

Report on the Implementation of the Latimer House Principles in the Australian Capital Territory

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Report prepared for the
The Australian Capital Territory Legislative Assembly



**UNIVERSITY OF
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**INSTITUTE FOR
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& POLICY ANALYSIS**

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About the Institute for Governance and Policy Analysis

The Institute for Governance and Policy Analysis at the University of Canberra was established in January 2014 to harness the research strengths of the ANZSOG Institute for Governance (ANZSIG) and the National Centre for Social and Economic Modelling (NATSEM). The aim of the Institute is *to create and sustain an international class research institution for the study and practice of governance and public policy*. The Institute has a strong social mission committed to the production of leading edge research and research driven education programs with genuine public value and, by implication, policy impact. The integration of ANZSIG and NATSEM has created exciting opportunities for the development of cutting edge research in public policy analysis through combining expertise in qualitative and quantitative methods, evaluation, micro-simulation and policy modelling.

The Institute's recent work includes:

(2011), *The National Water Commission five Years On*, Canberra/NWC.

(2011), *Establishing a New Independent Authority – Lessons from the National Water Commission*, Canberra/NWC.

(2011), *Governance Review – Understanding Austrade's Integrity Systems*, Canberra, Austrade.

(2012), *Home to Work - an evaluation*, DEEWR Innovation Fund, DEEWR, Canberra.

(2014), *Improving Services with Families: a perfect project in an imperfect system*, ACT Government Community Services Directorate.

(2012), *Home to Work - an evaluation*, DEEWR Innovation Fund, DEEWR, Canberra.

(2012), *On place-based service delivery*, ANAO, Canberra.

(2012), *Public sector innovation at the local scale*, ANZSIG/ACELG, Canberra.

(2012), *On collaborative governance*, ANAO, Canberra.

(2013), *Social participation: lessons from Europe*, Ministry of Planning, Brasilia/European Union.

(2013), *Triple Bottom Line Assessment Framework for the ACT Government*, Canberra, ACTCMD.

(2013), *Innovative Service Delivery to Vulnerable Families*. Canberra: CHASS.

(2013), *Improving Services with Families: a perfect project in an imperfect system*, Australian Capital Territory Government Community Services Directorate.

(2013), 'Not yet 50/50': Barriers to the Progress of Senior Women in the Australian Public Service', Canberra, Department of Prime Minister & Cabinet.

(2014), *Quadruple Bottom Line Assessment Framework for Strathfield Council*, Institute for Governance/Strathfield Council, NSW.

(2014), *The Power of One Voice – power, powerlessness and Australian democracy*, Canberra, Museum of Australian Democracy, MoAD, Canberra.

(2014), *Opportunities and Challenges for the Reform of Public Administration Arising from the Arab Transitions – Defining the Challenge, Making the Change, report commissioned by the United Nations Development Programme*, New York, UNDP.

(2014), *Human Services Blueprint – Evaluation Plan*, Canberra, Australian Capital Territory Government Community Services Directorate.

Acknowledgements

The Legislative Assembly of the Australian Capital Territory has commissioned the Institute for Governance and Policy Analysis (IGPA) to evaluate the quality of the application of Latimer House Principles in the work of the Legislative Assembly. The report that follows is designed to examine the extent to which the Principles are demonstrated both in the processes of government and in the behavior of those political and bureaucratic actors responsible for their achievement. In sum, it requires an investigation of process and agency.

We would therefore like to express our gratitude to those collaborators who have helped us to define the democratic deficit in the ACT Legislative Assembly and map some potential pathways to bridging it. This includes both Members of the Legislative Assembly (MLAs) and officers of Parliament and the ACT government. The high quality of interviews which we conducted was testimony to their professionalism and commitment to continuous improvement. We must also thank our research team Mark Evans, Meredith Edwards, and Richard Reid. Special thanks must also be conveyed to Tom Duncan for his sound project coordination at the ACT Legislative Assembly. As always, however, the interpretation of data in the analysis which follows remains the sole responsibility of the evaluation team.

Bill Burmester

18 December 2014

Working in the Canberra Village is like governing in a goldfish bowl. Most people know each other and are involved in each other's business to varying degrees. This has strengths and weaknesses. The processes of government are probably quicker in some ways but in practice the notion of the independence of the three branches of government is at best stretched and we need to paper over the cracks.

(MLA, Author interview, November 2014).

Overview

Context

By resolution on 11 December 2008, members of the Australian Capital Territory (ACT) Legislative Assembly endorsed and adopted the Commonwealth (Latimer) House Principles on the Three Branches of Government, acknowledging that the Principles express the fundamental values which should govern the relationship between the three branches of government in the ACT. The standing resolution also requires regular review of the ACT's implementation of the Principles. The Institute for Governance and Policy Analysis at the University of Canberra was commissioned to undertake the latest such review in the last quarter of 2014.

On the surface, the ACT looks like the model of a highly developed "Westminster" system of government which accords with the Latimer House Principles; all the components of good governance are in place, the processes of government operate well, the system of government has matured, the rights of citizens are well protected and the rule of law allows personal freedoms and economic opportunities beyond the expectations of citizens in many other jurisdictions around the world. Moreover, this review arises in a context in which Canberra has been ranked the world's most livable city in the OECD's latest wellbeing report (2014) and ACT citizens have reported 84.8 per cent confidence in their territory government in the Griffith Constitutional Values Survey (Brown, 2014, p. 8), by far the highest in Australia. In such circumstances outsiders would probably see it as somewhat churlish to arrive at a conclusion that the ACT "could do better".

In essence, the question that this Review attempts to answer is whether, in adopting the Latimer House Principles, the political and bureaucratic actors responsible for their implementation are bound by the Principles, dedicated to their implementation, and, crucially willing to have the results of their endeavours judged. If this is not the case, then the alternative interpretation is that at best the adoption of the Principles is a hollow gesture; at worst, cynical political game playing and nothing more than an expedient sop to the electorate. The outcome of the second would be stagnation of governance reform in the Territory.

This Review seeks to enlighten that debate. It is designed to examine the extent to which the Principles are demonstrated both in the processes of government and in the behavior of those political and bureaucratic actors responsible for their achievement. It does not try to determine the performance of the Government per-se. If it were to do so, one of the many appropriate research questions would have been "Why, in a well governed, and arguably the richest jurisdiction in one of the richest country in the world, are the lawns in public places not cut regularly?" Rather the Review seeks to determine the extent to which the Principles on which our system of government is based have been implemented in a meaningful way for the improvement of governance in the ACT.

This study seeks to establish a benchmark for the ACT's performance against each of the Principles by looking at three aspects: firstly the formalised structures and arrangements that

have been established in the ACT to implement the Principles; secondly, the practice and experience that has occurred in recent times in applying the Principles; and thirdly, where appropriate, evaluating the perspectives of key “custodians”¹ of the Principles as to the strength of and emerging challenges to the continued adherence to the values of a mature and stable democratic form of government.

The report draws on a mixed methods approach appropriate to making sense of the integrity puzzle and in keeping with the budget allocated for evaluation purposes. A more sophisticated frame could have been deployed in line with other work that members of the Institute have conducted as part of the Democratic Audit of the UK (Evans, 2004) and in evaluating other integrity agencies in Australia (Aulich, Evans and Wettenhall eds. 2011, Burmester, Evans & Whitton, 2011), if appropriate data and resources had been available.

Documentary analysis informs our analysis of ACT processes and this has been unsurprisingly circumscribed by the availability of data. Qualitative methods have been used to evaluate the perceptions of the ACT elite – political and bureaucratic – on advances made in implementing the Latimer House Principles. The headline findings are presented below.

¹ The notion of key office holders being seen as guardians of the Westminster system of government is raised in the notes accompanying the Principles. For this study, the following were identified for the ACT:

Legislature: Speaker of the Assembly; Leader of the Opposition; Leader of ACT Greens; Chair of the Standing Committee on Public Accounts; Auditor-General; Electoral Commissioner; Ombudsman, Clerk of the Legislative Assembly

Judiciary: Chief Justice of the Supreme Court; Chief Magistrate of the Magistrates Court

Executive: Chief Minister; Head of Service

Summary of Findings

The Review notes that the ACT is a subservient jurisdiction to the Commonwealth: all the self-governing powers and authorities granted to it are determined by the Commonwealth under the Commonwealth's *Australian Capital Territory (Self-Government) Act 1988* and the Commonwealth Parliament retains the power to veto ACT legislation. As a result this constraint on the full independence of the ACT to establish legislation and conduct government in its own right subject only to the same constitutional and legal constraints as any Australian State remains a limitation on the implementation of the Principles.

