, 12 February 1991, p 394; MoP, No 96, 20 February 1991, p 407; MoP, No 113, 21 June 1991, p 478; Assembly Debates, 12 September 1990, pp 3094-106 and Assembly Debates, 13 September 1990, pp 3206-27. Royal Canberra Hospital Bill 1991, see MoP, No 121, 11 September 1991, p 514; MoP, No 129, 22 October 1991, p 556; Assembly Debates, 11 September 1991, pp 3162-3169 and Assembly Debates, 22 October 1991, pp 4110-4112.

76 Prior to its omission from standing order 170, the motion that the bill be withdrawn was negatived and debate proceeded on the bill. See MoP, No 90, 15 December 1993, pp 514-515; Assembly Debates, 15 December 1993, pp 4610-4613.

77 Bail Amendment Bill 1992; see MoP, No 41, 8 December 1992, p 234; Assembly Debates, 8 December 1992, pp 3598-3599.

78 Long Service Leave (Building and Construction Industry) (Amendment) Bill (No 2) 1993, see MoP, No 91, 16 December 1993, p 521; Assembly Debates, 16 December 1993, pp 4714-4715.

- standing orders were suspended to enable consideration of the bill to resume forthwith.[79]

12.54. Sometimes the Assembly has permitted bills to be presented pursuant to notice, as amended by leave.[80] On 21 April 1999, on the resumption of the debate on the question that the Building and Construction Industry Training Levy Bill be agreed to in principle, the Assembly's attention was drawn to the fact that the bill's title did not agree with the notice of presentation of the bill and the Assembly gave leave for the debate to be resumed.[81]

12.55. The provisions of standing order 136 (same question rule) do not prevent the presentation of a bill the same in substance as a bill already listed for consideration on the *Notice Paper* where the Assembly has not made a substantive decision on the earlier bill. However, once a decision has been made to agree in principle to either of the bills, further consideration of the order of the day for the resumption of debate on the other bill is prevented by standing order 136.[82]

12.56. It is in order to present an amending bill whilst the principal bill is still before the Assembly. However, in making a statement to the Assembly on this matter, the Speaker has observed that the expectation is that a principal bill would be considered by the Assembly prior to consideration of the amending bill.[83] In 2002, a point of order was taken concerning the applicability of standing order 136 to the Medical Practitioners (Maternal Health) Amendment Bill 2002. The Deputy Speaker ruled that the bill did not breach the provisions of standing order 136 as it did not obstruct the Assembly, nor was it unnecessarily repetitive, but instead made an alternative course available to the Assembly.[84]

12.57. The Speaker, having ruled the Royal Canberra Hospital Bill 1991 out of order for contravening the then provisions of standing order 200 (its effect would have been to dispose of or charge the public money of the Territory), then called on the Deputy Chief Minister to move the (then) applicable motion to withdraw the bill

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79 Egg (Labelling and Sale) Bill 2001, see MoP, No 139, 29 August 2001, p 1825; Assembly Debates, 29 August 2001, pp 3659-3660.

80 For example, to correct the year of the principal Act, see MoP, No 111, 12 November 1997, p 871, 'incorrectly worded'; MoP, No 72, 8 December 1999, p 663; MoP, No 100, 6 September 2000, pp 989 (2) and 990, omit 'and for other purposes'; MoP, No 15, 1 April 2009, p 167.

81 MoP, No 46, 21 April 1999, p 383.

82 MoP, No 98, 6 May 2015, p 1089. Following a cognate debate involving two bills, and the subsequent agreement to one of the bills, the Speaker ordered the withdrawal from the *Notice Paper* of the other bill as it was the same in substance to the bill which had been agreed to.

83 MoP, No 34, 26 September 2002, pp 340-341; Assembly Debates, 26 September 2002, p 3318. The bill for the principal Act was considered and agreed to that day. The amending bill was considered and agreed to on 13 November 2002.

84 MoP, No 27, 21 August 2002, p 262; Assembly Debates, 21 August 2002, pp 2546-2547 and 2569-2570. The key to the point of order was, in the event that the two earlier bills succeeded, whether the bill in question would be out of order, given that it was seeking to reinstate something that the Assembly had just removed.

pursuant to standing order 170. As neither the Deputy Chief Minister nor any other member would move the motion, the Speaker advised the Assembly:

> After seeking the guidance of the assembled Members and no-one wishing to move under standing order 170, I must abide by the direction given to me by the Assembly on this matter, as indicated from the floor, and override standing orders. In that case, the matter will be placed back on the Notice Paper.[85]

12.58. In 2008, the standing orders were amended to provide that when a bill is ruled out of order by the Speaker, it is automatically withdrawn from the *Notice Paper*.[86]

Referral to a committee

12.59. Prior to the changes in the Tenth Assembly, bills could only be referred for committee inquiry by way of a motion moved by a member at any time after the presentation of a bill to the Assembly but not after the completion of the detail stage. For a more detailed examination of the referral of bills prior to the Tenth Assembly, see the First Edition of the Companion.

12.60. In the Tenth Assembly, the Assembly amended standing orders 174 and 175 so that all bills, upon presentation, stand referred to the relevant standing Assembly committee.[87] Standing order 174 provides that:

> Upon a bill being presented to the Assembly, the bill stands referred to the relevant Assembly standing committee for consideration and, in the event that the subject matter of the bill makes it unclear which committee it should be referred to, the Speaker will determine the appropriate committee.

12.61. Upon a referral, it is open to the relevant committee to decide whether or not it will undertake an inquiry in relation to a particular bill. If the committee agrees to inquire into the bill, it must advise the Assembly (in practice, this is done through the Speaker) and the responsible minister[88] and then it has two months to inquire into and report on the bill. If the committee decides not to inquire into the bill, the committee informs the Speaker, who advises the Assembly. The bill cannot be dealt with by the Assembly until the committee has reported.[89]

12.62. Notwithstanding the standing referral of bills to standing committees in the Tenth Assembly, on at least one occasion a bill was referred, by way of resolution, for inquiry and report to a select committee.[90]

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85 Assembly Debates, 22 October 1991, pp 4110-4112.

86 See standing order 170.

87 See MoP, No 7, 30 March 2021, p 87.

88 Within 14 days of the presentation of the bill; see MoP, 2 December 2020, No 2, pp 17-22.

89 Standing order 175.

90 Drugs of Dependence (Personal Use) Amendment Bill 2021. See MoP, 11 February 2021, No 6, p 74.

Consideration by scrutiny committee

12.63. The Assembly has, since its establishment, been aware of the importance of the scrutiny of legislation and has given the function to an Assembly committee since 1989.[91] The scrutiny function for both bills and subordinate legislation was initially undertaken by a discrete Standing Committee for the Scrutiny of Bills and Subordinate Legislation. However, since the commencement of the Fourth Assembly, the role has been performed by an existing subject matter standing committee (the Standing Committee on Justice and Community Safety and, before that, the Standing Committee on Legal Affairs). When performing this role, the committee is formally referred to as the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) but will often be referred to as simply the scrutiny committee.

12.64. Although there is no formal reference of bills (or subordinate legislation, see under the heading 'Subordinate legislation' in this chapter) to the committee, it clearly has been directed by the Assembly through its resolutions of appointment[92] to examine all proposed laws introduced into the Assembly (within specific, but important, parameters)[93] and to report to the Assembly on a regular basis. Members are protective of the committee and it is highly exceptional for a bill to be considered by the Assembly without either a report from the scrutiny committee or a statement from the chair summarising the committee's view.[94] Even in the exceptional instances where a bill may be introduced and passed at the same sitting, the scrutiny committee will still report subsequently on the bill and expect a response to any comment it may make.[95]

12.65. Specifically, the committee is established to perform a legislative scrutiny role by:

- considering whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
  - unduly trespass on personal rights and liberties;
  - make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

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91 MoP, No 25, 19 October 1989, p 101; Assembly Debates, 19 October 1989, pp 1862-1867.

92 For example, MoP, No 2, 13 December 2016, pp 13-16.

93 The committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the committee to assist the Assembly into passing into law acts and subordinate legislation which comply with the principles set out in the committee's terms of reference.

94 Standing order 246A empowers a committee to authorise the chair to make a statement to the Assembly with regard to 'matters within the committee's terms of reference'.

95 Assembly Debates, 7 May 2020, pp 959-961.

- make rights, liberties and/or obligations unduly dependent upon nonreviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny; and
- consider whether any explanatory statement associated with legislation meets the technical or stylistic standards expected by the Assembly;

- reporting to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
- considering whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
  - is in accord with the general objects of the Act under which it is made;
  - unduly trespasses on rights previously established by law;
  - makes rights, liberties and/or obligations unduly dependent upon nonreviewable decisions; or
  - contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; and
- considering whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Assembly.

12.66. The committee does not comment on the policy positions embodied in legislative proposals and avoids taking partisan positions. Rather, its role is conceived as highlighting potential rights issues and bringing them to the attention of the Assembly for determination. The committee's relationship with the executive and other members sponsoring bills is generally cooperative and, as a consequence, it is commonplace for many amendments to be proposed following scrutiny committee comment.

12.67. In 2009, standing order 182A was inserted, requiring all proposed government amendments to government bills to be referred to the committee for consideration and report. From 2019, the requirement was extended to include amendments proposed by any member. In order to provide a sufficient time frame for its consideration, the committee requires proposed amendments to bills be provided to it at least 14 days prior to the Tuesday of the sitting week in which the amendments are proposed to be moved.[96]

96 MoP, No 99, 4 June 2019, p 1492.

12.68. The requirement for scrutiny committee consideration of amendments can be bypassed, with the agreement of the Assembly, if amendments are urgent, minor or technical, or in response to scrutiny committee comment.

Human Rights Act

12.69. The *Human Rights Act 2004* enshrines in law certain rights and freedoms enjoyed by individuals in the ACT.[97] While no right is absolute, s 28 of the Human Rights Act states that 'human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society'. In relation to any bill presented by a minister, the Attorney-General is required by s 37 to present to the Assembly a compatibility statement (included in the explanatory statement for the bill) providing their opinion as to whether the bill is consistent with human rights and, if not, how it is inconsistent. An Assembly committee (generally, the committee responsible for legal matters acting in a legislative scrutiny role—see under the heading 'Consideration by scrutiny committee' above in this chapter) is charged with examining and reporting on every bill's compliance with the Human Rights Act.

12.70. Section 30 of the Human Rights Act requires a Territory law to be interpreted in a way that is compatible with human rights. If the Supreme Court is satisfied that a law is not consistent with a human right, it may make a declaration that the law is not consistent with the human right (a declaration of incompatibility). The court must give a copy of the declaration of incompatibility to the Attorney-General promptly. The Attorney-General must present a copy of the declaration to the Legislative Assembly within six sitting days of its receipt, and present to the Assembly within six months of that a written response to the declaration of incompatibility.[98] In this way a declaration of incompatibility provides a trigger for dialogue within the Assembly and, eventually, further dialogue between the court, the legislature and the executive.

12.71. On 19 November 2010, the first declaration of incompatibility was made by the ACT Supreme Court in a decision relating to an application for bail.[99] On 15 February 2011, the Attorney-General tabled the declaration of incompatibility in the Assembly,[100] and on 28 June 2011 the government presented a response to the declaration[101] indicating that, as there were still outstanding court proceedings,

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97 Citizens have additional rights to take part in public life; see s 17.

98 Human Rights Act, s 33.

99 *In the Matter of and Application for Bail by Isa Islam* (2010) 4 ACTLR 235.

100 MoP, No 90, 15 February 2011, p 1125.

101 MoP, No 109, 28 June 2011, p 1376.

it was precluded from responding to issues around the application of the *Bail Act 1992*, but that it would make a further response to the Assembly once appeal proceedings in the court were finally concluded. It subsequently tabled a final response.[102]

Agreement in principle

12.72. The agreement in principle stage of consideration is analogous to the second reading stage in other legislatures. It allows members to debate the broad policy that is advanced in the bill.

12.73. Though the 'in principle' debate is primarily concerned with the principles of the legislation, the chair has permitted brief reference to foreshadowed amendments. In the application of the relevancy rule, under standing order 169,[103] the chair would have recourse to the long title and the content of the bill, the sponsoring member's presentation speech and any explanatory statement presented with the bill. The chair would also have available any report on the bill from the scrutiny committee or any other report from another standing or select committee in the event that the bill has been referred to committee prior to its agreement in principle.

12.74. The key factors in the application of the relevancy rule are the long title of a bill and its contents. Where a bill has a restricted title and its contents are of limited purpose, the interpretation and application of the relevancy rule are relatively straightforward. Where a bill has an unrestricted title and a large number of clauses, the interpretation and application of the relevancy rule may be difficult.[104]

Amendment to the question 'That this bill be agreed to in principle'

12.75. Standing order 173 permits the moving of any amendment to the question:

> An amendment may be moved to the question "That this bill be agreed to in principle". The amendment must be relevant to the bill, must not anticipate an amendment which may be moved at the detail stage, and must make clear whether or not the bill will proceed to further stages of passage.

12.76. It is unusual in the Assembly for amendments to be moved at the agreement in principle stage, and the procedure has not been used for many years. When it did occur, the amendments tended to be declaratory in nature. The following examples illustrate the point.

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102 In a statement to the Assembly, the Attorney-General advised that amendments to the Bail Act would be pursued by the government. See MoP, No 148, 8 May 2012, p 1900; Assembly Debates, 8 May 2012, pp 2125-2127.

103 Standing order 169 provides that 'The long title of a bill must agree with the notice of intention to present it, and every component of the bill must come within the long title'.

104 See *House of Representatives Practice*, p 364.

- On 28 June 1989, after the order for the consideration of a bill had been called on and the question before the Assembly was 'That this bill be agreed to in principle', an amendment was moved by a member proposing the addition of the words at the end of the motion. The amendment was negatived after a vote of the Assembly.[105]

- When debate resumed at the agreement in principle stage of the Film Classification (Amendment) Bill 1989 on 26 July 1989, an amendment was moved to the question 'That this bill be agreed to in principle'. The amendment proposed to omit all words after 'That' and to substitute other words which indicated that the Assembly would not oppose the bill but did hold certain opinions in relation to its subject matter. This amendment was also negatived by the Assembly.[106]

- On 21 November 2002, an amendment was moved to the question that the Planning and Land Bill 2002 be agreed to in principle. It proposed the omission of all words after 'That' and proposed to substitute words indicating that the Assembly, whilst not declining to agree to the bill in principle, condemned the responsible minister for failing to provide all supporting statutory rules so as to allow the Assembly to make an informed decision about whether the total package deserved support. The amendment was negatived.[107]

- An amendment to the motion for agreement in principle for the Heritage Bill 2004 criticised the minister for his failure to consult interested parties in preparing the bill, sought to require the minister to carry out certain consultations and made further consideration of the bill conditional on the completion of those consultations.[108] The amendment was defeated.

12.77. To date, the Assembly has never agreed to an amendment to the question that a bill be agreed to in principle.

12.78. There is only one precedent in which the House of Representatives has agreed to a second reading amendment.[109] When this occurs, determining the effect of

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105 Water Pollution (Amendment) Bill 1989, see MoP, No 9, 28 June 1989, p 34; Assembly Debates, 28 June 1989, pp 503-513. The amendment, in fact, contravened the provisions of standing order 173 as it then stood: 'An amendment may not be moved to the question "That this bill be agreed to in principle" except in the form of an amendment relevant to the bill, which does not anticipate an amendment which may be moved in the detail stage and does not propose the addition of words to the question: Provided that an amendment relating to public affairs may be moved to such question in relation to an appropriation bill for the ordinary annual services of the Executive'. Standing order 173 was amended in 2008 to include a requirement that such amendments must make clear whether or not the bill will proceed to further stages of passage.

106 Film Classification (Amendment) Bill 1989, see MoP, No 15, 26 July 1989, pp 59-60; Assembly Debates, 26 July 1989, pp 1002-1015.

107 MoP, No 40, 21 November 2002, p 428.

108 MoP, No 112, 5 August 2004, pp 1597-1598.

109 *House of Representatives Practice*, p 369. The agreement was thought to be accidental. The Speaker later ruled that the amendment had passed validly and that proceedings on the bill should have ceased at that point. In another instance, a second reading amendment was agreed to on division, but the vote was retaken under House of Representatives standing order 132 and negatived.

carrying such an amendment may hinge on its wording. *House of Representatives Practice* observes that 'If the rejection [in the amendment] is definite and uncompromising the bill may be regarded as having been defeated'. However, wording giving qualified agreement has been construed to mean that the second reading may be moved on another occasion'.[110]

Determination of question

12.79. When the in principle debate has concluded (and the question on any amendment has been negatived), the chair then puts the original question 'That this bill be agreed to in principle' to the Assembly.

12.80. Should that question be negatived, as occurs on occasion with both executive and non-executive bills,[111] the bill proceeds no further unless the Assembly, by special order, rescinds the order and resumes debate on the bill or the bill is reintroduced in the following calendar year. Defeat on this question is, therefore, fatal to the bill and the bill is removed from the *Notice Paper*.

Detail stage

12.81. If the Assembly agrees to the question 'That this bill be agreed to in principle', and providing there are no proceedings pursuant to standing order 174 (that is, the referral of a bill to a standing committee), or a resolution referring a bill to a select committee, and the committee has not yet reported, the Assembly must then immediately proceed to consideration of a bill at the detail stage, unless leave of the Assembly is granted to dispense with that stage.[112] In fact, current practice is that leave of the Assembly is granted to dispense with the detail stage for the majority of the bills considered and it is only when amendments have been foreshadowed that the detail stage proceeds.

12.82. Should it be the wish of the Assembly to postpone further consideration of a bill prior to its consideration in detail (for example, to allow time for the drafting of amendments to clauses or further consultation on particular provisions), it is not uncommon for the detail stage consideration to commence and debate on the consideration of clause 1 to be adjourned. The resumption of the debate is made an order of the day for a future time.[113]

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110 *House of Representatives Practice*, pp 369-371. See also *Odgers'*, p 313 and *McGee*, pp 423-424.

111 For example, the Crimes (Anti-Consorting) Amendment Bill 2019 (see MoP, No 90, 20 March 2019, p 1303) and Fair Trading (Fuel Prices) Amendment Bill 2013 (see MoP, No 34, 19 September 2013, pp 336-337).

