**LEGISLATIVE ASSEMBLY FOR THE**

**AUSTRALIAN CAPITAL TERRITORY**

# OFFICERS OF THE ASSEMBLY LEGISLATION AMENDMENT BILL 2013

## EXPLANATORY STATEMENT

Circulated by
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## Introduction

This explanatory statement relates to the Officers of the Assembly Legislation Amendment Bill 2013 as presented by Mr Shane Rattenbury MLA in the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

## Overview

The Bill formally recognises the auditor-general, the ombudsman and the three Electoral Commission members as officers of the Assembly.

In their report into the appointment of officers of the Parliament, the Standing Committee on Administration and Procedure described the role and character of an officer of the parliament as follows:

> ... Officers of the Parliament can be distinguished from other statutory offices because their governance arrangements are based on a relationship with the Parliament rather than with Executive government. This premise is supported by the literature. For example, the Constitution Unit's Oonagh Gay and Barry Winetrobe, in their detailed 2003 analysis of Officers of the Parliament observed the term 'is used as a device to denote a special relationship with Parliament, which is designed to emphasise independence of the executive'. Gay and Winetrobe expand on this point, explaining, 'ultimately the key determinant of such Officers is their connection with Parliament, rather than the executive. Parliament has the potential to act as more than simply the arena for party government. Therefore, it is the nature and scope of that relationship between Officers and Parliament which is central to the constitutional uniqueness and importance of being an Officer'. Or, as succinctly stated by Robert Buchanan in his examination of Australian and New Zealand Officers of the Parliament, 'an officer of parliament performs functions of a parliamentary nature, for parliament's benefit'.[1]

The nature of the functions that the auditor-general, ombudsman and Electoral Commission fulfil, to help ensure the accountability of the executive and the representative character of the Assembly, are more appropriately characterised as a function of the legislature rather than the executive and as such it is appropriate to recognise the 'special relationship' that each has with the Assembly by making them officers of the Assembly.

One of the essential roles of the Assembly is to ensure the accountability of the executive. The auditor-general and the ombudsman provide a very important oversight mechanism to ensure the probity of executive conduct. This role is best characterised as being fulfilled on behalf of the Assembly rather than as part of the executive itself. This does not mean that these two office holders will not continue to work constructively with government agencies rather it means that ultimately they are responsible to the parliament, that they fulfil their role

[1] Standing Committee on Administration and Procedure, *Officers of the Parliament,* Report 4 (2012) (footnotes omitted).

of behalf of the parliament and that they are not part of the entity that they are responsible for scrutinising.

The Electoral Commission fulfils essential functions to ensure that the Legislative Assembly is as representative of the community as possible, that the electoral system as fair as possible and that as many people as possible participate in the democratic process. It is therefore appropriate that this be done directly on behalf of the Assembly itself rather than through the executive.

The Bill provides that each of these officers is independent and creates a much clearer separation between these officers and the executive. Reporting will be done through the Speaker of the Assembly and appropriations for the officers must be included with the Appropriation Bill for the Office of the Legislative Assembly.

In additional to ensuring independence, the Bill articulates the requirements for appointment of the officers, who will be appointed by the Speaker on behalf of the Territory rather than by the executive, as well as setting out a framework for the suspension and dismissal of the officers and creates a new obligation for the executive to respond to reports to the Assembly by the officers, similar to the current requirement to respond to petitions and committee reports under the standing orders.

The Bill will also create a relationship between each officer of the Assembly and an Assembly Committee. In the case of the auditor-general this will continue to be the Public Accounts Committee, for the electoral commission and ombudsman this will be the committee responsible for electoral matters and for integrity and accountability of public administration respectively. Currently none of the standing committees have these explicit functions and the Assembly will be required to amend the terms of appointment for the committees. Given that for these officers there is no continuing relationship with any committee the Bill does not make a determination on which is the most appropriate committee and leaves this matter for the Assembly to resolve. This will give the Assembly the flexibility to determine the most appropriate committee and adapt should circumstances change over time.

The Bill amends the *Auditor General Act 1996, the Electoral Act 1992* and the *Ombudsman Act 1989* as well as other administrative Acts to give effect to the new arrangements. Similar to the role of the clerk of the Assembly these officers are equally responsible to all Members of the Assembly and have a role in providing advice and responding to the concerns of all Members. The provisions for each office holder and the consequential amendments to implement the new arrangements are modelled on the scheme created for the clerk and the Office of the Legislative Assembly by the *Legislative Assembly* (*Office of the Legislative Assembly) Act 2012*.

