INQUIRY INTO THE REVIEW OF THE PERFORMANCE OF THE THREE BRANCHES OF GOVERNMENT IN THE AUSTRALIAN CAPITAL TERRITORY AGAINST LATIMER HOUSE PRINCIPLES—9TH ASSEMBLY

STANDING COMMITTEE ON ADMINISTRATION AND PROCEDURE

FEBRUARY 2020

REPORT NUMBER 16
THE COMMITTEE

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RESOLUTION OF APPOINTMENT

The Standing Committee on Administration and Procedure Committee is established pursuant to Standing Order 16:

16. (a) A Standing Committee on Administration and Procedure is established at the commencement of each Assembly to:

(i) undertake self-referred inquiries or inquiries referred by the Assembly and, in addition, in the third year of an Assembly term the committee shall inquire into and report on the operation of the standing orders and continuing resolutions of the Assembly with a view to ensuring that the practices and procedures of the Assembly remain relevant and reflect best practice;

(ii) advise the Speaker on:

(A) Members’ entitlements including facilities and services;

(B) the operation of the transcription service (Hansard);

(C) the availability to the public of Assembly documents;

(D) the operation of the Assembly library;

(iii) arrange the order of private Members’ business, Assembly business and Crossbench Executive Members’ business;

(b) the Committee shall consist of:

(i) the Speaker;

(ii) the Government whip;

(iii) the Opposition whip; and

(iv) a representative of the crossbench (or if a single party, the whip of that party);

(ba) Should a whip be unable to attend a meeting, the Party nominated deputy whip may attend in their place;

(c) the Speaker shall be the Chair of the Committee; and

(d) the Committee shall have the power to consider and make use of the evidence and records of the Standing Committee on Administration and Procedure appointed during the previous Assemblies.
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RECOMMENDATIONS

RECOMMENDATION 1

5.46 The Committee recommends that, following the election of the 10th Assembly in October 2020, the Government/Assembly consider the comments and suggestions of the Review of the Performance of the Three Branches of Government in the Australian Capital Territory against Latimer House Principles in its development of a new committee structure.

RECOMMENDATION 2

5.49 The Committee recommends that the matters raised in the Review in relation to the role and operation of the Standing Committee on Public Accounts be brought to the attention of Standing Committee and that the Committee be invited to respond to the Assembly on why so few reports on Auditor-General’s reports had been presented. That Committee is also invited to provide its views on its preferred form, structure, membership and terms of reference for any future public accounts committee for the Assembly.

RECOMMENDATION 3

5.88 The Committee recommends that information relating to the Officers of the Parliament be included on the Legislative Assembly website, including links to their home pages.

RECOMMENDATION 4

5.105 The Committee recommends that Continuing resolution 8A be amended at paragraph 2A to ensure that a review is undertaken in the second year of every second Assembly.
1 BACKGROUND

1.1 Paragraph 2A of Continuing Resolution 8A (adopted December 2008, amended February 2012), which endorses the Commonwealth (Latimer) House Principles on the Three Branches of Government, states:

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

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

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

1.2 The first review for the 7th Assembly was conducted by Professor John Halligan from the University of Canberra in 2011, the second review for the 8th Assembly was conducted by the ANZSOG Institute for Governance and Policy Analysis. All review documents can be found on the Assembly’s website (https://www.parliament.act.gov.au/Publications/review-of-latimer-house-principles).

1.3 In September 2018 the Clerk wrote to 9 universities and individuals with an interest in parliamentary government seeking expressions of interest, with only one of those expressing an interest in undertaking the review. Accordingly, the Speaker appointed Emeritus Professor John Halligan from the Institute for Governance and Policy Analysis at the University of Canberra to undertake the review. As noted above, Professor Halligan had undertaken the first review in 2011.

1.4 The proposed completion date was initially 31 May 2019.

1.5 The final report entitled Review of the Performance of the Three Branches of Government in the Australian Capital Territory against Latimer House Principles was received by the Speaker on 9 September 2019, provided to the Standing Committee on Administration and Procedure on 12 September 2019 and tabled in the Legislative Assembly on 17 September 2019.
2 Conduct of Inquiry

2.1 At its meeting on 12 September 2019, the Committee noted the Review and the Speaker wrote to the relevant stakeholders on 15 October 2019 seeking their comments by 15 November 2019.

2.2 Submissions were received from:

- Mr Andrew Barr, MLA, Chief Minister (dated 4 December 2019)
- Chief Justice Helen Murrell, Chief Justice of the Supreme Court of the ACT (dated 7 November 2019)
- Mr Glenn Theakston, Acting Chief Magistrate and Chief Coroner, ACT Magistrates Court (dated 13 November 2019)
- Ms Kathy Leigh, Head of Service, ACT Government (received 24 December 2019)

2.3 The Committee met on 6 occasions to discuss the recommendations of the Review.

2.4 In its consideration of the Review the Committee followed the order presented in the Review and made observations on the discussion leading up to each of the Review’s recommendations. For each review recommendation in this report, there is discussion, submission consideration and Committee comment and/or recommendation.

2.5 The Committee noted that Associate Professor Benedict Sheehy, a legal specialist, was responsible for the review of the judicial branch components of the Review.
3 REVIEW RECOMMENDATIONS

3.1 The Review made 13 recommendations and are as follows:

Review Recommendation 1: The Executive should seek a better balance between principles of portfolio allocation so that there is greater alignment of ministers and directorates and more stability in the arrangements in the interests of clarity for accountability purposes.

Review Recommendation 2: There is an ongoing role for the ACT executive, the Auditor-General and the Legislative Assembly in reviewing the efficacy of performance indicators and accountability.

Review Recommendation 3: The Legislative Assembly should review the committee system and committees roles to determine whether:

- the language used should be sharpened by referring to scrutiny of the executive and investigation of public policy matters
- greater use should be made of standing committees for the examination of bills
- standing committees should more explicitly reflect directorates, and be clearly subject matter committees
- some subjects incorporated in committee titles be dropped where they are not given obvious attention in committee
- some select committee activity might be incorporated in standing committees including estimates

Review Recommendation 4: That the Legislative Assembly should review the purpose and operation of the Public Accounts Committee with reference to how they operate in comparable jurisdictions, and whether the resources available should be increased.

Review Recommendation 5: The low recent percentages for Executive responses to committee recommendations indicate that the reasons for the rates of response need to be clarified and this task should be undertaken by the Executive.