Nevertheless, in passing its resolution to formally adopt the Principles, and in many other regards, the ACT Legislative Assembly has marked itself out as a leading Legislature among those across Commonwealth nations. And in other regards too, the ACT can be seen as ahead of the game amongst Westminster based systems of governance in its success in implementing the Latimer House Principles. In some regards, however, there is a gap between current evident practice, and the expectations that could reasonably be inferred from genuine commitment to the spirit of the Principles. In other words, the Territory could do better, and will need to continue to reform its democratic practices. *This Review found that opportunities exist to further strengthen this performance, and some challenges to the direction of democratic practice are emerging in the Territory.*

The main such area of concern that emerges from this Review goes to the central tension in a Westminster system of government, namely the respect for the independence and influence of the parliament and its members by the government of the day which, by definition, controls and dominates parliament. The Principles are alive to this tension and set out a number ways by which the Executive arm can be seen to be respectful of parliament.

In the case of the ACT, this aspect was the most significant instance among the Principles where there appears to be a gap between the formal (well advanced) structures and processes that exist in the ACT, and perspectives on their application by the political and bureaucratic elites. The picture the Review found was that, on one hand, recent Assemblies and Governments have implemented a number of significant reforms to protect, improve and consolidate the formal standing of governance processes articulated in the Principles, while on the other, examples of shortcomings in actual practice can be observed. The Review found, that despite well founded structures and formal processes existing in many areas of governance, that members of the Assembly believe that there is ***not adequate time for public consultation on Government bills***; that in the current assembly ***private members have not exercised their ability to introduce private members bills and there has not been detailed scrutiny of legislation by committees***; that ***scrutiny of government by the Assembly through detailed examination of Auditor General reports has been diminished*** and ***there are mounting concerns as to appropriate resourcing in this area***; and, that little movement has occurred in reducing ***the dependence of political parties on fund raising sources that raise conflict of interest issues***. This suggests there are

further opportunities to improve the practice of government in the ACT. The reinvigoration of the Assembly by the increase in the number of members from the current seventeen to twenty-five could well provide an opportunity to address these matters.

The Review also found that there *was a degree of compliance in regard to the need for appropriate strategies to guard against the potential for corruption* in the public affairs of the Territory and that the approach *to seek legislative approval through the whole of the Assembly to limit rights to judicial review in particular instances seems a satisfactory and democratic safeguard* to the exercise of such limitations in the ACT's Westminster system of government.

Another issue of significance to emerge from the Review is that of the preparedness of the Territory to respond to emerging trends in democratic processes and expectations of a modern citizenry for greater involvement in decision-making beyond voting in their polis (see IGPA 2013&2014). In this, the ACT is in a unique position in being both a state level and local government administration, and at the same time being the national capital of the Federation. Again, the ACT has put in place some of the foundations for a more mature engagement with civil society, but *the ACT Legislative Assembly has yet to develop and exploit recent innovations in increasing citizen involvement in decision making from around the world nor build on those introduced by the ACT public service in recent times* (For example, Time to Talk <http://timetotalk.act.gov.au/>).

Recommendations

Recommendation 1: Other jurisdictions such as South Australia and Victoria have in recent times established fully independent court administrations, and such a step in the ACT would give further clarity to the independence of the Judiciary within the Principles.

Recommendation 2: Given the ability and opportunity for members of the Assembly to introduce private members bills, the ACT would be well served if this opportunity was taken-up by non-executive members, and so broaden legislative deliberations in the Territory.

Recommendation 3: General acceptance of the proposition that adequate resourcing be provided to scrutiny bodies through the budget is more than simply adopting a formal process of consultation. To strengthen public confidence, there is a requirement on the government of the day to reach reasonable consensus across the political spectrum on an acceptable level of budgetary allocations to these bodies.

Recommendation 4: The ACT would do well not to remain complacent in the area of possible corruption, and seek out appropriate strategies to guard against the potential of a growing corruption threat to the good governance of the ACT. While an ongoing stand-alone corruption commission may not be justified for a small jurisdiction, other measures such as providing

investigative powers and resources to existing integrity bodies and adopting mandatory review obligation by the Auditor in selected areas of administration could be considered.

Recommendation 5: A granular approach whereby the majority of audit findings could be “triaged” directly into rapid implementation while more contentious or resource intensive recommendations face greater political scrutiny would seem an appropriate strategy more in line with the Principles.

Recommendation 6: The approach to seek legislative approval through the whole of the Assembly to limit rights to judicial review (as in the case of Light Rail) seems a satisfactory and democratic safeguard to the exercise of such limitations in the ACT’s Westminster system of government and an appropriate way to avoid additional costs being imposed on ACT taxpayers.

Recommendation 7: Jointly establishing protocols between all parties in the Assembly on the time available for public consultation by the Assembly on, and Committee consideration of, new legislation may assuage concerns, and close the gap between current practice and a more generous and inclusive approach. This proposal could reasonably be adopted with little detriment to government business.

Recommendation 8: The ACT should consider other ways of attesting to the integrity of its system of government more independently of those with an interest in current systems and processes. Periodic reviews with specific terms of reference undertaken by eminent independent experts could be one possible approach

Recommendation 9: The ACT would be well served if a wider range of citizen engagement strategies were considered and followed in the ACT drawing on innovations currently being deployed in the ACT public service.

Recommendation 10: The ACT Legislature should review the data needs of engaging in subsequent reviews of the implementation of the Latimer House Principles to ensure that they are driven by objectively derived data in addition to elite perceptions.

Introduction – Commonwealth (Latimer House) Principles on the Three Branches of Government (“The Principles”)

The Principles² are set out as a guide to the expectation of the interlocking features that deliver sound representative governance within a jurisdiction. This study seeks to establish a benchmark of the ACT’s performance by examining the Principles from three perspectives: firstly, through documentary analysis of the formalised structures and processes that have been established in the ACT to implement the Principles; secondly, observation of the practice and experience that has occurred in recent times in applying the Principles; and thirdly, assessment of the perceptions of key “custodians” of the Principles as to the strength of, and emerging challenges to, the continued adherence to Latimer House Principles.

Each of the Principles is examined cumulatively in the following sections. Sections 1 and 2 focus on an analysis of the three branches of government and their adherence to the Principles. Subsequent sections of the report then focus on specific Latimer issues arising from the interviews we conducted with key “custodians” of the Principles. These include: challenges for public office holders (Section 3); ethical governance (Section 4), accountability mechanisms (Section 5); the law-making process (Section 6); and, oversight of government (Section 7). It then remains for Section 8 to evaluate the implications for our findings for future governance.

² Numbering in this Report retains paragraph numbers from Latimer Principles (shown where appearing in bold italics) as recorded in the Resolution of the Assembly (11 December 2008). The Resolution and Principles are included in full at Attachment A.

1

Objective

(2) The objective of the Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.

Self-government in the ACT is now a mature system embedded within a long established Westminster tradition and as such embodies within its formal structures and practices a strong framework for the implementation of such values. However, it needs to be noted that the ACT is a subservient jurisdiction to the Commonwealth: all the self-governing powers and authorities granted to it are determined by the Commonwealth under the Commonwealth's *Australian Capital Territory (Self-Government) Act 1988* and the Commonwealth Parliament retains the power to veto ACT legislation. Thus the term "*in accordance with the laws and customs of each Commonwealth country*" above has special and particular application to the ACT. This arrangement arises from the inclusion of the so-called "Territories Power" in the responsibilities of the Commonwealth under the Australian Constitution (*section 122*). While it could be argued the Territories power is necessary for the Commonwealth to exercise control over its own seat of government, the *Self Government Act* sets out a curious set of limitations on the powers granted the ACT as well as other restrictive conditions.

Police powers remain with the Commonwealth, as do certain electoral arrangements and a prohibition on the introduction of euthanasia (a particular matter that arose early in the period of self-government). In other words, it cannot be claimed that the ACT is a self-determining jurisdiction equivalent to the State jurisdictions across a wide range of matters to which the Latimer House Principles apply (see section 23 of the Act³). Given this, the implementation of the Principles in the ACT is also necessarily inhibited.