**Human Rights**

The provisions of the Bill engage rights protected by the *Human Rights Act 2004*. The potential limitations that arise primarily relate to the right to privacy and reputation, a fair hearing, the right to be protected from discrimination and to freedom of association.

Right to privacy and reputation

Similar to the requirements for the disclosure of interests by the clerk and for executives of the public service, the Bill will require the officers of the Assembly to disclose their personal and financial interests. A disclosure must be made to the Speaker, within seven days of appointment, of the beginning of the financial year and of any change in an interest.

The limitation of the right to privacy is justified. The nature of the limitation is relatively minor as the disclosure is made only to the Speaker as the representative of the Assembly. The disclosure is not made to the public generally or even to an entity or organisation; such as an administrative unit. The Speaker's use of the information will be subject to the *Privacy Act 1988* (Cth) and the *Human Rights Act 2004* section 40B.

Conceivably the only time when the Speaker may use the information is if the Speaker was contemplating suspending or terminating the appointment because the office holder had acted improperly and failed to declare an actual or perceived conflict of interest. In these circumstances the Bill authorises the Speaker to consult with the commissioner for public administration or any other person the Speaker considers relevant where potentially elements of the personal information could be further disclosed.

The purpose of the limitation is to act as a check on the conduct of office holders who hold very important positions with significant public responsibilities that must be beyond reproach. For example the decisions of the electoral commission may conceivably have an impact on the outcome of elections and it is important that measures are put in place to ensure that the community can have the utmost confidence in the electoral commission. Similarly the auditor-general or the ombudsman may be asked to evaluate conduct which they may have an interest in or involve people they have a personal connection with; as such it is important that there is a mechanism to prevent against decisions being made where a conflict or the perception of a conflict of interest exists.

Whilst it is of course highly unlikely that a person appointed to the position of auditor-general, ombudsman or member of the Electoral Commission would act inappropriately it is particularly important that the roles and the close connection to the Parliament is reflected in measures to ensure that the positions are themselves accountable to others and to protect the integrity of the offices.

Given the nature of the limitation and the important purpose that it serves it is reasonable to require the disclosure and create the limitation on their right to privacy. The limitation is proportionate to its purpose and the least restrictive means of achieving a legitimate end.

Right to a fair hearing

In providing a statutory mechanism for the suspension and the ending of the appointment of the office holders the Bill engages the right to a fair hearing. At each stage of the process explicit recognition of the requirement to give the office holder the chance to make a submission to the decision maker, or makers where the question is before the Legislative Assembly, is afforded to the office holder.

The Bill adopts the same provisions as exist for the clerk in relation to the suspension and termination of appointment as set out in the *Legislative Assembly* (*Office of the Legislative Assembly) Act 2012.* These provisions where amended during debate on the Legislative

Assembly (Office of the Legislative Assembly) Bill 2012 to respond to the concerns of the Scrutiny Committee in report no 49.

In addition to the provisions in place for the clerk and additional requirement is proposed in the Bill to require the Speaker to provide the office holder with a chance to respond to a motion to end their appointment before the matter is debated in the Assembly. An office holder is given three days to respond to such a motion and the Assembly will then have a full three days to consider the office holders response. This is a relatively short period of time however given the nature and importance of the role and the need to resolve any impropriety quickly and at the same time balance the harm to the reputation of the office holder from an unmeritorious motion sitting on the Assembly notice paper for an extended period of time, seven days is considered a reasonable period for an office holder to respond and then have that response considered.

Discrimination

The Bill imposes a limitation on the appointment of the auditor-general and the ombudsman, preventing a person who has been an ACT public servant within the previous two years from being appointed to either of the positions (however this does not apply to a person who has been a member of staff of an officer of the Assembly). This provision limits the right to have access, on general terms of equality, for appointment to the public service and public office protected by section 17(c) of the *Human Rights Act 2004*. It is not necessary to impose this limitation on the electoral commissioner given the nature of the functions that the commissioner fulfils.

The nature of the limitation is relatively specific in that it prevents a defined class of person from being appointed to two specific positions that generally become available only each seven years for the auditor-general and five years for the ombudsman.

The limitation is important because, as is the case with any corporate auditor, it is accepted that it is not appropriate to a person from within an organisation to then be responsible for the auditing of the organisation. For example a public servant who had worked in a particular administrative unit or on a particular project could not, without at the very least the perception of a conflict of interest, audit the performance of the administrative unit or project. More generally a senior public servant who may be considered for either of the roles is likely to have had a significant role across the service which will further give rise to a perception of a conflict of interest. It is reasonable to expect that a person appointed to a role as significant as the auditor-general or ombudsman will be able to exercise their statutory functions, on behalf of the legislature, without the risk of a perception of a conflict of interest.