Review Recommendation 6: The capacity needs of the Assembly should be reviewed holistically to determine where weaknesses in support can be best addressed. This ranges from resources for MLAs particularly the opposition members, committee work particularly investigative activities, more in-depth scrutiny of the Executive, and the level of research staff in the Office of the Legislative Assembly that can be drawn on. This should be done in conjunction with the review of how standing committees are performing as a strengthened committee system is likely to require greater supporting expertise. The optimal approach is an independent review process that considers the roles of the Assembly and the resources required.

Review Recommendation 7: A regular expert review of the work and needs of the courts be instituted in consultation with both the courts and the executive for the purposes of determining appropriate resourcing and accountability.
Review Recommendation 8: The relationship between the Registrar, the courts and JACS has been described as ‘structurally awkward’ and may be an area where reform should be considered.

Review Recommendation 9: While the Integrity Commission Act provides for a review in 2022, the ACT Executive and Judiciary need to be open to the potential need for an earlier review if it becomes clear that there are issues beyond the basic concerns of unnecessary and costly redundancy with respect to providing oversight of judicial officers.

Review Recommendation 10: The Executive establish what appropriate time frames are for consultation with the different parts of the Judiciary, namely, judicial officers, ACT Law Society and ACT Bar Association, and provide proposed legislation within those time frames.

Review Recommendation 11: The Officers of the Legislative Assembly should be profiled on its website.

Review Recommendation 12: A priority issue for the Executive is to address the continuing shortfall in representative capacity. The two main alternatives are either to increase the number of MLAs and Ministers (as recommended by previous reviews) which can be accomplished within the existing legislation; or to reassign functions and responsibilities within a new structure, which would involve reviewing the legislation and the appointment of an expert reference group to undertake the task.

Review Recommendation 13: In view of the Executive’s interest in deliberative engagement, the potential for a citizens’ council should be explored as a structure that complements and supplements the Legislative Assembly (variations being either electorate-based mechanisms for providing a real recognition or a local government focus).
4 SUMMARY OF SUBMISSIONS

CHIEF MINISTER

4.1 In his response to the Committee’s call for comment on the Review, the Chief Minister welcomed the acknowledgement that “the ACT’s implementation of the Latimer House Principles is ‘highly credible and notable’.”

4.2 He made particular reference to recent establishment of the Integrity Commission and the inclusion of the judiciary in its mandate however he anticipates a collaborative approach between the Integrity Commission and the Judicial Council in relation to the investigation of complaints.

4.3 In relation to the possibility of establishing citizen councils, the Government considered that the current engagement mechanisms supplement deliberative engagement. He noted that over 3000 citizens have joined the community panel with over half actively participating.

4.4 The Review had commented on the perceived low response rated to Assembly Committee reports. The Chief Minister proposed that the data collection and reporting methodology was flawed as the Government had responded to the vast majority of reports within the required time frames.

HEAD OF SERVICE

4.5 Ms Leigh, Head of Service, addressed the first two recommendations of the Review. Those recommendations both reflected on the structure of both ministerial portfolios and the Chief Minister, Treasury and Economic Development Directorate. The Review was critical of the complexity of the two structures and expressed the view that it was impacting on the effective scrutiny of the Executive, a claim Ms Leigh disputed.

CHIEF JUSTICE OF THE SUPREME COURT

4.6 The response of the Chief Justice of the Supreme Court, the Hon Helen Murrell, focused on the relationships between the Executive and the Judiciary. She welcomed the Review’s fair and comprehensive account of the relationship and the challenges faced by the Judiciary.

4.7 In relation to resourcing she agreed with Review Recommendation 7 which called on an independent expert review to investigate the appropriate levels and structure of the funding for the courts. The control of the budget for the courts should, in her view, be with the Courts who could then optimise flexibility and target resources into areas of greatest need.
4.8 The Review had commented on judicial appointments and agreed with the conclusion that the current process allows for the most meritorious applicants to be proposed by the Selection committee and was critical of the lack of transparency once the recommendation/s were considered by Cabinet.

4.9 Review Recommendation 8 dealt with the relationship between the Registrar, the courts and the directorate. Justice Murrell was of the view that the role of Principal Registrar should have a statutory office, and to remove the role from the influence of the Executive. The first step, she proposed, should be a review of the current arrangements for financial resourcing and budgetary control, and the role the Registrar played in that would define the position’s interaction with the Executive.

4.10 An earlier review of the Integrity Commission Act prior to its legislated review in 2022, as proposed by Review Recommendation 9, was endorsed.

4.11 Timings for consultation in relation to proposed legislation was highlighted by the Review as a difficulty and the Chief Justice agreed that established time frames should be developed.

4.12 In relation to the comment in the Review regarding judicial independence and the Executive issuing press releases on the Court’s behalf, the submission noted that the ACT was the only jurisdiction, apart from Tasmania, that did not have a public information office and the employment of such an officer would be welcomed.

**ACTING CHIEF MAGISTRATE AND CHIEF CORONER**

4.13 Mr Theakston, Acting Chief Magistrate and Chief Coroner, having been appraised of the response of the Chief Justice, was in concurrence with the views she expressed.

4.14 Reference in the Review to work loads of after-hours duty roster magistrates was flagged as in error. Mr Theakston provided additional information that clarified the arrangements.
5 CONSIDERATION OF REVIEW RECOMMENDATIONS

5.1 In considering the Review and its recommendations, the Committee was appreciative of the work done by the Review team which encompasses a review of the whole system of Government in the Territory. However, on some occasions criticisms were made with little empirical evidence and no investigation; some matters raised were somewhat trivial and not within the scope of the Latimer House Principles; and broad sweeping statements were occasionally made on no evidence other than hearsay and personal experience.

5.2 It was not entirely clear what was proposed by the Review to strengthen the implementation of the Latimer House Principles in the ACT.

5.3 In the Review the following matters were considered:
   - Applying Latimer House Principles to the Australian Capital Territory (including recommendations and observations)
   - Executive Branch
   - Parliamentary Branch
   - Judiciary Branch
   - Public Office Holders, Oversight and Integrity
   - Civil Society and Governance in the ACT
   - ACT Futures

APPLYING LATIMER HOUSE PRINCIPLES TO THE AUSTRALIAN CAPITAL TERRITORY

5.4 The Review acknowledged the unique system of government in the ACT and the greater demands and complexity that imposes on governance. 30 years as an independent jurisdiction has developed a hybrid approach to Westminster.

