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Making the Grade

Legislative Assembly for the ACT—assessment against the updated CPA Benchmarks for Democratic Legislatures

**Paper to be presented by Tom Duncan, Clerk of the
Legislative Assembly for the Australian Capital Territory**

There has to be some way to measure success in the Service. British Leyland can measure success by the size of its profits. However, the Civil Service does not make profits or losses. *Ergo*, we measure success by the size of our staff and our budget. By definition a big department is more successful than a small one. It seems extraordinary that Woolley could have passed through the Civil Service College without having understood that this simple proposition is the basis of our whole system. (*Memo from Sir Humphrey Appleby*)

Background and purpose

In 2006, a Commonwealth Parliamentary Association (CPA) study group hosted by Bermuda produced a report entitled, *Benchmarks for Democratic Legislatures*. Drawing on a range of earlier works, including the National Democratic Institute's discussion paper, *Toward the Development of International Standards for Democratic Legislatures*, the benchmarks set out a set of best practice standards aimed at providing tools to better assess levels of parliamentary democracy across CPA branches.

The Legislative Assembly for the Australian Capital Territory was the first legislature to measure itself against the 2006 benchmarks. Through that assessment, which was published in 2008 in *The Parliamentarian*,¹ the Assembly was rated as having met 80 of the 87 benchmarks.

In 2018, the Recommended Benchmarks for Democratic Legislatures were revised and updated following the work of a study group of CPA members representing different Commonwealth regions. The group was organised by the Commonwealth Parliamentary Association Headquarters Secretariat and the Westminster Foundation for Democracy.

With the changes to the benchmarks in 2018, the Office of the Legislative Assembly² wished to establish whether the Assembly's performance had changed.

This paper sets out the results of the Office's assessment of the revised benchmarks.

Method

An assessment team, comprising the Clerk of the Legislative Assembly, Tom Duncan, and the Director of the Office of the Clerk, David Skinner, applied a relatively straightforward assessment method. Recognising that compliance with the benchmarks could exist on continuum, the assessment team evaluated the Assembly against each benchmark to determine whether the Assembly:

- fully complied with the spirit and the letter of the benchmark (awarding 2 marks);
- partially complied with the spirit and the letter of the benchmark (awarding 1 mark); or
- did not comply with the spirit and the letter of the benchmark (awarding no mark).

¹ Based on a paper '[Rating the ACT Legislative Assembly against CPA Benchmarks for Democratic Legislatures— is A minus good enough?](#)' by then Speaker Wayne Berry MLA and David Skinner for the 39th Presiding Officers and Clerk's Conference in Adelaide, 2008.

² The Office of the Legislative Assembly is a statutory office responsible for advising on parliamentary procedure and providing administrative support to the Legislative Assembly for the ACT.

The assessment team considered the Assembly's performance against the benchmarks with the underlying democratic functions of the legislative branch of government in mind. Parliaments have a number of important functions including: the representation of electors, the scrutiny of government and holding the executive to account, and the consideration and passage of legislation. In making its assessments, the assessment team considered relevant statutory and subordinate law, the conventions and practice of the Assembly, the standing orders and resolutions of the Assembly, and relevant statistics associated with the business of the Assembly.

Where the assessment team considered that the evidence supported an assessment of full compliance with a benchmark, two points were awarded, where the team considered that the evidence supported partial compliance, one point was awarded, and where the team considered that the evidence was unable to support compliance, no points were awarded. Where a particular benchmark was not relevant to the Assembly—for instance, because it related to a national legislature or a bicameral legislature—it was excluded from the assessment.

External review

Following its own assessment, Emeritus Professor John Warhurst AO³ of the Australian National University undertook an external review to validate or invalidate the judgements that had been made by the Office and to offer any further comment.

As a general comment on the Office's assessments, Professor Warhurst noted:

The initial Office Assessments are almost invariably sound and my comments below are largely in the form of suggestions to tighten up or to expand the comments by the Office rather than to dispute the rating.

The benchmarks themselves include many subjective general terms which are always open to interpretation, including: regular, periodic, fair, proportionate, regularly, substantial proportion, adequate, timely, sufficient, reasonable, etc. This point should be made in a prominent position.

The ACT Legislative Assembly has general characteristics, including its relatively small size, which may affect the applicability of the benchmarks. These should also be noted.

The Office revised a number of its assessments and comments on the basis of Professor Warhurst's analysis.

The Office will provide the assessment to the Assembly's Standing Committee on Administration and Procedure (which is comprised of the Speaker (Chair) and each of the whips of the three parties represented in the Assembly) for consideration and endorsement later in July 2019.