This perception is not sufficiently overcome through the requirement to appoint a person to the position in accordance with the merit principles or because there are now other people outside the executive involved in the appointment process. Certainly these requirements improve the transparency and accountability of the decision making process but that does not overcome the key issue that comes about from having a person from within an organisation then being asked to examine the performance of that organisation.

The limitation relates directly to the legitimate end, ensuring that the functions of the office holders can be covered as expansively as possible and with the least potential for conflicts of interest to arise and operates only to extent necessary to achieve the aim. Two years is a

reasonable period after which sufficient time should have passed to allow an objective evaluation of the areas where the person may have previously worked.

Freedom of association

The Bill also contains a limitation on the other work and volunteer activity that the office holders can engage in that potentially engages the right to freedom of association. The Bill prevents the auditor-general from doing any other paid work and prevents all officers of the Assembly from engaging in unpaid activity that is inconsistent with their functions.

The limitation is necessary to promote the independence and standing of the position of officer of the Assembly. It is necessary to guarantee the independence of the officers and ensure that the impartiality of the office holders cannot be called into question. The extent of the limitation is relatively limited, in the case of the auditor-general the demands of the position and the level of remuneration make it very unlikely that a person would wish, or need to, take on other employment.

As officers of the Assembly their private conduct may well be publicly discussed and it would be a matter of significant and legitimate public concern if an officer of the Assembly were engaging in an activity that was inconsistent with their functions. The restriction is the least restrictive means available of ensure that the conduct of the officers is consistent with the legitimate expectation of the Assembly in appointing them as officers of the Assembly.

**Delegation of Legislative/Administrative Power**

The Bill delegates significant responsibility to the Speaker for the officers of the Assembly. The delegated administrative power has a range of checks and balances in place to help ensure that the Speaker's actions reflect the collective views of the Legislative Assembly.

The Bill also delegates additional power to the office holders themselves providing for the office holders to appoint a person to act in their positions while they are on approved leave. Ordinarily the *Legislation Act 2001* provides that the person making the appointment is also responsible for acting appointments. In the case of officers of the Assembly it is appropriate that they be able to appoint a person to act in their place while they are on approved leave given the particular position of trust they are placed in and the nature of their roles. The ability to appoint a person to act in the position is only available where leave is approved by the Speaker and the office holder has consulted with the Speaker about their proposed acting appointment. It is designed primarily to cover ordinary leave that any employed person would take from time to time, for example recreational leave. In circumstances where there is no permanent appointee, it is the Speaker who will make the acting appointment; for which they must consult the relevant Assembly committee.

Additionally the Bill also limits the legislative power currently given to the executive by the *Auditor General Act 1996, the Electoral Act 1992* (and *Referendum (Machinery Provisions) Act 1994*) and the *Ombudsman Act 1989*. The ability to make regulations for these Acts will now be conditioned on consultation with the office holder and the relevant Assembly Committee. The commencement of any regulations will also be limited until after the period for disallowance has concluded or a motion to disallow has been rejected by the Assembly. This ensures that any regulations made by the executive are consistent with the views of the Assembly and cannot operate without having effectively secured Assembly support.

**Notes on Clauses**

Clauses 1-3 Name of Act, Commencement, Legislation amended
These are formal clauses setting out the name of the Act, its commencement date and the legislation amended by the Bill. The Bill provides that it will commence on written notice by the Minister. The *Legislation Act 2001* section 79 provides that if written notice of commencement has not occurred the Bill will automatically commence 6 months after its notification day.

**Auditor-General Act – Clauses 4-15**

Please note that the amendments to the Auditor General Act are predicated upon the changes passed by the Assembly in the *Auditor-General Amendment Act 2013*. Clarification of the operation of affected provisions is included in the notes below.

Clause 4
This clause applies the model for the creation of an officer of the Assembly. It is modelled on section 8 of the *Auditor-General Act 1997* (Cth) and declares the auditor-general to be an officer of the Legislative Assembly.

Clause 5
This clause sets out the process of appointing the auditor-general. Importantly it provides that the appointment is made by the Speaker, acting on behalf of the Territory, after a detailed consultative process that is modelled on the requirements for the appointment of the clerk under the *Legislative Assembly (Office of the Legislative Assembly) Act 2012*.