5.5 Professor Halligan noted that the Commonwealth Parliamentary Association’s (CPA) Benchmarks for Democratic Legislatures (updated in 2018) focussed more on the requirements for a democratic legislature and less on the higher levels of performance and effectiveness. In the most recent CPA Benchmarking exercise the ACT Legislative Assembly was assessed as compliant or partially compliant with 91% of the benchmarks. 2

5.6 The Review is based on document analysis and discussion with senior persons within the Assembly, the Executive and the Judiciary, as well as stakeholders outside the ACT system of government. It noted that the Review was limited in its breadth and depth due to the

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1 2% non-compliant and 7% not applicable (related to bicameral jurisdictions)
2 Paper presented by T Duncan, Clerk, to the 50th Presiding Officer and Clerks Conference, Brisbane, July 2019
complexity of the ACT system however all elements of the Latimer House Principles were examined, some in more depth than others.

5.7 In its observations, the Review acknowledged that the Executive Branch demonstrated that it was sensitive to the Latimer House principles and willing to respond to the need to strengthen some aspects.

5.8 In relation to the Parliamentary Branch, relative independence from the Executive was rated very well. The Review appeared concerned with the organisation’s continual focus on performance rather than strengthening measures.

5.9 Governance and the ACT future was discussed in terms of the Territory’s subservience to the Federal Parliament and the question of equity of representation.

**EXECUTIVE BRANCH**

**MINISTRY**

5.10 The small size of the Ministry has been considered to be a longstanding weakness in the ACT Executive with individual ministers often responsible for up to six portfolios. The recent (2016) increase in the size of the Assembly to 25 members afforded the opportunity to increase the size of the Ministry. At the time of the Review, there were seven Ministers, with an eighth appointed in August 2019.

5.11 The small number of ministers, each required to manage the responsibilities of multiple portfolios, is compounded by the integrated Australian Capital Territory Public Service (ACTPS) structure. The Review noted that the increased size of the Assembly and the consequent increase in the Ministry had not solved the workload issues. The grouping of closely related fields into one portfolio coupled with multiple ministries risks a minister not being seen to be completely on top of a matter. The span of focus for a minister was considered by the Review to dilute accountability.

5.12 The Review discussed workloads of Ministers in other jurisdictions, concluding that the average number of portfolios is higher than other states and the Northern Territory. NSW and Queensland have allocations of portfolios under four, with Tasmania and Western Australian having more ministers with four or five portfolios. The question was then posed as to the capacity to manage multiple portfolios across multiple functional areas.

*Review Recommendation 1: The Executive should seek a better balance between principles of portfolio allocation so that there is greater alignment of ministers and directorates and more stability in the arrangements in the interests of clarity for accountability purposes.*
5.13 COMMENT—The Committee noted that the issues raised in Review Recommendation 1 were a matter for the Executive to consider. The difficulties posed by the multiple portfolio ministerial arrangement also impacted scrutiny and accountability mechanisms.

5.14 COMMENT—In her response to the Review, the Head of Service noted that Directorates were very adept at working with multiple ministers. The Committee also acknowledged that the structure was “less tribal” and facilitated more whole-of-government integration.

DIRECTORATES

5.15 The Review noted that the organisational structure of the Government directorates and agencies reflected those established following the Hawke Review of the ACTPS in 2011, with the exception of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD).

ACCOUNTABILITY AND PERFORMANCE

5.16 The ACT Government and the ACTPS prepare the expected array of accountability and reporting documents. In addition to the requirement for the preparation of annual and financial reports, the Government is also required to report on its progress in delivering the terms of the Parliamentary Agreement between the Australian Labor Party (ALP) and the ACT Greens. The annual and financial reports are the main form of external reporting.

5.17 The review of the budget and annual reports by the standing committees of the Legislative Assembly are a central accountability measure.

5.18 Coupled with that is the requirement for the government to respond to Committee reports within specified time frames.

5.19 In April 2019 CMTEDD prepared a framework document that outlined the expectations for a performance regime and annual reports are required to include performance statements. These statements are subject to review by the Auditor-General. Assembly Estimates Committees have suggested improvements to accountability measures and targets to make them more meaningful, noting the balance between measurable targets and the resourcing of data collection.

5.20 The Review cited a recent doctoral thesis by Graham Smith (2019) which discussed the high clarity of performance measures for the ACT but noted that relevance and completeness were not subject to formal review. The high level of clarity of performance measures was attributed to the review of accountability indicators by the Auditor-General in 2018.3

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3 Submission from the Head of Service, p 1
4 Strengthening Performance and Accountability: A Framework for the ACT Government
5.21 The evaluation of performance measures appears to have been subsumed into routine management practices, a situation the ACT government identified with.

**Review Recommendation 2:** There is an ongoing role for the ACT executive, the Auditor-General and the Legislative Assembly in reviewing the efficacy of performance indicators and accountability.

5.22 **COMMENT:** The Committee agreed with Review Recommendation 2 however noted that the Review did not indicate if the current accountability programs were effective or not.

5.23 **COMMENT—**The Head of Service, and the Chief Minister⁶, in their submissions, advised that the ACT Government was continuing to work on the recommendations of the Auditor-General report 2 of 2018.

5.24 The Review went on to discuss red tape reduction strategies undertaken to streamline processes and regulation for the community sector. It noted that it was unclear if the program was intended to reduce internal or external red tape, but did acknowledge that the ACT Government was considered to be “nimble” than larger jurisdictions.

**OPEN GOVERNMENT**

5.25 The open government initiative of the ACT Government includes a number of components and the Review focussed on three: annual reports; freedom of information; and open access to cabinet decisions.

5.26 The Review noted that the Government presented open access initiatives as enhancing democracy and “placing the community at the centre of the governance process”. Recent changes to the *Freedom of Information Act 2016* (FOI ACT) created a statutory right to information held by government with information only remaining confidential where it was contrary to public interest.

5.27 Proactive disclosure is a feature of the open access initiatives with directorates and agencies providing a large range of information about their activities as a matter of course, with many agency documents such as policy documents, ministerial briefs, question time briefs and committee hearing briefs routinely being made available.

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⁶ Submission from the Chief Minister, p 1
PARLIAMENTARY BRANCH

PARLIAMENT AND LATIMER

5.28 The Review noted that the ACT Legislative Assembly continued to perform well against the Latimer House Principles.

5.29 The past two elections have produced a fairly even balance in numbers between the two main parties with a third party assuming the balance of power. These collaborations have produced parliamentary agreements which have had an agenda of improving the work, operations and resources of the Assembly.

5.30 In addition to the Latimer House Principles, the ACT Legislative Assembly has conducted a benchmarking exercise based on the CPA’s *Benchmarks for Democratic Legislatures* in which the Assembly was assessed as compliant or partially compliant with 91% of the benchmarks. This exercise also highlighted a small number of areas that needed attention.

INDICATORS ON MLA INDEPENDENCE

5.31 The Review focussed on the following indicators of MLA independence:

- the functioning of Committees;
- the attention given by the Assembly to non-executive bills;
- the willingness of the executive to accept amendments from non-executive MLAs;
- non-government questions; and
- the time assigned to non-government business.