Results

When the CPA Study Group re-considered the original 87 benchmarks it added a further 47 new benchmarks, bringing the total number of benchmarks to 132. Subject to the views of the Standing Committee on Administration and Procedure, the Assembly has scored 225 marks against a possible score of 246, which, in percentage terms is 91.5% (compared with the 91.9% score obtained in 2008).

³ Emeritus Professor John Warhurst AO, Visiting Fellow, School of Politics and International Relations, Australian National University.

Where did the Assembly fall short and not meet the benchmark at all?

Of the 132 benchmarks the Assembly did not meet three, and partially met 14 measures. Detailed below are the explanations of why the Assembly did not meet the benchmark.

Parliamentary government – 5.1.5

The Legislature shall take measures to ensure that women are represented at all levels of administration.

The Assembly did not meet this benchmark and it is unsure whether it will ever be in a position to do so. The Office made the following comment explaining its rating:

There are no measures in place to ‘ensure that women are represented at all levels of administration’. As with elsewhere in the Australian public sector, the merit principle is applied in relation to all appointments at all levels of administration.

While there is no barrier to encouraging women to apply for particular positions within a public sector organisation, any measure that is designed to ‘ensure’ that one category of person over another is considered for a position on the basis of an attribute (e.g. sex or gender) unrelated to a person’s merit, cannot, under current legislative arrangements, be adopted.

The implementation of measures to ‘ensure’ that women are represented at all levels of administration’ would almost certainly contravene the *Discrimination Act 1991*, which establishes that a person’s sex and a person’s gender identity are ‘protected attributes’.

Section 8 of that Act, *inter alia*, provides that:

- A person directly discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.
- A person indirectly discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has 1 or more protected attributes.

It is also observed that this benchmark would appear to conflict with benchmark 5.3.1, which proposes that ‘Recruitment and promotion of non-partisan staff shall be on the basis of merit and equal opportunity’, and 5.2.2 which proposes that ‘recruitment procedures... shall not discriminate... recruitment of staff on the basis of race, ethnicity, religion, gender, disability...’.

Legislative function general – 6.1.5

The Legislature shall encourage the process of equality impact assessment with respect to the development of legislation, policies and budgets.

The Assembly has not, by resolution or by legislation, expressed a formal view on encouraging the adoption of ‘equality impact assessments’ in relation to legislation, policies and budgets.

Legislature procedure – 6.2.4

The Legislature shall establish procedures for systematic monitoring of the effective implementation and consequences of legislation.

This was another benchmark that the Assembly did not meet. In our comment on the benchmark we noted:

There is no systematic monitoring of ‘effective implementation and consequences of legislation’. However, through debate, the work of Assembly committees and the use of question time, the Assembly is able to examine these matters in an ad hoc fashion. It would be open to the Executive to consider an arrangement whereby it report on these matters (through, for instance, annual reports) to the Assembly. It is also a function that could be given to the Auditor-General in the context of its performance audit program.

The external advisor noted that the benchmark does appear to be beyond the scope of a legislature.

Benchmarks which the Assembly partially met

Candidate eligibility – 1.2.2

Measures to encourage the representative political participation of marginalised groups shall be drawn to accomplish precisely defined objectives.

There are no explicit measures—outside of statute—to ‘encourage the representative political participation of marginalised groups’ occurring under the banner of the legislature (i.e. by way of the internal institutional arrangements of the Assembly).

Arguably, any measures that might be taken to encourage the representative political participation of marginalised groups is a matter that falls to individual and collective political actors in civic and civil life, including the executive and individual members, rather than being an inherent function of a democratic legislature.

Such arrangements may also, of course, occur by way of particular legislative proposals (as opposed to the utilisation of internal policies, practices and procedures of the legislature to produce such measures).

As an example, the Assembly passed the *Aboriginal and Torres Strait Islander Elected Body Act 2008*, the object of which is very much in line with the encouragement of representative participation of a marginalised group—

The objects of this Act are, in recognition of the rights of Aboriginal and Torres Strait Islander peoples to freely determine their political status and to freely pursue their economic, social and cultural development in line with the right to self-determination—

- (a) to ensure maximum opportunity for the voice of Aboriginal and Torres Strait Islander people living in the ACT to reach decision-makers in the government and its agencies; and
- (b) to ensure maximum participation of Aboriginal and Torres Strait Islander people living in the ACT in developing and implementing government policies affecting them; and
- (c) to ensure coordination by government agencies in developing policies affecting Aboriginal and Torres Strait Islander people living in the ACT without detracting from, or diminishing, the responsibilities of those agencies to provide services for the broader community; and
- (d) to further the economic, social and cultural development of Aboriginal and Torres Strait Islander people living in the ACT.

