

10 November 2011

Mr Shane Rattenbury MLA
The Speaker
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Speaker

I have attached the Report *An Assessment of the Performance of the Three Branches of Government in ACT Against Latimer House Principles*.

This report has been prepared as requested by the Standing Committee of Administration and Procedure of the ACT Legislative Assembly.

Yours sincerely



John Halligan
Professor of Public Administration

An Assessment of the Performance of the Three Branches of Government in ACT Against Latimer House Principles

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Remit

The Standing Committee on Administration and Procedure of the ACT Legislative Assembly has resolved that 'the Speaker appoint a suitably qualified person to conduct an assessment of the implementation of the three arms of government in the ACT against the Latimer House Principles'.

The consultant is to provide a written independent assessment of the performance of the three arms of government and the ACT against the Latimer House Principles, endorsed by the Legislative Assembly on 11 December 2008.

Included as part of the assessment, the consultant will consider the potential government's shortcomings identified in paragraph 3.12 of the report of the Standing Committee on Administration and Procedure into the Latimer House Principles.¹

RECOMMENDATIONS AND OBSERVATIONS

LATIMER HOUSE PRINCIPLES AND THE AUSTRALIAN CAPITAL TERRITORY

The three branches of government in the ACT perform strongly against Latimer House Principles.

There are also a few shortfalls against the principles, and there is considerable potential for improving the quality of governance in a number of respects.

The use of universal principles has to be related to a context, in this case the Australian Capital Territory, in assessing the branches of government. A potential tension exists between the Latimer House Principles (hereafter Latimer or Latimer Principles) and constituent features of ACT government. To what extent can certain principles be fully and appropriately realised in a small and intimate system of government? More generally the principles may pull in different directions: for example, how readily is branch independence to be reconciled with effective relations between branches?

Much depends on the adaptive ability and capacity of the branches in the ACT system in balancing resource and skill constraints with creative interpretation in the application of such principles.

PARLIAMENTARY BRANCH

Legislative Assembly

The Legislature rates very well against Latimer Principles in terms of its relative independence from the Executive, the opportunities for private members, and the concern with enhancing the institution.

Committee System

The committee system of the Legislative Assembly needs to be reviewed to reflect a larger Assembly, and to improve overall performance. This will resolve the current need to rely on the three-person standing committee.

Referral of Legislation to Committees

Greater use should be made of the committee system for the consideration of legislation.

Name of the Assembly

There is benefit in reflecting on whether the name of the Legislative Assembly continues to be the most appropriate given the distinctive city-state character of ACT. One option is the 'National Capital Legislative Assembly', which implies the civic side and more directly reflects the city and the state and the special status of Canberra within the nation.

Assembly Budget Control

A key Latimer Principle, that the Legislature should have the power to determine and approve its budget, is not applied in ACT. This question should be reviewed once the ACT system of government as a whole acquires independent authority over its governance, and agreement is reached on a larger Assembly.

Public Accounts Committee

The resources of the committee, including the size of its membership, need to be strengthened.

JUDICIAL BRANCH

Judiciary

The Judiciary plays a major role in the ACT system as one of the three branches of government, and in general accords with core Latimer Principles.

The timely delivery of justice has been affected by the different views within the Executive and the Judiciary about the nature of the issues and how they should be resolved. There has been progress towards improving procedures and structures of the courts, which promises to address the backlog of work.

Judicial Appointments

The protocols for the appointment of judges and magistrates have been formalised and refined in recent years. There is a continuing need for the principles that underpin the protocols – transparency and robustness – to be apparent as far as possible in the actual appointment processes.

Judicial Accountability and Reporting

It is recommended that the Judiciary consider some form of public report (not a formal accountability instrument), which is designed as a medium for public communication to the ACT community and which might include reviews of cases and issues dealt with.

STATUTORY OFFICE HOLDERS, OVERSIGHT AND INTEGRITY

Funding of Oversight Agencies

A parliamentary committee should review the budgets for selected statutory office holders focused on oversight. The Standing Committee on Administration and Procedure is the appropriate committee in the first instance.

Parliamentary Office Holders

The Auditor-General and the Ombudsman should become Officers of the Parliament.

Integrity System

A parliamentary select committee, in conjunction with the relevant oversight agencies, should appropriately craft the elements of an integrity system and recommend how oversight and integrity will be enhanced.

GOOD GOVERNANCE IN THE ACT

ACT Governance

The ACT system has many fine governance attributes, which in combination make for a system unique in the Australian context.

The operation of this system is however severely constrained in significant respects. There are fundamental questions to be asked about the quality of governance at the levels of the overall system and the branches of government, and these derive primarily

from capacity in a small-scale system. There are also questions about the choices made by branches in terms of how they operate in the ACT context.

Self-Government

Securing full-self government is already a priority of the ACT, and significant progress has recently been made with the removal of a Commonwealth Minister's ability to reject Territory legislation, but full independence from the Commonwealth needs to be reiterated here to underscore its importance as a fundamental basis of territory governance.

Enlarged Assembly

The Legislative Assembly needs to have its numbers substantially increased as soon as possible. The actual size needs to be determined, but the figure advanced by previous reports (25) is at the upper end of those advocated, and provides the greatest potential for augmenting governance capacity. The actual size and electoral arrangements should be the subject of an independent investigation that includes the Electoral Commissioner, with a major emphasis being governance capacity.

Political Executive

A Ministry of only 5 confounds the basic tenets of effective cabinet government, and raises questions about whether the ACT should continue to operate this type of system without an increase in its size. Given the complexities of running both a city and a state government the span of Ministers' portfolio responsibilities is immense. The current need to rely on a Ministry of 4 is a further product of the ACT syndrome.

Executive

The Executive does not feature prominently in Latimer House Principles despite its significance, because the concern is with the other two branches and with broader questions of governance. 2011 is, however, a year of great change in the ACT, and the implications of consolidating and integrating the Executive need to be considered carefully. There are good reasons for strengthening the capacity of the ACT administration, but what is the impact, or the unintended consequences, on the Legislature?

1 INTRODUCTION AND CONDUCT OF THE REVIEW

Latimer House Principles

1. The core principle is:

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.