112 Standing order 178.

113 See, for example, MoP, No 93, 8 March 2007, pp 959 and 961.

12.83. To date, the Assembly has not seen fit to adopt the committee of the whole procedure (common in comparable legislatures) for the clause-by-clause consideration of bills.[114] In the Assembly, the Speaker remains in the chair whilst the plenum proceeds with its detailed consideration of the provisions of each bill. As at 30 June 2020, approximately 37 per cent of bills agreed to by the Assembly since its establishment in 1989 have been amended at the detail stage.

12.84. The provisions of a bill are usually considered sequentially, with the question being proposed by the chair for agreement to each clause (or other provision) as it is reached (see also under the heading 'Order of consideration during the detail stage' below in this chapter). Often, in order to reduce time spent on clauses where no debate or amendments are proposed, leave of the Assembly is granted to enable consideration of clauses or amendments together[115] or to consider the bill as a whole. Debate may proceed on each question proposed. Apart from the member(s) in charge of the bill, members are restricted to speaking for two periods on each question for a limited period of time (see also under the heading 'Consideration of each clause' below in this chapter). Members may vote against clauses they oppose; they may move amendments to clauses; and they may move that new provisions be inserted in the bill. Flexibility is provided in that the standing orders contain provisions to allow consideration of clauses to be postponed and clauses to be reconsidered.

Order of consideration during the detail stage

12.85. The standing orders are specific about the order of consideration of the provisions of bills during the detail stage and the order of consideration of amendments. On occasion, the provisions may appear unnecessarily complicated. There is, however, reason and logic behind them. They protect the Assembly from reaching decisions on the order of consideration and the content of amendments which, while they may appear reasonable at the time, in fact could lead to confusion and ill-considered legislation.[116]

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114 For a background on the historical development of the committee of the whole procedure, see Lord Campion, *An Introduction to the procedure of the House of Commons*, 3rd edn, pp 25-29.

115 MoP, No 147, 11 August 2016, p 1704.

116 Mistakes do occur. On 11 December 1991 the Crimes (Amendment) Bill (No 5) 1991 was considered at the detail stage. The bill was, by leave, taken as a whole and six amendments were moved together, by leave, and agreed to. In fact, amendment six was inconsistent with amendments three, four and five. The bill was later recommitted, the relevant resolutions rescinded, and consideration of the bill at the detail stage recommenced; see MoP, No 145, 17 December 1991, pp 686-687. On 21 December 1994, during consideration of the Commercial and Tenancy Tribunal Bill 1994 (the title is the title of the bill as amended), the bill, likewise, was, by leave, taken as a whole at the detail stage. The government having, by leave, moved three groups of amendments to the bill at different stages (in addition, other members moved amendments), it later emerged that the Assembly had agreed to two amendments to omit a particular paragraph (paragraph 6(c)) and substitute another paragraph or paragraphs. It being held that standing order 191 did not give authority to omit either amendment, the bill as agreed to was in due course certified by the Clerk and notified in the *Territory Gazette* with both paragraphs included (though re-lettered in accordance with standing order 191). See MoP, No 121, 21 September 1994, pp 725-729 and *Tenancy Tribunal Act 1994*, Advice of the Clerk, dated 9 November 1994. One of the paragraphs that was

12.86. The Assembly's standing orders stipulate that, with certain exceptions, the order in which a bill is considered shall be:

- clauses as printed and new clauses (including their headings), in their numerical order;
- schedules as printed and new schedules, in their numerical order;
- postponed clauses (not having been specifically postponed until after certain other clauses);
- dictionary;
- preamble; and
- long title.[117]

12.87. Exceptions to this order are:

- for the consideration of the main appropriation bill for the year, when any schedule expressing the services for which the appropriation is to be made must be considered before the clauses and, unless the Assembly otherwise orders, the schedule must be considered by proposed expenditures in the order in which they are shown;[118]
- the common practice of the Assembly to grant leave for a bill to be considered as a whole at the commencement of the detail stage, to permit groups of clauses (or groups of amendments)[119] to be considered together, or to allow the remainder of a bill to be considered as a whole; and
- when the Assembly, by specific order, sets a different order for the consideration of a bill at the detail stage.[120]

12.88. This order of consideration must be followed, as far as possible, in any reconsideration of a bill ordered by the Assembly.[121]

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mistakenly included in the passed bill was removed by the subsequent passage of the Tenancy Tribunal (Amendment) Act Bill 1994.

117 Standing orders 179 and 180. Consideration of the preamble and the title stand postponed as amendments agreed to during the detail stage may necessitate an amendment to the title and preamble.

118 Standing order 180. See under the heading 'Subordinate legislation' below in this chapter.

119 MoP, No 147, 11 August 2016, p 1702.

120 See, for example, MoP, No 137, 27 November 1991, pp 603-604. For an example of a bill having been declared an urgent bill during consideration in detail and a specific order being set down for the consideration of the remaining stages and the reconsideration of specified clauses in the order for the allotment of time, see MoP, No 141, 5 December 1991, pp 647-648. For an example of where the order of consideration was varied as a result of the drafting of a particular bill (there being no clauses 68 to 99), see MoP, No 41, 10 December 2002, p 442.

121 Standing order 180.

12.89. The enacting words in a bill are not considered during the detail stage, though standing order 181 stipulates that an amendment may be moved 'to any part of the bill'.[122]

Consideration of each clause

12.90. As each clause is reached, the Speaker announces the number of the clause and must propose the question 'That the clause be agreed to',[123] though in practice the Speaker may propose 'That clause [citing the specific number of the clause] be agreed to' or that a proposed new clause or schedule be agreed to, in accordance with the provisions of standing order 180.

12.91. Once proposed, each question is open to debate (and amendment). It takes precedence over other questions until resolved, unless superseded by the questions that an amendment be agreed to, that consideration of a clause be postponed or that the debate be adjourned. Debate must be confined to the relevant provision of the bill as set out in standing order 180 or to an amendment before the Assembly.[124]

12.92. Should a member oppose a clause in a bill, they do not move that the clause be omitted. The member simply votes against the clause—that is, votes 'No' when the question 'That the clause be agreed to' is put. Any schedule of amendments circulated will usually indicate when a member will oppose a clause. However, should the Assembly grant leave for a bill to be considered as a whole (for groups of clauses to be considered together or for the remainder of the bill to be considered as a whole), practic.e has allowed a member to move that a clause be omitted (though this does raise the possibility of a clause being carried without majority support).[125]

12.93. On any question before the chair at the detail stage, any member (with the exception of the member or co-sponsoring members in charge of the bill) may speak only twice for a period not exceeding 10 minutes on each occasion.[126] This does not mean that members are restricted to speaking twice during the consideration of a clause; the restriction applies to 'each question before the Chair'. A member who has already spoken twice to the question 'That the clause be agreed to' may therefore speak for a further two periods on subsequent questions such as those

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122 See *Odgers'*, p 330, where there are precedents for amendments being made to enacting words on instructions to the committee of the whole.

123 Standing order 179.

124 Standing order 183.

125 See *Odgers',* p 330, regarding the possibility of a clause or item being carried without a majority in these circumstances. If the question is negatived, with the votes equally divided, the amendment is negatived and the clause or item remains, notwithstanding that it does not have majority support. In the Senate, therefore, the question is put separately on any clause or item which is opposed, thus ensuring that the risk of a clause or item being carried without a majority is avoided.

126 Should the Assembly be considering an appropriation bill for the ordinary annual services of the year, the minister in charge or a minister responsible for a department or appropriation unit may speak for 'periods not specified'.

proposed on amendments, or on a motion to postpone consideration of the clause, or that the clause, as amended, be agreed to. The standing orders do not specify any speaking periods for the member(s) in charge of a bill (be it an executive bill or another member's bill).[127] At the conclusion of a member's speech, should no other member seek the call, the chair may allocate the call to the member who has just spoken to enable them to speak for the second period.

12.94. Debate must be relevant to the question proposed—that is, members must confine themselves to the subject matter of the clause or the provision being considered.[128] Therefore, the scope of the debate may be limited. Should leave of the Assembly be granted for the consideration of a group of clauses together or for the consideration of the bill as a whole, the scope of the debate is widened.[129]

12.95. Standing orders permit the Assembly to order that a question be divided and to order that reports of committees and other matters be considered by parts.[130] The question 'That the clause be agreed to' has been divided by order of the Assembly.[131]

12.96. Once the question 'That the clause (or the clause as amended) be agreed to' is resolved, the Speaker then proposes the question on the next clause.

Postponement of clauses or other provisions

12.97. Standing orders provide for a clause or other component of a bill, or a clause or other component which has been amended, to be postponed.[132] Practice in the House of Representatives provides that a clause, or clauses which have been taken together by leave and any amendments moved thereto, may also be postponed.[133] Postponement may be specified—for example, until after consideration of a specific clause or clauses,[134] or a particular occurrence[135]—or it may be open. If the

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127 Standing order 69(e).

128 Standing order 58.

129 And see *House of Representatives Practice*, p 375.

130 Standing order 133.

131 MoP, No 23, 27 October 1998, pp 190-191; MoP, No 117, 25 August 2004, p 1685 (the Assembly ordering that a proposed amendment be divided during detail stage consideration). For an example of where a member having, by leave, moved that three new clauses be inserted in a bill and the question agreed to, with the Assembly later ordering that the question be reconsidered and further ordering that the question be divided, see MoP, No 113, 2 December 1997, pp 908-911, and see MoP, No 134, 9 and 10 August 2011, p 1586, where, clauses having, by leave, been considered together, the Speaker, having ascertained that it was the wish of the Assembly to do so, put the question on the clauses in sequence.

132 Standing order 185.

133 *House of Representatives Practice*, pp 378-379.

134 MoP, No 137, 27 November 1991, p 605; MoP, No 117, 6 March 2001, p 1236. This course may be followed in cases where it is agreed that the decision the Assembly makes on a particular provision of a bill is critical to the direction it takes in considering other clauses or circulated amendments. See also MoP, No 131, 21 May 2020, p 1967, where the proposed amendment would change the name of the Act.

135 See *Odgers'*, p 330, where consideration of a clause was postponed until a minister produced certain information or documents.

postponement order does not specify a particular time or occurrence, postponed clauses are considered after the schedules or any proposed new schedules[136] and (in the event of the possible necessity for consequential amendments) before the dictionary.

12.98. Consideration of clauses can be postponed by way of a motion which may be moved prior to or during that consideration. The motion is open to debate and amendment.

Amendments

12.99. A member may seek to alter the terms of a bill by proposing an amendment to any part of it. The amendment must be within the long title of the bill; it must be relevant to the subject matter of the bill; and it must otherwise conform with the standing orders.[137] An amendment is a subsidiary motion. Therefore, the question on the amendment temporarily supersedes the original question. Should the Assembly agree to an amendment, the original question is proposed, as amended.[138]

12.100. A question, having been proposed (for example, 'That the clause be agreed to' or that 'Ms X's amendment be agreed to'), may be amended by:

- omitting certain words only;
- omitting certain words in order to substitute other words; or
- inserting or adding words.[139]

12.101. In addition, a member may propose that a new clause or schedule be inserted in a bill or that a preamble be inserted in a bill.

Inadmissible amendments

12.102. Standing order 201 prohibits a member, other than a minister, from moving an amendment to a money proposal (as specified in standing order 200) if that amendment would increase the amount of public money of the Territory to be appropriated.[140] Amendments to bills have been ruled out of order pursuant to this provision (see under the heading 'Financial initiative of the Crown' in this chapter).

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136 Standing order 180. MoP, No 117, 6 March 2001, p 1236. Or after the remainder of the bill has been taken as a whole, by leave, and agreed to, MoP, No 20, 17 October 1995, pp 155-156.

137 Standing order 181.

138 Standing order 184.

139 Standing order 138.

140 An opposition member has, by leave, moved an amendment to an appropriation bill, which was subsequently amended and agreed to. The effect of the amendment was to insert guiding princples, see MoP, No 83, 4 December 2014, p 961.

12.103. In addition, an amendment may not be moved if it:

- transgresses the anticipation rule;[141]
- transgresses the same question rule;[142]
- does not come within the long title of the bill and is not relevant to the subject matter of the bill;[143]
- is substantially the same as one already negatived or is inconsistent with one that has already been agreed to, unless the bill has been reconsidered (in whole or in part);[144]
- is made to a part of a question after a later part has been amended, or after a question has been proposed on an amendment to a later part; or[145]
- contains words that are determined to be offensive or disorderly.[146]

12.104. The relevancy rule states that amendments must be within the scope of a bill and must be relevant to the subject matter of a bill. It is applied strictly in the Assembly—perhaps more strictly than in the House of Representatives.[147] In a key ruling in 2003, Speaker Berry stated:

> The question arises whether amendments proposed to be moved by … are within the title or relevant to the subject matter of the bill. The long title is fairly broad and one could make the assumption that, because the bill amends the principal act, any amendment that also amends the principal act would be in order.
>
> However, the practice of the Assembly has been not to allow amendments that are outside the scope of the bill. Examples could be, for example, where

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141 Standing order 130.

142 Standing order 136. Standing order 136 has been suspended to permit a member to move an amendment; MoP, No 117, 6 March 2001, p 1250. As noted in Chapter 10: Motions, under the heading 'Content of amendments', the Speaker has a discretion in the application of the same question rule, for good reason. For example, it would be a nonsense to strictly apply the same question rule to amendments to the provisions of a bill that were substantively the same as an earlier amendment that had already been agreed to.

143 Standing order 181. And see MoP, No 96, 25 June 1997, p 713; Assembly Debates, 25 June 1997, p 2040 (the bill, the Health and Community Care Services (Validation of Fees and Charges) Bill 1997, had a restrictive title [A Bill for an Act to remove any doubt about the validity of certain determinations and fees and charges under the *Health and Community Care Services Act 1996*] and the amendments clearly fell outside of the title (one of the amendments proposing to alter the title)). The minister proposing the amendments was actually granted leave by the Assembly to proceed to move the amendments. And see MoP, No 70, 25 November 1999, p 623 and, in particular, the ruling by Speaker Berry (upheld by the Assembly) on 8 May 2003.

144 Standing order 188. MoP, No 72, 8 December 1999, p 671. See also standing order 141.

145 Standing order 142.

146 Standing orders 53 to 57. See comments by Speaker McRae at Assembly Debates, 19 May 1993, pp 1615-1616, regarding an amendment proposed to the Radiation (Amendment) Bill 1993 the preceding evening.

147 *House of Representatives Practice*, pp 375-376.

> the long title of a bill was "A Bill for an Act to amend the *Motor Traffic Act 1937*" and the bill dealt with speed limits outside schools. If our practice were followed, an amendment dealing with the weights and dimensions of articulated vehicles would be ruled out of order, even though it was within the long title of the bill.
>
> The basis of such practice and rules is to ensure that "business, especially legislation, is conducted in an orderly, open and predictable manner devoid of surprise, haste or sleight of hand". I refer members to Odgers' Australian Senate Practice, 10th edition, page 19. Even if other members were alerted to the amendment, it could not be guaranteed and it would be hard to assume that community groups or other interested parties would be aware of such a proposal contained in an amendment.
>
> That is particularly relevant in this Assembly because we have a unicameral Assembly and there is no house of review or place of review in relation to legislation passed here.[148]

12.105. The Speaker then went on to address the amendments in question and ruled certain of them out of order. A motion of dissent from one of the rulings was moved. The ruling was upheld by the Assembly.

Procedure on amendments

12.106. A member may not propose an amendment unless:

- it is in writing and signed by the member; and
- copies of the amendment have been circulated to members.[149]

12.107. A proposed amendment to a bill must be delivered to the Clerk's office no later than 12 noon of the day preceding that on which it is proposed to be moved. The Clerk's office will arrange for its circulation to members as soon as practicable.[150] In practice, the terms of an amendment must be settled on much earlier, as there is now a requirement for all amendments to be provided to the scrutiny committee for consideration and report before being moved.[151] Should a proposed amendment not be provided in accordance with this requirement, leave of the Assembly must be obtained before it can be moved.

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148 Assembly Debates, 8 May 2003, pp 1799-804; MoP, No 58, 8 May 2003, pp 724-725.

149 Standing order 182. The Speaker having drawn attention to the fact that copies of an amendment were not available for circulation to members as required by standing orders, the Assembly adjourned the debate until a later hour in the day. MoP, No 59, 31 August 1999, p 523.

150 Standing order 178A.

151 Standing order 182A. See also under the heading 'Consideration by scrutiny committee' in this chapter for a description of the role of the scrutiny committee.

12.108. A member proposing an amendment is not precluded from reading out the terms of the amendment when moving it. However, the more common practice is to move in the terms 'I move the amendment [or amendment No X] circulated in my name'. As the terms of amendments must be circulated in the chamber, a member cannot require that the Speaker read the terms of an amendment.[152]

12.109. On an amendment being moved, the question then proposed in the Assembly by the Speaker is 'That the amendment be agreed to'.[153] The question on the amendment thus supersedes the question 'That the clause [or other provision] be agreed to', and the amendment proposed must be disposed of before another amendment to the original question may be moved.[154]

12.110. When amendments are moved together, by leave of the Assembly, the question 'That the amendments [or Ms X's amendments Nos Y to Z] be agreed to' is proposed and put.

12.111. In considering amendments circulated and in allocating the call, the Speaker will seek to call members in a sequence that ensures that each of their amendments is considered and dealt with in the order in which they procedurally apply to the clause or other provision of the bill under consideration. This ensures that the provisions of standing orders 141 and 142 are met and that the Assembly progresses through its consideration of the bill in an orderly and consistent manner.

12.112. Occasionally, individual members may wish to propose the same or a similar amendment, in which case the Speaker will call the member who, in their opinion, is the first to seek the call. If the Assembly agrees to the amendment, it is not in order to move an amendment which would have the effect of displacing the original amendment.[155]

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152 Standing order 60.

153 In fact, the Speaker is normally more precise in proposing the question on amendments during consideration of a bill at the detail stage—proposing the question in the form, for example, 'That Ms X's amendment No [ ] be agreed to' or 'That Mr Y's amendment to Ms X's proposed amendment No [ ] be agreed to'.

154 Standing order 143. The chair would not be precluded from proposing and putting the question on amendments in the form as printed and circulated as determined by standing order 138 (for example, 'That the words proposed to be omitted stand part of the question'), though the practice in the Assembly (where members vote by way of a call of the Assembly and therefore are not required to cross the floor to vote in the negative on a question) is for the Speaker to propose and put the question in the form 'That the amendment be agreed to'. For further discussion, see *House of Representatives Practice*, pp 313-314 and see Chapter 10: Motions, under the heading 'Amendments'.