³ **23. Matters excluded from power to make laws**

- (1) *Subject to this section, the Assembly has no power to make laws with respect to:*
- (a) the acquisition of property otherwise than on just terms;*
 - (c) the provision by the Australian Federal Police of police services in relation to the Territory;*
 - (d) the raising or maintaining of any naval, military or air force;*
 - (e) the coining of money;*
 - (g) the classification of materials for the purposes of censorship.*

Importantly, the Commonwealth Parliament retains a power of veto over ACT legislation. Previously, up until December 2011, a Commonwealth Minister (namely, a member of the dominant political party in the legislature) could effectively overrule the will of the ACT Legislative Assembly by advising the Governor-General to disallow the Act. Recently the ACT (Self Government) Act was amended to require the approval of the Commonwealth Parliament to overturn ACT legislation. While this still constrains the ACT legislature compared to State jurisdictions, current Assembly members generally accept that limitations are able to be imposed under the Territories power, and that it is improbable in the extreme that the Constitution would be altered to overcome this situation.

Interestingly, on the last occasion where the Commonwealth (Coalition) Government opposed ACT legislation enacting the ACT (Labor) government's policy on same sex marriage, it pursued that objection through judicial review (via the High Court) rather than seeking the Commonwealth Parliament's endorsement of its veto power. Whether this sign of respect for the ACT's independence will occur on future occasions is a matter of conjecture and likely to depend on the Commonwealth government's level of control of both houses of the Commonwealth Parliament at the time, and the composition of the High Court bench. Nevertheless, it did set a precedent for an appropriate response to differences between the two jurisdictions which may be called upon in future political debates and rhetoric. It is interesting also to note that the ACT Government, having its inability to make laws in regard to marriage clarified by the High Court, chose not to test whether the Commonwealth's marriage laws were discriminatory, and therefore also invalid.

The Territories powers via a vis the Commonwealth can also limit the ACT's authority and standing in more immediate, practical ways. Government decision making in Australia is increasingly developed, adopted and implemented through Council of Australian Government (COAG) processes and associated political bargaining processes. With the Territories power

(1A) The Assembly has no power to make laws permitting or having the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life.

(1B) The Assembly does have power to make laws with respect to:

- (a) the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient; and*
- (b) medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient; and*
- (c) the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment; and*
- (d) the repealing of legal sanctions against attempted suicide.*

vesting ultimate authority for the ACT (and similarly, the Northern Territory) with the Commonwealth, the ACT's position in such arrangements is more or less irrelevant – at worst, the ACT's inclusion could be construed as a curtesy. A current example is the current Prime Minister, Tony Abbott's call for a reasoned debate on changes to the GST, and his invoking of the will of the States as the key determinant of any changes thereto. The ACT can have no real influence on that issue, both because of its size, but also because of the Territories power in the Constitution. ***Hence, the ACT does not possess autonomy to establish legislation and conduct government in its own right subject to the same constitutional and legal constraints as any Australian State. This is an evident limitation on the implementation of the Principles.***

2

The Three Branches of Government

The key underpinning notion of Westminster systems of government is that of the three independent but related arms of government – the Legislature, the Judiciary and the Executive.

(3) The Three Branches of Government

Each Commonwealth country's parliaments, executives and judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

This Principle underpins the notions covered in subsequent Principles regarding the acceptance and respect for the role of each branch by the other branches and is of fundamental importance to the enduring sustainability of democratic systems of government. In particular it also raises the fundamental tension within Westminster based systems that arises from the fact that the government of the day, by definition, is able to exercise effective control of the Legislature. Within a party based political system, the government is the dominant party in the Legislature or the one that is able to garner the on-going support of the Legislature. The danger in such a case is that a “winner takes all” approach is adopted by the government of the day, and so it exercises exclusive rather than inclusive power in the governing of the City State. The power of the Executive may be offset through a range of formal arrangements that establish a respectful relationship between the Government and the Legislature, and which can be tested by the exercise of those arrangements in the processes of government.

How the ACT has implemented this notion is examined in the following three sections: Parliament and the Judiciary, the Independence of Parliamentarians and the Independence of the Judiciary.

Parliament and the Judiciary

The next two principles (5 and 6) go to the essence of the relationship between the Legislature and Judiciary.

(4) Parliament and the Judiciary

(5) *Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand;* and

(6) Judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

Under the Latimer House Principles the concept of the separation of powers in a Westminster system does not countenance isolation of each branch but a complimentary functioning to bring about effective rule of law, good government and protection of citizens' rights. Clearly, the role of the Government of the day, and in particular the Attorney General and Chief Minister, are key to this relationship between the Parliament and the Judiciary. *(Please note that the actions of the Executive in maintaining the independence of the Judiciary are also examined under Principles 11-17 below).*

In interviews conducted in the Review, these Principles were further refined to identify two distinct aspects of the relationship, namely, judicial decision-making on matters of law, and secondly, in regard to administrative and resourcing responsibilities in the judicial system.

On the first of these, the independence of and responsibility for courts to make independent judgements on matter brought before them was deeply understood as the basis of the relationship between the Executive and Legislature on the one hand and the Judiciary on the other. No concerns were raised and no evidence exists to suggest that this is a matter of contention in the ACT. In fact, in contrast to other jurisdictions, criticisms by politicians about "judicial law making" have not occurred in the ACT, and mandatory sentencing regimes, which constrain judges' decision making independence, have not been established.

An example of respectful arrangements that have been established within the ACT between the courts and the parliament are the arrangements established for the protection of human rights. The courts are required to interpret legislation having regard to the statutory based human rights of the Territory and can form a view that particular actions of the government or legislation passed by the Assembly are incompatible with those rights. In this case the courts can issue a declaration of incompatibility which refers the matter back to the law making body, the Assembly, for further consideration. The court's role is not to define rights or provide recompense for breaches; rather rectification is in the hands of the Legislature. In 2013/2014, no "statements of incompatibility" were referred to the Assembly.

On the second aspect, namely the administrative and resourcing arrangements through which the courts operate, there is clear evidence that the relationship between the Executive and Judiciary is "***complementary and constructive***". The Executive and the Legislature, as well as the citizenry, have a clear interest in ensuring that the system of justice is both prompt and efficient while the Courts have an equivalent interest in maintaining the standing and reputation of the judicial processes in the Territory. When the efficiency and speed of the courts became a matter of public concern in recent times (following a complaint by the ACT Bar Association about the performance of a particular Judge),⁴ arrangements were adopted by the Government and the Courts to resolve issues of resourcing and performance reporting in a

⁴ Canberra Times, "Pressure on Corbell to act on judge rap" December 17, 2012: Louis Andrews, Court Reporter. See: <http://www.canberratimes.com.au/act-news/pressure-on-corbell-to-act-on-judge-rap-20121216-2bhx6.html#ixzz3lpJVihXR> (last accessed 11 December 2014).

constructive manner. The details of a resource allocation model based on Court workloads, calibrated by performance benchmarks from other jurisdictions, are being finalised through an independent advisor. Other steps have been taken to improve the relationship between the judiciary and the legislature and executive. Both the Magistrates Court and Supreme Court have developed public annual reporting arrangements on their performance as a key accountability mechanism, and new disciplinary procedures have been developed collaboratively with the government to clarify handling of lesser complaints against judges and magistrates while retaining the exclusive power of the Assembly in cases of possible dismissal.

The only matter of concern raised with the Review in regard to the independence of the courts was the retention of the Court Registry within the Justice and Community Safety Directorate. The Registry manages the work of the Supreme Court, Magistrates Court and the ACT Appeals Tribunal, with its reporting lines and management embedded within the public service of the Territory. While this arrangement allows for the combination of the registries for all ACT courts and tribunals, and therefore allows capture of possible gains in efficiency in a small jurisdiction, it means that the Registry is not directly accountable to the Chief Justice or the Courts it serves. As with any mixed lines of responsibility and accountability, conflicts of priority, interests and loyalty emerge, and the independence of the Courts is inhibited.

Recommendation 1: Other jurisdictions such as South Australia and Victoria have in recent times established fully independent court administrations, and such a step in the ACT would lend further clarity to the independence of the Judiciary within the Principles.

Independence of Parliamentarians

Under the Principles, the independence of Parliamentarians is seen in two ways: namely that elected representatives are able to carry out their functions without unlawful interference, and also the functions of the parliament are not restricted through limiting criticism or using contempt and privilege processes to limit scrutiny of proceedings. The ability of individual parliamentarians to scrutinise the government of the day and its actions, and to represent their constituents without interference is critical to the achievement of Westminster principles such as individual responsibility and accountability and is also reflected under other principles.

(7) Independence of Parliamentarians

(8) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.

(9) Criminal and defamation laws should not be used to restrict legitimate criticism of parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.

The ACT Legislative Assembly has a number of measures that provide for independence of its members from the Executive of the day in line with parliamentary practice across other Australian jurisdictions. The particular matters included in the Principles above were not raised as a concern in the Review, and the notions and practices of political party control over serving members to the extent that that might impact on the independence of members was not further investigated.