The Speaker must make the appointment on the advice of the Public Accounts Committee (PAC) and also must consult with the Chief Minister, the Leader of the Opposition and the leader of any other party that is represented in the Assembly by at least two Members.

The speaker is not obliged to follow the advice of the PAC however the appointment may not be made unless the committee has recommended the appointment to the Speaker. Essentially the Speaker and the PAC must agree on the appointment.

This is somewhat akin to the veto power currently provided to the PAC in section 8 of the Act however instead of the committee being involved post the proposal of a person for the position they have an earlier role in the recommendation of the person.

An appointment is a disallowable instrument ensuring that the appointment reflects the view of and is approved by, the Assembly.

The clause also creates a limitation on who can be appointed by providing the generic skills and experience that the person must possess as well as prohibiting the appointment of a person who has been an ACT public servant within the last 2 years. The purpose of this limitation is to ensure that the person who fulfils the role is free from a perception of a conflict interest and to ensure that the person can provide a fresh perspective in fulfilling the statutory functions.

Public servant is defined by the *Legislation Act 2001* to mean a public servant employed in the ACT public service. The constitution of the public service is dealt with by section 12 of the *Public Sector Management Act 1994* which provides that members of the ACT Public Service are—
(a) the head of service; and
(b) the directors-general; and
(c) the executives; and
(d) other employees; and
(e) officers.

In effect this means that statutory office holders, such as the human rights commissioner, public advocate or members of the ACT Civil and Administrative Tribunal are not public servants within the definition and so can be appointed to the position of auditor-general.

Clause 6
This clause sets out the requirements for acting appointments. The clause essentially canvasses two scenarios, one where the auditor-general has finished their term of appointment or resigned and the other where the auditor-general is simply on approved leave and a person is required to act in the position during the absence.

Where there is no permanent appointment to the position the Speaker must consult the presiding officer of the PAC before making an acting appointment while the process for a permanent appointment is undertaken. An acting appointment cannot be for longer than 12 months (see *Legislation Act 2001* section 221).

Whilst the auditor-general is on approved leave the auditor-general may appoint a person to act in the position for the term of the leave. Ordinarily responsibility for acting appointments is the responsibility of the person who has the responsibility for making the appointment itself. In the case of officers of the Assembly the responsibility to appoint a person to act in their place while they are on leave is given directly to the officer (see notes on the delegation of administrative power above).

Clause 7
The *Auditor-General Amendment Act 2013* moves schedule 1.6 of the current *Auditor-General Act* to a new section 8B; this clause proposes to remove that new section 8B which is schedule 1.6 of the current Act. The section being removed relates to the operation of division 19.3.3 of the *Legislation Act 2001* that sets out the requirements for statutory appointments. This is being removed as the Bill sets out a comprehensive process for appointments (see clause 5) and covers all elements of the appointment so there is no need for the generic provisions of the *Legislation Act 2001* and it is important to clarify that those *Legislation Act 2001* provisions do not apply to the appointment process for the auditor-general.

Clause 8
This clause requires the auditor-general to make an oath or affirmation of office following their appointment as auditor-general, declare their personal and financial interests and not do any other paid work.

In relation to the requirement to make an oath or affirmation of office, a survey of Australian and NZ audit legislation identified that:

> An oath or affirmation of office is used in some jurisdictions to reinforce the Auditor General's independence and impartiality and in some cases to symbolically mark the special relationship with an allegiance to the Parliament. In a number of jurisdictions the oath is sworn before the Speaker or the clerk of the Parliament, symbolically strengthening the relationship between the Auditor General and the Parliament. In other jurisdictions it is sworn before the Governor. In several jurisdictions the legislation is silent regarding an oath.[2]

The Public Accounts Committee in their inquiry into the *Auditor-General Act 1996* supported the introduction of the requirement for an oath or affirmation.[3]

The requirement to disclose personal and financial interests potentially engages the right to privacy and this issue is discussed in the human rights discussion above. The purpose of the provision is to create an accountability measure to ensure the integrity of the office and to reduce the capacity for a conflict of interest to occur. The provision is modelled on the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* section 11 and was also recommended by the Public Accounts Committee.[4]

Unlike the electoral commissioner and the ombudsman who may do other work that is not inconsistent with the office that they hold, the auditor-general is prohibited from doing other paid work. Firstly it is important to note that it would be exceptionally difficult for a person to fulfil the requirements of the appointment and do other work at the same time. This is to ensure that the auditor-general has no other obligations and minimises the potential for a conflict of interest. Note that the auditor-general can still do any volunteer activities that are not inconsistent with the functions of the auditor-general.