5.32 The Review discussed the composition of committees over the 8th and 9th Assemblies, with particular reference to party representation and the position of Chair. Four member committees were established in the 8th Assembly to accurately reflect the proportional representation of parties in the Assembly with an underpinning belief that committee members would approach issues and decisions in a non-partisan manner. The result however was that a number of committees were unable to report or make recommendations in relation to particular inquiries. All 9th Assembly committees, with the exception of the Standing Committee on Public Accounts, now have an odd number of members.

5.33 The capacity of non-executive members to prepare and introduce legislation remains a feature of the Assembly’s compliance with Latimer principles. While over past assemblies the number of non-executive bills presented has fluctuated, it is more a reflection of the election cycles.

7 Paper presented by T Duncan, Clerk, to the 50th Presiding Officer and Clerks Conference, Brisbane, July 2019
and political tactics. In terms of the situation in other jurisdictions, the percentage on non-executive bills presented and subsequently passed, remains high.

5.34 The Opposition routinely propose amendments to government bills and again, the success rate fluctuates but there is a receptivity for the amendments.

5.35 Questions on notice are another avenue for non-executive members to operate in a meaningful manner. The Review commented that there had been periods where the responses to questions on notice had been regarded as “somewhat unhealthy”, especially 2016.

5.36 COMMENT—The Committee was not convinced by this claim and, having examined the source data for 2016, was of the view that it was due to 2016 being an election year. 65 questions were asked in the last sitting week of 2016 (in December) with answers not due until January 2017. For the 8th Assembly (2012 to 2016) 791 questions were asked in total and 17 remained unanswered by the election time. That represents an answer rate of 98 % which is a more realistic indicator.

5.37 COMMENT—The Committee questioned the indicators used to measure non-executive members’ capacity to interact with the Executive, which appeared to be limited to the asking of questions through Assembly processes and did not consider the many other interactions Members have with the Executive.

COMMITTEE SYSTEM

5.38 The Review provided comment on the differing roles committees play in other jurisdictions and noted that the committees of the Legislative Assembly paid considerable attention to issues raised in estimates and annual reports and seemingly less on other inquiries.

5.39 The issue of referral of Bills to committee was discussed briefly and the Review seemed concerned that only between 7 and 11% of bills are referred to Committees for inquiry and report (7 Bills in 2018).

5.40 The Review highlighted that the output of most committees of the Assembly, aside from the annual reports inquiries, had reduced in 2019.

PUBLIC ACCOUNTS COMMITTEE

5.41 The Review appeared critical of the work of the Standing Committee on Public Accounts as it was of the opinion that the committee had a fundamental role in parliamentary oversight, in particular its role in reviewing the reports of the Auditor-General. Every report prepared by the Auditor-General is automatically referred to the Committee and there has been a significant lag between the presentation of the report to the Assembly and the Committee’s consideration of the reports.
5.42 Over the 9th Assembly to date, the Standing Committee has inquired into and reported on 2 Auditor-General’s reports, made a statement to the Assembly on 30 reports and are currently inquiring into 2 reports, both from 2018.

5.43 However, based on the data provided in the annual reports of the Office of the Legislative Assembly, the Review noted that, on paper, the Standing Committee on Public Accounts appeared to be conducting more meetings for longer hours, more public hearings and receiving more submissions.

5.44 In relation to Auditor–General reports, the Review found that the Standing Committee on Public Accounts had appeared to have opted out of inquiring into Auditor-General’s reports in the 9th Assembly.

_Review Recommendation 3:_ The Legislative Assembly should review the committee system and committees roles to determine whether:

- the language used should be sharpened by referring to scrutiny of the executive and investigation of public policy matters
- greater use should be made of standing committees for the examination of bills
- standing committees should more explicitly reflect directorates, and be clearly subject matter committees
- some subjects incorporated in committee titles be dropped where they are not given obvious attention in committee
- some select committee activity might be incorporated in standing committees including estimates

5.45 COMMENT—The Committee considered the comments made by the Review in relation to the role of committees and noted that, with an election to be held on October 2020, there was an opportunity to review the terms of reference for all committees.

**Recommendation 1**

5.46 The Committee recommends that, following the election of the 10th Assembly in October 2020, the Government/Assembly consider the comments and suggestions of the Review of the Performance of the Three Branches of Government in the Australian Capital Territory against Latimer House Principles in its development of a new committee structure.

_Review Recommendation 4:_ That the Legislative Assembly should review the purpose and operation of the Public Accounts Committee with reference to how they operate in comparable jurisdictions, and whether the resources available should be increased.

5.47 Review Recommendation 4 specifically refers to the role and function of the Standing Committee on Public Accounts and suggests a jurisdictional comparison.
5.48 COMMENT—The Committee noted the comments of the Review in relation to the scrutiny of Auditor-General’s reports and was concerned that this important function was not being adequately undertaken.

Recommendation 2

5.49 The Committee recommends that the matters raised in the Review in relation to the role and operation of the Standing Committee on Public Accounts be brought to the attention of Standing Committee and that the Committee be invited to respond to the Assembly on why so few reports on Auditor-General’s reports had been presented. That Committee is also invited to provide its views on its preferred form, structure, membership and terms of reference for any future public accounts committee for the Assembly.

INDEPENDENCE AND RESOURCING OF THE ASSEMBLY

5.50 The Review focused on the resourcing provided to the parliament and the source of the funding. It noted that there had been a number of mechanisms to strengthen the independence of the parliament and its officers.

5.51 However, the Review was of the view that, to be fully compliant with the Latimer House Principles, the budget for the legislature should be determined independently of the executive. The development of the Budget Protocols Agreement, which commenced in 2014 and has since been refined, was, in the view of the Review, reaffirmed the independent status of the Parliament and its Officers.

LAW MAKING PROCESS

5.52 While the Review considered the law making processes in the Territory to be compliant, concern was expressed that committees played an insignificant role, with 7 bills being referred to a committee for inquiry and report.

HOLDING THE EXECUTIVE TO ACCOUNT

5.53 This section of the Review dealt briefly with the process employed by non-executive members to question the Executive, being through questions on notice and questions without notice. Members have been very active in this area.

5.54 However, of more concern to the Review was the response rate of the Government to the recommendation of the report of the standing committees.

Review Recommendation 5: The low recent percentages for Executive responses to committee recommendations indicate that the reasons for the rates of response need to be clarified and this task should be undertaken by the Executive.
5.55 COMMENT—The Committee noted that the data used to support the suggestion that the Government was non-compliant with the standing orders relation to responses to committee reports was a snapshot as at a particular date and did not accurately reflect the situation over the long term.