The standing orders and practices of the Legislative Assembly in affording non-executive members time and opportunity to pursue issues of their own volition are generous in comparison to other jurisdiction. In addition, the fact that most of the ACT's governments have been minority governments has led in the past to a rich mix of executive and non-executive business being introduced and considered by the Assembly. In past assemblies, it has been usual for between 15 and 30 private members bills to be considered and, importantly, enacted. However, in the 2013/14 year, this privilege, and indicator of members acting independently from the executive was not exercise. Two Executive Member bills were considered, having been introduced by the minor coalition member of the Executive. This is a curious departure from past practice, and necessarily constrains the matters on which the chamber can indicate its position and demonstrate the independence of its members.

Recommendation 2: Given the ability and opportunity for members of the Assembly to introduce private members bills, the ACT would be well served if this opportunity was taken up by non-executive members, and so broaden the legislative deliberations in the Territory.

Independence of the Judiciary

A key component of the Latimer House Principles has to do with ensuring the independence of the Judiciary, an essential requirement of Westminster systems under which the actions of the government are subject to judicial review (see Principle 25). The Principles include:

(10) Independence of the Judiciary

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims the Principles include the following:

(11) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

- (12) equality of opportunity for all who are eligible for judicial office;*
- (13) appointment on merit; and*
- (14) that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.*
- (15) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.*
- (16) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.*
- (17) Interaction, if any, between the executive and the judiciary should not compromise judicial independence. Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties. Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner. An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.*

The ACT is now better placed to demonstrate that it meets these requirements than in the past following a range of reforms to its practices. The appointment of both the current Chief Magistrate and Chief Justice (both of whom are women) followed an openly advertised and transparent selection process based on merit. All judges and magistrates have security of tenure, and no political interference in the affairs of their continued service has occurred. (In the one case of a judge's effectiveness being raised – discussed above – the issue of tenure was not pursued, and administrative and budget relief was adopted as the solution. The rulings of the courts are easily assessable to the profession and the public, and the legal profession has shown itself to be engaged and cooperative in the administration of justice in the ACT (in fact it was the ACT Bar Association that raised the timeliness of judgements of the courts that lead to the review of resourcing and performance of the court system). As indicated above new disciplinary procedures have been developed collaboratively with the government that clarify and strengthen the security of tenor of judicial appointees, and processes for ensuring the adequacy of resources for the workload faced by the court system are being finalised.

The Council of Chief Justices of Australia and New Zealand have adopted a set of guidelines⁵ in regard to communications and relationships between the judicial branch of government and the legislative and executive branches. *These guidelines are fully in accord with the Principles and provide a useful codification of accepted practice in this area.*

⁵ 'Guidelines for Communications and Relationships between the Judicial Branch of the Government and the Legislative and Executive Branches', adopted by the Council of Chief Justices of Australia and New Zealand on 23 April 2014.

3

Public Office Holders

The Principles acknowledge that a modern Westminster system involves a range of statutory office holders who, under their enabling legislation, are responsible for the exercise of specified powers independent of the Executive. The Principles focus on their appointment:

(18) Public Office Holders

(19) Merit and proven integrity, should be the criteria of eligibility for appointment to public office.

(20) Subject to (i), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.

This Review identified four key offices within the ACT most relevant to the Latimer House Principles: the Electoral Commission, Auditor General, Ombudsman and Human Rights Commission. The selection of officer holders to head these bodies has until recently been in the gift of the government of the day, but nevertheless no issues regarding appointments or the attendant processes have been raised in this Review. At the time of the review the Auditor General and Human Rights Commissioner are women; the Electoral Commissioner and Ombudsman are men. In the case of the Ombudsman, the convention adopted in the ACT is to appoint the Commonwealth Ombudsman as the ACT Ombudsman. This reflects the small size of the ACT and the inefficiency of creating an ACT specific body in this area. The selection of the Ombudsman is therefore a Commonwealth matter, and under the current practice, beyond the control of the ACT.

In an important recent change under the current Assembly, three such officers (Electoral Commission, Auditor General, and Ombudsman) have formally become Officers of the Legislative Assembly, further increasing the real, as well as the apparent, independence from the Executive. These office holders are now to be appointed by the Speaker of the Assembly and the budgets for their officers to be established jointly between the Legislature and Executive arms of government under an agreed set of protocols for budget settlement.

The Electoral Commission is now an office of the Parliament, and provided with a separate budget allocation to allow the execution of its duties. Protocols for setting budget allocations for the Commission, as well as the other officers of the parliament, have been settled between the Speaker and the Chief Minister and Treasurer with the budget allocation sought from the government through the Speaker of the Assembly. The Electoral Commissioner is now an advisor to the Assembly on electoral matters (and provided advise to the Assembly in regard to

the increase in the size of the Assembly)⁶, and remains fully independent of the Government. The Commission is armed with an extensive set of legislative powers to investigate and monitor electoral matters such as party funding and electoral fraud.

Similarly, the Auditor General is an Officer of the Parliament with a separate budget allocation for the exercise of her responsibilities. In this case however, there is likely to be a wider difference of opinion between political players as to how generous the budget allocation should be. It would be in a government's interest to restrict the resources available to scrutinise its performance, as it would be in the Opposition interest to maximise that level of scrutiny. At the end of the day, the balance will reflect the politics of the situation, with the amount of pressure on the government to increase allocations dependent on the electorate's view of its importance and likely benefit. Past history has shown that some State governments have reduced the resources available to auditor-generals when displeased with the exposure of shortcomings through audit findings, Victoria under Kennett being a notable recent example.

In the current Assembly, the Opposition has adopted a position of seeking additional resources for the Auditor to undertake an increased number of performance audits, with resources at a level matching those utilised in conducting financial audits. They have indicated they would implement this policy in government, while the Government maintains that current levels of resources are adequate, given budget priorities. *(Another issue raised by the Opposition in regard to Governmental responses to Audit findings is taken up in Section 8 below).*

The Assembly has in place a commendable set of formal protocols for the consideration of the level of resourcing for oversight bodies which involves resourcing bids being considered by the relevant Assembly Committee before the Speaker submits the request to the Government. If the Government does not accept the proposition, the Treasurer must provide a statement to the Assembly. It can be anticipated that this could be a contentious area of business for the Assembly, particularly where due regard is not paid to Committee recommendations. Such an eventuality would require a degree of political compromise to ensure that public confidence in the level of scrutiny to which the Government is being held is not jeopardised.

Recommendation 3: General acceptance of the proposition that adequate resourcing be provided to scrutiny bodies through the budget is more than simply adopting a formal process of consultation on those levels: to strengthen public confidence, it requires the government of the day to reach reasonable consensus across the political spectrum on an acceptable level of allocations to these bodies.

The Ombudsman is also an officer of the parliament, and his independence from direct ACT government interference is further reflected in the convention of his appointment noted above. In 2013–14 the Ombudsman received 467 approaches (374 about agencies and 93 about police) of which 76 were investigated by the office, with a larger number being referred to the agencies concerned for resolution.

⁶ ACT Electoral Commission Report to the ACT Legislative Assembly "Proposed changes to the Electoral Act 1992: Response to the Voting Matters report and further campaign finance reform issues:2014"

Both the Ombudsman and the Auditor General (as designated “disclosure officers”) have powers and responsibilities under the *ACT Public Interest Disclosure Act 2012* for matters relating to both the ACT public services and the ACT Legislative Assembly. Beyond the direct handling of PID matters that come before them, both offices of their own volition could initiate, within the disclosure of information provisions of the PID Act, enquiries into the area of public administration that first came to their attention as a PID matter. The key Public Office holders of the ACT work collaboratively together, meeting regularly to consider matters of joint or overlapping interest and consider the relationships between these officers to be respectful, cooperative and appropriate.

The Human Rights and Discrimination Commissioner continues to be part of the government administration, exercising responsibilities across a range of civil rights and anti-discrimination matters. In regard to Human Rights, there is no jurisdiction to handle breaches of human rights, but the Commissioner provides community education and information about human rights law, reviews the effect of ACT laws on human rights, and advises the Attorney-General on the operation of the Human Rights Act 2004. The Commission is an independent statutory agency, comprising five members of the Commission: the Children & Young People Commissioner; the Disability & Community Services Commissioner; the Discrimination Commissioner; the Health Services Commissioner; and the Human Rights Commissioner. This gives a wide range of protections to the citizens of the ACT in seeking fair and just treatment by government agencies and others in the ACT. The Commission as a whole dealt with just on 700 enquiries and considered some 554 complaints in 2013/14, a level of activity that suggests that the respectful treatment of citizens occurs reasonably well across the ACT, but that complaint handling over discrimination and poor treatment in areas of health, disability and justice remains an important protection for citizens.

