SUBMISSION TO STANDING COMMITTEE ON ADMINISTRATION AND PROCEDURE REVIEW OF AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) ACT 1988 (C'WLTH) AND ASSOCIATED LEGISLATION

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I have been invited by Mr Shane Rattenbury MLA, Chair of the Standing Committee on Administration and Procedure, Legislative Assembly for the Australian Capital Territory, to make a submission to the Review of the Australian Capital Territory (Self-Government) Act 1988 (C'wlth) and associated legislation now being conducted by the Committee. This submission is in pursuance of that invitation.

It is in two parts. The first comments on several matters raised in the recent report by my University of Canberra colleague Professor John Halligan entitled *An Assessment of the Performance of the Three Branches of Government in ACT Against Latimer House Principles* (Halligan 2011). The second deals with another matter that was touched on fairly briefly in the Hawke Report *Governing the City State* (Hawke 2011), and only tangentially in the Halligan Report: the use of arm's length (non-departmental) bodies in ACT administration. This issue has long been of serious research interest to me, and I believe it connects significantly with the ACT's self-governing arrangements. It raises questions that relate particularly to the Legislation Act, the Financial Management Act and the Public Sector Management Act, which together constitute a body of legislation associated with the Self-Government Act and which play vitally important roles in the working of our system of self-government.

I. MATTERS REFERRED TO IN THE HALLIGAN REPORT

Adherence to Latimer Principles

Press reportage of the Halligan Report was concerned particularly with its recommendations concerning the size and title of the Legislative Assembly (esp. Kretowicz 2011; *Canberra Times* 2011). Obviously this was judged to have most immediate interest for the Canberra community. But the provenance of the report was broader: Halligan had been commissioned to assess the performance of the three arms of ACT government (legislative, executive and judicial) against the Latimer House Principles.

These Principles have been the subject of a previous inquiry by the Standing Committee on Administration and Procedure (SCAP2009), and before that the Assembly was assessed against the associated Commonwealth Parliamentary Association (CPA) Benchmarks by former Speaker Wayne Berry (Berry 2008). The Principles were first enunciated as a plan of action by (British) Commonwealth political and judicial luminaries at a conference at Latimer House, Buckinghamshire, UK, in 1998, and they have subsequently been endorsed and developed at a series of meetings of Commonwealth Heads of Governments, Commonwealth legal bodies and the CPA. In essence, they convey a package of benchmarks designed to achieve best-practice standards of parliamentary government. To achieve such best practice, there must be strong measures to ensure the independence of the legislature and the judiciary from executive government control.[1]

The Halligan Report opens by observing that the three branches of government in the ACT perform strongly against Latimer Principles. But it sees at least 'potential tension' arising in seeking to realise the principles in a jurisdiction as 'small and intimate' as the ACT and, more generally, a problem in that the principles may pull in different directions when branch independence needs 'to be reconciled with effective relations between branches' (Halligan 2011: 1). It also makes the important point (pp.6-7) that the executive branch does not feature prominently in the Latimer Principles, whose main concern is with the other branches – whereas, of course, the Hawke report on the ACT city-state, released in February 2011, was primarily concerned with the executive branch (Hawke 2011).

The positive view of the ACT situation in relation to the Latimer Principles is apparent in many parts of the Halligan Report. While it notes that the principle that the legislature should have power to determine its own budget is not applied in the ACT, it sees the alternative arrangement adopted in the ACT as a sensible compromise for this small jurisdiction (pp.8-9). It is less happy with some other features, e.g. that more draft legislation is not passed through the preliminary stage of committee consideration, and that the system has not been able to prevent a large backlog in the processing of cases before the courts. Notwithstanding the finding that there remains 'considerable potential for improving the quality of government in a number of respects' (p.1), however, the Halligan Report comments favourably that the ACT

> has an enviable set of attributes, a number of which distinguish it from inter-state counterparts, which derive from context and the creativity of the political and public service participants in the system. The system of government performs at a high level against Latimer House Principles (p.23).

From my own long observance of the ACT system of government in operation, I am very happy to endorse this positive view. But that does not mean that the system cannot be improved, and I also agree with Halligan that the small size of the Legislative Assembly must be seen as a constraint that prevents the system from performing at an even higher level.