The requirement not to do other work was also recommended by the Public Accounts Committee:

> The Committee believes that a requirement in the Act specifying that the Auditor-General cannot hold other forms of remunerative employment whilst holding office would not only enhance the independence of the Auditor-General but also the status of the Office as an independent Officer of Parliament.[5]

The reasons for the distinction between the auditor general and the other officers of the Assembly are pragmatic rather than principled. In the case of the ombudsman the current arrangement with the Commonwealth means that we cannot impose such a requirement if we are to continue to the current arrangement where the Commonwealth ombudsman is also the

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[2] Robertson, G. *Independence of Auditors-General—A survey of Australian and New Zealand Legislation*, Commissioned by the Victorian Auditor-General's Office (2009).

[3] Standing Committee on Public Account, Report on Inquiry into the *Auditor General Act 1996,* Recommendation 12 page 56.

[4] Standing Committee on Public Account, Report on Inquiry into the *Auditor General Act 1996,* Recommendation 14 page 57

[5] Standing Committee on Public Account, Report on Inquiry into the *Auditor-General Act 1996,* Recommendation 13 page 56.

ACT ombudsman. It is not the intention of the Bill to prevent this arrangement from continuing.

In the case of the Electoral Commission members other than the Commissioner, the positions are part time and it would simply not be practical to expect a person to fulfil the role and not be able to have any other employment. The electoral commissioner is a full time position however the commissioner does on occasion participate in elections in other jurisdictions and assist other electoral commissions both in Australia and overseas and it is not considered appropriate to limit the electoral commissioner's ability to do this additional work.

Clause 9 Resignation
Consistent with the change to provide that it is the Speaker who appoints the auditor-general this clause provides that it is the Speaker rather than the Chief Minister who must receive a notice of resignation from the auditor-general.

Clause 10
This clause provides for the retirement, suspension and ending of appointment of the auditor-general as well as the granting of a leave of absence by the Speaker. These provisions essentially replicate the provisions for the clerk in the *Legislative Assembly (Office of the Legislative Assembly) Act 2012.*

The procedure set out is comprehensive and has been designed to ensure that the auditor-general is afforded procedural fairness where the auditor-general is being suspended or having the appointment ended.

One difference with the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* provisions for the ending of the appointment of the clerk is the additional provision for a response from the auditor-general in the event that the motion is moved in the Assembly to end the appointment of the auditor-general where a committee process has not occurred. The new provision will ensure that the auditor-general has the opportunity to respond and the Assembly has the opportunity to consider that response.

Clause 11
Clause 38 of the *Auditor-General Amendment Act 2013* omits the current section 23 which covers the appointment of staff and provides a more comprehensive set of arrangements for the staff of the Auditor General at new section 9C. This clause omits new subsection (3) of 9C as the rules for the direction of staff will be set out in a new section 9DA (see clause 12 below).

Clause 12
This clause provides that the staff of the auditor-general, importantly this includes any consultants engaged by the auditor-general, are only subject to the direction of the auditor-general and anyone the auditor-general authorises and not anyone else. This clause is effectively the same as the new section 9C in the *Auditor General Amendment Act 2013.*

Clause 13
This clause inserts a new requirement on the Minister to present a response to a report presented by the auditor-general to the Assembly. This is similar to the current requirement to respond to petitions and committee reports under the standing orders of the Assembly.

Clause 14 regulation making power
This clause inserts a new requirement requiring the executive to consult with the auditor-general and the PAC before any regulation can be made for the Act. This is an important mechanism to regulate the regulation making power given to the executive to ensure that the auditor-general and the PAC participate in the development of any proposed regulations.

Additionally the clause provides that any regulation that is made cannot commence until after the period for disallowance has concluded or a motion to disallow has been rejected by the Assembly. This ensures that any regulations made by the executive are consistent with the views of the Assembly and cannot operate without having effectively secured Assembly support.

Clause 15
This clause inserts the transitional arrangements for the existing auditor-general to clarify that the current auditor-general is taken to have been appointed under the new arrangements. The current auditor-general will however still be required to take an oath or make an affirmation and a declaration of interests consistent with the requirements in clause 8 above. The Bill provides one month in which to fulfil these requirements.

The additional time provided for fulfilling the requirements is in recognition that the commencement of the Bill is by notice and therefore may occur at any point across a period of time. It is therefore appropriate to allow additional time for the office holder to fulfil the requirements (for example if the office holder happened to be on leave at the time the Bill commences they would not be able to comply through no fault of their own).