155 The more procedurally appropriate course is to move the subsequent amendment as an amendment to the original amendment when it is first proposed.

12.113. An amendment may be moved to a proposed amendment. Should an amendment be moved to an amendment (this is not unusual in the Assembly; an amendment has been moved to an amendment to an amendment), the question 'That the amendment to the amendment be agreed to' supersedes the question 'That the amendment be agreed to'.[156]

12.114. The Speaker then works back to the original question, with the question on each amendment being resolved separately. When an amendment is agreed to, the main question must be put, as amended.[157] Should the amendment be negatived, the question must be put as originally proposed.[158] Thus, the Assembly must vote on, say, the amendment to the amendment, then on the amendment (or the amendment as amended), then on the original question 'That the clause [or the clause as amended] be agreed to'.

12.115. Amendments may be withdrawn by leave of the Assembly.[159]

New clauses

12.116. Should a member propose that a new clause or a new schedule (or even a new preamble)[160] be inserted in a bill, they do so at the appropriate stage in the order of consideration by moving (when no question is before the Assembly) 'That proposed new clause [citing the number] be inserted in the bill' or 'That proposed new schedule [citing the number where appropriate] be inserted in the bill'. The Speaker then proposes the question, which is open to debate and amendment. A proposed new clause must comply with the standing orders. It may be ruled out of order for the same reason as an amendment may be ruled out of order.

12.117. As with other amendments, the terms of any new clause or new schedule proposed must be provided in writing, must be signed by the member proposing it, and copies must have been circulated to members in the chamber.

12.118. As is the practice in the House of Representatives, if more than one new clause is proposed to be inserted in a bill, each new clause is considered and dealt with as a separate question. However, amendments to insert several new clauses, which may constitute a new part or division, may be moved together, by leave.[161]

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156 During Assembly consideration of the Residential Property (Awareness of Asbestos) Amendment Bill 2004, the *Minutes of Proceedings* record: 'On the motion of Ms Dundas, her amendment No 1 to Mrs Cross' proposed amendment to Ms Gallagher's proposed amendment (see schedule 4) was made, after debate'. See MoP, No 117, 25 August 2004, p 1685.

157 Standing order 146.

158 Standing order 147.

159 Standing order 144.

160 MoP, No 38, 24 November 1992, p 219.

161 *House of Representatives Practice*, p 378.

Completion of the detail stage

12.119. Once the Assembly has completed its consideration of a bill's clauses, schedules and dictionary, it next considers the preamble to the bill (if any) and then its long title. If any amendment has been made to the bill that necessitates an amendment to the long title, the standing orders provide that the long title must be amended, and the question proposed 'That the title, as amended, be agreed to'.[162] This provision suggests that an amendment may only be moved to the title if an amendment to the bill necessitates this.

Reconsideration of bill

12.120. Any member may move that a bill be reconsidered, either in whole or in part.[163] Should the Assembly so order, for the purpose of speaking opportunities and times, the practice has been for any questions proposed to be considered new questions. Thus, members may speak again for a further two periods on each question before the chair.

12.121. Once any questions on the title are resolved and the detail stage completed, the Speaker must put the question 'That this bill be agreed to' or 'That this bill, as amended, be agreed to' forthwith. The question must be determined without amendment or debate.[164]

Bill passed

12.122. Once a bill has been agreed to, no further question on it may be put; the bill has been passed by the Assembly.[165]

12.123. Should the question on the agreement be negatived, the bill proceeds no further (as is the case if the question on the agreement in principle is negatived). The bill may be reintroduced in a later calendar year.[166]

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162 Standing order 186.

163 Standing order 187. See, for example, MoP, No 135, 25 November 1991, pp 587-588; MoP, No 138, 28 November 1991, p 619; MoP, No 141, 5 December 1991, p 654 (a number of clauses including clauses as amended); MoP, No 113, 2 December 1997, p 910 (an amendment inserting three new clauses reconsidered); MoP, No 98, 31 August 2000, p 977; MoP, No 108, 5 December 2000, p 1105; MoP, No 117, 6 March 2001, p 1249; MoP, No 128, 15 and 16 June 2001, p 1432; MoP, No 101, 7 and 8 September 2000, p 1002 (clause reconsidered, by leave, during detail stage consideration).

164 Standing order 189. For comment on the origin of the rule see *May* (23rd edn), p 4. On occasion, the Assembly has granted leave for debate to ensue on the question.

165 Standing order 190.

166 See, for example, Community Referendum Bill 1995—negatived on 14 December 1995 (MoP, No 34, 14 December 1995, p 247) and reintroduced as the Community Referendum Bill 1996 on 27 June 1996 (MoP, No 58, 27 June 1996, p 389); Utilities (Network Facilities Tax) Repeal Bill 2007—negatived on 14 November 2007 (MoP, No 119, 14 November 2007, p 1275) and reintroduced as the Utilities (Network Facilities Tax) Repeal Bill 2008 on 5 March 2008 (MoP, No 131, 5 March 2008, p 1381). See also under the heading 'Appropriation bill negatived' in this chapter.

12.124. In cases of particular necessity, however, the Assembly has rescinded resolutions agreeing to bills in order to reconsider them. The Assembly recommits bills usually by overriding the requirements of standing order 137. It does this by suspending the standing order or by way of a motion moved by leave (unanimous consent required), having subsequently ordered that the resolutions of the Assembly agreeing to particular amendments, clauses or other questions and agreeing to the bill or the bill, as amended, be rescinded. Further, the Assembly has, by special order, set out at what stage the bill is to be reconsidered (and when)[167] or the specific scope of any reconsideration.[168]

Urgent bill

12.125. Should a member in charge of a bill, or a member acting on behalf of that member, declare that a bill is urgent, the question 'That this bill be considered an urgent bill' must be put and, if agreed to, that member may forthwith move a motion specifying the time which shall be allotted to the various stages of the bill.[169] One declaration of urgency and one motion for the allotment of time have even been moved in relation to three bills after standing and temporary orders were suspended to allow that course to be followed.[170] The procedure is rarely used (see Appendix 11 for details).

12.126. Debate on the motion to declare a bill urgent or on the motion for the allotment of time shall, in each case, not exceed 15 minutes, with each member speaking for no more than five minutes. Both questions are open to debate.[171]

Clerical, grammatical or typographical amendments

12.127. Corrections to clerical, grammatical and typographical errors are often made by the Clerk, with the Speaker's authority, pursuant to standing order 191 (and often following suggestion by Parliamentary Counsel). The scope of such amendments is limited and, in making amendments of this nature, the Clerk refers to the principles governing the making of printing corrections as set out in *Bennion*,[172] particularly Rule 4, which states (in reference to the United Kingdom context):

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167 Usually forthwith.

168 For example, see MoP, No 145, 17 December 1991, p 686; MoP, No 132, 6 December 1994, pp 801-802 (the order rescinded the resolutions agreeing to the bill as amended and the resolution in relation to a specific clause and restricted the Assembly's reconsideration to those questions); MoP, No 42, 27 March 1996, pp 292-293 (the order rescinding the resolution agreeing to the bill in principle and providing that the question 'That this Bill be agreed to in principle' be reconsidered forthwith); and MoP, No 118, 11 December 1997, pp 966-967 (the order (as amended) rescinding the resolution agreeing to the bill as amended and providing for the reconsideration of clauses 5 and 8 of the bill).

169 Standing order 192. See MoP, No 24, 18 October 1989, pp 97-98; MoP, No 141, 5 December 1991, pp 647-648; MoP, No 16, 25 June 1992, pp 83-84 (three bills); 1995-97/449-451; MoP, No 2, 28 April 1998, p 20; MoP, No 111, 30 and 31 August 2007, pp 1204-1205.

170 MoP, No 16, 25 June 1992, pp 83-84.

171 Standing order 69(f). MoP, No 51, 24 February 1993, p 295.

172 F A R Bennion MA, *Statutory Interpretation—A Code*, Butterworths, 1997, Third Edition, pp 148-149.

> Where the text of the House Bill contains a misprint, and it is clear what the correct version should be, it is for the Public Bill Office to correct the error. If it is not clear what the correction should be the error must be allowed to remain (unless, there being further stages of the Bill's progress to come, the error can be put right by an amendment).[173]

12.128. The Clerk may also make amendments consequential on the passage of the bill and prior to its certification, including:

- amendments necessary or desirable to the title, long title or method of citation;
- amendments to correct the citation of an Act; and
- renumbering of provisions and updating cross-references.

12.129. The Speaker is obliged to advise the Assembly of such amendments, usually by tabling the instruments formally agreeing to the Clerk's requests to make amendments.[174]

Certification and notification of enactment

12.130. As the Territory does not have an official position analogous to an administrator or a state governor, there are therefore no assent procedures for legislation as is the case in comparable Australian legislatures. Originally, the Self-Government Act, complemented by the certification provisions in the standing orders, set out the process whereby proposed laws took effect.[175] The Territory has since enacted legislation providing for the notification of Acts, and these provisions are now contained in Chapter 4 of the Legislation Act, which provides for both the numbering and notification of Acts.

12.131. However, before an Act can be notified, Assembly standing order 193 requires that, after a bill has been passed, the Clerk must certify a copy of it as being a true copy of the bill passed by the Assembly. The Speaker must then ask Parliamentary Counsel to notify the making of the proposed law. The Clerk's certificate reads as follows:

> I hereby certify that the above is a true copy of the [short title of bill], which was passed by the Legislative Assembly on [date].

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173 For discussion of the scope of such amendments, see the paper presented by the Clerk of the South Australian House of Assembly, *Twenty Fourth Regional Conference of Presiding Officers and Clerks, Port Vila, Vanuatu, 26-29 July 1993*, Transcript of Proceedings, pp 121-138.

174 Standing order 191.

175 They took effect upon the date of notification in the Territory Gazette of their having been passed by the Assembly (unless the proposed law otherwise provided), with the Chief Minister at the time being responsible for the publication of the notification; Self-Government Act, s 25 (with the passage of the Legislation Act, the Speaker assumed responsibility for the publication of the notification). The notification had also to indicate the place or places where copies of the proposed law could be purchased. In the event of copies of the law not being available for purchase as notified, the Act made provision for the tabling of a statement advising the Assembly of the fact and giving of reason why they were not so available. Section 25(6) of the Act provided that the original provisions ceased to have effect on and after

12.132. The certificate is signed and dated by the Clerk. In the event that the title of the bill has been amended during its passage through the Assembly, the certificate reflects that fact by stating:

> I hereby certify that the above is a true copy of the [amended short title of bill], which originated in the Legislative Assembly as the [short title of bill as presented] and was passed by the Legislative Assembly on [date].

12.133. In the case of a bill for an entrenching law, the certificate differs again (see under the heading 'Entrenching laws and enabling laws' below in this chapter).

12.134. The Legislation Act[176] also provides that, should a proposed law be passed by the Assembly, the Speaker must ask Parliamentary Counsel to notify the making of the proposed law. Parliamentary Counsel is obliged to establish and maintain in electronic form a register of Acts and statutory instruments (the ACT Legislation Register).[177] The making of the proposed law is notified in the register by entering a statement that the law has been passed by the Legislative Assembly and the text of the law.[178]

12.135. The Speaker notifies Parliamentary Counsel of the passing of a bill by forwarding a paper copy of the Act as certified by the Clerk in accordance with standing order 193, together with a letter of transmittal asking Parliamentary Counsel to notify the making of the proposed law. At the same time, the Office of the Legislative Assembly forwards to Parliamentary Counsel an unsigned electronic version of the Act and an unsigned electronic copy of the letter of transmittal. It is also the practice for the Speaker to nominate a particular day for the notification of the passing of each proposed law, in accordance with s 28(3) of the Legislation Act.

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the commencement of an enactment providing for the publication of notice of the passing of a proposed law by the Assembly by an alternative means and the commencement of such a law.

176 Section 28(1).

177 Legislation Act, Chapter 2.

178 Legislation Act, s 28(4), specifically provides that the making of the proposed law is notified in the Legislation Register by entering in the register: (a) a statement that the law has been passed by the Legislative Assembly; and (b) the text of the law. If it is not practical to do so, the making of the proposed law is notified in a place the Parliamentary Counsel considers appropriate with the text of the proposed law and a statement (i) that the law has been passed by the Legislative Assembly; and (ii) of the place or places where copies of the law can be obtained (whether by purchase or otherwise). Legislation Act, s 28(5). If, on the day of publication, no copies are available at the nominated places, Parliamentary Counsel must give to the minister responsible for the administration of the Act a statement that the copies were not available, explaining why they were not available, and the minister must present the statement to the Assembly not later than six sitting days after receiving it; Legislation Act, ss 28(4)-(9). For a precedent where a similar statement was presented to the Assembly (prior to enactment of the Legislation Act), see MoP, No 47, 20 March 1990, p 192.

The ACT Legislation Register and website

Chapter 2 of the Legislation Act provides that Parliamentary Counsel must establish a register of Acts and statuatory instruments (the ACT Legislation Register). The register must contain:

- authorised republications of laws currently in force;
- Acts as made;
- subordinate laws as made;
- disallowable instruments as made;
- commencement notices as made;
- resolutions by the Legislative Assembly to disallow or amend subordinate laws or disallowable instruments;
- explanatory statements for bills and amendments to bills presented to the Assembly;
- explanatory statements and regulatory impact statements under Chapter 5 of the Legislation Act for subordinate laws and disallowable instruments;
- notifications of the making of Acts, subordinate laws, disallowable instruments, notifiable instruments, and commencement notices; and
- notifications of the disallowance or amendment of subordinate laws and disallowable instruments by the Legislative Assembly.

Parliamentary Counsel may enter additional material in the register if they consider it is likely to be useful to users of the register.

The register is at www.legislation.act.gov.au

Numbering of Acts

12.136. Section 27 of the Legislation Act provides that the Acts passed each year are to be numbered as nearly as practicable in the order in which they are passed.[179]

Entrenching laws and enabling laws

Entrenching laws

12.137. The Self-Government Act empowers the Assembly to pass a law called an entrenching law. An entrenching law imposes certain special procedures or conditions on the manner and form of making particular enactments.[180] The entrenching law must be submitted to a referendum of the electors of the Territory for approval and may include the requirements that an enactment or enactments

179 Legislation Act, s 27.

180 Which may include enactments that amend or repeal the entrenching law itself.

must be passed by a special majority in the Assembly and that, to have effect, it must be passed by a special majority of the electors. Should the entrenching law include such requirements, they will also apply to the entrenching law itself.

12.138. The purpose of the entrenching process is similar to that of the laws governing amendments to the Constitution. It recognises that certain laws are of fundamental importance to the Territory's legal structure or government processes and should be subject to change only if clear popular support for such change can be demonstrated. The entrenchment process permits an Assembly to bind later Assemblies to a certain extent. This has occurred in relation to the electoral system in use in the Territory.

12.139. The authority to pass entrenching laws is found in s 26 of the Self-Government Act. In introducing the Self-Government Bill into the House of Representatives, the responsible minister described the purpose of s 26 as extending:

> … to the people of the Territory, who are not party to the Australia Act, the general provisions of that Act, which allow the States to entrench laws relating to the Constitution, powers and procedures of their parliaments.[181]

12.140. The key elements of s 26 are:

- the entrenching law itself must be submitted to a referendum of the electors of the Territory[182] and must be approved by a majority of electors;
- while the entrenching law is in force, any enactment to which it applies has no effect unless made in accordance with the entrenching law; and
- if an entrenching law imposes requirements (or restrictions) on other enactments, the same requirements apply to the entrenching law.

12.141. There are therefore two basic categories of laws (and therefore proposed laws) in question: **entrenching laws** and **enactments to which entrenching laws apply** (which may include proposed laws that amend or repeal the entrenching law).

12.142. An entrenching law may apply to a specific piece of proposed legislation—for example, the 'Bill for an Act to entrench the *Community Referendum Act 1995*', or it may apply to a class of legislation. For example, the Proportional Representation (Hare-Clark) Entrenchment Act applies to 'any law that is inconsistent with any of the following principles of the proportional representation (Hare-Clark) electoral system'. Section 4 of the Act then lists 11 characteristics of the ACT electoral system that cannot be altered other than by legislation which complies with the entrenching law.

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181 House of Representatives Debates, 19 October 1988, p 1925.

182 An elector of the Territory is defined in the Act as a person who is entitled to vote at a general election.

12.143. All bills for entrenching laws must:

- pass the Assembly; and
- be submitted to a referendum of the electors of the Territory.

12.144. These particular hurdles may not necessarily apply to an enactment to which an entrenching law may apply. For example, an entrenching law might simply require that a law to which it applies must pass the Assembly with a special majority. However, if an entrenching law imposes requirements on other laws, those same requirements apply to the entrenching law itself. That is, if an entrenching law requires that a proposed law to which it applies must be passed by the Assembly with a two-thirds majority, then the entrenching law must also pass the Assembly with a two-thirds majority.

12.145. The Assembly has considered two bills for entrenching laws. The Proportional Representation (Hare-Clark) Entrenchment Bill 1994 was agreed to by the required majority of members and approved by a majority of electors at a referendum, becoming law as the Proportional Representation (Hare-Clark) Entrenchment Act.[183] The Community Referendum Laws Entrenchment Bill 1995 failed to pass the Assembly and, thus, was never put to a referendum.

12.146. In addition, the Assembly has considered two proposed laws to which the entrenching law applied:

- The Proportional Representation (Hare-Clark) Entrenchment Amendment Bill 2001 proposed to amend the entrenching law already enacted. Though agreed to by a majority of members of the Assembly, it did not pass the Assembly by the required two-thirds majority set by the principal (entrenched) Act[184] (thus failing at the first hurdle), and it did not further proceed.
- The Electoral (Entrenched Provisions) Amendment Bill 2001 was a proposed law to which the Proportional Representation (Hare-Clark) Entrenchment Act applied. It was agreed to by the Assembly by more than the two-thirds majority of members required by the principal (entrenched) Act (and thus did not need to be submitted to a referendum and passed by a majority of electors).[185]

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183 This Act, at s 5(1) specifies 'that any amendment or repeal of this Act' requires a two-thirds majority of the members of the Assembly and a majority in a referendum, whereas s 5(2) specifies that a law to which the Entrenchment Act applies must be passed either by a simple majority in the Assembly and a majority at a referendum or a two-thirds majority of the Assembly.