4

Ethical Governance

Ethical governance and the responsibilities of the individuals holding positions of influence and power within the system of government are included in the Principles:

(21) Ethical Governance

Ministers, members of parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.

The recent experiences of the state of New South Wales in matters of the integrity of individuals in conducting official business on behalf of its citizens is a timely reminder of the need for adequate commitment to and scrutiny of the integrity of officials and representatives. In interviews for this Review, concerns that the ACT had lessons to learn from others' failures were generally downplayed, and the need for an independent integrity commission of some description was seen as unnecessary. However, issues of conflicts of interest remain, both within the political elite as well as the wider community, in regard to sources of electoral funding in which the inherent dependency of political parties on donations from private and in some cases vested interests continues. It seems that the often rehearsed public airings of the Labor Party's involvement with poker machine revenue, and the role of property developer interests in ACT electoral funding, has not advanced much towards finding sustainable funding arrangements that do not raise integrity issues.⁷ The matter of full public funding was considered, but not resolved in the work of Select Committee consideration of Amendments to the *Electoral Act 1992* (see Report—*Voting Matters*, dated 30 June 2014) where the only agreement was to increase the level of public funding in an attempt, presumably, to reduce dependency on possibly "tainted" fund raising. **Hence, the ACT is no more advanced than other Australian jurisdictions where actual corruption has been found and the perception exists that until this is addressed, the ACT's governance is not as ethically based as it could be.**

Beyond election campaign funding a number of existing mechanisms were generally assessed as adequate in ensuring corruption was likely to be discovered, investigated and acted against in the ACT. Rare instances of where public servants had acted corruptly were cited as an indication of this adequacy. In the case of planning approval, a well acknowledged high risk issue, the highly public nature and exposure of decision making in this area was proffered as an adequate preventative mechanism.

⁷ Hansard, 5 August 2014: Gentleman. See: <http://www.hansard.act.gov.au/hansard/2014/week07/1938.htm> (last accessed 14 December 2014).

The ACT has shown itself to again be a leading jurisdiction by the Assembly introducing a Commission of Standards as a check on the integrity and behaviour of Assembly members. The Commissioner is an independent (part time) Officer of the Parliament, responsible for investigating specific complaints referred by the Speaker or Deputy Speaker, including possible breaches of the Members' Code of Conduct. The Commissioner is required to report findings from investigations to the Standing Committee on Administration and Procedure. So far, no matters have been referred.

The Commissioner of Standards does not have powers that reach back into the ethical conduct in the internal affairs of political parties themselves, although the Electoral Commissioner can investigate alleged breaches of electoral laws, including political donations. Experience in other jurisdictions suggests that wider powers and authority to investigate such areas could bear fruit.

Like other jurisdictions, the ACT now has a register for lobbyists, but unlike other States, the coverage of the register in the ACT extends to include those meeting with non-executive members and the staff of members of the Assembly.

The ACT public service has a strong ethical basis with a well-established set of values and code of conduct enshrined in legislation (*Division 2.1, Public Sector Management Act 1994*) and associated disciplinary procedures. Public officials saw the current arrangements for referral of alleged corruption or mal-administration to the police where the allegation involves, or could involve, an offence as a satisfactory and appropriate response.

As indicated above, the number of cases where corruption has been discovered and prosecuted in the ACT is small and as a result, when discovered, become newsworthy. This suggests that the integrity of government decision making and administration in the ACT is of a high order. Nevertheless, other jurisdictions have found it necessary and beneficial to establish independent commissions against corruption to protect the ethical governance of their jurisdiction and the ACT could consider the benefits of following this practice at some point in the future. As recently reported, the Australian Public Service Commission's view that little corruption occurred in that service was questioned by experts in the field who warned that the Commission may be deluding itself in this matter.⁸ By its nature corruption is undertaken with a view of not being discovered and hidden from overseeing authority.

Recommendation 4: The ACT would do well not to remain complacent in the area of possible corruption, and seek out appropriate strategies to guard against the probability of a growing corruption threat to good sound governance of the ACT. While an ongoing stand-alone corruption commission may not be justified for a small jurisdiction, other measures such as providing investigative powers and resources to existing integrity bodies and adopting mandatory review obligation by the Auditor in selected areas of administration could be considered.

⁸ Bartos, S., 'Our costly complacency on corruption', *The Canberra Times*, 5 March 2013. See: <http://www.canberratimes.com.au/federal-politics/our-costly-complacency-on-corruption-20130304-2fe2f.html> (last accessed 3 February 2015).

A further dimension to ensuring ethical governance in a polity is the protection of its citizens' human rights against the incursions of authoritarian governments. In 2004, the ACT was the first Australian jurisdiction to adopt a Human Rights Act to provide an explicit statutory basis for respecting, protecting and promoting civil and political rights. The office of Human Rights and Discrimination Commissioner was been established to ensure universal human rights are enjoyed by everyone in the ACT regardless of gender, religious belief, nationality, race or any other point of difference.⁹

⁹ See: <http://www.hrc.act.gov.au/res/Section%2032%20-%20Declaration%20of%20incompatibility.pdf> (last accessed 16 December 2014).

5 Accountability Mechanisms

Accountability mechanisms apply to all arms of the Westminster system, including the accountability of the parliament to the citizens through the ballot box. The Principles include:

(22) Accountability Mechanisms

(23) Executive Accountability to Parliament

Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament.

The ACT Legislative Assembly has a number of measures that provide for scrutiny by the parliament of the executive. The range of opportunities for all members to instigate public issues, whether through questioning of the Executive through Question Time, initiating private members bills and matters of public importance, through debate of Government business, or through the established Committee system is extensive, and in comparison to practices in other Australian parliaments, often far richer.

The perspectives that members bring to these arrangements will obviously depend on whether they are in government or opposition, and the arrangements and practices which are adopted, rightly, reflect the balance of power within the Assembly. In this, the ACT is well served by the proportional representation electoral system it has. Under this approach, minority government have occurred frequently, and the power of the Assembly to structure its affairs to strengthen the level of scrutiny and accountability it can exercise over the government of the day has been enhanced. In both the current and previous Assemblies, the minority Labor government has entered “parliamentary agreements” with the Greens that provide for a range of parliamentary practices and reforms, as well as commitments to implement a range of policy and administrative measures within government. Under its current approach, the Assembly has followed generous question time arrangements and devotes one day a (sitting) week to non-government business, far in excess of practices elsewhere.

Underlying civility has been a hallmark of the 17 member Legislative Assembly, and the openness and accessibility of its proceedings to the ACT citizens tends to mitigate punitive or legalistic practices in the proceedings of the Assembly. In addition, the past two Assemblies have also seen non-government Speakers preside over proceedings.

The ACT Assembly has a well-established committee system, including the Public Accounts Committee. Issues of committee structure and membership were raised in the Review, with a concern being raised that with an equally balanced Assembly (both major parties have 8 members) equal representation on committees reduces their effectiveness in holding the

Executive to account, or in pursuing investigations that might raise concerns for the government of the day. It must however be recognised that it is in no way exceptional for parliament committees in any parliamentary system to reflect the composition of the chamber. It would be unusual in the extreme to see a committee system dominated by non-government members who could theoretically establish a de-facto alternative government to the one with the confidence of the parliament. In the ACT's balanced committees it is possible for the non-government members of committees to provide dissenting reports for consideration of the Assembly and to publicly raise concerns with committee processes. It is noteworthy however that the committee system of the Assembly is not being used to scrutinise in depth the policy issues within legislation with no referrals of legislation to policy committees occurring in 2013/14.¹⁰

The PAC is chaired by a non-government member, and provides for an open scrutiny of the budgetary and financial affairs of the Territory. Budget hearings and public hearings are well established in the ACT.

Concerns were raised with the Review that the government has changed the way it publicly responds to the recommendations of the Auditor General. From November 2013 a truncated approach has been adopted that removed the initial response from the Directorate concerned to individual recommendations of the Auditor General and limited the Government's submission to the PAC to general statements only¹¹. If and only if, the PAC undertakes an inquiry into the Auditor's findings and tables a Report does the Government respond with a detailed position indicated on each recommendation. The recent introduction of this new practice is at odds past practice and with those followed in other jurisdictions.