Scope of and approach to the assessment

2. The scope of this assessment is based on recommendations and points made in the report of the Standing Committee on Administration and Procedure on Latimer House Principles. According to the Committee, the terms of reference for the assessment should include the Latimer House Principles, as endorsed by the ACT Legislative Assembly and should be framed to assess the ACT's performance against the Principles, and to identify areas for future inquiry.
3. The assessor may choose to assess the ACT's performance against the Commonwealth Parliamentary Association's Benchmarks for Democratic Legislatures if appropriate.
4. Further the Committee recommends that eleven potential shortcomings identified in submissions and listed in paragraph 3.12 of its report on Latimer House Principles be considered as part of the independent assessment. The Committee also expresses the wish to develop a culture of awareness of good governance and accountability in the Territory. (The recommendations are listed in the Annex 1.)
5. Apart from the terms of reference and the principles enunciated as part of the Latimer compact, four considerations were taken into account:
 - In applying the Latimer House Principles, system context needs to be considered: in other words, principles designed for the countries targeted by the original exercise need to be adapted in considering the Australian Capital Territory. The Speaker, who is also the Chair of the Standing Committee on Administration and Procedure, expressed the view that using the Latimer Principles 'creates a context for discussion even if they are not literally observed. Having a set of benchmarks is a useful tool, as is stepping out of the local context and reflecting on it'.²
 - The character of the Australian Capital Territory: the scale of the Australian Capital Territory, the size of the Assembly, the capacity of the Executive, and the implications for governance.
 - Government renewal in the ACT: The ACT system has demonstrated considerable capacity for renewal during 2011, in particular in the executive and legislative branches. The Executive undertook the Hawke review;³ the Legislature through its committees conducted several specific inquiries into

areas and issues of relevance to this review; and with the Judiciary, a review of case management in the Supreme Court is being conducted. This assessment is part of this overall process.

- Finally, the assessment is also mindful of several views expressed, including:
 - That of the Standing Committee on Administration and Procedure, which 'believes that the ACT has strong democratic institutions and protocols in place which ensure good governance for the Territory'.⁴
 - Several submissions that 'identified possible shortcomings in effective separation of powers in the ACT' (3.5). The issues identified (3.12) were seen to deserve further scrutiny.
 - The view of the need to avoid the 'growth of unnecessarily complex reporting mechanisms and procedures' (3.1).⁵
- 6. Interviews were conducted with relevant MLAs, public office holders and senior staff in the three branches. The excellent records of the Legislative Assembly (such as committee reports, public submissions and government responses) provided a rich source of government and public views about issues of the day.

ACT and Latimer

7. As already indicated the intention is that not all Latimer House Principles should be examined in a literal sense for it can be assumed that many have already been sufficiently satisfied in the ACT context. This report reflects but does not consistently follow the headings of the 2009 report.⁶ This enables a more coherent treatment to be provided of the branches and the other aspects (e.g. public office holders).
8. To capture the spirit of Latimer, five themes are given particular attention: the Legislature; Judiciary; Relations between Branches of Government; and Statutory Office Holders, Oversight and Integrity; and ACT Governance. The Executive is not featured in Latimer except in relation to other branches, presumably because the concern is with the potential weaknesses of the other two.
9. Other themes are raised in the Latimer Principles (e.g. civil society) that cannot be pursued within the purview of this modest project. A number of the sub-themes have been the subject of official inquiries in 2011 (such as the current inquiry by the Standing Committee on Administration and Procedure into the position of Officer of Parliament). Some topics warrant a larger investigation than is possible here. Recent developments are touched on in the final section of this report.

Executive

10. As mentioned, the focus is on the other branches and their relationships. However, the Executive looms at most points of the discussion of governance because of its pivotal role in the ACT system.

11. One reason for the emphasis on the Executive is because the report of the Hawke review was published this year, and provides for major restructuring and some rethinking of important aspects of ACT administration and governance.⁷ Several themes of relevance are the emphases on:
 - Integration, cohesion and whole of government (reflected in the title: *One Government – One ACT Public Service*)
 - Collaboration and sharing of responsibility
 - Municipalising of the structure (although not necessarily the processes)
12. There are important implications arising from the implementation in 2011 of the integrative agenda and for the Executive's potentially enhanced role vis a vis other branches.
13. The discussion of governance in general intersects with this review at a number of points. There are also a number of other questions raised of relevance, such as the position of statutory office holders, and the capacities of the Executive and the Legislature.

2 PARLIAMENTARY BRANCH

Parliament and Latimer

14. The Legislative Assembly performs well against Latimer Principles (and the benchmarks of the Commonwealth Parliamentary Association) as a unicameral parliament for a small jurisdiction with wide responsibilities. The Assembly has had relatively more independence, compared to comparable systems operating within a Westminster tradition because a one-party majority in the Assembly is the exception. In the multi-party context of the ACT there is vigorous debate about enhancing the institution, an active Opposition and a steady stream of changes. For the 7th Assembly, a Parliamentary Agreement exists between the governing party (the Australian Labor Party, ACT) and the ACT Greens, which includes an agenda for improving the work, operations and the resources of the Assembly.

Independence of parliamentarians

Resources and budgeting

15. According to Latimer, 'Parliamentarians should have equitable access to resources commensurate with their responsibilities'.⁸ Two types of argument were raised with regard to resourcing. One was that the support for MLAs was insufficient, typically the lament of non-government members. Less clear were ways in which the good governance of ACT would be advantaged through better resourcing.
16. The second argument was based on the view that the effectiveness of specific agencies that work closely with parliamentary committees was constrained by the resourcing available for timely action. The Audit Office and the Public Accounts Committee fall into this category with the issue being expressed through the Standing Committee's ability to process Auditor-General reports. In this case the

question becomes how much emphasis or priority is accorded oversight (discussed below).