184 Section 5(1) of the principal Act provides that the principal Act, or any amendment or repeal of the principal Act, has no effect unless passed by at least a two-thirds majority of members and a majority of electors at a referendum.

185 Proportional Representation (Hare-Clark) Entrenchment Act, s 5(2).

Assembly procedure

12.147. Bills for entrenching laws and bills to which entrenching laws apply are not given any special notation or identification marks when presented in the Assembly.[186] Standing orders make no specific provisions affecting their consideration.[187] Such bills are introduced and are considered by the Assembly in the same manner as other bills until the conclusion of the detail stage.

12.148. The provisions of s 26(5) of the Self-Government Act are invoked once the Speaker, pursuant to standing order 189, puts the question 'That this bill be agreed to' or 'That this bill, as amended, be agreed to'[188] if:

- the bill (in the case of a bill for an entrenching law) includes the requirement that an enactment (including the bill itself) or enactments be passed by a special majority of members; or
- the bill is subject to the provisions of an entrenched enactment that requires that it be passed by a special majority of members.

12.149. In these cases, even if there is no call for a vote, the practice of the Assembly has been that the Speaker, having stated the question, will direct the Clerk to call the Assembly. Each member, on being called, will signify 'Yes' or 'No' in accordance with the provisions of standing order 160.

12.150. Should the bill not achieve (be passed by) the special majority required, it will be of no effect in that it has not been validly or effectively 'passed by the Assembly' within the meaning of s 25(1) of the Self-Government Act[189] and there will be no further proceedings on the bill, irrespective of the provisions of standing order 134. In the precedents to date, the special majority required for relevant bills considered by the Assembly has been 'at least' a two-thirds majority of members—now taken to be at least 17 members.

12.151. Details of proceedings to date on relevant bills are set out at Appendix 22 of the First Edition of the *Companion*.

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186 Of the former, the long titles of the bills presented to date clearly identified them as bills for entrenching laws. Of the latter, the short and long title of the Proportional Representation (Hare-Clark) Entrenchment Amendment Bill 2001 clearly identified it as a bill to amend an entrenching law, and the short title, explanatory memorandum and minister's presentation speech identified the Electoral (Entrenched Provisions) Amendment Bill 2001 as a bill to which an entrenching law applied.

187 Standing order 194 relates to the certification by the Clerk that an entrenching law has been passed by the Assembly and approved at a referendum.

188 Assuming that proceedings have reached this stage.

189 Advice of the ACT Government Solicitor of 3 May 2001.

Certification and later proceedings

12.152. Once passed by the Assembly, all entrenching laws must be submitted to a referendum of the electors of the Territory, as provided by enactment,[190] as must those laws where this is required by an entrenching law. The Assembly has provided for this by enacting the Referendum (Machinery Provisions) Act.

12.153. In addition, standing order 194 provides:

> Whenever a bill for an entrenching law has been passed by the Assembly and approved by a majority of the electors of the Territory at a referendum, it shall be so certified by the Clerk and the Speaker shall then ask Parliamentary Counsel to notify the making of the proposed law.

12.154. In the case of the one entrenching law passed by the Assembly—the Proportional Representation (Hare-Clark) Entrenchment Bill 1994—the bill was initially certified by the Clerk as having passed the Assembly and was transmitted to the Electoral Commissioner.[191]

12.155. The actual terms of the certificate (printed on page one of the text of the bill) are set out below:

> This Bill for an entrenching law passed the Legislative Assembly on 8 December 1994 by a special majority as required by section 26 of the *Australian Capital Territory (Self-Government) Act 1988* and section 5 of this Bill. It is transmitted to the Electoral Commissioner for submission to a referendum of the electors of the Territory in accordance with the provisions of the *Referendum (Machinery Provisions) Act 1994*.

12.156. The trigger mechanism for a referendum to proceed is contained in the provisions of the Referendum (Machinery Provisions) Act. Section 5 provides that the Act applies in relation to a 'referendum law'—that is, an enabling law (see under the heading 'Enabling laws' in this chapter), an entrenching law (a law required to be submitted to a referendum under s 26(2) of the Self-Government Act) or a law required by an entrenching law to be submitted to a referendum.[192]

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190 Self-Government Act, s 26(2).

191 At the same time, the Speaker formally advised the Chief Minister of the course being followed, the Chief Minister at that time having responsibility for publishing notices of proposed laws having been passed pursuant to s 25(1) of the Self-Government Act.

192 Referendum (Machinery Provisions) Act, s 5 and dictionary.

12.157. The Act[193] makes provision for the timing and conduct of referendums. It establishes that a poll for a referendum shall be held:

- either on the polling day of the next ordinary election; or
- in the case where a referendum law provides for a referendum day other than polling day, on a day fixed by the executive in writing unless the referendum law itself provides otherwise (although certain days are precluded).[194]

12.158. The Act also contains a range of provisions governing the conduct of referendums. For example, it provides that, as soon as practicable after the count is concluded, the Electoral Commissioner must prepare a notice setting out the numbers so counted and declaring the result of the referendum.

12.159. On 16 March 1995, the Electoral Commissioner advised the Clerk of the result of the referendum for the entrenchment of the Proportional Representation (Hare-Clark) Entrenchment Bill 1994, including a copy of the *Territory Gazette* notice declaring that a majority of the electors entitled to vote at the referendum had approved the entrenching law.

12.160. The Clerk, however, did not certify the bill immediately in accordance with the provisions of standing order 194. Certification was delayed until receipt of advice from the Registrar of the Supreme Court that no application had been made to the Supreme Court (as the Court of Disputed Elections) disputing the validity of the referendum.[195] This course of action was based on the practice of the House of Representatives of delaying certification of Constitution alteration bills approved by the electors until ascertaining whether a petition disputing the referendum had been lodged and until any dispute had been determined. In addition, legal advice sought at the time concluded that it was reasonably practicable for the Clerk not to certify the entrenching law before the expiry of the period in which the referendum result could be challenged.[196]

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193 The purpose of which is to provide default machinery provisions that are to operate to the extent to which they are not actually inconsistent with the actual provisions of a referendum law, thus ensuring referendums are conducted in the same way as elections, as far as practicable, and avoiding the necessity for specific referendum laws to address general machinery provisions (see Referendum (Machinery Provisions) Act, s 5 and Assembly Debates, 22 September 1994, p 3279).

194 Referendum (Machinery Provisions) Act, s 7. The day cannot occur: (a) between the commencement of a pre-election period (defined by the Electoral Act as meaning the period of 37 days ending on the end of polling day for an election) and the expiration of 36 days after the polling day for the relevant election; or (b) on a polling day for the election of senators or a general election of members of the House of Representatives or a referendum held under a law of the Commonwealth, unless the minister makes appropriate arrangements with the appropriate Commonwealth minister for the poll for the referendum to be held on that day.

195 Received on 27 April 1995.

196 C*ertification of bills for entrenching laws under standing order 194*, Legal Opinion, Parliamentary and Constitutional Section, Constitutional and Law Reform Branch, Attorney-General's Department, 30 March 1995.

12.161. Following the receipt of advice from the Registrar of the Supreme Court that no application had been made disputing the validity of the referendum, the Clerk certified the bill as follows:

> I certify—
>
> (a) that the above is a true copy of the Proportional Representation (Hare-Clark) Entrenchment Bill 1994 which was passed by the Legislative Assembly on 8 December 1994 by the majority of Members required by paragraph 5(1) of the Bill; and
>
> (b) that the entrenching law was submitted to a referendum of the electors of the Territory in accordance with subsection 26(2) of the *Australian Capital Territory (Self-Government) Act 1988* of the Commonwealth and approved by a majority of the electors.
>
> The period allowed by law for making an application to the Court of Disputed Elections disputing the validity of the referendum has now expired without any such application having been made.

12.162. In accordance with then standing order 194, the Speaker then presented the bill to the Chief Minister for notification.[197]

12.163. Where special conditions apply to the making of a law other than the requirement to submit the law to a referendum, the Speaker submits the proposed law to Parliamentary Counsel for notification and the Clerk certifies that the special conditions have been met. For example, the Electoral (Entrenched Provisions) Amendment Bill 2001 was agreed to by the special majority of members as set by the principal (entrenched) Act and was certified by the Clerk as follows:

> I certify that the above is a true copy of the Electoral (Entrenched Provisions) Amendment Bill 2001 which was passed by the Legislative Assembly on 15 June 2001 by at least a 2/3 majority of members of the Legislative Assembly as required by paragraph 5(1)(a) of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*.

197 Note that the Legislation Act, at s 28, now requires the Speaker to ask Parliamentary Counsel to notify the making of a law.

Enabling laws

12.164. In addition to making provision for referendums of the electors of the Territory for entrenching laws and laws that entrenching laws require to be submitted to referendum, the Referendum (Machinery Provisions) Act makes provision for enabling laws to be submitted to referendum. An enabling law is defined by the Act as a law that provides for a matter, including a proposed law, to be submitted to a referendum and is included in the dictionary definition of 'referendum law'.[198] To date, the Assembly has not considered an enabling law.

12.165. The Referendum (Machinery Provisions) Act provides the general mechanisms for the conduct of referendums required to be held by laws of the Assembly, except to the extent that the actual referendum law provides otherwise.[199]

Money bills

Self-Government Act

12.166. The Self-Government Act gives the ACT a capacity to raise revenue similar to that of the states and the Northern Territory. All moneys received by the Territory—taxes, fees and other charges, income from investment and commercial activities—form the public money of the Territory, which is regulated under enactment passed by the Assembly. Funds may not be withdrawn or appropriated from the public moneys—except by way of legislation passed by the Assembly.

12.167. The Self-Government Act contains a number of provisions governing (and ensuring the primacy of the Assembly in regard to) the control of the public money of the Territory. Section 57 of the Act provides that:

> (1) the public money of the Territory [the revenues, loans and other money received by the Territory] shall be available for the expenditure of the Territory; and
>
> (2) the receipt, spending and control of the public money of the Territory shall be regulated as provided by enactment.

12.168. Section 58 of the Act (withdrawals of public money), provides that (with one exception) 'no public money of the Territory shall be issued or spent except as authorised by enactment' and that the 'public money of the Territory may be invested as provided by enactment'.[200] Section 65 of the Act (proposal of money votes), provides that:

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198 The Assembly might consider that, with regard to a particular matter, the views of the electorate should be sought directly by making that matter the subject of a referendum. It would do this by passing an enabling law setting out the question and requiring that it be submitted to the electorate at a referendum.

199 Referendum (Machinery Provisions) Act, s 5(2).

200 See s 16(4) of the Act, which provides that, in the event of a dissolution of the Assembly by the Governor-General and the subsequent appointment of a commissioner, should it be necessary to issue or spend public money of the Territory when not authorised to do so by or under enactment, the commissioner may do so with the authority of the Governor-General.

(1) an enactment, vote or resolution (proposal) for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a minister.

12.169. However, it is important to note that s 65 does not prevent a member other than a minister from moving an amendment to a proposal made by a minister unless the amendment is to increase the amount of the public money of the Territory to be appropriated.

12.170. The provisions of s 65 relating to 'the financial initiative of the Crown' have received considerable attention throughout the life of the Assembly (see under the heading 'Financial initiative of the Crown' below in this chapter).

12.171. The Self-Government Act also sets out provisions for financial relations between the Commonwealth and the Territory,[201] including borrowing from the Commonwealth. In addition, certain provisions originally included in the Self-Government Act relating to controls by the Commonwealth over the Territory's borrowings have now been repealed. These are s 61 (borrowing from persons other than the Commonwealth), s 62 (guarantee of borrowing), s 63 (borrowing not otherwise permitted) and s 64 (guarantees by executive).[202]

Financial initiative of the Crown

12.172. In addition to ss 57 and 58 of the Self-Government Act ensuring the primacy of Assembly control of the public money of the Territory, s 65 ensures that it is only a minister (meaning the Chief Minister or a minister appointed under s 41) who may initiate or move to increase appropriation proposals in the Assembly. This is a principle of long standing that is referred to as the financial initiative of the Crown.[203]

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201 Section 59 provides that the Commonwealth shall conduct its financial relations with the Territory so as to ensure that the Territory is treated on the same basis as the states and the Northern Territory, while having regard to the special circumstances arising from the existence of the national capital and the seat of government of the Commonwealth in the Territory.

202 Sections 61, 62, and 63 were repealed by the *Arts, Sport, Environment, Tourism and Territories Legislation Amendment Act 1991* (Cth), the repeal being a result of a 1990 decision by the Loan Council that the states and territories would gradually assume full responsibility for raising and servicing their government debt (see House of Representatives Debates, 14 February 1991, p 653). Section 64, which required the Territory to obtain the approval of the Treasurer of the Commonwealth before making guarantees for the discharge of certain obligations, was repealed by the *Australian Capital Territory Self-Government Legislation Amendment Act 1992* (No 10 of 1992), the provisions reflected the view that the Territory legislature should have greater responsibility for its own affairs (see House of Representatives Debates, 6 November 1991, p 2467).

203 It is of interest that, during Senate consideration of the self-government legislation in November 1988, an amendment proposing that a law et cetera for the disposal or charge of the public moneys of the Territory may be proposed by any member and shall not be passed unless a nominated committee of the Assembly approved the provision of the public moneys of the Territory for the purpose of the proposal. The amendment was negatived, the government viewing it as different from any provision operating in the states and the Northern Territory in relation to money bills and, as a matter of effective and sensible budget management, the initiation of money bills needed to be retained in the hands of the executive. The opposition supported the government. Senate Debates, 24 November 1988, pp 2813-2814.

12.173. Section 65, which is modelled on s 56 of the Constitution, provides that:

> Proposal of money votes
>
> (1) An enactment, vote or resolution (***proposal***) for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister.
>
> (2) Subsection (1) does not prevent a Member other than a Minister from moving an amendment to a proposal made by a Minister unless the amendment is to increase the amount of public money of the Territory to be appropriated.

12.174. Though greatly enhancing the power of the executive, the financial initiative of the Crown is seen as fundamental to good government. As Anson put it, it is:

> … the great safeguard of the tax-payer against the casual benevolence of the House wrought upon by the eloquence of a private member [or] against a scramble for public money among unscrupulous politicians bidding against one another for the favour of democracy. [204]

12.175. In addressing the issue of amendments in the context of the rules regulating financial procedures in the United Kingdom House of Commons, *May* states:

> The House of Commons has long found it necessary to place restrictions on the moving of amendments in order to keep intact the principle of the financial initiative of the Crown …
>
> The Crown's recommendation lays down the maximum amount of a charge on public funds or on the people, as well as its objects and purposes. An amendment infringes the financial initiative of the Crown not only if it increases the amount, but also if it extends the objects and purposes, or relaxes the conditions and qualifications expressed in the communication by which the Crown has recommended a charge.[205]

12.176. The principle reflects the fact that it is the executive that is responsible for the management of the public finances of the Territory and the administration of those finances. For the Assembly to impose expenditure proposals initiated by non-executive members (that is, members who are not ministers) on the

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204 Gordon Reid, *The Politics of Financial Control,* Hutchison University Library, London, 1966, pp 41-43. Reid is quoting the 1886 view of Sir William Anson. For further discussion on the background to the rule and its application in the Commonwealth Parliament, see the comments by Reid at pp 41-45, and also *Quick and Garran*, p 681.

205 *May*, pp 857-858.

ACT Executive may be regarded as harmful to the principles of responsible government[206] and indeed good government more generally.[207]

12.177. The current form of s 65 of the Self-Government Act was inserted following approaches from the Territory to the Commonwealth Parliament in 1994. The new provisions sought to remove uncertainty which flowed from the original wording. The explanatory memorandum to the amending bill stated:

> Subsections 65 (1) and (2): amended to ensure that the initiative of the Government in introducing legislation in the Assembly on financial matters is no greater or less than that of the Commonwealth Government under section 56 of the Constitution. The reference in the present section 65 to the 'object or effect' of a proposed law, and the absence of reference to 'appropriation' suggests that section 65 covers proposals to increase the Territory's possible financial liabilities without actually appropriating public moneys. This is not intended.[208]

12.178. The executive's exclusive responsibility in this regard has significant practical implications for the passage of financial measures through the Assembly. As *House of Representatives Practice* states in relation to that legislature:

> … the constitutional and parliamentary principle that only the Government may initiate or move to increase appropriations or taxes—plays an important part in procedures for the initiation and processing of legislation.[209]

12.179. These procedures are substantially reflected in the provisions of the Self-Government Act and the standing orders of the Assembly.

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206 The connection between responsible government and financial initiative is summarised in *McGee*, pp 514-515, which states that:

> … those in [executive] office … accepting responsibility for the Government's policies of economic and financial management, should not have fiscal decisions foisted upon them. The House of Representatives' alternative, if it wishes to change an important aspect of a Government's policy that those in office will themselves not change, is to change the Government, not to attempt to force a Minister to carry out, and thus accept responsibility for, fiscal policies with which they do not agree.

207 See comments (on s 56 of the Constitution) by *Quick and Garran*, where they also quote from Hearn's *Government of England*—'We are so accustomed to the general practice, and the deviations from it have been so inconsiderable, that its importance is scarcely appreciated. Those, however, who have had the experience of the results which followed from its absence, of the scramble among the members of the Legislature to obtain a share of the public money from their respective constituencies, of the 'log-rolling', and of the predominance of local interests to the entire neglect of the public interest, have not hesitated to declare that "good government is not attainable while the unrestricted powers of voting public money and managing the local expenditure of the community are lodged in the hands of an Assembly".' *Quick and Garran*, p 681.

208 The explanatory memorandum to the Arts, Environment and Territories Legislation Amendment Bill 1993 (as enacted Act No 6 of 1994, Cth). Note that while s 56 of the Constitution refers to the requirement for 'a message of the Governor-General' recommending a proposed appropriation, in effect ensuring executive support for the proposal, there is no reference to such a message as the Territory does not have an Administrator or a Governor, unlike the Northern Territory or the states.

209 *House of Representatives Practice*, p 415.

12.180. It should be noted that, unlike the House of Representatives, the Assembly has not further enhanced the hand of the executive over and above the constitutional provisions by imposing restrictions on non-ministers initiating proposals to impose taxes.[210] It has, however, enhanced the hand of the executive by imposing certain additional restrictions (initially by way of resolution) on non-executive members proposing amendments to expenditure proposals (see under the heading 'Standing orders' in this chapter) and, by statute, obviating the need for the executive to seek 'supply' by making provision for a standing supply provision in the Financial Management Act (see under the headings 'Financial Management Act' and 'Standing supply provision' in this chapter).