5.56 COMMENT—The following tables, provide a more accurate data for the 9th Assembly up to September 2019:

<table>
<thead>
<tr>
<th>Ninth Assembly—Government Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of Government responses received</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Ninth Assembly—Government responses received—time frames</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of Government responses not received</td>
</tr>
<tr>
<td>Percentage of Government responses within 4 months’ time limit</td>
</tr>
<tr>
<td>Percentage of Government responses not received within 4 months’ time limit</td>
</tr>
</tbody>
</table>

5.57 COMMENT—Further details can be found at: https://www.parliament.act.gov.au/in-committees/committee-activities

5.58 COMMENT—In his response to the Review the Chief Minister also highlighted that the use of the parliamentary report card did not accurately reflect the Government’s response rate to Committee reports.

5.59 In addition, it should be noted that Committee reports may not recommend any action by the Government, thus removing the requirement for a response.

INSTITUTIONAL DEVELOPMENT AND CAPACITY

5.60 The Review noted that the following initiatives had enhanced the Assembly standing and independence:

- Ethics and Integrity Advisor
- Parliamentary budget advisor (for Estimates processes)
- Commissioner for Standards
- Register of Lobbyists
- Regular reviews of the standing orders
- Establishment of Officers of the Parliament
- Integrity Commission
The level of resourcing for MLAs was briefly discussed with an emphasis on secretarial, office, library and research facilities, legal drafting and training for new members. There was no consensus view on what an appropriate level of resourcing would be.

**Review Recommendation 6:** The capacity needs of the Assembly should be reviewed holistically to determine where weaknesses in support can be best addressed. This ranges from resources for MLAs particularly the opposition members, committee work particularly investigative activities, more in-depth scrutiny of the Executive, and the level of research staff in the Office of the Legislative Assembly that can be drawn on. This should be done in conjunction with the review of how standing committees are performing as a strengthened committee system is likely to require greater supporting expertise. The optimal approach is an independent review process that considers the roles of the Assembly and the resources required.

COMMENT—the Committee noted Review Recommendation 6 and was reminded that funding for resources for non-executive Members were determined by the Chief Minister (staffing) and the Remuneration Tribunal (for allowances).

The Committee agreed to give the issues raised further consideration during the 10th Assembly.

**JUDICIAL BRANCH**

**JUDICIARY AND LATIMER—INDEPENDENCE OF THE JUDICIARY**

The Review noted that in most jurisdictions, the independence of the judiciary in relation to judgements it make in accordance with the law is unquestioned.

It is in relation to the administration of the courts/judiciary that there is some divergence. The Review noted that judicial independence requires control of the courts by the judiciary but efficient and effective court administration carries a role for the Executive.

In the ACT both positions are held in that the Executive asserts the need to control of operations of the courts to ensure appropriate efficiencies and the judiciary maintains that the courts need to be in control the judiciary so that the court’s priorities are met.

**RESOURCING**

While acknowledging that the level of resourcing provided to the judiciary is appropriate in most instances, the Review noted that the judiciary is cognisant of the small size of the jurisdiction and has not sought additional funding without regard to those constraints.

The Executive has funded new facilities for the judiciary in terms of new buildings which is a significant improvement.
5.69 Notwithstanding this improvement in infrastructure, the Review noted that the number of judicial officers in the Magistrates Court remains of concern. The Executive proposed that efficiencies such as those introduced in the Supreme Court along with more technologically advanced infrastructure, should lead to improved efficiencies.

5.70 The Executive indicated to the Review that a review of the work of the court should form the basis for determining the number of appointments and resourcing in general.

5.71 On the matter of resourcing of the Registrar, review found that there was a consensus view that underfunding contributed to a number of activities, including annual reporting not occurring.

*Review Recommendation 7: A regular expert review of the work and needs of the courts be instituted in consultation with both the courts and the executive for the purposes of determining appropriate resourcing and accountability.*

5.72 COMMENT—The Committee was of the view that this was a matter for consultation between the Executive and the Judiciary.

**APPOINTMENTS**

5.73 The Review commented that the judicial appointment process for the ACT is well developed and refined and is focussed on merit and transparency. It involves both key stakeholders as well as external judicial officers. It is however, ultimately the Executive that makes recruitment decisions and political and personal influences are inevitable.

5.74 In relation to gender balance, in both the Magistrates Court and the Supreme Court, the ACT has reached gender parity with the chief judicial officers both being female. The Review congratulated the ACT in this regard.

**RELATIONSHIPS BETWEEN THE BRANCHES: THE JUDICIARY AND THE EXECUTIVE**

5.75 The Review was aware of the mutual respect and goodwill between the branches which was based on the institutional understanding both branches have for the roles they play.

5.76 Of concern was the role of the Courts Registrar, positioned as it is between the demands of the Executive and the needs of the Courts. There is a view that the Registrar is under-resourced and unable to fulfil all the necessary duties required by the Courts. At the same time the Registrar is tasked with, on behalf of the Executive, monitoring the Courts’ administrative efficiencies and effectiveness. The situation was described by the Review as “structurally awkward”.

5.77 The introduction of the Integrity Commission in 2019 caused some concern over the capacity of the Commissioner to investigate allegations of corruption of “public official” – as judicial
officers are defined. Opposition to this matter ranged from the inappropriateness of the Executive to oversight the activities of the judiciary, to the fact that the ACT Judicial Council is well placed to provide sufficient oversight and investigation of complaints against the Judiciary.

5.78 Additionally, the Review highlighted that the judiciary and associated organisations (ACT Law Society, and the ACT Bar Association) had indicated that the short time frames allocated by the Executive for the consideration of proposed legislation was impacting the level of advice and comment these organisations were able to provide. In some instances less than three weeks were available with barristers often donating time to provide advice in the required timeframe.

5.79 The impact of these short time frames was highlighted by the Review which cited the example where an inadequate time frame for consultation resulted in unintended consequences in family violence orders. The new legislation removed the capacity of authorised police officers to issue temporary orders thus requiring the services of a magistrate.

5.80 This has had implications on the workloads of duty Magistrates, particularly in relation to after-hours duty rosters. The Review contended that a magistrate who was on the after-duty roster was unable to function during normal working hours the next day.

5.81 In his response to the Review, Mr Glenn Theakston, Acting Chief Magistrate and Chief Coroner, advised the Committee that this was not the case, highlighting that magistrates have attended to after-duty hours for a long time. He indicated that the anticipated increase in after-hours duties had not materialised and the issue was being managed.