17. According to Latimer, 'Parliaments should have control of and authority to determine and secure their budgetary requirements unconstrained by the Executive, save for budgetary constraints dictated by national circumstances'.⁹
18. This is an important issue, which warrants careful consideration. It was singled out by former Speaker Berry as an area where the 'Assembly does not comply with the spirit of the measure'. He argued that the Assembly should implement changes to 'provide greater control for the legislature in determining its budgets'. This he believed would substantially improve the Assembly's democratic credentials and give more fulsome expression to the separation of powers document'.¹⁰
19. In the context of the Australian type of parliamentary system, the Executive has been the dominant branch in the relationship with parliament because of how they are co-joined through members of the political executive being recruited from the parliament and because of an electoral system that has traditionally produced majority government. The ACT is different in that six out of the last seven Legislative Assemblies since 1989 have had minority governments.
20. Where the separation is more strongly etched the Legislature can be expected to have greater autonomy in budgetary decisions. In other contexts the question becomes whether the Legislature can negotiate funding with the Executive that is sufficient for its requirements. There were indications that the Executive was fairly attentive to the felt needs of the Legislative Assembly, but this is under the conditions of minority government.
21. The benchmark of the Commonwealth Parliamentary Association is clear: 'Only the legislature shall be empowered to determine and approve the budget of the legislature'.¹¹ Some Commonwealth countries follow this practice, but this has not been part of the Australian tradition where the Executive prevails.¹²
22. This remains an ideal rather than a burning issue. The matter should be reviewed once agreement has been reached on a larger Assembly.

Parliamentary budget office

23. The Standing Committee on Administration and Procedure reported on 'the merit of appointing a Parliamentary Budget Officer to strengthen the capacity of the Assembly to better hold government to account by increasing transparency in its fiscal planning framework and improving scrutiny of the estimates process'.¹³ In this respect the Assembly has been shown to be abreast of international developments in that the OECD's network of Parliamentary Budget Officials only met for the third time in 2011. An OECD survey of this growing practice, covering parliamentary budget offices and officers, is to be published in 2011.¹⁴ The Australian Parliament is acquiring a Parliamentary Budget Office, headed by an independent statutory officer (which follows New South Wales' creation of one in 2010).

24. In the ACT's case a sensible recommendation by the Standing Committee in 2009 was that:
- a fully resourced, independent parliamentary budget office is beyond the reach of the smaller jurisdiction ... the legislative assembly does not need an independent officeholder, or even a designated officer to provide independent financial analysis on the budget papers. Instead, the Committee considers that temporarily appointing an expert consultant for the duration of the estimates process presents a more flexible approach and is the most appropriate model for the legislative assembly'.¹⁵
25. This approach received support from the Executive.¹⁶ An external expert has been used annually to provide advice with regards to Estimates since 2009.

Indicators of MLA independence

26. Two indicators are used to examine the independence of parliamentarians (who are still acting as members of political parties). The first is the composition and operation of standing committees. In a legislature of seventeen members, the membership of standing committees is likely to be dominated by non-government parties, currently the ACT Greens and the Canberra Liberals (but the ACT Greens also operate under a Parliamentary Agreement with the governing Australian Labor Party). Of the seven Standing Committees all but one have three members, the remaining committee (Administration and Procedure) has four. In each case there is only one government member on the committee, which means that non-government parties prevail in terms of membership.¹⁷
27. Similarly, the roles of chairs of committees are distributed across the parties, but with one exception are currently held by opposition or cross-bench members. The ACT has a tradition of using opposition members in this position. Another example is the Select Committee on Estimates, which has five members (two from the Opposition, two from the third party, and one from the government), and a non-government chair.
28. The second indicator is the capacity of private members to introduce legislation and to secure its passage. In 2009-10, 72 bills were introduced comprising 55 from the Executive and 17 private members' bills. This is an unusually high number for an Australian parliament (or indeed comparable parliaments overseas). Of those introduced all the Executive's bills were passed, but 10 private members' bills were also successful.
29. There is a significant tradition of private members' bills (PMB) being introduced over the last two decades, and in some cases they were passed. The figures for the 2008-09 and 2009-10 sessions when the governing party has lacked a majority are respectively 32% and 59%. For the latest year the number of private members' bills introduced is down from recent years, and 45% were passed.

Table 1

Private members' bills

	2007-08	2008-09	2009-10	2010-11
Introduced	19	19	17	11
% of total introduced	29%	24%	24%	17%
N passed	1	6	10	5
% of bills passed	.2%	11%	15%	9%
% of PMB passed	5%	32%	59%	45%

Sources: ACT Legislative Assembly Secretariat Annual Reports, Appendices.

Referral of bills to Assembly committees

30. A standard indicator of the role of a parliament in legislation is whether bills are referred to committees. In large assemblies specialised consideration of bills and other matters is imperative. In a small Legislative Assembly like that of the ACT, the plenary meetings may be sufficient for much of the legislative program. The number of amendments to bills for the last five sessions has been 425, 82, 497, 314, 245.
31. The Latimer Principles refer to opportunity being 'given for public input into the legislative process' 92(h). A common way of handling this is to refer legislation to parliamentary committees, which can then conduct public inquiries. Given that few items of legislation were referred to committees, this type of opportunity was not accorded significance in the ACT Legislative Assembly.
32. Bills referred to committees of the ACT Legislative Assembly for the 7th Assembly 2008-2011 (up to 18 May 2011) numbered 8 out 173 bills (4.6%). For the Australian House of Representatives the figures for the 42th Parliament were two out of 571 (0.35%). The Senate has been the main house of legislative committee review for the Australian Parliament, and has reported on over 80 bills in each of the recent financial years. However, House practice has changed dramatically in the 43rd Parliament (following the 2010 election) with bills being referred to a majority of the standing committees.
33. In the New Zealand House of Representatives, bills are usually referred to the relevant committee following the first reading. The committee may call for public submissions, and receive oral and written submissions. It can recommend amendments and whether the bill should be passed.
34. The Executive's view on this matter appear to be that most bills lack sufficient substance to warrant being sent to committees, and MLAs presumably could also seek to refer more bills. Yet other jurisdictions are tending to use committees more, Queensland being the latest to opt to refer all bills to committees.¹⁸
35. Greater use can be made of the committee system for the consideration of legislation. The automatic referral of legislation appears to be inappropriate in the ACT case, but neither is the minimal use of the referral option. There appears to be an implication that a small sub-national assembly should be regarded differently

because a range of significant bills does not arise. It seems inconceivable that the ACT despite its scale does not have some bills of comparable moment to similar jurisdictions.