The Government appears to have taken an expeditious approach to streamline processes, guided by directing public service resources to priorities on-hand, rather than one of full and open commitment to the Principle of scrutiny of action and performance, or to notions of continuous improvement. It appears to be somewhat self-serving in that it delays approved responses to reports for some considerable period, and necessarily focusses only on those contentious issues remaining after PAC scrutiny. Given the PAC is now, like all committees of the Assembly, evenly balanced between government and opposition members, the likelihood of close scrutiny of poor performance is significantly diminished.

Based on previous outcomes of audit reports most recommendations are likely to be supported by government, be non-controversial, represent good management practice and not involve significant resourcing imposts. A "continuous improvement" philosophy would see such recommendations welcomed and publicly acknowledged, taken up and quickly implemented as

¹⁰ Annual Report: Legislative Assembly for the ACT 2013/14. Available on-line at: http://www.parliament.act.gov.au/__data/assets/pdf_file/0018/644013/Annual-Report-accessible-PDF-for-website-2014-0925.pdf, p. 81 (last accessed 14 December 2014).

¹¹ Annual Report: ACT Auditor Generals 2013-14, page 149. Available on-line at: <http://www.audit.act.gov.au/Annual%20Reports/ACT%20Audit%20Office%20-%20Annual%20Report%202013-14%20-%20loaded%20to%20website.pdf> (last accessed 14 December 2014).

management initiatives without detriment to the government, rather than lost or delayed due to political posturing.

Recommendation 4: A granular approach whereby the likely majority of audit findings could be “triaged” directly into rapid implementation while more contentious or resource intensive recommendations face greater political scrutiny and process would seem an appropriate strategy more in line with the Principles.

(24) Judicial Accountability

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies. In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness. The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

The ACT’s judicial system cannot be said to be marked by issues of controversy or public condemnation. On the contrary, the reputation of the courts, and the standing of judicial officers in the community is overwhelmingly high.

The Courts themselves are conscious of the need for high standing and have initiated measures to show their accountability to society. A range of indicators relating to court actions and performance are now being produced by the Supreme and Magistrates Courts. Proceedings, decisions and the dealings of the courts are made easily accessible, and new disciplinary procedures have been developed collaboratively with the government that clarify and strengthen the security of tenor of judicial appointees.

No instances of the courts seeking to restrict criticism of their performance were drawn to the notice of the Review.

(25) Judicial Review

Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

Judicial review exists in full measure in the ACT through a range of appeal rights and protections within the hierarchy of courts through which legal matters can proceed. In some matters the

right of appeal can be seen as a highly over-rated commodity and itself a cause of concern to the citizenry.

The most apparent issues that are pursued through various levels of judicial review in the ACT are planning decisions for infrastructure projects and commercial developments. The common feature in the following examples are that narrow vested interests seek to overturn decisions on public or commercial amenity approved for the wider good by the government.

Canberra Airport Corporation, commercial provider of large retail space (which itself was exempt from Territory Planning laws by being located on the federal Canberra Airport precinct) unsuccessfully challenged the ACT government's right to approve development of a competing large retail project (DFO) in nearby Fyshwick. After considerable delay and expense, the DFO was completed.

Similarly, the GDE was stalled for a considerable time over the objections and repeated legal challenges by a group of Aranda residents, adding an estimated \$20m¹² to the overall cost of the project that serves the interests of citizens across Canberra. This was a classic case of NIMBY attitudes by a small number of residents, despite the overwhelming benefits to the wider ACT community and economy.

In the case of the Giralang Shops redevelopment, judicial review of a planning system has involved four levels of review through judicial bodies: an appeal to the ACTPLA approval of a redevelopment proposal to the ACT Civil and Administrative Tribunal (ACAT) and following the Minister's decision to "call in" (approve) the proposal; an unsuccessful appeal to the ACT Supreme Court under the *Administrative Decisions (Judicial Review) Act 1989*; an unsuccessful appeal to that ruling to the Court of Appeal, and then referral to the High Court of Australia over the matter of standing afforded the appellants in the lower courts. The High Court has now referred the matter back to further judicial review on the merits of the Minister's decision, rather than the standing afforded the appellants. This has involved a huge use of legal and court resources stretching, from the first appeal, over 4 ½ years. In the meantime, the interests of the citizens in access to local convenient shopping have been denied, not by the actions of government, but the process of judicial review itself being pursued by competing commercial interests to delay and limit access by other supermarket chains.

The Government has recently sought to limit appeal rights through legislation in regard to plans for a light rail system in northern Canberra and Gungahlin in an attempt to reduce the additional cost to the project of being subjected to delay and appeal by narrow vested interests. Its justification for this action has been that the project is part of an electoral mandate. It seems that the unfettered rights of narrow vested interests to seek to thwart broader interests of the citizens of the ACT needs reflection and review if the very expensive and most often fruitless processes are to be avoided.

Recommendation 6: The approach to seek legislative approval through the whole of the Assembly to limit judicial review rights (as in the case of the Light Rail) is a satisfactory and democratic safeguard to the exercise of such limitations in the ACT's Westminster system of

¹² Estimated by former Chief Minister Jon Stanhope.

government and an appropriate way to avoid additional costs being imposed on ACT taxpayers.

Nevertheless, in other areas of individual rights and duties, the interests of good governance in the ACT are well served by the ready availability of judicial review of government actions whereby citizens are protected in matters of far more directly personal importance than planning disputes. In these cases, it is the rule of law that is being tested, rather than the sectional interests of a few that are more rightly pursued through the ballot box.

6 The Law-making Process

(26) The law-making process

In order to enhance the effectiveness of law making as an essential element of the good governance agenda:

(27) there should be adequate parliamentary examination of proposed legislation;

(28) where appropriate, opportunity should be given for public input into the legislative process; and

(29) parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.

Law making in the ACT by the Legislative Assembly in large measure provides for the requirements of these principles. In 2013-14, the Assembly approved 52 executive bills and 3 executive members' bills (bills introduced by the ACT Greens MLA).

The normal passage of legislation in the ACT has a number of sound processes that find support in the Principles. There is a Scrutiny of Bills Committee that ensures legal drafting is closely examined (including through independent legal advice on rights and liberties, application and onus of proof matters), and all bills are accompanied by a statement of compatibility with the Human Rights Act. Policy committees of the Assembly are to conduct enquiries into legislation where they so choose.

The current Assembly however has made little use of standing policy committees to enquire deeply into the legislation being brought to the parliament. In 2013/14 there were five such committees (along with 4 Select committees and the PAC) and yet no bills were referred for enquiry. ***This lack of detailed scrutiny of legislation by committees sees a valuable opportunity for strengthening the law making process being lost.***

Concerns were raised that current practices in the timing of debates for government legislation do not facilitate widespread public consultation by members of the Assembly after introduction. Usual practice is for debate to be held in the second sitting week following introduction which does limit the time available for non-government members to approach constituents and their representative associations/organisations with the intention of getting a considered response to a Bill.

This concern is heightened in light of non-government members' concerns over the effectiveness of the current committee system to be able to routinely refer legislation for examination by the relevant policy committee, a practice in some other jurisdiction. In the 2013/14 year, 58 bills were introduced to the parliament, and while all were considered by the

“scrutiny of bills” committee (Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)” on a “non-policy” basis, only one other non-appropriation bill appears to have been more fully considered by the relevant policy committee.

The Government has argued that prior public consultation in the preparation of legislation is the norm, and little is likely to be gained from more extensive post-introduction consultation. However, such an attitude seems to be at odds with the intent that the parliament, rather than the Executive, has adequate time to consult on and consider the laws it is being asked to pass.

Recommendation 7: Jointly establishing protocols between all parties in the Assembly on the time available for public consultation by the Assembly on, and Committee consideration of, new legislation may assuage concerns, and close the gap between current practice and a more generous and inclusive approach that could reasonably be adopted with little detriment to government business.

Exemptions could be made in those cases where there is genuine urgency to pass legislation.

7 Oversight of Government

As covered in other areas of the Principles, holding governments to account is a significant component to the democratic process and in which the ACT has extensive arrangements.

(30) Oversight of Government

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process. Steps which may be taken to encourage public sector accountability include:

(31) The establishment of scrutiny bodies and mechanisms to oversee government enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as public accounts committees, ombudsmen, human rights commissions, auditors-general, anti-corruption commissions, information commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances.

(32) Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

The ACT has in place many of the mechanisms identified in the Principles as important for overseeing government. The Territory has a public accounts committee, an ombudsman, a human rights commission, an auditors-general, freedom of information legislation which can, and do, play a key role in enhancing public awareness of good governance and rule of law. However, the Review found there is a general reluctance toward the establishment of independent investigative bodies such as anti-corruption or crime commissions beyond the current policing arrangements for the Territory. This is partly because of a perception that there is in fact very little corruption or wrong doing possible in a sophisticated, close community like the ACT. Nevertheless, warnings elsewhere in this Review suggest that complacency is not a friend of good governance, even in seemingly benign city-states. It is also been argued by respondents to this Review that the size of the ACT does not warrant some of the trappings of more significant jurisdictions – this certainly has been the argument for not having a stand-alone Assembly Budget Office. The fear remains that such views actually play to the preferences of the political class, rather than the protection of the citizens.