Standing orders

12.181. Standing orders 200 and 201 relating to money proposals were amended in 1994 to reflect amendments to the Self-Government Act. They state that:

> **Money proposals submitted – without notice**
>
> 200. An enactment, vote or resolution for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister. Such proposals may be introduced by a Minister without notice.
>
> **Limitations on amendments**
>
> 201. A Member, other than a Minister, may not move an amendment to a money proposal, as specified in standing order 200, if that amendment would increase the amount of public money of the Territory to be appropriated.

12.182. Prior to the adoption of these standing orders in their current form, there had been considerable controversy and frustration in the Assembly over the application of the former standing orders regarding the initiation of legislation. Members had been prevented from proceeding with their bills in the Assembly. The original provisions could operate to virtually exclude private members from proposing business in the Assembly. The amendments to the Self-Government

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210 For example, House of Representatives standing order 179 provides that:

> (a) Only a Minister may initiate a proposal to impose, increase, or decrease a tax or duty, or change the scope of any charge.
>
> (b) Only a Minister may move an amendment to the proposal which increases or extends the scope of the charge proposed beyond the total already existing under any Act of Parliament.
>
> (c) A Member who is not a Minister may move an amendment to the proposal which does not increase or extend the scope of the charge proposed beyond the total already existing under any Act of Parliament.
>
> This standing order goes considerably beyond the relevant section of the Commonwealth Constitution in curtailing the legislative prerogatives of the House. Section 56 of the Constitution merely states that: 'A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated'.

Act clarified that private members were not prevented from the initiation of legislative proposals simply on the basis that private members had the right to initiate proposals, and to have them decided by the Assembly, while it would remain the exclusive responsibility of the executive to initiate the expenditure of the Territory's money.[211]

12.183. Since the adoption of the new standing orders in 1994, to date no private members' bills proposed in the Assembly have been found to have infringed standing order 200.[212]

12.184. In March 2008, the Assembly further amended the standing orders by adopting standing order 201A, thus incorporating in the standing orders the terms of a 1995 resolution further restricting the scope of amendments that non-executive members may move to money proposals. The new standing order provides:

> 201A. An amendment in accordance with standing order 201 must be in accordance with the resolution agreed to on 23 November 1995 – i.e. "That this Assembly reaffirms the principles of the Westminster system embodied in the 'financial initiative of the Crown' and the limits that that initiative places on non-executive Members in moving amendments other than those to reduce items of proposed expenditure."

12.185. In the Ninth Assembly, an amendment to the Betting Operations Tax Bill 2018 proposed by a non-executive member was ruled out of order by the Speaker on the basis that it contravened standing order 200.[213] The proposed amendment sought to insert a new clause in the bill providing that 'For a financial year, the prescribed proportion of total betting tax paid to the commissioner under section 12 for the previous financial year is appropriated to the racing clubs'.[214]

12.186. Speaker Burch ruled as follows:

> Once the betting tax bill becomes law and commences, public moneys raised by the imposition of the tax will be paid into consolidated revenue. The moneys so raised may only be expended in accordance with the appropriation under section 6 of the Financial Management Act.

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211 The new standing orders were adopted, the Assembly having agreed to a recommendation of the Standing Committee on Administration and Procedures—*Standing Orders 200 and 201*, Report of the Standing Committee on Administration and Procedures, 7 June 1994; MoP, No 112, 16 June 1994, p 633. Section 65(1) of the Self-Government Act had originally provided 'An enactment, vote, resolution or question (any of which is in this section called a 'proposal') the object or effect of which is that to dispose of or charge any public money of the Territory shall not be proposed in the Assembly except by a Minister'. For a summary of the application of the earlier procedures, see *Standing Orders 200 & 201 and their interpretation*, Report of the Standing Committee on Administration and Procedures, December 1990.

212 But see under the heading 'Amendments to appropriation bills' in this chapter regarding the concerns of Speaker Cornwell regarding the provisions of the Financial Management Amendment Bill 2001 (No 2) regarding the resolution of the Assembly of 23 November 1995.

213 Debates of the Legislative Assembly for the Australian Capital Territory, 18 September 2018, p 3717.

214 See Schedule of Amendments, Schedule 1, MoP, No 71, 18 September 2018, p 995.

> The amendment to the betting tax bill proposed by Mr Parton purports to effect an appropriation of public moneys raised by the tax. As such, it is contrary to section 65 of the self-government act. It is for this reason and based on the advice of the officers I have referred to in this statement that I have ruled the amendment to be out of order.[215]

12.187. These and related matters were referred to the Standing Committee on Administration and Procedure for consideration and inquiry.[216]

Revenue proposals

12.188. On 19 September 2018, a non-executive member introduced the Land Tax (Community Housing Exemption) Amendment Bill 2018.[217] The purpose of the bill was to exempt from land tax some owners of land who had entered into an agreement with a registered community housing provider and who had made the land available under the agreement to the provider for the purpose of community housing.[218]

12.189. On 23 October 2018, the Speaker acknowledged that the bill did not contravene standing orders 200, 201, or 201A but ruled the bill out of order[219] on the grounds that:

(a) there being no specific procedural codification in the Assembly's standing orders relating to non-executive members' ability to amend taxation proposals and no Assembly precedent, House of Representatives practice applied by reason of standing order 275; and

(b) House of Representatives standing order 179 prohibits non-executive members' bills of this kind.

12.190. The Speaker stated that the bill sought to alleviate a tax, which was not permitted by House of Representatives standing order 179.[220] That is, by proposing to disapply the imposition of the tax on the class of persons mentioned in clause 5 of the bill, the bill sought to 'change the scope of the charge'[221] and was therefore contrary to paragraph (a) of House of Representatives standing order 179.[222]

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215 Assembly Debates, 18 September 2018, p 3717.

216 The committee did not report in the Ninth Assembly. See MoP, No 137, 13 August 2020, p 2080 and Assembly Debates, 13 August 2020, pp 1929-1931.

217 MoP, No 72, 19 September 2018, p 997.

218 See clause 5 of the Land Tax (Community House Exemption) Amendment Bill 2018.

219 MoP, No 74, 23 October 2018, p 1037.

220 Joy Burch MLA, Assembly Debates, 23 October 2018, p 4040. Note that it would have been totally acceptable for a non-executive member to move this alleviation had it been in relation to a government-initiated bill, but not via one they themselves had initiated.

221 A 'charge on the people' is taken as a reference to a tax or a duty, *House of Representatives Practice*, p 416.

222 As per paragraph (c) of standing order 179, a non-executive member is, however, not prevented from moving an amendment which does not increase or extend the scope of a charge under an existing Act.

12.191. In ruling that the Land Tax (Community Housing Exemption) Amendment Bill 2018 was out of order, the Speaker adopted the view that House of Representatives practice could be taken to apply by reason of Assembly standing order 275.[223] It is important to point out that the Speaker's ruling, informed by the advice that she received, indicated that no precedent existed in the Assembly's practice concerning taxation bills being initiated by non-executive members.[224] Further analysis revealed that there had been occasions where non-executive members had successfully presented bills which, had they been passed, would have resulted in considerable impacts on taxation and other revenue measures, most notably the Utilities (Network Facilities) Repeal Bill 2007 and Utilities (Network Facilities) Repeal Bill 2008.[225]

12.192. The Assembly referred the application of s 65 of the Self-Government Act and related matters to the Standing Committee on Administration and Procedure for consideration and inquiry and report.[226] The inquiry lapsed at the end of the Ninth Assembly.

Financial Management Act

12.193. The Territory initially regulated the receipt, spending and control of public money by the provisions of the *Audit Act 1989* until, in 1996, it enacted the *Financial Management Act 1996*.[227] This law now regulates the management of the public money of the Territory.[228]

12.194. The Financial Management Act confirms that the appropriation of the public money of the Territory must be by way of an enactment. Section 6 of the Act provides that 'no payment of public money[229] must be made otherwise than

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223 Standing order 275 provides that 'Any question relating to procedure or the conduct of business of the Assembly not provided for in these standing orders or practices of the Assembly, shall be decided according to the practice at the time prevailing in the House of Representatives in the Parliament of the Commonwealth of Australia'.

224 Joy Burch MLA, Assembly Debates, 23 October 2018, p 4040.

225 MoP, No 116, 17 October 2007, p 1242 and MoP, No 131, 5 March 2008, p 1381. Other examples include the Rates (Fire and Emergency Services Levy Repeal) Amendment Bill 2008 (Mr Mulcahy) and the Payroll Tax Amendment Bill 2013 (Mr Smyth).

226 A more detailed analysis of the financial initiative of the executive, including relevant principles and practice relating to revenue proposals, is available in a discussion paper prepared by the Office of the Clerk for the Standing Committee on Administration and Procedure in relation to its inquiry into s 65 of the Self-Government Act. See *Background paper—Application of section 65 of the Self-Government Act and related standing orders*, August 2019.

227 Its long title is 'An Act to provide for the financial management of the government of the Territory, to provide for the scrutiny of that management by the Legislative Assembly, to specify financial reporting requirements for the government of the Territory, and for related purposes'.

228 The Financial Management Act replaced the Audit Act (originally the Audit Ordinance 1989 (No 37 of 1989) made by the Governor-General under the *Seat of Government (Administration) Act 1910* on 9 May 1989), which was repealed by the *Financial Management and Audit (Consequential and Transitional Provisions) Act 1996*.

229 The definition of 'public money' in the Financial Management Act differs from that in the Self-Government Act, the former excluding money held by the Territory as trust money and certain other moneys received by the Territory from Territory-owned corporations and Territory authorities.

in accordance with an appropriation'. The dictionary to the Act defines an appropriation as 'an appropriation of public money by any Act including this [the Financial Management] Act'.

12.195. The Act also includes a number of provisions governing the form and content of appropriation bills, the preparation and presentation of budget papers and the reporting requirements of the Territory and individual directorates. It also makes provision for:

- the management of the Territory and directorate appropriations and budgets;
- financial reporting requirements,
- the financial management responsibilities of directors-general;
- the management of the Territory bank account;
- banking and investment;
- borrowings, guarantees and trust money; and
- financial and governance provisions for territory authorities.

12.196. In relation to the Assembly's consideration of money bills, the relevant provisions of the Act are:

- section 5: unless the Assembly provides otherwise, the first appropriation bill relating to a financial year must be introduced into the Assembly no later than three months after the beginning of the financial year; and
- section 8: provides for the possibility of an Appropriation Act making separate appropriations in relation to each directorate for:
  - the provision of controlled recurrent payments by the directorate;
  - any capital injection to be provided to the directorate; and
  - any payments to be made by the directorate on behalf of the Territory.

12.197. At s 7, the Act provides for an *'automatic'* supply period at the beginning of a financial year if an appropriation bill for that year has not been passed by the Assembly.[230] The Treasurer, within strict limits, is authorised to make payments to meet the requirements of government, but not so as to exceed in total half of the amount appropriated in the previous financial year. With the passage of the Appropriation Act, payments made by the Treasurer under this section 'are taken for all purposes to have been made out of money appropriated by that Act'.

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230 It used to be the practice of the Commonwealth Parliament that the budget was presented in August and the appropriation bills for that financial year debated thereafter. Thus, it could be that appropriations were not passed until some months into the financial year. To cover the period from the start of the financial year until the passage of the appropriation bills, the parliament used to pass supply bills in the previous financial year to make interim provision for the first few months of the following financial year.

This provision has been utilised on a number of occasions.[231] See also under the heading 'Standing supply provision' in this chapter for a fuller discussion of this section.

12.198. Sections 9 and 9A provide for appropriations to be expressed net of controlled recurrent payments that a directorate receives for the provision of goods and services and input tax credits that apply to those goods and services. These sections also authorise directorates to apply that income to 'paying the expenses and liabilities of the directorate'. Sections 12, 12AA and 12A specify what must be included in a proposed budget for a directorate, a Territory authority or a Territory-owned corporation respectively.

Procedure on appropriation bills

Introduction

12.199. Appropriation bills must be introduced by a minister and may be introduced without notice.[232] Though s 65 of the Self-Government Act (and standing order 200) envisages that an appropriation may be initiated by resolution,[233] s 6 of the Financial Management Act makes it clear that no payment of public money may be made otherwise than in accordance with an appropriation Act.

12.200. The Financial Management Act makes provision for the form of appropriation Acts. An appropriation Act may make separate appropriations in relation to each directorate for:

- the provision of any recurrent payments by the directorate;
- any capital injection to be provided to the directorate; and
- any payments to be made by the directorate on behalf of the Territory.[234]

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231 See, for example, MoP, No 94, 29 and 30 June 2000, p 934, where the appropriation bill was defeated and an amended appropriation bill was not passed until 10 July 2000 (MoP, No 95, 10 July 2000, p 939), and MoP, No 111, 30 and 31 August 2007, p 1205, where the appropriation bill for the financial year 2007-08 was passed on 30 August 2007.

232 Standing order 200.

233 Section 65 of the Self-Government Act is based upon s 56 of the Constitution. The use of the term 'a resolution for the appropriation of public money' may relate to the financial procedures in the colonial legislatures and the United Kingdom House of Commons at the time of Federation (and used by the House of Representatives until 1963), when certain bills were based upon financial resolutions. At that time financial procedures were more complex, involving consideration by the Committee of Supply and Ways and Means. The procedure in relation to the main appropriation bill of the year culminated with formal consideration by a committee of ways and means, after which a bill to give effect to the resolution was brought in and usually passed formally and immediately.

234 Financial Management Act, s 8. Prior to the amendments made by the *Financial Management Legislation Amendment Act 2005*, the provision regarding the form of appropriation Acts was prescriptive.

12.201. Section 8 also specifies the form of any separate appropriation in relation to a Territory authority or Territory-owned corporation. It also makes provision for net appropriations for controlled recurrent payments, capital injections and payments on behalf of the Territory.[235]

12.202. Section 10 of the Act obliges the Treasurer, immediately after the presentation of the bill for the first Appropriation Act relating to the year, to present to the Assembly the proposed budgets for the Territory, each directorate, and each Territory authority and Territory-owned corporation for the year. Sections 11, 11A, 12, 12AA and 12A detail what must be included in the budget papers and proposed budgets for the Territory, directorates, authorities and corporations. Where the executive seeks a supplementary appropriation (additional expenditure not provided for in the budget) at any time during the financial year, s 13 requires the Treasurer to present supplementary budget papers and specifies the information that must be included in those papers.

12.203. Since 2012, a separate Appropriation (Office of the Legislative Assembly) Bill has also been presented immediately after the presentation of the main appropriation bill. In addition to appropriation for the Office of the Legislative Assembly, it includes appropriations for the Auditor-General, the Electoral Commission and the Integrity Commission, as officers of the Assembly.[236]

Motion for agreement in principle

12.204. Standing orders contain two provisions relating to the consideration of the question that a bill be agreed to in principle that are unique to the consideration of appropriation bills in the Assembly:

- the relevancy rule in debate is relaxed in that, on the motion for agreement in principle to appropriation bills for the ordinary annual services of the executive, matters relating to public affairs may be debated;[237] and
- for consideration of the main appropriation bill for the year, there is no time limit specified for the speeches of the mover of the motion 'That this bill be agreed to in principle', nor for the first opposition and crossbench members next speaking.[238]

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235 Financial Management Act, ss 9, 9A and 9B.

236 Financial Management Act, s 8(3) and (4).

237 Standing order 58(b).

238 The practice of setting the time limit for the Leader of the Opposition (and leaders of other parties) in a motion began in 1991 (MoP, No 123, 17 September 1991, p 523) and is still the practice notwithstanding standing order 69(d), which provides for no time limits for the mover (the Treasurer), the first opposition member speaking, and the first crossbench member speaking on the main appropriation bill for the year.

Procedures following agreement in principle

12.205. Up until the Tenth Assembly,[239] it had been the practice of the Assembly to refer the appropriation bills to a select committee on estimates, following agreement to it in principle. The committee was established each year to examine the expenditure proposals contained in the bills, together with any revenue estimates proposed by the government in the budget.[240] Appropriation bills introduced subsequent to the main appropriation bill for the year have also been referred to estimates committees or to the Standing Committee on Public Accounts.[241]

12.206. Reports of estimates committees (and, in the Tenth Assembly, standing committees) have included recommendations relating to specific items of expenditure, overall financial management, other budgetary issues, and to the presentation of the budget papers themselves.[242] Following presentation of a committee report, the government provides a response outlining its attitude to the various recommendations and indicating which, if any, it is prepared to act on. The practice is that motions are moved to take note of the respective papers.

12.207. After the committee has reported and the government response has been presented, the Assembly then proceeds to the detail stage of consideration of the bill. Normally the Assembly agrees to permit the orders of the day for the consideration of the report of the estimates committee and the government response to be called on and debated cognately with the order of the day relating to the appropriation bill.[243] At the commencement of consideration of the detail stage, the Speaker reminds the Assembly that leave of the Assembly has been granted for a cognate debate and that members can speak to the main appropriation bill, the Appropriation (Office of the Legislative Assembly) Bill, the relevant parts of the committee report and the government's response to that report.[244]

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239 In the Tenth Assembly, a trial was initiated by which appropriation bills and agencies' budget estimates were referred to relevant standing committees.

240 See, for example MoP, No 99, 3 May 2007, pp 1005-1006; MoP, No 105, 7 June 2007, p 1060.

241 For example, Appropriation Bill 1999-2000 (No 3) was referred to the Select Committee on Estimates already appointed to consider Appropriation Bill 2000-2001, the resolution of appointment having been amended (MoP, No 91, 25 and 26 May 2000, p 881). Appropriation Bill 2019-2020 (No 2) was referred to the Standing Committee on Public Accounts (MoP, No 125, 13 February 2020, p 1868). The Assembly has declined to refer appropriation bills to select committees; see, for example, MoP, No 54, 1 July 1999, pp 473-474 (Appropriation (Bruce Stadium and CanDeliver Limited) Bill 1999), and MoP, No 56, 24 August 1999, p 497 (Appropriation Bill (No 2) 1999-2000). See also Chapter 17: Committees.

242 The practice of the Assembly is that committees do not make amendments to bills referred but may recommend amendments.