The system has always been limited by Commonwealth power over its legislative capacity, and the recent removal of the power of the Commonwealth minister to veto ACT legislation has had a beneficial liberalizing effect (though that power still resides in the Commonwealth Parliament). The actual size of the Assembly is set by Commonwealth legislation (in the Self-Government Act), so the Commonwealth will need to be persuaded of the merits of any firm proposal to increase the size. There is no such limitation on the sphere of action of a state or the Northern Territory. Here we see that the ACT enjoys a more limited form of self-government than do its 'partners' at the sub-national level of Australian government.

The Legislative Assembly: name and size

The Halligan Report argues that the Assembly would be better styled the 'National Capital Legislative Assembly', which name, it argues, 'implies the civic side and more directly reflects the city and the state and the special status of Canberra within the nation' (pp.2, 41). I have to say that I disagree with this view – it is my only significant disagreement with anything in the Report. I think the proposed change actually detracts from the status of the Assembly by suggesting national ownership at the expense of the community being governed, so affording encouragement to non-Canberrans to intervene freely in its affairs.

The question of the size of the Assembly has been argued almost since the beginning of self-government. The Self-Government Act (s.8) sets the number at 17, and provides that this number may be changed by (Commonwealth) regulation if it is in accordance with a resolution of the Assembly. There have been many proposals over the years to increase the number, but the parties in the Assembly have not agreed on the number. The Pettit Report in 1998 spelt out the many reasons believed to justify an increase, with an optimum size of 25 indicated (Petit 1998: 40); the Hawke Report argued along similar lines (Hawke 2011: 31-33). In 2002 Professor Halligan and I argued in a joint submission to the Assembly's Select Committee on Legal Affairs, inquiring into the same issue, that it would make sense to have a 21-member Assembly (with three 7-member electorates) (Halligan & Wettenhall 2002). But Halligan argues now, and I agree with him, that 25 is an appropriate number.

There are many good reasons justifying such a change. But the Halligan Report makes much of two particular reasons which link the Assembly closely with the processes of executive government, drawing attention to Halligan's caveat that, while the Latimer Principle that there must be strong measures to ensure the independence of the legislature deserves our support, strong measures must also be present to ensure good executive-legislative working relations. First, the ACT's ministry (executive government) has been heavily overloaded, more ministers need to be appointed, and, for this to happen, there must be a larger legislative 'pool'. And second, it is desirable that many more drafts bills (those prepared by the executive as well as those of private members) need to be considered by Assembly committees, and again, for this to happen, there must be more members to service those committees. These are strong arguments justifying the increase in Assembly size to 25 members, augmenting others relating to improved community representation, etc.

Community representation is an issue that received much attention in the Pettit Report as it considered the ability of the small number of MLAs spread over a few quite large multi-member electorates to adequately connect with those they are representing. Turning this sort of sentiment towards the work of executive government, the Halligan Report observes briefly (p.11) that there 'are questions to be asked about whether the municipalisation of administration should be reflected more generally in the ACT system'. That is an interesting comment that may seem puzzling to some, but as has been observed elsewhere (Halligan, Skelly & Wettenhall 2002; Wettenhall 2009: 62) the fact that the ACT is not divided into local government areas with conventional municipal councils marks us out as distinctive among the Australian sub-national jurisdictions and is always deserving of serious attention as we contemplate our governance arrangements.

Judicial branch, statutory office holders, oversight, integrity

The Halligan Report's findings in relation to the judicial branch, statutory office holders, oversight and integrity also deserve serious consideration. In considering the problems that the judicial branch has faced, it may be worth noting that, in the Commonwealth jurisdiction, there has been some effort to separate court administration from the ministerial executive by resorting to statutory authority arrangements (Wettenhall 1986). Halligan discusses Latimer-style judicial independence and the important judicial-legislative relationship while recognising the executive's responsibility for funding (pp.11-17). For statutory office holders, there is now much general interest in declaring some to be 'officers of parliament' to connect them more closely with the legislative rather than the executive branch. In his discussion of integrity needs, the Halligan Report recommends this for the Auditor-General and the Ombudsman (pp.17-20), but recent advocacy extends to other statutory offices.[2]

The issue of statutory office holders merges easily into the broader issue of the use of non-departmental bodies, now increasingly described as 'arm's length bodies', and brings me to the second part of this submission.