36. While there may not be the pressure of a large parliament to make greater use of its members beyond the plenary meetings, there are other good reasons for moving matters to committees. The environment can be less partisan. The committees can be used more effectively for handling public submissions on bills. An analysis of the relative time spent on plenary sessions compared to committees might be helpful here.

Tenor and workings of the Assembly

37. Parliaments based on the Westminster model have usually been characterised by an adversarial conflict between government and opposition. The advent of proper committee systems 30-40 years ago produced significant changes in Anglophone systems for deliberations could be removed from the public contests of the chamber to small meeting rooms where partisanship might matter less, and cross-party collaboration could matter more.
38. This development pointed towards a modified Westminster system,¹⁹ which in conjunction with minority or coalition government in many national and sub-national jurisdictions internationally has registered significant impacts.
39. A greater emphasis on collaboration in the interest of good governance (which has been advocated by the ACT Business Council) need not preclude a prominent place for the Opposition. It depends in part on how different types of work are segregated.
40. There are questions to be asked also about whether the municipalisation of administration should be reflected more generally in the ACT system following the Hawke review.

Name of the Assembly

41. There is benefit in reflecting on the name of the Legislative Assembly because of the city-state nature of ACT and the recent municipalisation of the administrative structure. This could involve de-emphasising the word 'legislative' and giving prominence to the civic side. The term 'Legislative' continues to be most commonly used in the two federal systems of Australia and Canada at the provincial and state level. In the United States the lower house is often termed the House of Delegates or Representatives. Other terms are Assembly, General Assembly and House of Assembly. Most legislatures in the three systems are bicameral.
42. One option for the ACT is the National Capital Legislative Assembly, which implies the civic side and more directly reflects the city-state.

Public Accounts Committee

43. The Standing Committee on Public Accounts (SCPA) has a central place in parliamentary oversight, and is given special recognition by Latimer. The mere existence of such a committee does not ensure that good oversight occurs in practice as weak public accounts committees have been commonplace at the state level in Australia, at least until recently.
44. In line with the ACT practice of using non-government MLAs as chairs of the committee, the Standing Committee on Public Accounts has an excellent record. Of the twelve chairs from self-government up to 2008, only one (the first) was from the governing party, ten came from the opposition, and one from the cross-benches. Wayne Berry has observed that 'this is a record ... unrivalled by any other Australian jurisdiction'.²⁰ Further, the deliberations can be quite collegial (an experience shared with the comparable committee of the Parliament of Australia).
45. For 2009-10, the SCPA recorded the most meetings (65) and the most public hearings (22). The inquiries attracted 118 witnesses and 34 submissions. The outputs were four reports and nine SO 246A Statements. For 2008-09, there were nine meetings (3rd of the committees), one hearing, and five reports.
46. Public Accounts is an active committee but has to rely on three members (and the relatively limited support of one committee secretary). In the past it may have normally produced six to eight reports per year, but for the last two years, the figure was four or five.
47. Of its work 80 per cent relates to the Auditor-General. Every AG report is automatically referred to SCPA, which may choose to conduct a separate inquiry into the report. However, there has generally been a significant lag – around a year – between the release of an Auditor-General's report and consideration by the committee. This means that the committee is inclined to run 4-6 reports behind. The question arises of how durable are issues raised in AG reports.
48. There are questions therefore about the breadth and timeliness of SCPA's oversight. This derives from two issues, one the number of MLA's on the committee and second, the level of resources made available. Both require attention: the first will presumably be resolved if the overall size of the Assembly is attended to; the second, requires acceptance of the need for greater resources to address the backlog.

Commonwealth Parliamentary Association Benchmarks for Legislatures

49. The assessor could choose to evaluate the ACT's performance against the Benchmarks for Democratic Legislatures produced by the Commonwealth Parliamentary Association (CPA) in 2006. As an extensive systematic examination of the Legislative Assembly had been undertaken three years ago by former Speaker Berry, it was thought to be unnecessary to apply the assessment tool at this stage, but to focus on issues that arose.

50. Berry contended that of the 87 CPA benchmarks, seven did not 'fully meet either the spirit and/or the letter of a measure as it had been set out by the Study Group'.²¹ These were:
- The Assembly Budget: Dealt with above.
 - Legislative debate and the use of a closure motion: Only a concern if the measure is used excessively to assert Executive dominance. Did not arise in discussions.
 - Committee review of legislation: A concern, which has been examined earlier.
 - Independent employment arrangements: The concept of the Legislature being responsible for the parliamentary service instead of the Executive was acted on in 2008. There is now a proposal from the Speaker for a separate Legislative Assembly Service.
 - Code of conduct for staff employed by Members who were not subject to an Assemble code of conduct: A code has recently been proposed by the Chief Minister, but has not been sighted at the time of writing.
 - Oversight committees to provide reasonable opportunities for minority and opposition parties to engage effectively in scrutiny of expenditure, including the allocation of the position of the public accounts committee to a non-government member: Discussed above.
51. Public voting for plenary sessions of the Assembly: The exceptions where a secret ballot is used seem to be insubstantial.
52. Berry concluded that there was still scope for improvement despite awarding the Legislative Assembly an A minus, and that the main question that needed to be addressed was the control of the Assembly's budget development.

3 JUDICIAL BRANCH

Judiciary and Latimer

53. Latimer addresses two dimensions: the independence of the branch and relationships between branches, both of what have been important in the ACT. Other specific matters are also raised: judicial accountability, resourcing and the appointments process. The Standing Committee on Administration and Procedure Committee has also referred to several issues raised in submissions to its 2009 inquiry into the Latimer Principles.
54. The comments pertain to both the ACT Supreme Court and the ACT Magistrates Court. The functioning of the ACT Civil and Administrative Tribunal was also raised but could not be investigated within the scope of this review (but it is noted that ACAT has been reviewing its operations and procedures).