Recommendation 8: As with the approach taken with appointing a part-time Commissioner of Standards for the Assembly, the ACT should consider other ways of attesting to the integrity of its system of government more independently of those with an interest in the current systems and approaches. Periodic reviews with specific terms of reference undertaken by eminent independent experts could be one possible approach.

By its nature the Canberra community takes a keen interest in government, and has a number of (traditional) media outlets through which the city's affairs are paraded and transparency and accountability promoted. Proceedings of the Assembly are open to the public and members afforded adequate time to raise matters of public importance. Growing use of social media has the potential to make all democracies more open, transparent and less constrained to limited or biased news and access to information.

8

Future Challenges

The last of the Latimer House Principles identifies the notion of a Civil Society, but only at the broadest level.

33. Civil Society

Parliaments and governments should recognise the role that civil society plays in the implementation of the Commonwealth's fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.

This leads to consideration of two aspects, namely, the methods by which citizens are formally entitled to *lawful participation in the democratic process* and the wider notion of citizen engagement in policy development and operational delivery.

The first of these goes to the effectiveness of the electoral arrangements, in reflecting the choices of the electorate in determining the make-up of the Legislative assembly, and the subsequent selection of the Government.

The electoral system used in the ACT is the Robson rotation Hare-Clarke Proportional (Multi-member electorate) system. As a proportional representation system, with the addition of Robinson rotation, this should result in very close representation of the voting choices of the electorate. In past Assemblies this has resulted in minority governments in all but one term (2004-2008). In the future with an expanded number of members, it is possible that greater stability for the major parties will occur. However this is not certain.

From a citizen's point of view, it could be that the benefits of minority government continue with the expansion of the Assembly. Minority governments depend on more than party loyalty for their continuance, and so the dependence by the Executive on establishing harmonious relations with the Legislature is increased. Modern democratic government is less and less the domain of long serving entrenched dominant parties and more about brokered consensus-building across a spectrum of citizen preferences. This does not make government easy, but it does increase accountability to the electorate albeit with the risk of a decline into populism or political gridlock.

This Review has not been resourced to fully examine the notion of civil society as set out at Item 33 of the Principles. To do justice to an examination of this principle would be a review process in itself and would necessarily involve considering recent emerging pressures within democracies for greater citizen engagement in the processes of government. This pressure has emerged more strongly and certainly gained momentum since the Principles were initially formulated. Beyond the notions of fair and robust electoral systems the ways by which this

principle could be implemented are largely underdeveloped and un-tried within the ACT Legislative Assembly as well as elsewhere. However, the ACT Public Service has put significant thought into new forms of citizen-centric governance which the Assembly could learn from. For example, “Time to Talk” (see: <http://timetotalk.act.gov.au/>) and, in particular, the ACT Community Services Directorate’s innovative work through the West Belconnen Local Services Network which utilizes a community-driven development approach.

The concept of citizen-initiated referenda has been muted in the ACT in the recent past but not taken up. Without a broader approach to citizen engagement and complimentary initiatives to provide new avenues for participation, such a mechanism could prove counter-productive in building civil society. Rather, current interest in developing more participatory approaches in policy and operational delivery could be harnessed and pursued.

In recent times, the government and Assembly have put considerable effort into greater engagement strategies, and increasing the openness of government. One example has been the acceptance of “e-petitions” by the Assembly which allow ACT residents to add their names electronically to petitions notified on the Assembly’s website. However, it seems only a small number of residents are currently responsive to such initiatives and participate in these types of activities.

Recommendation 9: The ACT would be well served if a wider range of citizen engagement strategies were considered and followed in the ACT drawing on innovations currently being deployed in the ACT public service.

The evidence from a nationally based research study with the Museum of Australian Democracy (Evans et al., 2013&2014) suggests that the ACT is ideally placed to be a centre for innovation in democratic innovation. Australians want to see reforms to the representative system of government to ensure that politicians do what they are supposed to do and they also want to see participatory reforms to give them a greater say in decision making. Citizens want to experience democratic politics that are more accountable, open, participatory and digital (Evans et al., 2014).

The evidence that the study has been able to generate about how Australian citizens calibrate their engagement with their political system supports those who argue against the view that citizens are ingrained in their disdain of and disengagement from politics. Rather the study shows that many Australian citizens do participate in politics, across quite a wide repertoire of political acts. Equally though many appear to do nothing more than vote. While many Australian citizens sign up to stereotypical criticisms of politics as ‘all talk and no action’ and as ‘selling out principles’ considerably more citizens lend their support to a set of propositions that favoured a complex understanding of democratic realities: recognising the need for debate before decision; the value that making compromises brings; and the importance of elected representatives making political and governmental decisions rather than those with business or other technical expertise. Moreover, the study found that, if asked about what could shift their

interest and engagement in politics, only (just over) a third of Australians judged that their interest would remain fixed. About 4 in 10 would respond by getting more engaged if politics was more open and 2 in 10 if the political context got worse – that is they judged that politics had got more self-serving – then that would trigger their engagement.

In short, the study evidence supports the argument that citizen engagement with politics is contingent and conditional. In addition, a further finding from the survey was that 77 per cent of citizens wanted more scope for direct democracy through referendums over major decisions. This suggests that Australian citizens could be up for a more extended role if a different politics was on offer.

How then should the political system respond to these insights? There are of course several options from more direct democracy to other practices for enhancing political participation such as the devolution of decision-making in certain areas direct to community through various forms of localism (see Evans, Marsh and Stoker ed., 2013 and Hildreth, 2011).¹³ It seems that one commendable path to reform, therefore, is not about choosing between representative and participatory democratic models but of finding linking arrangements between them. Why? Because it is evident from study findings that citizens have complex orientations towards democracy. There is some support for a new participatory politics but in practice many citizens are inactive beyond voting. By implication there appears to be considerable appetite for using participation to shore up representative democracy and develop a more integrated, inclusive and responsive democratic system.

This finding is amplified in the results of a further survey conducted in January 2014 in collaboration with the Museum of Australian Democracy at Old Parliament House in Canberra.¹⁴ A representative sample of Australians were asked to consider a range of reforms to their political system. The choice of reforms deliberately included those aimed at enhancing the efficacy of the representative political system, changes to the electoral system itself, the extension of participation through localism and new forms of participation (see Chart 1). Reforms of the representative political system came top. Reforms to the electoral system came second but were popular across all generations of citizens. On-line participation proved least popular across all generations but with strong support amongst younger generations. All generations endorse the importance of participatory reforms with the aim of shoring up representative democracy and developing a more integrated, inclusive and responsive

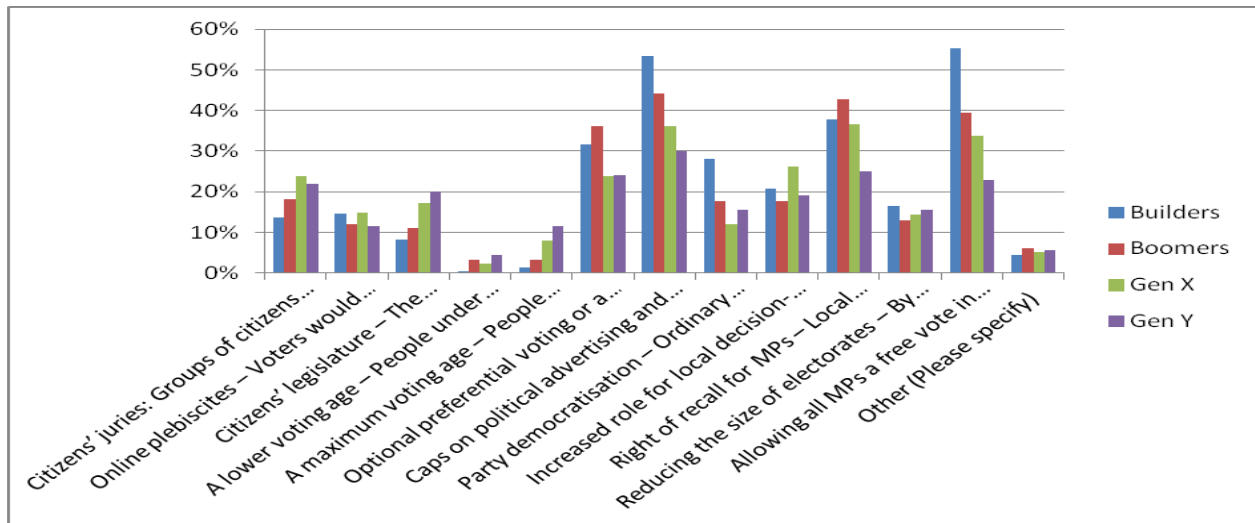
¹³ We define localism as ‘The devolution of power, or functions and/or resources away from central control and towards front-line managers, local democratic structures, local institutions and local communities, within an agreed framework of Commonwealth, State or Territory minimum standards’ (Evans *et al.*, 2013, p. 3).