II. ARM's LENGTH BODIES IN THE ACT

Maintaining an Australian tradition...

The Hawke Report on *Governing the City State* observed that

> there were currently around 180 boards and committees supported by the ACTPS [ACT Public Service], many of which have a statutory basis.... While there are undoubted benefits from these structures, there are inevitable costs to the decision making process, principal among which is 'dispersion of government entities and resulting lack of readability of the institutional system' (Hawke 2011: 99, quoting from OECD 2002: 24).

Hawke believed the system needed tidying up: along with recommendations relating to several particular entities, he wanted all ACT government boards and committees to be reviewed

> with a view to ensuring the role and function of these bodies is clearly understood and that bodies recommended to continue have clearly designed roles and responsibilities that align with the Government's overall strategic direction and objectives (Hawke 2011: 7).

Similar sentiments have been expressed by reviews in the recent period in a number of countries. There is clearly considerable interest today in the masses of public bodies that inhabit what has sometimes been described as the 'outer public sector', made up of all the non-departmental but still public bodies that contribute so much the active working of our governmental systems (on the Australian Commonwealth, see Wettenhall 2011). Another recent report located about 900 such bodies in Britain, made much of the disorderly state of this outer public sector, and proposed a system of classification in an effort to reduce that disorderliness (Gash et al 2010). We have now embarked on a small research project in the ANZSOG Institute for Governance in the University of Canberra designed to review the ACT position, both as a partial response to the relevant sections of the Hawke Report and as an up-date of earlier work in this area, mostly now forgotten.

There are many reasons for the establishment of such bodies, but the desire to grant their managements more freedom of action than would be possible if they were part of ministerially-headed departments (including a better ability to focus on special client groups, professional concerns, technical issues, etc) is usually prominent among them. Frequently (as in a national broadcasting service) the perceived need to insulate them from close partisan-political control is a parallel motivation. Increasing current use of the term 'arm's length body' [3] invites the comment that the arm's length can be long or short, depending on the amount of autonomy granted a particular agency in its creating statute or charter.

Australia has a long history of using such bodies, in both Commonwealth and state administration and in the statutory form (described variously as statutory authorities, statutory corporations and statutory agencies) and the company form. As a previous study by the Centre for Research in Public Sector Management (CRPSM) in the University of Canberra [4] makes clear, the Commonwealth made ready use of them in its pre-self-government administration of the ACT, and this habit passed easily to the new territory government established in 1989 (Wettenhall & Laver 2002). Along the way, there were several official attempts to make some sense of what was going on across the various portfolios of government.[5]

The so-called integrity agencies constitute a special group of statutory creations within the broader group of non-departmental or arm's length bodies, and were considered in some depth in the Halligan Report. As noted above, a currently asked question is whether some of them should now be categorized as 'officers of parliament' (as is the case in New Zealand). Whether or not that happens, they remain a part of the general category of non-departmental bodies, of which (to repeat) the Hawke Report tells us there are about 180 in the ACT.

The full story is yet to be told – we hope our current research may help unravel it. But it includes the decision of the Kane Alliance Government in 1990 to adopt the New Zealand and New South Wales model of the territory-owned corporation (TOC) for some of the larger and more commercially-oriented authorities, limited use thereafter of that model, and the decision forced on the Carnell Liberal Government by an anti-privatization Assembly in 2000 to link one TOC with a private company in creating what has been described as one of the world's most genuine public-private partnerships (ActewAGL, on which see Wettenhall 2007). Most of the territory's non-departmental bodies remain in the statutory form, and several were affected by change (including closures and revisions of operating charters) induced by the still-secret Costello Strategic and Functional Review of 2006. Many of them have been drawn into the 'shared services' arrangement established after that review, in which a 'business unit' of the Treasury[6] provides a variety of common services (like payroll and staff recruitment: see Shared Services 2011), thus reducing the area of autonomy available to the managers of the agencies involved.

...but in a messy way!