Procedure and sessions – 2.6.1

Plenary debates and votes in the Legislature shall be public.

With the exception of votes in relation to the election of the Speaker, Deputy Speaker, Chief Minister and Leader of the Opposition (which require a secret ballot—see standing orders 2, 3, 5 and 5B), all votes of the Assembly are made publicly known.

All proceedings of the Assembly are open to the public, Hansard Debates and video of proceedings are publicly available via the website.

Committees – 3.1.5

All Committee votes and substantive decisions, and the Committee’s reasons for them, are made public in an accessible and timely manner.

Minutes of all committee proceedings, including the results of particular votes are maintained. However, not all minutes of a committee may be made publicly available without the committee tabling them in the Assembly. There may be occasions where it might be in the interests of the Assembly or the public that deliberations of a committee are not made publicly available.

Upon presentation of the report of a committee, standing order 253 requires that minutes or extracts of the relevant minutes are tabled in the Assembly.

Committees – 3.2.2

There shall be a presumption that the Legislature will refer legislation to a Committee, and any exceptions must be transparent, narrowly-defined, and extraordinary in nature.

There is no requirement that legislation is to be referred to a policy committee for inquiry and report. However, the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) examines: 1. all bills; 2. all amendments to any bills; and 3. subordinate legislation.

The committee must consider various rights issues as well as other matters provided for in the [committee’s resolution of appointment](#). See also standing order 182A relating to legislative amendments receiving scrutiny from the committee.

Committees – 3.2.3

Committees shall scrutinize legislation referred to them and have the power to recommend amendments or amend the legislation.

As stated above, not all Bills are referred to committees (with the exception of technical scrutiny by the (Legislative Scrutiny Committee).

Political parties, party groups, cross-party groups and the opposition – 4.2.2

The Legislature shall provide adequate resources and facilities for party groups pursuant to a clear and transparent formula that does not unduly advantage the majority party.

The Assembly does not adopt a ‘formula’ to determine the allocation of resources for party groups within the Assembly.

However, resources are generally provided on the basis that each individual non-executive MLA receives more or less the same level of support (ministers are given additional support in recognition of their Executive functions). The Speaker, Opposition Leader and Leader of the Crossbench also receive additional support in recognition of their special roles.

The Chief Minister makes staff salary determinations in accordance with the *Legislative Assembly (Members Staff) Act 1989* (LAMS Act). The [relevant determination](#) makes provision for the staffing allocation (an amount to employ or engage staff, contractors or consultants) provided to individual MLAs and additional amounts for the Leader of the Opposition, Deputy Leader of the Opposition, Crossbench member, Government Whip and Opposition Whip. [A separate determination](#) is made for the Speaker who also receives additional funding above that provided to MLAs.

Parliamentary staff – 5.4.1

The head of the parliamentary service shall have a form of protected status defined in legislation or in the Constitution to prevent undue political pressure.

The independence of the Office is protected from executive interference by way of s 8 of the Legislative Assembly (Office of the Legislative Assembly) Act, which provides that ‘The clerk and the office’s staff are not subject to the direction by the Executive or any Minister in the exercise of their functions’.

However, other than convention and practice, there are no legislative protections affording a broader protection from political interference.

This could be remedied by the inclusion of an additional provision in the Legislative Assembly (Office of the Legislative Assembly) Act to protect the Office, the Clerk, and staff of the Office from broader political influence or pressure and not just interference on the part of the executive.

Legislative function – 6.2.5

Only the Legislature shall be empowered to determine and approve the budget of the Legislature.

The doctrine of the financial initiative of the executive (embodied in s 65 of the Self-Government Act) prevents the Assembly from determining its budget. However, through the development of [budget protocols between the Executive and the Assembly](#) and the operation of ss 20-20AA of the Financial Management Act, the Assembly, through the Standing Committee on Administration and Procedure and the Speaker, have a high degree of influence over the amount of funding that is included in the standalone appropriation bill for the Office. Under the protocols, the Speaker is given the opportunity to appear with the Clerk before the budget committee of cabinet.

Legislative function – 6.3.1

Opportunities shall be given for public input into the legislative and Committee process, including the budget process.

So far as the Assembly is concerned, the budget is examined annually by a select committee on estimates and as part of the public inquiry process, members of the public are invited to (and do) make submissions and give evidence.

It is not, however, a requirement that all bills must be examined and reported on by the relevant policy standing committee as occurs, for instance, in New Zealand and Queensland parliaments.