55. The primary questions concern the Executive and the Judiciary, although the Legislature occasionally becomes involved. For example, the Assembly's involvement arises when the Auditor-General produces reports on court administration, and the Standing Committee on Public Accounts follows up with reports.²² There is also provision for a Legislative Assembly role under the Judicial Commissions Act 1994. If the Assembly resolves that a judicial commission should examine a complaint against a judicial officer, the Executive must appoint a commission to consider the complaint and to report to the Attorney-General. The Legislative Assembly may also resolve that the Executive should remove a judicial officer from office because of misbehavior or incapacity, to which the Executive must conform.

Independence of the Judiciary

56. The Latimer House Principles are clear on the position of the Judiciary: 'An independent, impartial, honest and competent Judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.'²³ In order to achieve these objectives there are requirements covering judicial appointments, security of tenure, resourcing of the judicial system and interaction with the executive.
57. The question of the role and standing of the judicial branch is subject to several interpretations. There is complete agreement about the independence of the Judiciary in terms of the judgements it makes in accordance with the law. With regards to the administration of the courts there appear to be at least two basic positions: one holds that judicial independence requires control of the courts to be in the hands of the judicial branch; the other is that effective and efficient court administration requires a direct role for the Executive. Both positions acknowledge a role for the other branch but differ as to what that role should be.
58. In the ACT these differences have been expressed through issues about the efficiency and effectiveness of the courts and the level of their resourcing. On the one hand, judges and magistrates have been particularly concerned with their independent standing, while on the other hand, the Executive appears to be seeking a Judiciary that will work more closely with it to improve procedures, as discussed below.

Appointments

59. Latimer is explicit that judicial appointments should be 'on the basis of clearly defined criteria and by a publicly declared process. The process should ensure equality of opportunity for all who are eligible for judicial office; appointment on merit; and that appropriate consideration is given to ... gender equity'
60. The judicial appointment process has evolved in recent years with the adoption of a protocol in 2007, and the legislative requirement from 2009 that a notifiable instrument is to be used. These appointment requirements for judges and magistrates provide a few details about the appointment process and a range of selection criteria. Reference is made to these appointments as being to the

Executive. The Executive is empowered to appoint judges and magistrates, and in practice it appears that the Attorney General makes the decision. The selection process involves an interview panel (mainly of judicial officers) which reports on the 'suitability of those candidates'. Consultation then follows on the candidates, before the Attorney General recommends an appointment to government.²⁴

61. In the course of this investigation, questions were raised about the process followed in making appointments, but the possible cases were from the past, and recent appointments to both the Magistrates and the Supreme Courts did not appear to be attracting the same concerns. Issues were the merit basis of actual appointments and the effectiveness of the consultations. The formal appointment process has become more transparent and robust as maintained by the Attorney General, and appears to be followed through in practice.
62. There was a 2008 Bill from the Opposition that nominees for judicial positions should be referred to a Legislative Assembly standing committee for consideration, but this was not supported by the Assembly. This approach is used in some other jurisdictions but is uncommon in Commonwealth countries.
63. With regards to gender equity, the membership of the Magistrate Court rates well with the majority being women, and the recently appointed Chief Magistrate is a woman. One of the four judges of the ACT Supreme Court is a woman.

Relationships between branches: the Judiciary and the Executive

64. The interface between the two branches has been notable at times for tensions, and an apparent inability at times to find common ground, but change has been afoot. The recent consultations between the Magistrates Court and the ACT government have been productive with implications for the resourcing of that court. However, the backlog of the Supreme Court have continued to attract public comment, a recent case being an editorial in the Newsletter of the ACT Bar Association, which criticised the timeliness of the delivery of justice in the criminal and civil streams with interstate colleagues making unfavourable comparisons.²⁵
65. A Governance Committee was established several years ago to handle relationships between the Judiciary and the Executive, and it has produced several improvements. A Supreme Court Working Group comprised of a range of stakeholders reported in 2010 on the issues affecting the Court's ability to complete cases in a timely way. The Attorney General and the Acting Chief Justice recently commissioned a review of case management and listing practices in the Supreme Court. This has produced a joint Discussion Paper by a Justice and the Director-General of JACS.²⁶
66. The relationships between the Executive and both the Magistrates and Supreme Courts are evolving in positive directions. However, there continues to be something of a gulf between the Executive and the Supreme Court over the level and causation of court delays, and particularly over the solutions. Chief Justice Higgins (and members of the legal profession) advocate the appointment of

another judge, while the Attorney General maintains that the workload is not excessive in comparison with other jurisdictions.²⁷

67. The timely delivery of justice has been affected by the different views within the Executive and the Judiciary, and further progress is required to address the backlog of work and to enhance the working relationships between the branches.

Judicial accountability

68. Latimer states that:

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.

69. The integrity and independence of the Judiciary in terms of matters of law are of course beyond contention. How these principles are to be translated into public confidence is rather more complicated in an environment where the process of administering the law is subject to a steady expression of concern about whether decisions are being (in Latimer words) 'given in a timely manner'.
70. The overall conclusion drawn is that there is a need for consideration about how the role and work of the Judiciary is communicated to the ACT community, which in turn needs greater assurance about the level and use of resourcing for the Judiciary.
71. There are options here that warrant consideration. The first is for a more direct form of public accountability. An entry in the Justice and Community Safety annual report about court administration is hardly sufficient for citizen appraisal of the work of the Magistrates and Supreme Courts. This matter becomes entangled to some extent with the question of what responsibilities the Judiciary is being held to account for. One argument here is that if the Judiciary were given greater funding autonomy and more complete administrative responsibilities, it should indeed be held to account in a formal and public way through annual reporting. This option would still require approval by an appropriation that would need Executive support, and may not resolve funding issues, as the recent case of the Federal Court demonstrates.²⁸
72. Another possibility is provided by combined annual report provided by several courts in Singapore, another city-state, which is designed also as a means of public communication and making the Judiciary more accessible.²⁹ An alternative is the practice followed in several jurisdictions of some form of public report that is not necessarily a formal reporting mechanism. The UK Chief Justice provides a written report to Parliament on the state of the Judiciary in England and Wales. This is not an accountability mechanism, but occurs by convention and reviews cases and issues dealt with.