5.82 The Review also indicated that the nature and meaning of independence was not fully appreciated by the Executive.

Review Recommendation 8: The relationship between the Registrar, the courts and JACS has been described as ‘structurally awkward’ and may be an area where reform should be considered.

5.83 COMMENT—The Committee was of the view that this was a matter for the Executive and the Courts to resolve, noting that it is difficult to ensure true independence whilst driving efficiency in the courts.

Review Recommendation 9: While the Integrity Commission Act provides for a review in 2022, the ACT Executive and Judiciary need to be open to the potential need for an earlier review if it becomes clear that there are issues beyond the basic concerns of unnecessary and costly redundancy with respect to providing oversight of judicial officers.

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8 Submission, Acting Chief Magistrate and Chief Coroner, pp1-2
COMMENT—The scheduled review of the Integrity Commission ACT 2018 in 2022 was considered by the Committee to be sufficient, but it was not averse to an earlier review, if deemed necessary.

*Review Recommendation 10:* The Executive establish what appropriate time frames are for consultation with the different parts of the Judiciary, namely, judicial officers, ACT Law Society and ACT Bar Association, and provide proposed legislation within those time frames

COMMENT—The Committee noted the recommendation and agreed that it was a matter for the Executive’s consideration.

**PUBLIC OFFICE HOLDERS, OVERSIGHT AND INTEGRITY**

**OFFICERS OF THE LEGISLATIVE ASSEMBLY**

The creation of the position of Officers of the Parliament by the Assembly in 2013 was considered by the Review to strengthen the roles and independence of statutory office holders and made a much clearer separation between these officers and the Executives. Currently the Auditor-General, Electoral Commission, the Ombudsman and the Integrity Commissioner are Officers of the Legislative Assembly, with appointments and reporting occurring through the Speaker’s Office.

*Review Recommendation 11:* The Officers of the Legislative Assembly should be profiled on its website.

COMMENT—The Committee was supportive of this suggestion.

**Recommendation 3**

The Committee recommends that information relating to the Officers of the Parliament be included on the Legislative Assembly website, including links to their home pages.

**INTEGRITY COMMISSION**

The Integrity Commission was established in 2018 and became operational in late 2019. It has the power to investigate corruption in the public sector and is meant to strengthen public confidence in government integrity. As mentioned previously, the Review commented on the inclusion of judicial officers under the umbrella of “public officials” however went on to fully describe the interactions between the Judicial Council and the Integrity Commission.
CIVIL SOCIETY AND GOVERNANCE

REPRESENTATION OF WOMEN

5.90 The Review noted that the ACT has a consistently high record across the three branches with 52% female Members, assembly leadership positions held by women and the majority of director-general positions held by women.

ASSEMBLY ENGAGEMENT

5.91 There are a number of ways members of the public can interact with the Assembly and a number of measures were highlighted by the Review.

5.92 In relation to constituent matters, it appeared from the data used by the Review that the Assembly’s record in this area was regarded as unhealthy. It is important to note that over the period of the data collected, the mechanisms Members use to address constituent matters with the Executive has shifted away from the traditional “I will write to the Minister on your behalf” to more interpersonal contact, social media and electronic communications.

5.93 The referral of Bills to Assembly standing committees was limited as was the number of inquiries undertaken by committees. Interestingly the public participation levels were significant for the high profile inquiries of 2018, those being the Inquiry into end-of-life choices (488 submissions), drone delivery systems (151 submissions), implementation of the NDIS in the ACT (70 submissions) and family and domestic violence (32 submissions).

5.94 The Review was aware of some innovative approaches being used by the Committee Support Office to encourage more participate including surveys, twitter, competitions and site visits.

EXECUTIVE ENGAGEMENT

5.95 The ACT Government’s open government agenda provides many opportunities for the public to interact with the Government, to prosecute points of view on a range of topics and to inform the decision-making processes of the Government. These initiatives have been well received and support the 9th Assembly Parliamentary agreement to “strengthen community consultation processes”.

ACT FUTURES

5.96 The Review spent some time discussing changes and growth in the ACT population base, and emphasized the need to consider medium and long terms issues. It reflected on the level of representation of ACT residents especially current size of the Assembly and previous recommendations to further increase the number of Members. The pressure of conducting
5.97 One suggestion of the Review was that a model of sub-jurisdictional bodies be implemented along the lines of some German city-states or citizen’s councils.

Review Recommendation 12: A priority issue for the Executive is to address the continuing shortfall in representative capacity. The two main alternatives are either to increase the number of MLAs and Ministers (as recommended by previous reviews) which can be accomplished within the existing legislation; or to reassign functions and responsibilities within a new structure, which would involve reviewing the legislation and the appointment of an expert reference group to undertake the task.

5.98 COMMENT—The Committee noted the comments of the Review and were of the view that there was strong community engagement through the citizens’ juries/councils, the “Have Your Say” website and the regular interviews with the Chief Minister on the local radio.

Review Recommendation 13: In view of the Executive’s interest in deliberative engagement, the potential for a citizens’ council should be explored as a structure that complements and supplements the Legislative Assembly (variations being either electorate-based mechanisms for providing a real recognition or a local government focus).

5.99 COMMENT—The Committee noted the Review recommendation and reflected on recent efforts to improve deliberative engagement and interactions with Assembly committees.

5.100 The role and standing of the ACT in the intergovernmental sphere is compromised by its subservience to the Australian Capital Territory (Self-Government) Act 1988 which imposes limits on its autonomy and power. The capacity of the Commonwealth to intervene in matters that are open to legislation in other jurisdiction is becoming a pressing issue for many Canberrans and is being prosecuted at a number of levels.

5.101 The Review proposed at this point that consideration should be given to appointing an administrator for the Territory, similar to that of the Northern Territory. No benefits of the proposal were advanced by the Review.

CONCLUSION

5.102 The Review concluded that “the Australian Capital Territory’s record in implementing Latimer House Principles is highly credible and notable”. It noted that tensions will continue to exist between the branches which is healthy and the Latimer House principles provide a focus examining performance.

5.103 COMMENT—The Committee is appreciative of the efforts of the Review team and notes that this is the third review of the Assembly in 12 years. As the Assembly is now 30 years old, it is considered that perhaps a review once every four years in not warranted, and a better time frame is once every eight years.
5.104

Recommendation 4

5.105 The Committee recommends that Continuing resolution 8A be amended at paragraph 2A to ensure that a review is undertaken in the second year of every second Assembly.