243 MoP, No 71, 22 August 2006, p 784.

244 Assembly Debates, 22 August 2006, p 2420.

Detail stage consideration

12.208. An appropriation bill is generally quite a short document.[245] Basically, it defines expenditure in terms of the Financial Management Act. The actual amounts to be appropriated are contained in a schedule to the bill and the detail of expenditure for individual directorates and agencies is included in the budget papers. Standing order 180 sets the procedure to be followed in consideration of the bill. The schedule listing the services for which an appropriation is to be made must be considered before the clauses, and the schedule must be considered in the order in which proposed expenditures are shown, unless the Assembly orders otherwise. Thereafter, the general provisions of standing order 180 apply.

12.209. Since 1996, the practice of the Assembly in considering the schedules has been slightly different from that set down in standing order 180, reflecting the changed layout of appropriation bills since the enactment of the Financial Management Act. The order of consideration is as follows: the first schedule is considered part by part (consisting of net controlled recurrent payments, capital injection and payments on behalf of the Territory); then the clauses, any other schedules and the title are considered.[246]

12.210. While there is generally an informal agreement regarding the time to be spent debating individual items in the first schedule, the Assembly on one occasion resolved to allot maximum times for each part and for the Appropriation (Office of the Legislative Assembly) Bill.[247] The Assembly has also passed a motion declaring the appropriation bill an urgent bill, and subsequently allotting 90 minutes for all remaining stages of the bill.[248]

Amendments to appropriation bills

12.211. Some amendments proposed to appropriation bills have caused the Assembly to review the application of standing order 201 and to impose even tighter restrictions than those set by the standing order and the Self-Government Act. This culminated in the adoption of standing order 201A in March 2008.

12.212. Prior to the adoption of standing order 201 in its current form, an amendment was proposed during detail stage consideration of the Appropriation Bill 1993-1994 to insert a new clause in the bill. The amendment did not propose to increase the

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245 For example, the text of the 2019-2020 bill was only six pages, including its title page, commencement and definitions clauses. The schedule, where the amounts appropriated for each agency are listed, added a further three pages. In contrast, the budget papers, which include the Treasurer's budget speech, consisted of 11 volumes comprising in excess of 1000 pages.

246 See, for example, Assembly Debates, 22 August 2006, pp 2420-2421. See also, in contrast, MoP, No 13, 11 April 2002, p 125 (Appropriation Bill 2001-2002 (No 2)); the proposed amounts to be appropriated were set out in clause 6 of the bill, so the bill was considered in the ordinary way.

247 MoP, No 156, 23 August 2012, pp 2071-2072.

248 MoP, No 111, 30 August 2007, p 1204.

amount appropriated but proposed restricting the use the executive could make of the money appropriated. The proposed new clause read:

> The executive shall not use money appropriated by this, or any other, Act for the purpose of reducing: (a) the number of persons employed as teachers in schools or colleges in the Territory; or (b) the number of teaching hours provided overall in those schools and colleges taken as a whole.

12.213. After noting the unprecedented nature of the amendment and its potential effect, and taking further points of order on the matter (and the sitting having been suspended for a short period), the Speaker ruled that the amendment was in order. The amendment was agreed to by the Assembly after some debate.[249]

12.214. The issue came to a head in November 1995, during Assembly consideration of the Appropriation Bill 1995-1996. Prior to the detail stage, the Assembly considered whether it would be in order for a non-executive member to propose to the Assembly an amendment or amendments, the object of which was to transfer a sum of money from the Treasurer's Advance[250] to one of the divisions relating to the Department of Education and Training. In the weeks leading up to the consideration of the relevant stage of the bill, legal opinions were obtained on the matter. These, together with a memorandum by the Clerk on the issues, were presented in the Assembly on 23 November 1995.[251]

12.215. Standing order 201 limited the ability of non-executive members to move amendments to money proposals. It provided that a member, other than a minister, may not move an amendment to a money proposal, as specified in standing order 200,[252] if that amendment would increase the amount of public money of the Territory to be appropriated. Unlike (then) standing order 292 of the House of Representatives (and the more restrictive provisions later formalised in Assembly standing order 201A), standing order 201 did not specifically exclude a non-minister from moving an amendment that would extend the objects and purposes or alter the destination of the appropriation recommended.

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249 MoP, No 85, 25 November 1993, pp 490-491; Assembly Debates, 25 November 1993, pp 4178-4199. There was an earlier precedent: in 1989, it appeared that a member could not obtain drafting assistance to prepare an amendment to the Legislative Assembly (Members' Staff) Bill (to facilitate the employment of consultants by members) as the amendment would contravene s 65 of the Self-Government Act; see Assembly Debates, 2 November 1989, p 2393. An interesting sequel to the inclusion of this clause was that the status of the 1993 amendment (the inclusion of s 11) was queried two years later and the Speaker undertook to obtain advice on the matter: Assembly Debates, 14 December 1995, pp 3049 and 3063. Advice was received and circulated to members later that month. The advice concluded that the effect of the section could not be said to extend beyond the 1993-94 financial year; see s 11 of the *Appropriation Act 1993*, Advice of Attorney-General's Department, 20 December 1995.

250 The Treasurer's Advance is a contingency fund appropriated for the Treasurer to use in the case of any unforeseen expenditure arising.

251 MoP, No 28, 23 and 24 November 1995, p 202.

252 That is, an enactment, vote or resolution for the appropriation of the public money of the Territory.

12.216. The advices focused, in part at least, on the meaning of the words 'enactment, vote or resolution' (especially 'vote'), conceding that the 1988 explanatory memorandum to the Self-Government Bill envisaged that certain types of transfers were permitted on the motion of non-executive members.[253] However, they concluded that, while it would be in order for a non-executive member to move to amend an appropriation unit to reduce the amount of money appropriated, it would not be in order to move an amendment that would have the effect of transferring funds from the Treasurer's Advance to one of the education appropriation units—in effect, to increase the amount appropriated but offsetting that increase by a corresponding reduction in another appropriation unit.

12.217. The advice of the Clerk concluded:

> The standing orders do not contain a prohibition on non-Executive Members proposing amendments that would transfer or alter the destination of the moneys to be appropriated, except they do prohibit non-Executive Members moving an amendment to a 'proposal' (ie. Enactment, vote or resolution) that would increase the amount of the public money of the Territory to be appropriated. Whether such an amendment as proposed would be in order depends on the definition of 'enactment, vote or resolution for the appropriation of public moneys', especially, in this context, the term 'vote'.[254]

12.218. The advice referred to the provisions of standing order 180, the practice of the Assembly to that time and practice elsewhere. The view of the Clerk was that the most ready identification of 'vote' in the context of the Assembly's consideration of the appropriation bill was that it referred to a division as listed in Part II to the Schedule of that bill (for example, the division relating to Territory planning or Housing and Community Services). The advice went on to state that any amendment to decrease the amount of the proposed expenditure in a vote or division would be in order, as it would be a vote against a proposed expenditure. To propose an amendment to increase the amount of a proposed expenditure in a particular vote or division would be out of order, even if the amount to be appropriated by the bill overall remained the same. It was in order, however, to move to transfer money within a vote (for example, from capital expenditure to recurrent expenditure within the same division). This is not now the case, given the 23 November 1995 resolution and standing order 201A.[255]

12.219. On the second day of consideration of the bill at the detail stage, the Assembly having earlier rejected a proposal that the schedule be taken as a whole and the Speaker having ruled out of order an associated motion to have the schedule

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253 The explanatory memorandum stated 'Sub-clause 64(2) enables Members of the Assembly to move amendments to monetary proposals made by a Minister but only to decrease or transfer the amount proposed'.

254 MoP, No 202, 23 and 24 November 1995, p 202.

255 Appropriation bills are no longer organised by divisions, as was the practice in 1995. Instead, appropriation bills provide amounts that are to be appropriated to a 'Territory entity' for 'net controlled recurrent payments', 'capital injections', and 'payments to be made on behalf of the Territory'. See, for instance, s 6 and Schedule 1 of the Appropriation Act 2018-2019.

considered a single 'vote',[256] standing orders were suspended to allow the Manager of Government Business to move a motion concerning amendments to appropriation bills, and the Assembly resolved:

> That this Assembly reaffirms the principles of the Westminster system embodied in the 'financial initiative of the Crown' and the limits that that initiative places on non-executive Members in moving amendments other than those to reduce items of proposed expenditure.[257]

12.220. Later that evening during consideration of the proposed expenditures in the schedule to the appropriation bill, amendments moved by non-executive members were ruled out of order as they conflicted with the earlier resolution of the Assembly. The amendments would have:

- increased the amounts of proposed expenditure;[258]
- placed restrictions on the use the executive could make of moneys appropriated;[259] and
- given directions on how moneys received were to be credited.[260]

12.221. As a result of the Assembly's agreement to the 23 November 1995 resolution, while clearly amendments moved by ministers to increase the amounts appropriated have been in order,[261] as have amendments moved by non-executive members proposing to decrease the amount to be appropriated,[262] some amendments sponsored by non-executive members have been ruled out of order. Those amendments proposed to:

- transfer funds within a line of appropriation to a department (from capital injection to net cost of outputs);[263] and
- insert a new part into Schedule 1 of the Appropriation Bill 2006-2007.[264]

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256 MoP, No 26, 21 November 1995, p 190; Assembly Debates, 21 November 1995, pp 2219-2223.

257 MoP, No 28, 23 and 24 November 1995, pp 201-203; Assembly Debates, 23 November 1995, pp 2362-2383. An amendment to remove all words after 'principles of' and substitute 'Council style government embodied in Liberal Party policy which allows full participation by all members of the Assembly' was negatived, Ayes 4, Noes 13, and the question that the principal motion be agreed to was resolved in the affirmative, Ayes 13, Noes 4.

258 MoP, No 28, 23 and 24 November 1995, pp 204-205 (the Assembly, having negatived a motion of dissent, upheld the ruling).

259 MoP, No 28, 23 and 24 November 1995, pp 206 and 207.

260 MoP, No 28, 23 and 24 November 1995, p 206 (the Assembly, having negatived a motion of dissent, upheld the ruling); MoP, No 28, 23 and 24 November 1995, pp 206-207 and 207 (2).

261 MoP, No 55, 2 July 1999, p 484; MoP, No 95, 10 July 2000, p 938; MoP, No 125, 3 May 2001, pp 1369 and 1375.

262 MoP, No 59, 31 August 1999, pp 517-518; MoP, No 63, 24 and 25 June 2003, pp 771-772, 773 and 777-778; MoP, No 73, 24 and 25 August 2006, pp 801 and 805.

263 MoP, No 24, 28 June 2005, pp 220 and 226. Following amendments to the Financial Management Act, net cost of outputs are now referred to as controlled recurrent payments.

264 MoP, No 73, 24 and 25 August 2006, pp 802 and 807. A member tried to frustrate a government proposal to close a number of schools by preventing any appropriation for that purpose. The new part would have identified 'school closures' as a specific output class and denied it any funding.

12.222. On 20 June 2001, the Speaker made a statement to the Assembly concerning the provisions of the Financial Management Amendment Bill 2001 (No 2), which was a private members' bill. The bill proposed to insert a new s 66AA in the Financial Management Act which would provide that no payment of public money may be made for a free school bus scheme unless the scheme had been approved expressly by a resolution of the Assembly.

12.223. The Speaker advised the Assembly that the bill did not contravene the provisions of standing orders 200 and 201, though he reminded members of the resolution of the Assembly of 23 November 1995. He stated that the issue was one that had considerable significance for the governance of the Territory as well as for the rights of non-executive members. He further advised that he did not propose to rule the bill out of order at that stage on the grounds that it conflicted with the 1995 resolution as the standing of the resolution in relation to the bill was not beyond doubt.[265] The bill was rejected by the Assembly later that day.

12.224. In its December 2007 review of the standing and other orders of the Assembly, the Standing Committee on Administration and Procedure suggested that the resolution of 23 November 1995 be incorporated as a standing order to reflect the practice of the Assembly over the preceding 12 years.[266] In March 2008, new standing order 201A was adopted by the Assembly as recommended.[267]

Appropriation bill negatived

12.225. On 29 June 2000, the Appropriation Bill 2000-2001 was considered by the Assembly. The bill included a controversial proposal to fund a trial of a supervised heroin injection facility in Canberra. Despite the relevant appropriation for the Department of Health and Community Care having been agreed to earlier in the evening, the question 'That this bill, as amended, be agreed to' was negatived eight votes to nine with three crossbench members supporting the opposition in voting against the bill. The Chief Minister immediately moved 'That the Assembly do now adjourn' and, after a short debate, the Assembly adjourned until the next scheduled sitting day, 29 August 2000.[268]

12.226. The Assembly in fact met on 10 July 2000 in response to a request by an absolute majority of members. Following consideration of certain necessary procedural motions, the Minister for Justice and Community Safety presented the Supervised Injecting Place Trial Amendment Bill 2000, which proposed to delay the introduction of the trial until 1 January 2002 at the earliest. The bill, which

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265 MoP, No 130, 20 June 2001, pp 1494 and 1495-1496; Assembly Debates, 20 June 2001, p 2143. It should be noted that it is not uncommon for non-executive members to move amendments to bills amending the Financial Management Act; see MoP, No 113, 2 December 1997, pp 912-913; MoP, No 112, 14 February 2001, p 1163; MoP, No 38, 18 October 2005, pp 406-407.

266 Standing Committee on Administration and Procedure, *Review of standing orders and other orders of the Assembly*—Volume 1, Report 2, December 2007, pp 54-55.

267 MoP, No 132, 6 March 2008, pp 1388-1389.

268 MoP, No 94, 29 and 30 June 2000, p 934; Assembly Debates, 29 June 2000, pp 2367-2369.

addressed the concerns that had led to the defeat of the appropriation bill, was agreed to.[269]

12.227. Following a further suspension of standing and temporary orders, the Assembly rescinded the critical vote taken on the morning of 30 June and reconsidered certain questions in relation to the main schedule of the appropriation bill. Government amendments to the bill having been agreed to, the Assembly then agreed to the question 'That this bill, as amended, be agreed to'. The question was passed on the voices.[270]

12.228. During debate on 10 July, there was discussion concerning the action of the opposition (in particular) and crossbench members in 'blocking supply', the propriety of such action and its potential effect. In the days preceding this debate there had been conjecture as to the position of the government, the defeat being seen as a rejection of the government on a critical matter of policy; namely, its budget for the forthcoming year.

12.229. Certain matters stand out. Though the appropriation bill was rejected, supply was assured. Section 7 of the Financial Management Act ensures that, subject to certain conditions, funds are available to cover this contingency and there was, therefore, no immediate budgetary crisis.[271]

12.230. As to blocking supply, members are not obliged to vote in favour of any question arising in the Assembly, including the critical questions on the main appropriation bill of the year. The Self-Government Act vests in the Assembly the power to make laws for the peace, order and good government of the Territory. Section 18(2) of the Act provides that questions shall be decided by a majority of votes of the members present and voting, unless a special majority is required by the standing rules and orders. Section 58 of the Self-Government Act also makes it clear that public moneys may be appropriated only by legislative enactment.

12.231. It would be wrong to assume that there is a convention or legitimate expectation that members will always vote in favour of appropriation bills, particularly the main appropriation bill for the year.[272] The budget is perhaps the most significant statement of government policy and its successful passage through the Assembly is a major political test that the executive must meet each year. To suggest that, by convention, members must vote in favour of the budget contradicts the clear intent

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269 See comments by the minister at Assembly Debates 10 July 2000, pp 2372-2373 and the debate following.

270 MoP, No 95, 10 July 2000, pp 935-939.

271 See under the headings 'Financial Management Act' and 'Standing supply provisions' in this chapter.

272 There has been debate in Australia as to whether a legal prohibition or an established convention limited the power of second chambers of bicameral parliaments to reject or delay supply, particularly with regard to the Australian Senate's actions in 1975. The discussion of the issue often owed more to party political commitment than reasoned argument. With regard to a unicameral legislature, in the absence of any clear legislative or constitutional provision, there can be no suggestion that a government must be granted supply.

of the Self-Government Act. It also implies a significant and undesirable shift in the balance between the legislative and executive branches and places a major restriction on the power of the opposition and other non-executive members.

12.232. The executive already possesses a significant advantage through the control it exercises by way of the standing supply provision, the provisions of standing orders 200 and 201, the resolution of 23 November 1995 and standing order 201A.

12.233. It is not unusual in the Assembly for the executive to be defeated on important issues, including its legislative proposals. It would be open for a Chief Minister to treat a defeat on a key issue as one of lack of confidence and to test the support of the Assembly by submitting their resignation to the Speaker. However, to date, none has chosen to do so.[273] Should the Chief Minister lose the confidence of the Assembly, ss 19 and 40 of the Self-Government Act make provision for a resolution of no confidence in a Chief Minister, and these provisions have been utilised on occasion (see Chapter 6: The ACT Executive).

12.234. Though the significance of the Assembly's rejection of the appropriation bill in June 2000 should not be dismissed, supply was assured (albeit with limitations) and particular circumstances did apply. The executive was able to obtain the support of an absolute majority of members for an early recall of the Assembly and for a legislative initiative to address a key issue which contributed to the defeat. It also gained support to rescind the earlier resolution of the Assembly and for an amended appropriation bill. Had the Assembly declined to rescind the resolution and the executive failed to gain agreement for an appropriation bill for the forthcoming year, the executive would have had to consider its position.

12.235. In the unlikely event of an impasse developing and no party in the Assembly being able to form a government and gain support for its budget, the Assembly could be seen to be incapable of effectively performing its functions. In that circumstance, and acting on advice, it would be open to the Governor-General to dissolve the Assembly in accordance with s 16 of the Self-Government Act, and a general election would ensue.

Standing supply provision

12.236. Following the defeat of the Appropriation Bill 2000-2001 in the Assembly on 30 June 2000, legal advice was sought concerning the provisions of s 7 of the Financial Management Act (payments authorised on lapse of appropriation). The basis of the request was that, with the exception of what were believed to be limited standing appropriations and the provisions of the Financial Management Act, the bill that had been rejected had proposed to make authorisation for the payment of all public money for the Territory for the financial year that had just commenced on 1 July 2000.

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273 For discussion of precedents in the House of Representatives, see *House of Representatives Practice*, First edn, pp 417-423.