What is now well understood is that a row over the issue of supermarket competition between former Chief Minister Jon Stanhope and the land release section of the relevant department, on the one hand, and the then chief executive of the ACT Planning and Land Authority on the other, was the catalyst for commissioning Allan Hawke to undertake his review of the ACT bureaucracy (Towell 2011a, 2011b).[7] Not surprisingly, 'the planning bureaucracy' was hit hard in the Hawke review, which explained unambiguously that '[c]oncerns about the fragmentation of responsibility for issues relating to land release, land use ... planning, and development loomed as the largest areas of structural focus for the Review'. These concerns, it added, were highlighted by 'the number and respective roles and responsibilities of [departments/directorates] and the other agencies, or parts of agencies that comprise the extraordinary 26 entities involved in approving development in the ACT' (Hawke 2011: 179).

In a submission to the Assembly Standing Committee on Planning and Environment in its 2006 inquiry on proposed changes to the planning and development legislation (Wettenhall 2006), I noted considerable incoherence in the way the ACT government presented information about its administrative arrangements, with that incoherence inevitably flowing over to the way the ACT Planning and Land Authority (ACT LPA) and the Land Development Authority (LDA) were regarded within the system. The 2006 submission identified five different ways of explaining the relevant machinery-of-government arrangements all endorsed officially in government documentation; the submission urged the importance of sorting out the issues involved in order that all concerned – ministers and departments, the legislature and its committees, ALBs (not only ACT PLA and LDA!) and their stakeholders – could move to a better understanding of roles, responsibilities and relationships, and so contribute to a smoother and more transparent governance system.

The Standing Committee observed briefly (SCPE 2006: 47) that, virtually simultaneously with its assessment of the draft planning and development legislation, the Costello Functional and Strategic Review was conducting its own inquiry. It therefore judged it appropriate to leave consideration of such machinery-of-government matters to that inquiry. In a submission to that review, we in the University of Canberra's CRPSM drew attention to the same issue (Aulich & Wettenhall 2006), but given the secrecy surrounding that inquiry we have no sense of how our submission was processed.[8]

More recently we sought to persuade the Standing Committee on Justice and Community Safety that it should support efforts to make the Electoral Commissioner (or Commission?) an 'officer of parliament' (Wettenhall & Aulich 2011). We were conscious that the electoral legislation had created two separately identifiable entities (Commission and Commissioner), but while we saw that duality as potentially confusing we were not aware that it was causing problems at the present time. So we limited ourselves in our formal submission to the 'officer of parliament' issue. Such machinery-of-government discourse was, however, brushed aside: that Committee simply noted our submission 'without further comment' (SCJCS: 37).

Through this series of episodes, the impression is that such machinery-of-government matters are generally regarded as being of too little significance to take up time when operational issues relating to particular agencies are seen to have immediate salience -- or perhaps they are simply seen as being too hard? My argument is that the organizational overlaps and contradictions which exist and which take away clarity in the exercising of functions and managing of relationships are enemies of the cause of good governance, and that they do demand our attention if we are take that cause seriously.

Efforts to classify

In virtually all efforts to classify the various types of bodies to be found in the ALB fringes of most government systems, sub-categories have been required. Thus the British report which gave great currency to the ALB term, noted above, divided the field into four categories based on required degrees of independence (Gash et al 2010). The ACT may not have so many – though 180 is a still significant number, and overlaps and inconsistencies clearly exist. Our investigations have suggested that there may be two essential traditions at work, that of the Chief Minister and Cabinet Department/Directorate and that of the Treasury Department/Directorate; that others within the system seem ready enough to ignore both and 'do their own thing'; and that what little effort there has been to attempt to reconcile these two 'systems' is to be found in the *Legislation Act 2001*. The concerned statutes are essential supplements to the self-government legislation – without them the system would not work at all. But the relevant statutory provisions are very complex, and I question whether they need to be so complex. It would make for better governance if the complexity could be reduced.

Government websites are not concerned with organizational detail. One of the most likely to be helpful[9] includes 'ACT Government Directorates' as one major item (there are currently nine), and 'Boards, commissions, advisory councils and committees' as another (but two of the 21 listed are actually parts of directorates, one relates to a set of 'applications and forms', and another groups Legislative Assembly committees collectively as a single item). We get no clarifying definitions here!