Clause 16
This clause inserts the term 'territory law' into note 2 of the dictionary to explain that the term is defined in the *Legislation Act 2001*.

**Electoral Act – Clauses 17 - 46**

These clauses provide that each of the three members of the electoral commission is an officer of the Assembly. It is important to note however that given that the electoral commissioner is responsible for the running of the commission, (and the other members have very defined roles within the *Electoral Act 1992*) that other references to 'officer of the Assembly' refer only to the electoral commissioner rather than all members of the commission except in certain circumstances which are provided for in the other amendments set out in schedule 1.

Clause 17
This clause changes the division heading from *Establishment, functions and powers of electoral commission* to *Establishment and independence of electoral commission*.
This is necessary because other provisions of the Act have been relocated and amended to allow for the addition of the clauses establishing the commissioner members as officers of the Assembly and improving the readability of the Act.

Clause 18
This clause declares the members of the Electoral Commission to be independent officers of the Legislative Assembly and gives the members complete discretion in the exercise of their

functions. This clause applies the same provisions as in clause 4 in relation to the auditor-general (see notes above) to the electoral commission members.

Clause 19
Currently the *Electoral Act 1992* provides that the Electoral Commission's functions include to "advise the Minister on matters relating to elections" and "to consider, and report to the Minister on, matters relating to elections referred to it by the Minister". This clause amends these requirements to instead provide that the function of the commission is to advise and report to the Assembly.

Clause 20
This clause relocates the fee making power to section 340B of the Electoral Act consistent with the standard practise of including such a power within the miscellaneous provisions at the end of an Act.

Clauses 21and 22
Currently section 10A provides that the electoral commission may give to the Minister a report on anything relating to elections, referendums or other ballots and any report must then be provided to the Assembly within 6 sitting days. These clauses will change the requirement so that any reports must be provided to the Speaker and then presented to the Assembly on the next sitting day.

Clause 23
This clause requires the Minister to provide a government response to any report presented to the Assembly under section 10A as amended by clauses 21 and 22.

It is important to note that given the nature of the reports it is probably more likely than not that the issues raised in the reports will require the Assembly to consider the matters raised rather than requiring any particular action from the government. However it is certainly possible that the matters raised will require a particular response from the government and it is appropriate that the Assembly consider that response wherever such a response is relevant. Where there is no substantive response required by the government the government can simply respond by observing that the matters raised in the report are the responsibility of the Assembly. Alternatively where a response is required the government can provide a substantive response to the matters raised.

Clause 24
This clause inserts two new division headings. These changes are necessitated as clause 29 moves current section 23 to section 11 and the current section 11 is omitted by this clause.

The clause also sets out the requirements for the appointment of the members of the Electoral Commission which are the same as for the auditor-general and the ombudsman (see notes on clause 5 above). Acting appointments are also provided for in the same terms as proposed in clause 6 above.

Clauses 25 and 26
These clauses, consistent with the change to make responsibility for the appointment of the office holders the responsibility for the Speaker on behalf of the Assembly, remove the reference to Executive and replace it with the Speaker.

Clause 27
This clause simply renumbers existing sections as amended by previous clauses in the Bill.

Clause 28
This clause provides that an appointment must not be for more than 5 years, provides for an oath or affirmation of office, disclosure of interests, the requirement not to do inconsistent work and the suspension and ending of the appointment of a member of the commission. With the exception of the requirement not to inconsistent work which unlike the provisions in relation to the auditor-general allows the electoral commission members to do other work and new section 18D(3)(a) which applies an existing requirement of the *Electoral Act 1992*, the provisions in the clause are the same as those for the auditor-general discussed in the notes above (see clause 8).

Clauses 29-34
These clauses make administrative tidy ups to the Act to improve the readability of the Act in light of the other changes proposed in the Bill.

Clause 35-37
These clauses deal with the staff of the electoral commissioner. They provide that the commission staff must either be employed under the *PSMA* or as temporary staff and consultants under section 32 of the Act. Similar to clause 12 above members of the commission staff are only subject to the direction of the commissioner or a person the commissioner directs.

Clauses 38 and 39
Consistent with previous clauses these clauses remove the current requirement to consult the Minister when appointing a person to assist a redistribution committee and requiring that redistribution reports to be provided to the Speaker for presentation to the Assembly rather than to the Minister.