Issues from Standing Committee on Administration and Procedure's report 2009

73. According to 3.12 'submissions highlight issues in the governance of the ACT which should be scrutinised and in the valuation of the implementation of the Principles. Those from the Law Society were:³⁰
- Review of Freedom of Information laws, especially given the current review at the Commonwealth level. [ACT Law Society]. As this matter is being pursued by the government, and was the subject of a recent Assembly report, no further comment is made.
 - Recent judicial appointment protocol reforms should be extended to quasi-judicial appointments, such as tribunals and other statutory offices. [ACT Law Society]. Apparently this matter is no longer an issue.
 - Guidelines for ethical conduct in all branches of government. [ACT Law Society]. The ACT Government has listed a range of guidelines in its response to the Standing Committee's report.³¹
 - Adequacy of funding for the court system. [ACT Law Society] A continuing tension that has not been assisted in the past by the different positions discussed above.

4 STATUTORY OFFICE HOLDERS, OVERSIGHT AND INTEGRITY

Oversight agencies

74. A range of statutory office holders exists, the most important being the Auditor-General, the Ombudsman and the ACT Electoral Commission, an independent statutory authority. The Auditor-General and the Ombudsman in particular have scope to engage in a range of public inquiries as core oversight agencies. Other statutory office holders include the Human Rights Commissioner and the Director of Public Prosecutions.
75. The Hawke review is both clear about the need for adapting the handling of statutory office holders to context (compare the ACT with NSW), the spectrum of independence that should exist and the possibility of a position combining statutory elements with other responsibilities. That report is then somewhat obscure about the applications.³²
76. The general feeling among several statutory office holders is that more needs to be done with regard to both resourcing their offices and/or to guaranteeing their independence. In terms of Latimer Principles, certain statutory office holders should be officers of the parliament.

77. Of the more independent oversight agencies, the Auditor-General's role in promoting public accountability in the Territory and the conduct of financial and performance audits is integral to the oversight of public administration. One outstanding issue has recently been resolved. The report by the Standing Committee on Public Accounts on the *ACT Auditor-General Act 1996* recommended that the act be amended to make the Auditor-General an Officer of Parliament. The government has recently agreed to the key recommendation (while contesting what 'independence' might mean). This current review endorses this recognition of the Auditor-General.
78. A reminder of the need for sensitivity and respect in the handling of relationships between the Executive and the Legislature was the recent debate over the lack of consultation with the Standing Committee on Public Accounts over the appointment of a new Auditor-General. It is standard practice for the Commonwealth Joint Committee of Public Accounts and Audit to play a role in the process of appointing the Commonwealth Ombudsman even if it is reacting to a government nominee. This may include an opportunity to ask questions of the nominee. The ACT's Auditor-General Act 1996 is quite clear about the need to refer the nominee to the Public Accounts Committee under the heading 'Veto by Public Accounts Committee'. At a time when there is a move to making the Auditor-General an officer of parliament, it is desirable to clarify the role of the Assembly in the appointment process.
79. The other key oversight agency is that of the ACT Ombudsman, the role of which is performed by the Commonwealth Ombudsman. The role of the ombudsman appears to be evolving into new types of inquiry in addition to the standard handling of individual complaints. This type of oversight agency has been seen as a parliamentary body in a number of jurisdictions, and the original importation from Scandinavia to an English speaking country, New Zealand, was as a Parliamentary Commissioner (Ombudsman). More recently, a committee of the UK House of Commons played a role for the first time in choosing the parliamentary ombudsman.³³
80. The ACT Government rejects this status for the ACT Ombudsman on the grounds that this oversight role is implemented by government and therefore should not be attached to the parliament. This interpretation ignores the parliamentary origins of the position and that other jurisdictions provide this recognition. It is appropriate therefore that the ACT Ombudsman should report directly to the Speaker or a committee of the Assembly.
81. There are other candidates for designation as an officer of parliament, but since the Standing Committee on Administration and Procedure is currently inquiring into the feasibility of establishing such a position, this matter is best considered in depth by that committee.
82. A further matter raised concerned the funding of particular agencies and whether the Assembly should play a more prominent role. If parliament wants to undertake more scrutiny there is a need to review the budgetary process. The New Zealand approach was to create a committee with responsibility for the oversight of officers of Parliament. The committee focuses on the annual budget setting for the

offices, but the estimates and financial reviews of the offices are allocated to specialised committees.³⁴ The ACT should adapt these types of ideas to its own circumstances.

Integrity agencies

83. It has become standard practice in Australia to focus on integrity agencies as a category of organisations with shared oversight responsibilities but different specialisations.³⁵ A succession of inquiries in Queensland, Victoria, South Australia, and Tasmania has produced reports during the last three years (Queensland Government 2009, Government of South Australia 2010, State Services Authority 2010, Integrity Commission, Tasmanian Government 2011).³⁶ A focus is on how the system accommodates a range of oversight activities.
84. The types of integrity bodies covered include the core auditor-general and ombudsman and an array of other agencies: anti-corruption, information commissioner, local government oversight, parliamentary commissioner, police integrity, and public standards commissioner. This does not exhaust the options or the range of bodies that may be considered within the integrity area. Schemes may include an integrity commissioner (Queensland and Tasmania) or integrity coordination board (Victoria). The systems are the product of the contexts, which have produced considerable variations among Australian models.
85. The concept of an 'integrity system' or 'branch of government' has also had advocates for some time, and the span of bodies included can include parliamentary committees concerned with oversight. Important issues raised are gaps in jurisdictions, the degree of coordination and level of cooperation between integrity agencies, breadth of coverage, such as the Executive, and the members of parliament and their employees.
86. The basic question is how relevant are these initiatives to the ACT context, and further whether they are sufficiently significant to warrant ACT action, and what form might that take?
87. The question of integrity has been significant in ACT government during the 7th Assembly. The Parliamentary Agreement between the Australian Labor Party (ACT) and the ACT Greens has a section on integrity. One element was for the endorsement of the Latimer Principles by the Assembly. The Chief Minister has expressed commitment to the fundamental issue of integrity. The Leader of the Opposition has supported an independent Public Service Commission.³⁷ The Hawke review touches on integrity in relation to values and management practices of leaders and employees, but does not engage the question of an integrity approach for agencies. As a consequence, implementation is focusing on the review and rationalisation of statutory office holders.
88. A forthright statement from the former ACT Ombudsman expressed views about the quality of oversight in the ACT, and advocated an integrated approach to integrity. He argued that in the last decade there has been:

slowing in the pace at which the ACT has kept in step with other jurisdictions in relation to broader integrity issues. For instance, while other jurisdictions are developing or have passed new legislation in relation to anti-corruption, personal privacy, freedom of information, lobbying activities, and parliamentary integrity, the ACT is still mostly relying on Australian Government agencies to provide these services or on legislation which was largely passed from the Commonwealth when self government was granted.³⁸