I am aware of three groups of statutory definitions aimed at developing precision in the use of what I am now calling ALBs: they come in the *Legislation Act 2001,* the *Public Sector Management Act 1994,* and the *Financial Management Act 1996,* all as amended. The latter two were presumably influenced in their drafting by the kinds of traditions now embodied in the ACT Chief Minister and Cabinet Directorate and Treasury Directorate respectively.

Appendix A summarizes these formulations. What emerges from this brief survey of the relevant provisions suggests a scramble of terms and meanings, with overlaps aplenty, some contradictions, and escape clauses often added to make observance far less than mandatory. There is particular drift in the main categories of 'territory authority' and 'territory instrumentality'. The main items (with Appendix A providing more detail) are:

Legislation Act

- administrative unit
- territory authority
- territory instrumentality
- territory-owned corporation
- statutory office-holder

Public Sector Management Act

- administrative unit
- territory instrumentality
- autonomous instrumentality
- statutory office-holder

Financial Management Act

- territory authority
- territory-owned corporation.

The annual Financial Audit Reports of the Auditor-General offer a further source of information about ways of categorizing this ALB population. For 2010, however, the term 'agency' was used in a totally undifferentiated way to embrace departments (now directorates) as well as non-departmental bodies, and a simple alphabetical listing embraced the 23 bodies selected for special audit and report. This population comprised six departments, two territory-owned corporations, eight other bodies that are clearly ALBs in our terms, and an otherwise-difficult-to-classify assortment that includes ACTION (within a department but 'a separate entity for reporting purposes'), ActewAGL (as noted, a joint venture or PPP) and UCU Ltd (a wholly-owned subsidiary of the University of Canberra) (Auditor-General 2010).

Appendix A represents a provisional attempt to identify these various classificatory systems, and to illustrate the capacity for confusion and misunderstanding that arises from the failure to seek to establish a single system of classes and definitions to apply across the whole ACT governance system It is my contention that machinery-of-government matters of this sort are too important to be shelved or ignored as we seek to achieve best possible functioning of our system of self-government, and that attention needs to be given to developing some consistency across the provisions of these statutes which serve as vital accompaniments to the ACT (Self-Government) Act 1988. This is, I believe, a matter that rests within the province of the ACT itself and does not require Commonwealth approval or intervention. I urge that this Committee now reviewing that Act <u>and associated legislation</u> should, when it has completed its current inquiry, embark on a further inquiry focusing on how these <u>associated</u> acts operate to structure and condition the ACT's large population of arm's length bodies.

<u>APPENDIX A: STATUTORY TERMS AND DEFINITIONS/EXPLANATIONS</u>

Legislation Act (Dictionary Part 1)

<u>Administrative unit:</u> 'an administrative unit for the time being established under the Public Sector Management Act'.

<u>Territory authority</u>: 'a body established for a public purpose under an Act, but does not include a body declared by regulation not to be a territory authority'.

<u>Territory instrumentality</u>: 'a corporation ... established under an Act or statutory instrument, or under the Corporations Act ... and is a territory authority under the Public Sector Management Act 1994'.

<u>Territory-owned corporation</u>: a corporation established under the Territory-owned Corporations Act 1990.

<u>Statutory office-holder</u>: 'a person occupying a position under an Act or statutory instrument (other than a position in the public service)'.

Public Sector Management Act

[This Act establishes the ACT Public Service, reflecting the transfer of many former units of the Commonwealth Public Service previously involved in ACT administration.]

<u>Administrative unit</u>: The Act declares that the Public Service is made up of administrative units established at the discretion of the Chief Minister and allocated to nominated ministers along with 'enactments and matters' for which the minister is responsible (ss.12-14: see eg Gallagher 2011a, 2011b). These arrangements are effected as 'notifiable instruments' which have the force of law under the Legislation Act. In them it is the departments/directorates that are listed as the 'administrative units' – as far as we can ascertain, there has only been one exception to this, when ACT PLA was accorded 'administrative unit' status for a limited period from 2003 (SCPE 2006: 45).