Joy Burch MLA

Chair

February 2020
APPENDIX A – CONTINUING RESOLUTION 8A

LATIMER HOUSE PRINCIPLES

Resolution agreed by the Assembly
11 December 2008 (amended 23 February 2012)

That:

(1) Preamble


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

THE PRINCIPLES

(2) Objective

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

(a) The Three Branches of Government

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

(b) Parliament and the Judiciary

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

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

(c) Independence of Parliamentarians

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

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

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

To secure these aims:

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

(A) equality of opportunity for all who are eligible for judicial office;
(B) appointment on merit; and
(C) that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.

(ii) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.

(iii) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.

(iv) Interaction, if any, between the executive and the judiciary should not compromise judicial independence. Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties. Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner. An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.

(e) Public Office Holders

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

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

(f) Ethical Governance

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

(g) Accountability Mechanisms

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

(ii) Judicial Accountability

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

(iii) Judicial review

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

(h) The law-making process

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

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

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

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

(i) Oversight of Government

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

(i) The establishment of scrutiny bodies and mechanisms to oversee government, enhances public confidence in the integrity and acceptability of government’s activities. Independent bodies such as public accounts committees, ombudsmen, human rights commissions, auditors-general, anti-corruption commissions, information commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances.
(ii) Government’s transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

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

(2A) In the second year after a general election, following consultation with the Standing Committee on Administration and Procedure, the Speaker shall appoint a suitably qualified person to conduct an assessment of the implementation of the Latimer House Principles in the governance of the ACT with the resultant report:
   (a) to be tabled in the Legislative Assembly by the Speaker; and
   (b) to be referred to the Standing Committee on Administration and Procedure for inquiry and report.

(3) This resolution has effect from the commencement of the Seventh Assembly and continues in force unless and until amended or repealed by this or subsequent Assembly.
Thank you for your letter of 15 October 2019, received in my office on 12 November 2019, about the Review of the Performance of the Three Branches of Government in the ACT against the Latimer House Principles as part of the Standing Committee of Administration and Procedure’s inquiry.

I welcome the report’s acknowledgement that the ACT’s implementation of the Latimer House Principles is “highly credible and notable”, with sustained attention to addressing accountability, performance, institutional and relational issues.

The Government continues to reform its practices and since the last review, we have instigated the following initiatives:
- passing of the Integrity Commission Act 2018 in November 2018, providing an independent body to investigate corruption in public administration and ultimately greater public confidence in government integrity;
- passing the Freedom of Information Act 2016, which applies the principle that a public right to government information is essential for an effective democracy; and
- improved electoral campaign finance laws through the Electoral Amendment 2015.

In relation to performance and accountability, in 2018, the ACT Auditor General conducted a review of the performance and accountability indicators. Subsequently, the Government reviewed the guidelines and in April 2019 released A Framework for Strengthening ACT Government Performance and Accountability. The 2018-19 Budget provided funding for a Policy Innovation Team to build evaluation capability and use behavioural insights for a regulatory reform agenda. In March 2020, the ACT Government will release its Wellbeing framework. Collectively, these initiatives will inform ongoing refinements to the performance and accountability framework.

The Integrity Commission has commenced operation, and Section 303 of the Integrity Commission Act 2018 provides for a review of this legislation as soon as practicable after 1 July 2022. The inclusion of
the judiciary into the coverage of the Integrity Commission will be monitored from the commencement of the legislation and will form part of the review under Section 303. The Integrity Commission will not be able to investigate complaints made about judicial officers that directly relate to a judicial decision or process. The power to impose a sanction against a judicial officer will remain with the Judicial Council or the Legislative Assembly. This approach retains the independence of the judiciary, encourages a collaborative approach between the Integrity Commission and the Judicial Council, and is consistent with the approach taken in other jurisdictions.

In relation to the potential for a citizens’ council, care should be given in any consideration of another layer of governance. I am confident the engagement mechanisms currently in place, including the ‘Your Say’ panel, provides a more contemporary approach to supplement our deliberative engagement. Since the YourSay Community Panel launched on 1 July 2019, almost 3,000 Canberrans have joined the Panel and a high proportion – over 50 per cent – are actively participating in activities. Since its launch, Panel members have been invited to take part in eight activities including both online surveys and invitations to attend focus groups. Topics we have researched though the Panel include Wellbeing, Motor Accidents Injury Scheme, Wintervention and the ACT Planning Review.

Any additional resourcing requests to progress recommendations from the Halligan report will need to be considered within a constrained fiscal environment and follow the normal budgetary process.

Finally, in relation to comments in the Review regarding the low percentages for Executive responses to committee reports, there may need to be a review of the collection methodology and reporting. The Legislative Assembly Parliamentary Performance Report Card is based on business carried out and completed in the relevant calendar year. This results in an inaccurate reflection of the Government’s response rate to committee reports. Whilst a Committee report may be tabled in a calendar year, the government response may not fall due until the following year. During the ninth Assembly, the Government has responded to the vast majority of committee reports within the required timeframes.

I look forward to the Committee’s deliberations on the 2019 Latimer Review.

Yours sincerely

Andrew Barr MLA
Chief Minister

- 4 DEC 2019
Dear Madam Speaker

**Review into the Latimer House Principles for the ACT**

Thank you for letter of 15 October 2019 about Emeritus Professor Halligan’s report on the Review of Performance of the Three Branches of government in the Australian Capital Territory against Latimer House Principles.

The overall findings of the Report are positive and reflect an ongoing refinement of the governance practices for the growing ACT community.

The recommendations of the review focus on the executive, parliamentary and judicial branches of the government. In responding to review’s recommendations, I have limited my comments, as Head of the ACT Public Service, to the role of the ACT Public Service in supporting the Latimer House Principles.

*Recommendation 1* refers to “greater alignment of ministers and directorates” “in the interest of clarity for accountability purposes”. Collectively, the Directors-General are very adept at working to multiple ministers – an arrangement that works well given the size of the Executive and the diverse portfolio responsibilities of a city state governance structure. One significant advantage of this arrangement is the ability to provide strategic advice from a whole of government perspective on individual issues.

In relation to **Recommendation 2**, in 2018 the ACT Auditor General conducted a review of the performance and accountability indicators. Subsequently, the Government undertook a review of the guidelines and in April this year released *A Framework for Strengthening ACT Government Performance and Accountability*. In March 2020, the ACT Government will release its Wellbeing framework, which will further enhance the performance and accountability framework.

Thank you for the opportunity to comment on the 2019 review of the ACT Government’s performance against the Latimer House Principles.

Yours sincerely

Kathly Leigh
Head of Service
Dear Speaker,

Thank you for the opportunity to respond to the recently tabled report reviewing the performance of the three branches of government against the Latimer House Principles.

My response is confined to those aspects of the Review that concern the judicial branch of government.