¹⁴ This survey explores how four different generations of Australians imagine their democracy, by examining their democratic experiences, their understanding of challenges to Australian democracy and how they imagine their democratic futures. The four generations include: the Builders (born 1925–1945), Baby Boomers (born 1946–1964), Generation X (born 1965–1979) and Millennials (born 1980–1994). The survey findings will help to inform the development of a new exhibition at the Museum of Australian Democracy entitled *The Power of One: Does your vote count in the modern world?* The exhibition was launched in November 2014.

democratic system. Crucially, it will help Australia evade the dangers of what Colin Crouch (2000: 56) has termed ‘post democracy’, ‘leading to politics once again becoming an affair of closed elites, as it was in pre-democratic times’. As the Nobel Laureate Amartyr Sen, puts it in his book *Development as Freedom* (1999), the quality of a democracy should be measured as much by how it reaches a decision as the decisions it reaches.

It seems that the reform process would need to proceed on the basis of four fundamental principles – politicians as the key agents of change, non-partisanship, institutional strengthening and connecting-up the citizen with the Canberra-village. The first principle proceeds from the assumption that politicians should act as the bridge between representative and participatory democracy. The second principle follows the insight that anti-politics is about the health of Australian democracy and is a problem for all politicians regardless of party politics. The third principle is based on the idea that it makes sense to use existing institutions which already have public legitimacy and trust to build the new politics (such as the Assembly). The fourth principle is rooted in the popular perception that reforms are needed to bring Canberra closer to the people and the people closer to Canberra.

Chart 1. Reform trajectories



9

Parting Shot

In undertaking this review, evidence was collected from extensive interviews with the “custodians” of the ACT system of government, as well the examination of the substantial material about the operations of the various arms of government available through annual reports and websites of various bodies within the ACT. Nevertheless, assembling an integrated and comprehensive set of objective data about the governance of the ACT from a range of fragmented sources is problematic, and beyond the resources available for the current undertaking. As a result, the findings that could be drawn from the current exercise are more limited than should be the case for such an important study. Moreover, the evidence base is heavily reliant on the perceptions of political and bureaucratic elites. We therefore recommend that: 1) a set of agreed indicators for future evaluation of the implementation of the Latimer Principles is developed; 2) data is collected in relation to these indicators on an annual basis to allow for the objective assessment of progress; and 3), an annual report is tabled at the ACT Legislative Assembly.

Recommendation 10: The ACT Legislature should review the data needs of engaging in subsequent reviews of the implementation of the Latimer House Principles to ensure that they are driven by objectively derived data in addition to elite perceptions.

References

ACT Audit Office (2014): Annual Report 2013-14 Report no. 6/2014

<http://www.audit.act.gov.au/Annual%20Reports/ACT%20Audit%20Office%20-%20Annual%20Report%202013-14%20-%20loaded%20to%20website.pdf>

ACT Electoral Commission (2014): Report to the ACT Legislative Assembly “Proposed changes to the Electoral Act 1992: Response to the Voting Matters report and further campaign finance reform issues:2014”

ACT Ombudsman(2014): Annual Report 2013-2014 http://ombudsman.act.gov.au/docs/associated-with-reports/online_act_annual_report_1314.pdf

Aulich, C. Evans, M., & Wettenhall, eds. (2011), *Understanding Integrity Agencies in Australia*, Routledge, Taylor Francis.

Brown, A.J. (2014), *Griffith Constitutional Values Survey (2014)*, Brisbane, University of Griffith. Available on-line at: www.griffith.edu.au/federalism (last accessed 21/12/2014).

Burmester, B. Evans, M. and Whitton, H. (2011), *Austrade Governance Review*, Canberra (IGPA/Austrade).

Crouch. C. (2000), *Coping with Post-democracy*. Fabian Ideas, 598. London: Fabian Society.

Evans, M. (2004), *Constitution-making Under New Labour*, London, Palgrave.

Evans, M. Stoker, G. and Nasir, J. (2013), *How do Australians Imagine Their Democracy? 2013 Australian Survey of Political Engagement*. Canberra: IGPA. Available on-line at: <http://www.governanceinstitute.edu.au/research/publications/recent-reports>.

Evans, M., Halupka, M. and Stoker, G. (2014), *The Power of One Voice – power an powerlessness and Australian democracy*. Canberra: IGPA/MOAD. Available on-line at: <http://www.governanceinstitute.edu.au/research/publications/recent-reports>.

Evans, M. Marsh, D. and Stoker, G. eds. (2013), *Understanding Localism*. Double Special Issue of *Policy Studies*, 34: 4-6.

Hildreth, P. (2011), What is localism, and what implications do different models have for managing the local economy? *Local Economy*, 26: 702-714.

Legislative Assembly for the ACT, (2014). *Annual Report 2013/14*
http://www.parliament.act.gov.au/data/assets/pdf_file/0018/644013/Annual-Report-accessible-PDF-for-website-2014-0925.pdf

OECD (2014), *2014 OECD Regional Wellbeing Survey Report*, Paris, OECD. Available on-line at: www.oecd.org (last accessed 21/12/2014).

Sen, A. (1999), *Development as Freedom*. New York: Alfred Knopf.

Attachment A.

LATIMER HOUSE PRINCIPLES

Resolution agreed by the Assembly

11 December 2008 (amended 23 February 2012)

That:

(1) **Preamble**

Members of the Legislative Assembly endorse and adopt the Commonwealth (Latimer) House Principles on the Three Branches of Government as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003.

Members do so in acknowledgment that the principles express the fundamental values they believe should govern the relationship between the three branches of government in the Australian Capital Territory.

The Principles

(2) **Objective**

The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.

(3) **The Three Branches of Government**

Each Commonwealth country's parliaments, executives and judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

(4) **Parliament and the Judiciary**

(5) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

(6) Judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

(7) Independence of Parliamentarians

- (8) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.
- (9) Criminal and defamation laws should not be used to restrict legitimate criticism of parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.

(10) Independence of the Judiciary

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims:

- (11) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:
 - (12) equality of opportunity for all who are eligible for judicial office;
 - (13) appointment on merit; and
 - (14) that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.
- (15) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.
- (16) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.

- (17) Interaction, if any, between the executive and the judiciary should not compromise judicial independence. Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties. Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner. An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.
- (18) Public Office Holders
- (19) Merit and proven integrity, should be the criteria of eligibility for appointment to public office.
- (20) Subject to (i), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.
- (21) Ethical Governance
- Ministers, members of parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.
- (22) Accountability Mechanisms
- (23) Executive Accountability to Parliament
- Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament.

(24) Judicial Accountability

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The Principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies. In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness. The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

(25) Judicial review

Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

(26) The law-making process

In order to enhance the effectiveness of law making as an essential element of the good governance agenda:

- (27) there should be adequate parliamentary examination of proposed legislation;
- (28) where appropriate, opportunity should be given for public input into the legislative process; and
- (29) parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.

(30) Oversight of Government

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process. Steps which may be taken to encourage public sector accountability include:

(31) The establishment of scrutiny bodies and mechanisms to oversee government, enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as public accounts committees, ombudsmen, human rights commissions, auditors-general, anti-corruption commissions, information commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances.

(32) Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

(33) Civil Society

Parliaments and governments should recognise the role that civil society plays in the implementation of the Commonwealth's fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.

(2A) In the second year after a general election, following consultation with the Standing Committee on Administration and Procedure, the Speaker shall appoint a suitably qualified person to conduct an assessment of the implementation of the Latimer House Principles in the governance of the ACT with the resultant report:

(a) to be tabled in the Legislative Assembly by the Speaker; and

(34) to be referred to the Standing Committee on Administration and Procedure for inquiry and report.

(35) This resolution has effect from the commencement of the Seventh Assembly and continues in force unless and until amended or repealed by this or subsequent Assembly.