89. Does the ACT need 'a more comprehensive, coherent and coordinated' system as was advocated for Victoria?³⁹ The complexities of several state jurisdictions (e.g. municipal oversight) are not reproduced in the ACT, and the anti-corruption focus of much of the advocacy in the states has yet to be demonstrated to be relevant. However, there are indications that modernising parts of the integrity field is required, and that the ACT will benefit from a greater consciousness of the components of an integrity system and a collective approach to its oversight.
90. There is one explicit position in ACT. The Parliamentary Agreement for the 7th Assembly refers to 'enhancing Integrity in Government by working with Oversight Institutions to establish the concept of an Integrity Branch of Government ... in recognition of their joint interests and their separation from the Executive, Parliament and the Judiciary'. The government is expected to take leadership in this regard.
91. Of the several options, some degree of integration of the integrity components is worthy of further consideration, and the notion of combining several within one agency might be viable, but is beyond the scope of this assessment. Similarly the constitution of a formal integrity branch comparable to the other three branches under Latimer Principles is an interesting concept but requires a full examination.
92. The conclusion is that an integrity system should be instituted that establishes formal links between designated integrity agencies. This may be viewed as a stepping stone to the integrity branch concept. A parliamentary select committee, in conjunction with the relevant oversight agencies, should appropriately craft the elements of the integrity system and recommend how oversight and integrity will be enhanced.

5 GOOD GOVERNANCE IN THE ACT

Quality of governance in the ACT

93. The Standing Committee of Administration and Procedure expressed the wish to develop a culture of awareness of good governance and accountability in the Territory. There is considerable potential for enhancing the roles of the Assembly and addressing questions of oversight. There is also a range of emergent issues: municipalisation versus the state government role, and executive action and agenda versus oversight and scrutiny.
94. The ACT remains in some respects a stunted system of governance that has been constrained by another level of government and lack of agreement on key

strategic issues. The single most significant constraint on good governance in the ACT, apart from scale and resourcing relative to its responsibilities as a state and municipal entity, has been the Australian Capital Territory (Self-Government) Act 1988, which has imposed severe limitations on the autonomy and power of the jurisdiction. The right of a federal government, whether by legislation or ministerial fiat, to veto territory laws has reduced the status of the ACT to that of a protectorate.

95. The *Territories Self-Government Legislative Amendment (Disallowance and Amendment of Laws) Bill 2011* was designed to amend the *Australian Capital Territory (Self-Government) Act 1988* to remove the power of the Governor-General to disallow or recommend amendment to any laws made by the Legislative Assembly of the ACT and Northern Territory. The recent passage of this Bill means that a Commonwealth minister can no longer reject ACT legislation, but there is still provision for the Commonwealth Parliament to pass legislation that will have this effect. The power to determine the size of the Assembly remains with the Commonwealth Parliament.

Size of the Legislative Assembly

96. The Assembly can choose to increase the number of members but this is subject to a Commonwealth regulation. There have been 17 members of the Legislative Assembly since self-government. There has been extensive discussion of this question during the short history of self-government with a series of reviews by the ACT and the Commonwealth recommending a larger Assembly. It is perhaps quite remarkable that despite the consistency in the recommendations (although not necessarily on the increase in the number of MLAs) from a succession of reports, nothing has transpired.⁴⁰
97. A complication has been the division among the three parties as to the preferred size of a larger Legislative Assembly. In other words, there is a lack of consensus because party political self-interest prevails and appears to trump both the desire for enhancing governance capacity, and also any creative initiatives that might reduce the differences between the three parties.
98. The options for a larger Assembly range from 19 to 25 members. The current population of 356K will reach 438K by 2031 according to the Hawke review, which also produced comparative statistics for all Australian jurisdictions. These demonstrate a high level of under-representation for the ACT based on local and state representations elsewhere. This current review does not seek to prescribe a figure, but notes the need for a substantial increase. The Hawke review favoured 25 members (the size also of the Northern Territory Legislative Assembly with serves a much smaller population of 230,000), and this was also the optimum figure for the *Review of Governance of the Australian Capital Territory* in 1998.⁴¹ This size provides the greatest potential for significantly augmenting governance.
99. There is little reason to believe that the three political parties will be able to reach agreement on a size of the Assembly because of their previous different calculations about which number serves their interests. The only means of advancing this matter is for the actual number and electoral arrangements to be

the subject of an independent investigation undertaken in conjunction with the Electoral Commissioner that gives prominence to the issues of governance raised in this report.

100. The number of ACT government ministers is fixed at five, but there are currently only four ministers (compare the Northern Territory with a cabinet of eight). As a consequence each ACT minister is responsible for a number of portfolios plus having COAG roles. The evidence from previous reviews and from the reactions of those working within ACT governance is that this number is grossly inadequate for the complexities of state and local government in the 21st century. Ministers are stretched beyond their capacity to cover the span of responsibilities of an Australian state government, one of the most substantial intermediate systems in the world, plus local government. There are also potential conflicts between the different portfolio responsibilities of ministers (e.g. Chief Minister and Health; Treasurer and Education and Training), and constraints on proper debate where a minister has both whole-of-government and line responsibilities. The Attorney General also has Environment, Municipal Services and Police and Emergency Services.
101. There were a number of reports of the changing approach of the political executive since minority government came into play. It had become less imperious, and more open, sensitive and willing to respond to issues. This suggested that collaboration rather than defending the government had become more integral to its style for some purposes.