12.237. Section 7 of the Financial Management Act, as it then stood, provided that:

> If, before the end of a financial year, no Act other than this Act has been passed appropriating public money to meet the requirements of the next financial year, the Treasurer may pay the amounts necessary to meet those requirements subject to the following provisions:
>
> (a) the authority of the Treasurer under this section ceases on the commencement of the first Appropriation Act for the next financial year;
>
> (b) on that commencement all payments made under this section for the next financial year are taken for all purposes to have been paid out of money appropriated by that Act;
>
> (c) the payments made under this section for any purpose must not exceed, in total, ½ of the amount appropriated by Appropriation Acts for the immediately previous financial year for that purpose.[274]

12.238. The explanatory memorandum to the 1996 bill relating to this section states:

> This clause makes provision for the supply period at the beginning of a financial year. The provision obviates the necessity for the passage of a separate Supply Bill before the beginning of the financial year. Under the provision, authority to incur expenses is continued by reference to the Appropriation Act or Acts for the immediate past year.

12.239. The advice was sought specifically concerning the limitations s 7(c) of the Financial Management Act placed on the Treasurer's authority to pay the sums to meet the requirements for the financial year that had just commenced, with particular reference to:

- the meaning of the words 'meet[ing] the requirements of the financial year' and the restrictions this may place on new spending initiatives;
- the extent to which s 7 restricts the government's ability to utilise the Treasurer's Advance; and
- the amount that would be available to the government from the Treasurer's Advance (taking into account the total amount that had been appropriated by Appropriation Acts for the preceding financial year).[275]

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274 In 2020, the section was amended by the Financial Management Amendment Bill to allow payments of up to 100 per cent of the 2019-2020 appropriation (see s 7(1)(c) of the Act) to be made for 2020-2021. The amendment followed a decision by the Federal Government to delay its budget until October 2020 in the face of the global coronavirus pandemic. See MoP, No 133, 18 June 2020, pp 2002-2003, 2011-2012; Assembly Debates, 4 June 2020, p 1199-1200; Assembly Debates, 18 June 2020, pp 1322-1325.

275 Appropriation Acts for the preceding financial year were *Appropriation Act 1999-2000*, *Appropriation (Bruce Stadium and CanDeliver Limited) Act 1999*; *Appropriation Act (No 2) 1999-2000* and *Appropriation Act 1999-2000 (No 3)*. Advice was also sought on a further question as to whether there was an avenue open to the government to fund the First Home Owner Grant Scheme through the *Goods and Services Tax (Temporary Transitional Provisions) Act 2000* (when enacted).

12.240. The advice received[276] addressed a number of matters of definition and the practices elsewhere. It concluded that the permissible payments under section 7 of the Financial Management Act were up to half the amount allocated to each department by the Appropriation Acts in 1999-2000 (the preceding year) according to the categories of output, capital injection and payments on behalf of the Territory.[277] The advice further stated that the amount allocated to a department could not be viewed as a global sum, s 7 of the Act requiring the expenditure to be related to the individual categories—that being the 'purpose' of the appropriation.

12.241. In relation to the sum available for expenditure, the advice concluded that, since s 7 referred to the amount appropriated by Appropriation Acts, it therefore seemed that the total amount appropriated for the 1999-2000 financial year for the purposes referred to in s 8[278] was available.[279]

12.242. Due to the difficult language of (then) s 18 of the Financial Management Act[280] and its relationship with s 7, the advice concluded that it was difficult to provide a definitive answer as to the use that could be made of the Treasurer's Advance, considering that the better (and safer) view was that s 7 could not provide for an advance to the Treasurer because of the limits imposed on that appropriation by then s 18.

12.243. The Financial Management Amendment Bill 2015 included significant amendments to the Financial Management Act. Notably, upon commencement, a new section 7A (Temporary advance for new purpose or new entity) came into effect, allowing the Treasurer to 'authorise temporary advances for up to half of the amount appropriated to the Treasurer's advance during the supply period under section 7, for expenditure for a new purpose or a new entity, provided in the first Appropriation Bill where there is an immediate requirement for expenditure'.[281] If the Treasurer authorises a temporary advance, the Treasurer is required to attach the authorisation to the next financial statement presented to the Legislative Assembly.

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276 Advice to the Clerk of the Legislative Assembly for the Australian Capital Territory on the Financial Management Act provided by Dennis Pearce, Special Counsel, Phillips Fox Lawyers, 7 July 2000.

277 It was argued that the purpose (s 7(c)) for which an amount is appropriated by an Appropriation Act must be derived from s 8 of the Financial Management Act (s 8 has since been amended) and the form of the appropriations themselves—the three categories of payment as they then stood (outputs, capital injections and payments on behalf of the Territory).

278 Setting of the form of appropriation.

279 That meant that the appropriations provided for in the *Appropriation (Bruce Stadium and CanDeliver Limited) Act 1999* were not relevant as they related to previous financial years.

280 Which made provision for the Treasurer's advance.

281 Financial Management Amendment Bill 2015, explanatory statement, pp 2-3.

12.244. An amended s 18B (Treasurer's advance—reduction of amounts) of the Financial Management Act addressed a situation that could occur whereby a Treasurer's advance was no longer required by the relevant entity and, therefore, remained undrawn. The explanatory statement to the amendment bill notes that:

> The amendment provides transparency to Treasurer's Advance authorisations by allowing the Treasurer to reduce an amount previously authorised from the Treasurer's advance in a financial year if the Treasurer is satisfied that the amount has not been fully disbursed to the entity and the undisbursed amount is no longer required by the entity. It is expected that use of this section will be rare.
>
> If the Treasurer authorises a reduction, the Treasurer's advance is taken to be restored by the amount of the reduction and the Treasurer may apply this amount towards another payment that meets the criteria under section 18. This amendment will apply to an authorisation which has not been disbursed to the entity at all or where part of the authorisation has not been disbursed.

12.245. An amended s 18C of the Financial Management Act:

> Removes the requirement to present to the Assembly a summary of the total expenditure after the end of the financial year, given this requirement duplicates information contained in the individual Treasurer's Advance instruments tabled through-out the year. In order to ensure there is no loss of transparency, the amendment requires a complete reconciliation of the Treasurer's Advance to be attached to each authorisation instrument. The amendment specifies what information is to be included in the reconciliation.
>
> This clause also replaces the existing presentation requirement for each authorisation from 'within 3 sitting days after the day when the authorisation is given' to 'on the next financial statement presentation day' … This change means that Treasurer's Advance instruments will be provided to the Assembly each quarter and will be presented together with a summary of the instruments.

Expenditure of public money without authorisation by enactment—Bruce Stadium redevelopment

12.246. In 1999 and 2000, the question of the legality of payments made by the executive towards the redevelopment of a major sporting arena in the Territory, Bruce Stadium, occupied much of the Assembly's attention. To date, it is the only case where public moneys have been found to have been paid without proper legislative authority. The issue resulted in the resignation of the Chief Minister, thus pre-empting the Assembly's consideration of a motion of no confidence. For an account of the background and events see paragraphs 11.209 to 11.220 of the First Edition of the *Companion.*

Subordinate legislation

Introduction

12.247. The power to make the laws for the peace, order and good government of the Territory rests with the Assembly.[282] However, the Assembly, by enactment, has also delegated its power to make laws to the executive and others.[283] This form of law is generally known as subordinate law or delegated legislation. The term 'delegated legislation' has been defined as follows:

> 'Delegated legislation' is a convenient general description for a legislative instrument made by a body to which (or a person to whom) the power to legislate has been delegated.[284]

12.248. The Self-Government Act defines 'subordinate law' as meaning 'an instrument of a legislative nature (including a regulation, rule or by-law) made under an enactment'.[285]

12.249. Delegated legislation is used to enable a person, usually a minister, to make decisions having legal authority which vary or fill in the detail of a law made by the Assembly. This avoids the need for relatively minor matters of an administrative character being the subject of primary legislation. However, to maintain scrutiny by the legislature and to ensure that ministers (and others) do not exceed their power to make delegated legislation, a subordinate law or a disallowable instrument must be tabled in the Assembly and may be disallowed by the Assembly (see under the heading 'Assembly consideration' in this chapter).

12.250. For example, many Acts allow a minister to make or vary fees. Section 96 of the *Road Transport (General) Act 1999,* for instance, states that the minister may determine fees, charges and other amounts payable under the road transport legislation.[286] The section also states that such a determination is a disallowable instrument. Fee determinations must be tabled in the Assembly and can be subject to disallowance by the Assembly.

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282 Self-Government Act, s 22.

283 Part 6.4 of the Legislation Act, for instance, envisages legislative instruments being made by the executive, ministers, rulemaking committees established under the *Court Procedures Act 2004*, and courts or tribunals or members of courts or tribunals.

284 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 5th edn, LexisNexis Butterworths, p 1. This work (at p 4) discusses the use of the terms 'delegated legislation' and 'subordinate legislation', preferring the former term 'since it encapsulates the essential notion that the legislation is prepared and promulgated by a delegate of the parliament'.

285 But see under the heading 'Legislation Act' in this chapter for the definition contained in the Legislation Act, s 8.

286 Part 6.3 of the Legislation Act details requirements to be included in an instrument determining a fee. Section 9(1)(b) of the Act states that a determination of fees or charges by a minister under an Act is a disallowable instrument.

12.251. While not explicitly vesting the Assembly with the power to delegate its lawmaking power (with the possible exception of giving the executive responsibility for governing the Territory with respect to 'making instruments under enactments or subordinate laws' in schedule 4 of the Self-Government Act), the Self-Government Act does recognise subordinate laws and there is an assumption that the Assembly will delegate some of its lawmaking power.[287]

12.252. Questions about the rights of legislative bodies in the Australian states and self-governing territories to delegate their legislative function are addressed in *Delegated Legislation in Australia*.[288] Citing a number of cases from the latter part of the 19th century to recent times, the authors state that the courts have taken a generous view of the rights of legislative bodies to delegate their legislative function. In particular, where a legislature has been given power to legislate 'for peace, order and good government', the widest discretion of enactment has been held to follow.[289]

Subordinate Laws Act

12.253. Prior to the first meeting of the Assembly in May 1989, the Governor-General, acting on the advice of the Federal Executive Council, made the *Subordinate Laws Ordinance 1989*—an ordinance relating to subordinate laws consequential upon the establishment of the Territory as a body politic under the Crown.[290] The Ordinance, which became an Act on 11 May 1989,[291] contained a range of provisions, including those relating to the regulation-making powers of the executive. It also contained provision for the numbering and citation of subordinate laws and disallowable instruments and their notification.[292] Of particular importance from the Assembly's perspective, the Ordinance required subordinate laws and disallowable instruments to be laid before the Assembly

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287 For instance, the Act requires the courts et cetera to take judicial notice of enactments and subordinate laws (s 30); gives the executive the responsibility for executing and maintaining enactments and subordinate laws (paragraph 37(a)); and, again, in schedule 4 it also gives the executive responsibility for 'Matters arising under instruments made under enactments or subordinate laws'.

288 Dennis Pearce and Stephen Argument.

289 A qualification to the general power to delegate is that it does not allow a parliament to create a new legislature which can function independently of the parliament establishing it and without being answerable to that parliament. See Dennis Pearce and Stephen Argument, pp 387-388. Pearce and Argument also discuss the position with regard to the power of the Commonwealth Parliament to delegate its legislative power. See also the early part of Chapter 15 of *Odgers'*, which discusses the power of the Commonwealth Parliament to delegate the power to make laws.

290 Subordinate Laws Ordinance 1989, No 24 of 1989. The ordinance was made under the *Seat of Government (Administration) Act 1910*. The Act, as amended, was repealed by the *Legislation (Consequential Provisions) Act 2001*.

291 Pursuant to the provisions of s 34(4) of the Self-Government Act.

292 On 27 June 1989, the first subordinate law was presented in the Assembly and in that year 20 subordinate laws and 70 disallowable instruments were gazetted. Between 1989 and 2019, an average of 43 subordinate laws and 271 disallowable instruments were gazetted or notified on the Legislation Register each year.

within 15 sitting days of their notification. If this were not done, they were taken to be void and of no effect and the Assembly could disallow the law or instrument or a provision of the law or instrument.

12.254. Until the enactment of the Legislation Act[293] and the repeal of the Subordinate Laws Act, the provisions of the Subordinate Laws Act primarily governed the exercise of the regulation-making power and the Assembly's supervision of the exercise of that power. The Assembly has enhanced its powers and role in the following areas:

- In 1991, provision was made for the automatic disallowance of a subordinate instrument not considered and negatived within 15 sitting days of its presentation in the Assembly.[294]
- In April 1994, the Subordinate Laws (Amendment) Bill 1993 was passed, enabling the Assembly, within certain constraints, to amend a subordinate law that had been laid before it.
- In June 1994, an amendment added the requirement for compulsory consultation on certain statutory appointments between the appointing minister and a nominated standing committee of the Assembly. It also made provision for the instruments making statutory appointments to be disallowable instruments.
- In December 2000, an amendment added a requirement that regulatory impact statements accompany subordinate legislation in circumstances where there may be appreciable costs placed on the community.

Legislation Act

12.255. The Legislation Act, which came into operation on 12 September 2001, sought, in part, to arrange the various kinds of statutory instruments into logical groups, the view being that the then structure of the law governing subordinate laws did not make them easy to use and that provisions overlapped.[295] It also introduced the new concepts of 'notifiable instrument' and 'registrable instrument' (the term 'registrable instrument' was replaced with the term 'legislative instrument' in 2006).

12.256. Part 1.2 of the Legislation Act defines meanings, including those of notifiable instruments, commencement notices, legislative instruments, subordinate laws and disallowable instruments.

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293 Presented in the Assembly as the Legislation (Access and Operation) Bill 2000.

294 Prior to the insertion of this provision, subordinate legislation automatically came into effect if motions of disallowance were not dealt with by the Assembly.

295 Legislation (Access and Operation) Bill 2000 and Legislation (Access and Operation) (Consequential Provisions) Bill 2000, explanatory memorandum, pp 6 and 7.

12.257. A key definition for the purposes of the Act is that of 'statutory instrument', which the Act defines broadly as an instrument[296] (whether or not legislative in nature) made under an Act or another statutory instrument or power given by an Act or statutory instrument and also power given otherwise by law. Statutory instruments include (but are not limited to) subordinate laws, disallowable instruments, notifiable instruments and commencement notices.[297]

12.258. The Act defines 'subordinate law' as a regulation or rule (whether or not legislative in nature)[298] made under:

- an Act;
- another subordinate law; or
- power given by an Act or subordinate law and also power given otherwise by law.[299]

12.259. Chapter 2 of the Legislation Act deals with the ACT Legislation Register and website.

12.260. A 'disallowable instrument' is defined by the Legislation Act as:

- a statutory instrument (whether or not legislative in nature) that is declared to be a disallowable instrument by an Act, subordinate law or another disallowable instrument; or
- a determination of fees or charges by a minister under an Act or subordinate law.

12.261. Part 1.2 of the Act defines meanings, including those of notifiable instruments, commencement notices, legislative instruments, subordinate laws and disallowable instruments.

12.262. Parliamentary Counsel is obliged to establish and maintain an electronic register of Acts and statutory instruments—the ACT Legislation Register.[300] The Legislation Register is an authorised electronic statute book that provides the community with free and ready access to all ACT legislation and related information.[301] In addition to primary laws and bills (and explanatory statements

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296 An 'instrument' is any writing or other document; see Legislation Act, s 14.

297 Legislation Act, s 13.

298 Thus, making it broader than the definition in the Self-Government Act.

299 Legislation Act, s 8. The explanatory memorandum states that a subordinate law will usually be made under the power specifically given by an Act for the purpose but allows for the possibility that, in making the subordinate law, the Act may also draw upon another source of power such as a rule of common law or a prerogative. See Legislation (Access and Operation) Bill 2000 and Legislation (Access and Operation) (Consequential Provisions) Bill 2000, explanatory memorandum, p 8.

300 Legislation Act, s 18.

301 See www.legislation.act.gov.au.

for bills and amendments to bills), the Legislation Act provides that the Legislation Register must contain:

- subordinate laws as made;
- disallowable instruments as made;
- notifiable instruments as made;
- commencement notices as made;
- resolutions passed, or taken to have been passed, by the Legislative Assembly to disallow a subordinate law or disallowable instrument; and
- explanatory statements, and regulatory impact statements under chapter 5 of the Act, for subordinate laws and disallowable instruments.

Making of subordinate laws and disallowable instruments

12.263. If an Act authorises or requires the executive to make a subordinate law or a disallowable instrument, the subordinate law or disallowable instrument is taken to be made by the executive when it is signed by two or more ministers who are members of the executive and the signing ministers include the Chief Minister and the responsible minister. In addition, it is taken to be made when it is signed by the second minister signing.[302]

12.264. The provision that the responsible minister sign the law or instrument was inserted after some controversy in the Assembly (see Chapter 6: The ACT Executive, under the heading 'Cabinet'). The Legislation Act, s 41(5) defines 'responsible Minister' for that section[303] and the provision does not apply if the responsible minister cannot sign due to their absence from the Territory, illness or being on leave.

12.265. An authorising law will indicate what kinds of statutory instruments may be made and who is authorised to make them. For example, the *Motor Accident Injuries Act 2019* authorises the making of many statutory instruments, including the following:

- regulations (subordinate law made by the executive—see section 492);
- determination of a motor accident levy (disallowable instrument made by the minister—see section 490);
- MAI (motor accident injuries) guidelines (disallowable instrument made by the MAI Commission—see section 487);
- appointment of MIA commissioner (notifiable instrument made by the minister—see section 24); and

302 Legislation Act, s 41.

303 For how to interpret references to a minister or the minister, see the Legislation Act, s 162.

- declaration of an AWE (average weekly earnings) adjustment factor (notifiable instrument made by the MAI Commission—see section 95).

12.266. The Legislation Act (Chapter 6: Making statutory instruments generally) sets out the legal framework for exercising the power to make a statutory instrument. A subset of statutory instruments, disallowable instruments and subordinate laws are also subject to the requirements of the Legislation Act, Chapter 7, in relation to presentation, amendment and disallowance by the Assembly (see Assembly consideration below).

Regulatory impact statements

12.267. Where a proposed subordinate law or disallowable instrument is likely to impose appreciable costs on the community, or a part of the community, the minister administering the authorising law must arrange for the preparation of a regulatory impact statement for the proposed law and the statement must be presented to the Assembly with the subordinate law or disallowable instrument.[304] Part 5.2 of the Legislation Act sets out the requirements for a regulatory impact statement.