Clause 40
This clause creates a formal requirement to consult with the electoral commission and the relevant Assembly Committee prior to making a regulation for the *Electoral Act 1992*. Additionally any regulation that is made will not commence until after the period for disallowance has concluded or a motion to disallow has been rejected by the Assembly. This ensures that any regulations made by the executive are consistent with the view of the Assembly and cannot operate without having effectively secured Assembly support.

Clause 41
This clause inserts the transitional arrangements for the current members of the electoral commission. The provisions are the same as will apply for the auditor-general (see clause 15 above).

Clauses 42-44
These clauses amend provisions in the dictionary to ensure consistency with the amendments to the Act.

Clause 45
Clause 20 of the Bill relocates the power to determine fees for the Act the changes in this clause ensure that references to that section are amended consistent with its relocation.

**Ombudsman Act – clauses 46 - 70**

The *ACT Self-Government (Consequential Provisions) Act 1988* provides at section 28(3): "The person for the time being holding office as Ombudsman (in this section called ***the Ombudsman***) under the Commonwealth Act shall be taken to be the ACT Ombudsman until the appointment of the ACT Ombudsman is made under the ACT law." An arrangement between the ACT and the Commonwealth continues to operate so that the Commonwealth ombudsman is also the ACT ombudsman. The provisions in the Bill recognise this situation and will operate under the current arrangement so that the ACT ombudsman can operate as an officer of the Assembly at the same time as fulfilling the role of Commonwealth ombudsman.

Clause 47
This clause declares the ombudsman to be an independent officer of the Legislative Assembly and gives the ombudsman complete discretion in the exercise of the ombudsman's functions. This clause applies the same provisions as in clause 4 (in relation to the auditor-general) to the ombudsman.

Clauses 48 and 49
These clauses remove the capacity for a Minister to issue a certificate preventing the ombudsman from obtaining information that the ombudsman believes to be relevant to an investigation under the Act.

Clause 50-54
Section 18 of the Act currently provides that where the ombudsman is concerned about the conduct of an agency the ombudsman may provide a report into the matter to the agency concerned and the Minister responsible for the agency. Sections 19 and 20 provide for the ombudsman to give reports that the ombudsman believes have not been adequately dealt with by the agency to the Chief Minister and following that to the Legislative Assembly. This clause changes the current system so that if the ombudsman is not satisfied with an agency response the ombudsman will have a discretion to provide the report to the Chief Minister or directly to the Assembly if the ombudsman considers that this is appropriate. Further if the ombudsman provides a report to the Chief Minister and then considers that the response is inadequate the ombudsman can then present the report to the Assembly.

It is appropriate that the ombudsman be given the discretion to be deal with any circumstances as they arise. The clause allows the ombudsman to work with agencies and the executive or when it is important that the Assembly be notified of a matter to raise that matter with the Assembly directly. The clause balances the role of the ombudsman as an officer of the Assembly while at the same time allowing for the ombudsman to work with agencies internally where doing so will ultimately achieve the best result for those most affected by the issue and the community more generally.

Additional consequential changes are also made to section 21 to ensure consistency with the amended provisions and to require that the Speaker present any ombudsman's report to the Assembly on the next sitting day and to require the government to provide a written response to any report presented to the Assembly within three months.

Clause 55
This clause provides for the appointment of the ombudsman and is substantially the same as clause 5 in relation to the auditor-general above. Note that while the Assembly wishes to continue the arrangement with the Commonwealth ombudsman no appointment will be made under these new provisions and the effect of the *ACT Self-Government (Consequential Provisions) Act 1988* will be to maintain the Commonwealth ombudsman as the ACT ombudsman.

Clause 56
This clause adopts a more contemporary formulation of the terms of the ombudsman's appointment and removes the existing determination making capacity of the Chief Minster.

Clause 57
This clause requires the ombudsman to make an oath or affirmation of office following their appointment as ombudsman, declare their personal and financial interests and not do any inconsistent work. With the exception of the requirement not to inconsistent work which unlike the provisions in relation to the auditor-general allows the ombudsman to do other work, these provisions are substantially the same as the provisions of clause 8 in relation to the auditor-general.

Clause 58
This clause provides for the approval of leave for the ombudsman. In effect the clause will only apply where the arrangement in place with the Commonwealth ombudsman ceases. Under the current subsection 25(2) which is not amended by the Bill any leave approved for the Commonwealth ombudsman is taken to be granted for the same period for the ACT Act.

Clause 59
This clause sets out the provisions for the retirement, suspension and ending of the appointment of an ombudsman. The provisions are substantially the same as those set out in clause 10 in relation to the auditor-general (see notes above).