The Australia Capital Territory as a system of governance

102. The notion of a city was recognised in the Hawke report, but its brief was the structure of the administration. This leaves the big questions of whether other dimensions need to be revisited. If the Vienna model has lessons for the ACT the combination of mayor and provincial governor would be looked at. The complication in the Australian context is that so many functions regarded internationally as belonging to local government are assigned to the state.
103. The Legislative Assembly could be renamed to reflect its responsibility as a city-state and the balance of its work. The Legislative Assembly could be renamed National Capital Legislative Assembly (or the Civic Assembly) to reflect the city-state, to de-emphasise the word 'legislative' and to give prominence to the civic side.

6 SUMMATION AND CONCLUSION

104. The Standing Committee on Administration and Procedure observed that the assessment 'will allow us to reflect on our strengths and identify weaknesses and potential areas for reform'. Several of the matters raised in submissions to the 2009 review seemed to be no longer important. In any case there are other major aspects that deserve priority because of their long-term implications for governance.

105. The Australian Capital Territory 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.
106. At the same time, the constraints on the system single most important constraint on governance has come from without rather than within. Just as the administration has been restructured so the political executive and the assembly need to be reconstituted within a system that is based on a considerably larger number of MLAs.
107. Within the system of government there is potential for the relations between the three branches to evolve and mature further. Executive–Legislature relations have a number of promising features, but there are areas for further development. The evolving Executive–Judiciary relationship is making progress in working through differences in attitudes towards productivity improvements and resourcing, and with good will can become more effective.

Areas for Future Inquiry

108. This review has tended to support the Standing Committee on Administration and Procedure statement that ‘the ACT has strong democratic institutions and robust accountability mechanisms in place. The Committee adds that ‘we must be vigilant and continually scrutinising our governance institutions to ensure that high standards are maintained’.⁴²
109. Following the Hawke review, an extended period of implementation is in process. The follow-ups within the Executive include consideration of statutory appointments in the context of a small jurisdiction. There are interesting questions to be asked about the implications and consequences of refocusing the city-state on municipal organisation. This includes the extent to which municipalisation of the structure will produce benefits for citizen engagement. New developments that have recently become prominent have to be reserved for the next Latimer assessment, notably the medium terms results of Chief Minister Gallagher’s open government initiative.
110. The identity and operation of the Legislature requires monitoring in order to maintain high standards. The operation of the Judiciary where it intersects with the Executive requires a full progress report in the next inquiry in view of the continuing questions about the timeliness of the delivery of justice. Both warrant the analysis and reflection that a future inquiry would produce.
111. Finally, a recent observation by the Executive Vice-President of the Commonwealth Magistrates’ and Justices’ Association is instructive:

The Latimer House Principles have become the bedrock of Commonwealth values, including of course respect for the rule of law. They are worthy of study, and of continuous debate, not only by the judiciary but also by the legislature and by the executive in all the countries of the Commonwealth.⁴³

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ANNEX 1: STANDING COMMITTEE ON ADMINISTRATION AND PROCEDURE RECOMMENDATIONS (2009)

Recommendation 1

The committee recommends that following consultation with the standing committee on the ministration and procedure, the speaker appoint a suitably qualified person to conduct an assessment of the performance of the three arms of government and the ACT against the Latimer House Principles.

Recommendation 2

The committee recommends that the independent assessment be undertaken mid-term of each assembly, and the resultant report tabled in the assembly by the speaker.

Recommendation 3

The committee recommends that continuing resolution 8A be amended as follows:

Insert new paragraph 2A:

- (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 and 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
 - (b) to be referred to the Standing Committee on Administration and Procedure for enquiry report.

Recommendation 4

The Committee recommends that potential governance shortcomings identified in submissions and listed in paragraph 3.12 of this report could be considered as part of the independent assessment.

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List of submissions

Many submissions highlighted issues in the governance of the ACT which could be scrutinised in an evaluation of the implementation of the Principles. Those listed in 3.12 of the report were:

- Development of a more robust process to ensure that government implements the agreed recommendations of Assembly enquiries, to maintain public confidence in committee enquiries as effective means to keep governments accountable and transparent. [ACT Auditor-General].
- The *Public Sector Management Act 1994* and *Financial Management Act 1996* could be interpreted as permitting some executive or departmental control of the

Electoral Commission and the Commissioner, thus potentially threatening the independence of the Commission. These concerns may be applicable to other statutory officers holders. [ACT Electoral Commission]

- Mechanisms to safeguard the independence of oversight bodies, such as clearly defined functions, adequate resourcing and reporting arrangements and follow-up of implementation of recommendations. [ACT Greens]
- Independence of funding for Parliament. [ACT Greens]
- Review of Freedom of Information laws, especially given the current review at the Commonwealth level. [ACT Law Society]
- Recent judicial appointment protocol reforms should be extended to quasi-judicial appointments, such as tribunals and other statutory offices. [ACT Law Society]
- Guidelines for ethical conduct in all branches of government. [ACT Law Society].
- Adequacy of funding for the court system. [ACT Law Society]
- Increased use of public consultation during the pre-drafting stage of legislation, and through all major pieces of legislation being referred to the appropriate Assembly committee allowing for an enquiry process. [ACT Greens]
- Consideration of the role of deliberative policy forums, or other innovative ways of engaging the community in policy-making. [ACT Greens]
- Development of a public education programme on the Principles [ACT Greens]

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- ⁴⁰ Standing Committee on Legal Affairs, *The Appropriateness of the Size of the Legislative Assembly for the ACT and Options for Changing the Number of Members, Electorates and Any Other Related Matter*, Report 4, ACT Legislative Assembly, Canberra, June 2002; Jon Stanhope, Chief Minister, Government Response to Standing Committee on Legal Affairs Report No. 4 of 2002, September 2002.
- ⁴¹ ACT Government, *Review of the Governance of the Australian Capital Territory*, ACT, Canberra, 1998.
- ⁴² Standing Committee on Administration and Procedure.
- ⁴³ Sir Philip Bailhache, *The Implementation of Latimer House Principles*, paper presentation in Kuala Lumpur 19 July 2011.