12.268. A minister may exempt a piece of subordinate law from the requirement to provide an impact statement. However, that exemption must be presented to the Assembly with the subordinate law and the exemption itself is disallowable. If the exemption is disallowed, the minister must then provide an impact statement.[305]

Notification and numbering

12.269. Part 6.4 of the Legislation Act establishes arrangements for the numbering and notification of legislative instruments (subordinate laws, disallowable instruments, notifiable instruments and commencement notices) that are similar to those for the notification of primary legislation. Authorised persons[306] arrange for notification by Parliamentary Counsel. The Act also makes provision for regulations to prescribe the requirements that must be met for registration.[307] As for primary legislation, the Act requires Parliamentary Counsel to notify the making of an instrument on the Legislation Register)[308] and provides that a legislative instrument is not enforceable by or against the Territory or anyone unless it is notified.

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304 Legislation Act, s 34(1) and s 37.

305 Legislation Act, ss 34(4) and (5). The statement must be presented to the Assembly not later than five sitting days after the regulatory impact statement exemption is disallowed.

306 Section 61(12) of the Act defines an 'authorised person' for making a notification request for a legislative instrument.

307 The Legislation Regulations 2003 prescribe the requirements about the form of legislative instruments (including approved forms) and other requirements that must be complied with for the notification of subordinate laws and disallowable instruments.

308 Or 'in another place the Parliamentary Counsel considers appropriate'; for example, another government website or outside the Assembly. Legislation Act, s 61(2)(b).

12.270. Legislative instruments commence on the day after the day on which they are notified, though there is provision for later and earlier commencement.[309]

Assembly consideration

Presentation

12.271. Section 64(1) of the Legislation Act requires that each subordinate law and disallowable instrument must be presented to the Assembly not later than six sitting days after its notification day.[310] A sitting day of the Assembly is defined by the Act as 'a period that commences on a day the Assembly meets and continues until the Assembly next adjourns'. Should a subordinate law or disallowable instrument not be presented in accordance with the subsection, it is taken to be repealed.[311]

12.272. Section 65 of the Act gives the Legislative Assembly the power to disallow any subordinate law or disallowable instrument that is presented to it. Disallowance under the provisions of that section 'has effect for all purposes as if it were a repeal made by an Act'.[312]

Consideration by scrutiny committee

12.273. For successive Assemblies, the Standing Committee on Justice and Community Safety has undertaken a legislative scrutiny role, charged with examining bills and subordinate legislation (see under the heading 'Consideration of bills by the Assembly' above in this chapter).

12.274. When considering subordinate legislation, the committee's resolution of appointment requires it to:

- consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
- is in accord with the general objects of the Act under which it is made;
- unduly trespasses on rights previously established by law;
- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

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309 Legislation Act, s 73. Chapter 8 of the Act deals with commencement and the exercise of powers before commencement; and see Legislation Act, dictionary.

310 The '6 sitting days' period was, for a time, altered during the COVID-19 pandemic. Through amendments arising from the *COVID-19 Emergency Response Legislation Amendment Act 2020*, the reference at s 64(1) was changed from six days to the first sitting day. MoP, No 130, 7 May 2020, pp 1948 and 1953.

311 Legislation Act, s 64(2).

312 Legislation Act, s 65(5).

- contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
- consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meet the technical or stylistic standards expected by the committee; and
- report to the Assembly on these or any related matter.

12.275. Although it does not have a specific remit to do so, the committee has regularly reported on ACT Human Rights Act issues raised in subordinate legislation.

12.276. As with bills, the committee refrains from comment on the policy aspects of subordinate legislation. The practice of the committee is to consider whether an item of delegated legislation accords with the power delegated by the principal Act; is not offensive to established legal principles; and to ensure that it does not deal with a matter which should, more appropriately, be dealt with by the Assembly in substantive legislation.[313]

12.277. Much of its comment relates to technical drafting matters, compliance with process or the quality of supporting information provided. As its reports show, the committee has been successful in negotiating with the executive to improve the quality of explanatory and regulatory impact statements and rectifying errors in drafting.[314]

12.278. When the committee notes a significant problem, it will advise the Assembly through its report. It is not the practice of the committee to recommend disallowance. In practice, disallowance is a rare occurrence; where the committee brings a significant problem to light, the executive will generally rectify the matter by revoking the offending instrument and issuing a revised version.[315]

Disallowance or amendment

12.279. The Assembly may disallow or, within certain limitations, amend a subordinate law. The Legislation Act provides that if a notice of motion to disallow a subordinate law or a disallowable instrument is given in the Assembly not later than six sitting days after the day it is presented to the Assembly and the Assembly resolves to disallow the subordinate law or disallowable instrument, it is taken to be repealed:

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313 Derived from 'Role of the Committee' as printed in the frontispiece of the committee's scrutiny reports and the committee's resolution of appointment.

314 For example, see the committee's comments in relation to DI2019-39 raised in its Report 31, dated 28 May 2019, and the government's response in which it advised that the instrument had been remade. Subordinate legislation may be drafted by Parliamentary Counsel or by directorate officials, depending on the type of instrument. Thus, there can be considerable variation in the quality of drafting and the compliance with procedural requirements.

315 See, for example, Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (Ninth Assembly), *Report No 34*, p 15.

- on the day after the day the disallowance is notified; or
- if the resolution provides that it takes effect on the day the resolution is passed, that day.[316]

12.280. Also, and of particular importance, the Assembly is taken to have resolved to disallow the subordinate law or disallowable instrument if, at the end of six sitting days after the day the notice is given:

- the notice has not been withdrawn and the motion has not been called on; or
- the motion has been called on and moved, but has not been withdrawn or otherwise disposed of.

12.281. Notices of motions of disallowance are placed on the *Notice Paper* under Assembly business;[317] and in relation to each notice and order of the day, the number of sitting days to resolution is indicated on the *Notice Paper.*[318]

12.282. The Assembly has:

- seen fit to take steps to ensure that notices of motions or orders of the day for the consideration of such notices are considered prior to the expiration of the designated number of sitting days;[319] and
- discharged orders of the day for the consideration of motions of disallowance before the expiration of the requisite number of sitting days.[320]

12.283. Though standing order 112 provides that a notice of motion becomes effective only when it appears on the *Notice Paper*, the Assembly has on occasion suspended standing and temporary orders to permit a member to move a motion to disallow a variation to the Territory Plan on the same day that the member gave notice to the Clerk.[321] Near the expiration of the Third Assembly, similar action was taken in relation to subordinate laws.[322] The procedure must be regarded as highly

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316 Legislation Act, ss 65(1) and (2).

317 Standing order 77(j). The standing order provides that 'Assembly business' includes any notice of motion to amend, disallow, disapprove or declare void and of no effect any instrument made under any Act of the Assembly which provides for the instrument to be subject to amendment, disallowance or disapproval of the Assembly or subject to a resolution of the Assembly declaring the instrument to be amended or void and of no effect or any other order of the day to consider such a motion.

318 NP, No 41, 16 November 2005, p 667.

319 Since 2019, standing order 77(j) has provided that if such a notice has not been called on by the end of the day before the stipulated period ends, the member is required to move the notice on the next sitting day and such business has precedence over all other business. For earlier instances, see MoP, No 128, 17 October 1991, p 548 and NP, No 127, 17 October 1991, p 2087 (there were 14 sitting days remaining). And see MoP, No 139, 3 December 1991, p 621 and NP, No 138, 3 December 1991, pp 2226-2227, where the Assembly ordered that notices relating to two motions of disallowance be called on together and one question put on both motions.

320 MoP, No 113, 21 June 1991, p 477; MoP, No 85, 10 April 1997, p 634.

321 See MoP, No 97, 3 March 1994, pp 545-546. There was a notice of motion in identical terms on the *Notice Paper* with five sitting days remaining for resolution, NP, No 96, 3 March 1994, p 1517.

322 See MoP, No 118, 11 December 1997, pp 967 and 968-969.

questionable unless extraordinary circumstances prevail. The giving of notice is generally required for substantive motions. It allows time for full consideration by members. Publication on the *Notice Paper* also allows for consideration and comment by the community, and it reduces the chances of poor decision-making.

12.284. The soundness of providing notice is borne out by what occurred in relation to one of these precedents. Having obtained advice from the Government Solicitor that a resolution of the Assembly purporting to amend an instrument 'pursuant to the [then operative] *Subordinate Laws Act 1989*' was of no effect, the Speaker was obliged to inform the responsible minister in writing of this fact.

12.285. A motion to disallow an instrument made under the LAMS Act called upon the Chief Minister to make a new determination to be effective from that day.[323] Pursuant to provisions that now no longer apply, the Assembly has also considered a motion to disapprove of three determinations made pursuant to the *Remuneration Tribunal Act 1973* of the Commonwealth.[324]

12.286. In 2016, a government member lodged a disallowance notice which was the same in substance as an opposition notice already listed on the *Notice Paper*. The next day, standing orders were suspended to bring on the government member's notice to disallow, which was then negatived after debate. The government had argued that the debate was necessary for fear that the opposition's notice would expire (and hence the instrument be disallowed) before it would be moved. A change to standing order 77(j) would prevent that now. The opposition's notice, being subject to the 'same question' rule, was withdrawn from the *Notice Paper*.[325]

12.287. The Assembly has considered motions to disallow provisions of instruments.[326]

12.288. Where a subordinate law is disallowed, or a disallowable instrument, not having been called on or disposed of (thus, is taken to be disallowed), the Speaker is required to request that Parliamentary Counsel notify the disallowance. Upon being so requested, Parliamentary Counsel must notify the disallowance in the Legislation Register (or, if not practicable, in another place the Parliamentary Counsel considers appropriate).[327] A disallowance under the provisions of the particular sections of the Act (s 65) has effect for all purposes as if it were a repeal made by an Act.[328]

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323 MoP, No 28, 19 November 1998, p 229. The motion was later withdrawn.

324 MoP, No 16, 24 August 1995, p 124. 'Disapprove' is the term used in the Remuneration Tribunal Act, having the same effect as disallowance.

325 MoP, No 126, 11 February 2016, pp 1441-1442; Assembly Debates, 11 February 2016, pp 235-248.

326 MoP, No 85, 30 March 2000, p 812; MoP, No 116, 1 March 2001, pp 1203-1205. The motion was to disallow six provisions of an instrument but was amended to make it one of amendment to the instrument. The motion, as amended, was agreed to. MoP, No 88, 11 May 2000, pp 849-850 (motion agreed to). MoP, No 76, 17 February 2000, p 732 (motion agreed to). MoP, No 122, 29 March 2001, p 1336 (motion, as amended, agreed to).

327 Legislation Act, s 65A. The section also provides for the Speaker to determine that notification be made on a particular day and sets out the details required of the registration.

328 Legislation Act, s 65.

12.289. Where a subordinate law or disallowable instrument that has amended or repealed an Act or statutory instrument[329] has been taken to be repealed (due to it not having been presented to the Assembly within six sitting days of its notification or having been disallowed by the Assembly), section 66 of the Legislation Act makes provision for the revival of a law that has been affected (from the date of the effective repeal) as if the disallowed law had never been made.

12.290. In addition, if the Assembly resolves to disallow a subordinate law or statutory instrument, the Legislation Act prohibits the making of a subordinate law or disallowable instrument the same in substance within six months of the date of disallowance, unless the Assembly rescinds the resolution of disallowance or, by resolution, approves the making of a subordinate law or disallowable instrument in the same terms (or same in substance) as the original.[330]

12.291. Under s 68 of that Act, the Assembly may amend particular provisions of a subordinate law or disallowable instrument. However, s 68(1) provides that:

> In this section:
>
> **… amendment** does not include an amendment that would have the effect of waiving or changing any fee, charge, penalty or other amount payable to the Territory.
>
> **… disallowable instrument** does not include a determination of fees or charges by a Minister under an Act or subordinate law.

12.292. The provisions set out in s 68 of the Legislation Act are similar to those in place for the disallowance of a subordinate law or disallowable instrument, namely:

- notice of a motion to amend the subordinate law or disallowable instrument must be given in the Legislative Assembly not later than six sitting days after the day it is presented to the Assembly;
- should the Legislative Assembly pass a resolution to amend the subordinate law or disallowable instrument, it is amended accordingly:
  - on the day after the day the amendment is notified; or
  - if the resolution provides that it takes effect on the day the resolution is passed, that day;
- the Assembly is taken to have passed a resolution to amend the subordinate law or disallowable instrument if, at the end of six sitting days after the day the notice is given:
  - the notice has not been withdrawn and the motion has not been called on; or

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329 And the repeal or amendment had commenced.

330 Legislation Act, s 67.

- the motion has been called on and moved but has not been withdrawn or otherwise disposed of.

12.293. In the latter circumstances, the resolution that takes effect is that set out in the original motion. An amendment made in this way has effect for all intents and purposes as if it had been made by an Act.[331]

12.294. The Assembly has considered motions to amend subordinate laws.[332] On one occasion, a motion to disallow six provisions of an instrument was altered to an amendment.[333]

12.295. The Speaker is required to request Parliamentary Counsel to notify amendments to subordinate legislation (and may determine the day of notification).[334] Parliamentary Counsel must notify the disallowance or amendment in the Legislation Register (or in another place the Parliamentary Counsel considers appropriate).

12.296. In addition, the 'six months' rule also applies to subordinate laws and disallowable instruments that have been amended. No subordinate law or disallowable instrument the same in substance as the amended law may be made within six months from the day the amendment was made, unless the Assembly rescinds the resolution that made the amendment or, by resolution, approves the making of a subordinate law or disallowable instrument in the same terms (or the same in substance) as the original.[335]

12.297. The question arises about what happens should the Assembly's term end[336] or the Assembly is dissolved by the Governor-General[337] within six sitting days after a notice of motion to disallow or amend a subordinate law or disallowable instrument is given in the Assembly, and at the time of the dissolution or expiration:

- the notice has not been withdrawn and the motion has not been called on; or
- the motion has been called on and moved but has not been withdrawn or otherwise disposed of.

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331 And the provisions of s 83 of the Act (Consequences of amendment of statutory instrument by Act) apply.

332 MoP, No 67, 21 October 1999, pp 593 and 595 (there were a number of amendments); MoP, No 85, 30 March 2000, p 805 (the motion was amended and, as amended, was agreed to).

333 MoP, No 116, 1 March 2001, pp 1203-1205; MoP, No 86, 18 November 2010, pp 1043-1047. The motions, as amended, were agreed to.

334 Legislation Act, s 69.

335 Legislation Act, s 70.

336 See Chapter 8: Sittings of the Assembly.

337 Pursuant to s 16 of the Self-Government Act.

12.298. In both cases, the subordinate law or disallowable instrument is taken to have been presented to the Legislative Assembly on the first sitting day of the Assembly after the next general election of members of the Assembly, and thus may be subject to a fresh disallowance motion.[338]

Variations to the Territory Plan

12.299. In addition to the requirements that the responsible minister must refer any draft variation to the Territory Plan to the appropriate standing committee of the Assembly (and consider any recommendations made by the committee), the *Planning and Development Act 2007* stipulates that certain notifiable instruments (plan variations and associated documentation) must be presented to the Assembly within five sitting days after the day of their approval. The Assembly may, on motion of which notice has been given, by resolution, within five sitting days, reject the variation or any provision of it.[339]

12.300. A motion in these terms has been agreed to.[340] The Assembly has also divided the question when considering a motion to reject a proposed variation[341] and, on the Assembly negativing a motion to reject a proposed variation, the Speaker has directed that a notice of motion on the same matter be removed from the *Notice Paper.*[342]

12.301. An amendment has been moved to a motion moved pursuant to notice to disallow a proposed variation. The amendment proposed to add words which would restrict the ambit of the disallowance. Both the amendment and the motion were negatived.[343] An amendment has been ruled out of order as the Speaker was unable to discern from it whether, if it was agreed to, she would have to notify Parliamentary Counsel that the variation had been disallowed.[344]

12.302. After suspending standing orders and citing the need for certainty, a motion to reject a variation to the Territory Plan has been moved by a minister, with the government subsequently successfully voting to negative the motion, thereby removing the ability of a similar motion to be lodged in the same calendar year.[345]

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338 Legislation Act, s 71.

339 Planning and Development Act, s 79.

340 MoP, No 64, 14 October 1999, p 572.

341 MoP, No 143, 11 December 1991, p 665.

342 MoP, No 143, 11 December 1991, pp 665-666; NP, No 142, 11 December 1991, p 2280.

343 MoP, No 133, 20 November 1991, pp 573 and 576.

344 MoP, No 18, 8 May 2013, pp 171-172, 211. But see MoP, No 135, 16 February 2012, pp 1750-1751.

345 MoP, No 111, 13 August 2015, p 1256; Assembly Debates, 13 August 2015, p 2883.

12.303. In a similar fashion as disallowable instruments, should a notice or order of the day relating to the rejection of a variation to the Territory Plan remain unresolved at the termination or dissolution of an Assembly, the variation is taken to have been presented at the first sitting after a general election for a new Assembly.[346]

Appointments to statutory positions

12.304. Where a minister has the power under an Act to appoint a person to a statutory position, the minister must, before making the appointment, consult with:

- a standing committee of the Assembly nominated by the Speaker for the purpose; or
- should there be no nomination in force, the Assembly committee responsible for the scrutiny of public accounts.[347]

12.305. The instrument making or announcing the appointment is a disallowable instrument and thus subject to disallowance by the Assembly.[348]

12.306. A statutory position is defined by the Legislation Act for the purpose of this provision as 'a position (including as a member of a Territory authority) established under an Act'. There are exclusions, however. The provision does not apply to the appointment of:

- a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or
- a person to occupy, or to act in, a statutory position for not longer than six months, unless the appointment is of the person to, or to act in, the position for a second or subsequent consecutive period; or
- a person to a statutory position if the only function of the position is to advise the minister.[349]

12.307. Details of a proposed appointment are to remain confidential until the appointment is made. Also, on a six-monthly basis (that is, 1 January to 30 June and 1 July to 31 December), standing committees are required to make a statement to the Assembly and present a schedule of appointments considered during the period.[350]

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346 Planning and Development Act, s 81.

347 Legislation Act, ss 226 to 229. In practice, at the commencement of each Assembly the Speaker tables a schedule setting out the general areas covered by each of the standing committees.

348 Legislation Act, s 229.

349 Legislation Act, s 227. In advice to the Clerk of 31 March 2004, the Government Solicitor advised that the provisions of s 227(1) of the Act did not apply where appointments are made by the executive, as distinct from a minister.

350 Continuing resolution 5A.

12.308. The committee may make a recommendation to the minister about the proposed appointment. The minister must not make the appointment until they have received a recommendation or until 30 days have passed since the consultation took place (whichever happens first).

12.309. In making the appointment, the minister must have regard to any recommendation received.