Territory instrumentality: 'a body corporate established by or under an Act or under the Corporations Act, subject to control and direction by a minister', but not an administrative unit. The Chief Minister can declare (also in a notifiable instrument) that a body is or is not a 'territory instrumentality' (s.3A). Associated definitions make it clear that a 'territorial instrumentality' may or may not have a board. There is discretion (s.24) for individual creating acts to provide that their staffs may be employed under the PSMA, in which case their chief executive will hold powers of a director-general 'as if' they were administrative units under PSMA.[10] [There is specific provision excluding judicial officers (Supreme Court and magistracy), Legal Aid Commission (ACT), Actew Corporation, ACTAB Ltd and University of Canberra from operation of PSMA.]

Autonomous instrumentality: An alternative term for territory instrumentality used in parts of the Act (ss.43, 64).

Statutory office-holder: holder of an office established by an Act. These office-holders hold powers under PSMA 'as if' the organizations they head were administrative units under that Act (s.25).

Note: There is a sense in which whatever PSMA prescribes about the separate existence of ALBs is cancelled out by their treatment in the Administrative Arrangements orders. Dozens of ALBs (or the statutes that create them and that they administer) appear in these orders simply as 'matters' within the responsibility of the listed ministers and therefore as functions of the respective administrative units. In other jurisdictions, such as that of the Commonwealth, they would be clearly separated from departments, and seen instead as outer parts of the portfolios of the various ministers. This practice is evident also when a function clearly undertaken by an ALB is named quite specifically as a ministerial portfolio (as in the case of the Minister for Gaming and Racing in the 9 September 2009 portfolio allocations (Gallagher 2009).

Financial Management Act

Territory authority: a body corporate established by an Act. But there is an escape clause: under s.38 the Treasurer may declare by notifiable instrument that a stated body is not a territory authority for this Act, and such notifiable instruments issued in 2003, 2005 and 2010 have exempted a very miscellaneous group, with the criteria for exemption not explained.[11]

Territory-owned corporation: meaning as in Legislation Act.

Note: This Act regulates the financial dealings of all parts of the ACT public sector. Extensive sections relate to the ALB population, with a clear division between those that have boards and those that don't. Different constructs in the Legislation Act, Public Sector Management Act and Financial Management Act will be obvious.

ENDNOTES:

1. Several of the most relevant documents come as appendices to SCAP 2009.
2. Other generally supportive views can be found in submissions to the current Standing Committee on Administration and Procedure Inquiry into the Feasibility of Establishing the Position of Officer of Parliament (SCAP 2011). A special issue of the journal *Policy Studies* (Aulich, Wettenhall & Evans 2012), which effectively began life as a workshop at the ANZSOG Institute of Governance in the University of Canberra (with several ACT and Commonwealth 'integrity officers' participating), has just been published and raises many relevant issues. In it Aulich writes particularly on ACT agencies (Aulich 2011).
3. 'Quango' was of course an earlier class-name for the general group.
4. Now included in the ANZSOG Institute for Governance.

5. Notably JCACT 1974, Craig 1984, Pearson et al 1984, PRB 1990, Petit 1998, Parkinson 2002.
6. Some such 'business units' of departments (now directorates in the ACT) exist, operating effectively as hybrids with some but not all the characteristics of arm's length bodies: notably the ACTION bus service and the public housing section of the Territory and Municipal Services Directorate.
7. No doubt the row between the Chief Minister and then Auditor-General Tu Pham over Audit Office criticism of the service offered by the ACT Ambulance Service also contributed.
8. What is clear is that, as a result of that exercise, at least one arm's length body (Australian Capital Tourism Corporation) was closed, and others had their roles substantially revised.
9. www.act.gov.au/browse/about-act-government, accessed 10 March 2012.
10. The 'as if' formula has frequently been in use in the Commonwealth public sector, where statutes create ALBs and then provide that their staffs will be appointed under Public Service Act procedures with their chief executives holding powers under the Public Service Act as if they were departmental chiefs in respect of those staff.
11. The group includes ACT PLA, health professions boards, ACT Architects Board, Government Solicitor, Registrar-General, Commissioner for Housing, Australian-American Educational Foundation, Long Service Leave Authority, University of Canberra and several others. From Financial Management (Territory Authorities) Declarations 2003, 2005 and 2010, issued under the Financial Management Guidelines.

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