Overall, I consider that the Review contains a fair and comprehensive account of the current challenges faced by the judicial branch. Further, I agree with the reviewers' observation that, in general, the relationship between the Judiciary and the Executive is cordial and respectful.

In relation to particular matters that affect the Supreme Court (most of which affect both courts), I make the following comments.

**Resourcing**

I strongly endorse Recommendation 7 insofar as it proposes that an expert review of the work and needs of the courts be instituted for the purpose of determining appropriate budgets.

As the Review observes, the current system of increasing the budgets by a set percentage per year is inappropriate; the budgets should reflect the actual financial needs of each court.

An independent expert review would provide a proper foundation for rebasing the budget of each court. The Supreme Court is prepared to partner with the Executive in relation to obtaining such an independent review.

In relation to budgetary control, within the constraints of the budgets provided, the courts are in the best position to determine how the budgets should be spent. Court control of budget would optimise flexibility and financial resources to be targeted in the areas of greatest need, as opposed to areas of political interest.

The independence of the Judiciary can only be assured if the courts control their own finances. It is true that, in other jurisdictions where the Executive has relinquished budgetary control, the outcomes "have not been uniformly positive" but it is equally true that, in jurisdictions where the Executive has maintained budgetary control, the outcomes have been uniformly problematic.
Appointments

Confidence in the Judiciary depends upon the appointment of meritorious candidates who (as one aspect of merit) reflect the diversity of the ACT community.

The current process for judicial appointment is excellent insofar as it enables the identification of the most meritorious applicants, taking into account the need for diversity.

The difficulty is that transparency and the emphasis on merit is maintained only up to the point where the selection committee recommends applicant/s. Beyond that point, the process is shrouded in secrecy and vulnerable to derailment by political nepotism. The selection committee (usually comprising the head of the relevant jurisdiction, a senior representative of the Executive and a third party) may recommend a candidate or candidates as most suitable based on criteria that include diversity, yet Cabinet may determine to appoint a person whom the selection committee has deemed to be relatively unsuitable. At the very least, Cabinet should be required to publicly explain the appointment of a person who was not considered by the selection committee to be among the most suitable applicants.

Role of the Principal Registrar

The Principal Registrar holds a statutory appointment and has a statutory responsibility to support the heads of jurisdiction in relation to their administrative responsibilities. However, perhaps as a vestige of earlier times when there was no statutory office of Principal Registrar, the Executive is inclined to consider that he is responsible to the Executive in relation to administration of the courts, asking for information that (in the courts’ opinion) is unnecessary and making substantial demands on his time.

There needs to be a cultural change on the part of the Executive.

Additionally, it would be an incidental benefit of the courts gaining greater control over their budgets that the Executive would have less need to make demands on the Principal Registrar’s time.

While I do not oppose Recommendation 8, in my view the first step should be to review the arrangements in relation to financial resourcing and budgetary control; the role of the Principal Registrar and the extent of the legitimate need for the Principal Registrar to deal with the Executive are largely dependent on where financial responsibility lies.

Integrity Commission

The Review fairly reflects the view of the Judiciary that, by empowering the Integrity Commission to investigate judicial conduct, the Executive has undermined judicial independence and that it is unnecessary to confer oversight on the Integrity Commission in circumstances where the Judicial Council was established for the specific purpose of dealing with complaints of judicial misconduct. The Judicial Council has a record of dealing with complaints of judicial misconduct promptly and effectively.

I endorse Recommendation 8, which proposes that the Executive and Judiciary consider an early review of whether the Integrity Commissioner’s powers in relation to investigating judicial misconduct are appropriate or necessary.
Consultation about legislative change

Generally, the judiciary is given inadequate time to consider proposed legislative changes. We have requested adherence to minimum timeframes.

I endorse Recommendation 10, that the Executive and the Judiciary establish appropriate timeframes for consultation regarding legislation. If such timeframes are agreed, I would hope that the Executive would adhere to them.

Access to justice

As an example of a failure by the Executive to appreciate the nature of judicial independence, at p 27 of the Review, the reviewers refer to the fact that the Executive may issue press releases concerning judicial matters.

Apart from Tasmania, the ACT is the only jurisdiction in which the courts lack a public information officer. As a result, the ACT is excluded from the strong network of public information officers serving courts around Australia, who share ideas about advancing access to justice by building better communications between courts and the public.

Access to justice is a high priority for the Supreme Court and the Court would welcome funding to employ a public information officer.

Helen Murrell
Chief Justice
13 November 2019

Ms Joy Burch MLA
Speaker ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Speaker,

REVIEW OF THE PERFORMANCE OF THE THREE BRANCHES OF GOVERNMENT

Thank you for the invitation to respond to the Review of the Performance of the Three Branches of Government in the Australian Capital Territory against Latimer House Principles.

The Chief Justice's response

I have had the opportunity of reading the Chief Justice's response and adopt her observations, and in particular echo her comments about:

- the respectful relationship between the Executive and the Judiciary;
- our support for a fundamental review of the cost base for court services to support a decision for appropriate base funding for each Court and the Principal Registrar;
- the importance of how judicial appointments are decided;
- the merit in limiting the demands made by the Executive on the Principal Registrar, and suggest that a protocol or service agreement between the Executive and the Courts may assist in that regard;
- the inappropriate and unwarranted nature of the Integrity Commission’s oversight of judicial officers, in circumstances where there are already legislative arrangements for a Judicial Council and Judicial Commission; and
- the utility of the Judiciary being provided with a meaningful opportunity to consider and respond to the Executive’s law reform initiatives.

A correction

I need to correct a factual error on pages 26 and 27 of the report. It is not the case that magistrates are not listed to sit while rostered on for after-hours duty.
For a long time, magistrates have attended to after-hours duty. That work includes issuing warrants, extending investigation periods, issuing forensic procedure orders, and a range of coronial functions including issuing coronial investigation scene orders.

When the after-hours family violence orders commenced in 2017, there was concern that this additional after-hours work may adversely impact upon the ability of magistrates, who were rostered on for after-hours duty, to effectively function in court the following day. Contingency plans were contemplated and included not list magistrates during such duty periods. However, the anticipated large number of after-hours applications have not yet materialised, and magistrates have remained rostered to sit in lists during their duty periods.

Having said that, the after-hours applications do create additional calls during the night, the calls do wake duty magistrates and disrupt their sleep, and that disruption can impact upon the magistrates the following day.

Thank you again for the opportunity to comment on the above review. This process, of considering current arrangements by reference to the Latimer House Principles, provides the Territory with a valuable opportunity to maintain good government.

Yours sincerely,

Glenn Theakston
Acting Chief Magistrate and Chief Coroner