Clause 60
This clause provides for the appointment of an acting ombudsman similar to the provisions set out in clause 6 in relation to the auditor-general (see notes above). However the clause will not apply while the Commonwealth ombudsman continues to hold the office of ACT ombudsman. In effect any acting appointment made by the Commonwealth will also apply for the ACT.

Clauses 61 and 62
Clause 61 relates to the appointment and independence of the staff of the ombudsman and for the delegation of ombudsman function to the staff of the ombudsman. Currently the Act provides for the delegation of functions by the ombudsman and all clause 62 does is simplify the current section 32.

Clauses 63 to 64
Consistent with clauses 48 and 49 these clauses remove the references to the ability of a Minister to issue a certificate preventing the disclosure of information.

Clause 65
The clause provides that instead of the Minister being responsible for making a determination the Speaker will be delegated the responsibility for making a determination on the condition that prior to exercise of the power the Speaker must consult with the ombudsman.

Clause 66
Similar to clause 14 this clause creates some additional limitations on the exercise and scope of the regulation making power.

Clause 67
This clause inserts the transitional arrangements for the current ombudsman. The provisions are the same as will apply for the auditor-general (see clause 15 above).

Clauses 68 and 69
These clauses amend provisions in the dictionary to ensure consistency with the amendments to the Act.

**Schedule 1 Other amendments**

Schedule 1 sets out the consequential amendments to other Acts required to properly implement the recognition of the auditor-general, ombudsman and members of the electoral commission as officers of the Assembly. These amendments largely replicate the changes made by the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* in relation to the Office of the Legislative Assembly.

Part 1.1 *Annual Reports (Government Agencies) Act 2004*
Similar to the requirements currently in place for the Office of the Legislative Assembly these clauses amend the annual reporting requirements to ensure the independence of the officers of the Assembly while maintaining their accountability to the community for their use of public resources.

In relation to the electoral commission it is important to note that the electoral commissioner is responsible for the day to day work of the commission. However the reporting requirements of course should extend to the whole commission and as such amendments are made at clause 1.17 to adopt an inclusive definition of the commission as the definition proposed to be included in the *Legislation Act 2001* refers only to the electoral commissioner (see clause 1.25).

Part 1.2 *Financial Management Act 1996*
These clauses clarify the financial reporting requirements for the officers of the Assembly. Importantly clause 1.13 also sets out the process for appropriations for officers of the Assembly. The Speaker after consulting with the office holder and the relevant Assembly Committee must make a recommended appropriation to the Treasurer and the Assembly. If the Treasurer presents a Bill to appropriate a lesser amount for an officer of the Assembly than has been recommended by the Speaker the Treasurer must also present to the Assembly a statement of reasons for the deviation from the recommended amount. This is the same as the current requirement in place for the Office of the Legislative Assembly.

Parts 1.3 and 1.4 *Government Procurement Act 2001* and *Government Procurement Regulation 2007*

Consistent with the current provisions in place for the Office of the Legislative Assembly these clauses introduce the same provisions to ensure the independence of the officers of the Assembly as are in place for the Office of the Assembly.

Part 1.5 *Legislation Act 2001*

The definition in the Bill proposed to be inserted in the Act refers to the officers of the Assembly for general application. The definition refers only to the electoral commissioner rather than all the members of the commission as most of the responsibilities of the commission are fulfilled by the commissioner particularly in relation to the administrative responsibilities of the commission.

Part 1.6 *Public Interest Disclosure Act 2012*

This clause defines an officer of the Assembly as the head of an ACTPS entity and therefore a disclosure officer and able to receive public interest disclosures for the Act.

Part 1.7 *Public Sector Management Act 1994*

These clauses insert the same requirements for officers of the Assembly as are in place for the Office of the Legislative Assembly.

Part 1.8 *Referendum (Machinery Provisions) Act 1994*

Similar to clause 40 this clause creates a formal requirement to consult with the electoral commission and the relevant Assembly Committee prior to making a regulation for the *Referendum (Machinery Provisions) Act 1994*. Additionally any regulation that is made will not commence until after the period for disallowance has concluded or a motion to disallow has been rejected by the Assembly. This ensures that any regulations made by the executive are consistent with the view of the Assembly and cannot operate without having effectively secured Assembly support.

Part 1.9 *Territory Records Act 2002*

These clauses provide that the officers of the Assembly are subject to the record keeping requirements of the *Territory Records Act 2002*.