Financial and budget oversight – 7.2.4

In addition to the draft annual budget, the Legislature shall receive and assess medium-term and annual budget strategies and be informed of the main assumptions that underlie the annual budget’s revenue and expenditure projections.

In addition to the annual budget (which contains out-year funding strategies / budgets) and appropriation, the Treasurer also provides a mid-year budget update.

Section 20A (2) of the Financial Management Act provides that the Treasurer must present the budget review for a financial year to the Legislative Assembly no later than 15 February in the financial year. Section 20B(1) of the Financial Management Act states that the “purpose of the budget review for a financial year is to give updated information to allow the assessment of the government’s financial performance against the financial policy objectives and strategies set out in the financial policy objectives and strategies statement for the Territory budget for the financial year.”.

Section 30E of the Financial Management Act provides that each directorate:

- (1) Within 45 days after 31 December in each financial year, each Minister must—(a) prepare a half-yearly performance report for each directorate for which the Minister is responsible; and (b) present the report to the Legislative Assembly.
- (2) The report must include—(a) a progress report on delivery of outputs; and (b) an explanation of any significant variations from performance criteria.

There is no parliamentary budget officer responsible for providing direct advice to the Assembly in relation to the assumptions, reasonableness and outlook associated with the government’s budget.

Financial and budget oversight – 7.2.9

All reports of the Supreme or National Audit Office shall stand referred to the Public Accounts Committee, or a designated Committee, for further report.

The resolution of appointment of the Standing Committee on Public Accounts requires that it examine ‘all reports of the Auditor-General which have been reported to the Assembly’.

In the period between November 2016 (when the Ninth Assembly commenced) and April 2019, there have been 26 reports of the Auditor-General. Of these, the Standing Committee on Public Accounts is conducting inquiries in relation to four of these reports. 21 reports have been ‘noted’ by the committee. 14 public hearings have been conducted during the period.

While the Assembly satisfies the technical letter of the benchmark in that all reports are referred to the committee, given it is clearly the spirit of the benchmark that the preponderance of referrals are, in fact, substantively inquired into and reported on by the committee, a score of 1 has been applied.

It must be noted that it is for public accounts committee, as with all Assembly committees, to determine how it approaches its remit and there may be valid reasons behind whether or not each audit report is the subject of substantive inquiry and report. For instance, it could be the case that a committee’s attention is drawn to particular areas of audit activity and determine to focus its attention of those areas to the exclusion of others.

See:

<https://www.audit.act.gov.au/reports-and-publications/audit-reports#AuditReports2016>

<https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-public-accounts>

Representational function – 8.1.1

The Legislature shall be organised in such a way as to enable the substantive representation of women in its work.

The precise intention of this benchmark is somewhat unclear.

The Assembly has not adopted a *specific* organising principle (or practice) that is directed towards ‘the substantive representation of women in its work’.

However, this is not to say that women and the interests of women in the ACT have not been ‘substantively represented’.

Through the electoral process and the performance of the Assembly’s democratic functions the interests of women are substantively represented by both male and female members depending on the particular issues that come before the Assembly.

In 2016, the Assembly was the first Australian legislature where a majority of women were elected (currently 56% of Assembly members are women). Three of the Assembly’s seven Speakers have been women and three of the ACT’s seven Chief Ministers have been women.

Accessibility, openness and engagement – 10.1.2

The Legislature shall be accessible and open to persons with disabilities.

The Assembly is accessible and open to persons with disabilities.

However, the Speaker’s chair and the front bench of the Government and the Opposition are not wheelchair accessible.

Accessibility, openness and engagement – 10.1.6

The Legislature shall identify demographic groups whose perspectives are not well represented in parliamentary decision-making and make efforts to increase their participation.

On behalf of the Assembly, the Office uses various engagement techniques (some ad hoc, others systematic) to invite participation from a variety of individuals and groups, particularly through the committee system.

Members themselves also undertake to encourage participation amongst various demographic groups.

Conclusion

The Assembly has again undertaken this benchmarking exercise to identify those benchmarks where it either does not comply with at all, or complies with partially.

Every four years the Assembly undertakes a comprehensive review of the operation of its standing orders and continuing resolutions with a view to ensuring that the practices and procedures of the Assembly remain relevant and reflect best practice. Undertaking this benchmarking exercise will assist in enabling the Assembly to adjust its standing orders, where it believes it is required, to more fully comply with the benchmarks.

However, the exercise has also shown that there are some benchmarks that the legislature will, perhaps, never be able to meet. These include the requirement that representation of female staff at all levels of parliamentary administration, and the systematic monitoring of the effectiveness of legislation passed by the Assembly.