INQUIRY INTO ELECTORAL ISSUES IN THE A.C.T.

SUBMISSION TO STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY, LEGISLATIVE ASSEMBLY FOR THE A.C.T.

INQUIRY INTO THE A.C.T. ELECTORAL COMMISSION'S *REPORT ON THE A.C.T. LEGISLATIVE ASSEMBLY ELECTION 2008* AND ELECTORAL LEGISLATION AMENDMENT BILL 2011 AND ELECTORAL (CASUAL VACANCIES) AMENDMENT BILL 2011

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Introductory

The ANZSOG Institute for Governance in the University of Canberra (hereafter the Institute) has been invited to make a submission to this Inquiry. The Terms of Reference for the Inquiry direct attention specifically to the comprehensive report on the 2008 ACT elections by the Electoral Commission, some particular matters relating to proposed changes in the relevant ACT electoral legislation, and broadly to "any other relevant matter". In this submission the Institute takes a broad position:

- briefly reviewing the evolution of the ACT electoral system,
- expressing its general support for the main elements of that system and for efforts to improve its operation "at the edges", and
- reflecting on the important role of the ACT Electoral Commission/Commissioner as an "integrity agency" and on the relevance of current debates about the idea of establishing a recognised group of "officers of parliament" to include that Commission.

In making this submission, the Institute notes that there has been growing interest in the ideas of "integrity agencies" and "officers of parliament" over the past decade, an interest already reflected in two other inquiries by Legislative Assembly Committees in the recent period: the Standing Committee on Public Accounts Inquiry into the Audit Act 1996 (ACTPAC 2011), and the Standing Committee on Administration and Procedure Inquiry into the feasibility of establishing the position of Officer of Parliament (now in progress). This interest is consistent with the notion of an "emerging fourth [or integrity] branch of government" to consist of "strong oversight bodies" identified as a significant agenda item in the Parliamentary Agreement entered into between Labor and the ACT Greens at the inauguration of the present 7th Legislative Assembly (Stanhope & Hunter 2008: App.1, items 1.2(d), 5.2).

Evolution of the ACT electoral system

The stages of development through which the ACT electoral system has evolved into its existing form have been traced in work done in the former Centre for Research in Public Sector Management (CRSPM) in the University of Canberra, now embraced in the Institute. The first

large research report was prepared under a grant from the pre-self-government ACT Administration and with the support of senior officers of that Administration (Grundy et al 1996; see also Oakes & Reeder 1991), with subsequent reports in the self-government period undertaken in collaboration with the Chief Minister's Department, one of them under an ARC SPIRT grant[1] with the Chief Minister's Department serving as industry partner (Halligan & Wettenhall 2000; 2002). Other work was published in close collaboration with Prof Philip Pettit who conducted a formal review of the ACT governance system in 1998 (Pettit 1998; Wettenhall 1998), and independently (eg Wettenhall 1984, 2009).

The evolving history can be seen as essentially falling into three stages, the first relating to the pre-self-government period and the other two reflecting the major configurations of the post-self-government period.

Stage 1: Before self-government, the Territory's representative institution progressed from a partly elected Advisory Council formed in 1930 to a fully elected *but still advisory* body (it lacked law-making power) described variously as the Legislative Assembly (1974-79) and the House of Assembly (1979-86). In the Advisory Council period, the Territory was arranged as a single multi-member electorate, initially with four, then six and finally eight elected members alongside the four nominated ones; in the Legislative Assembly/House of Assembly period, there were two electorates with a proportional representation voting scheme returning the 18 members.[2]

Stage 2: The self-government settlement provided for a 17-member Legislative Assembly, but gaining agreement on the electoral system to be used proved to be one of the most difficult features of the settlement as the debate progressed in the federal parliament. A compromise plan to have around half the members elected from single-member constituencies House of Representatives-style with the balance elected at large, Senate-style, was not accepted. At this stage the main political parties also ruled out adoption of the Tasmanian-designed Hare-Clark system of proportional representation. Eventually a European system providing for direct proportional representation was chosen, described locally as "modified d'Hondt" (Grundy 1996: 189-190).

It is now notorious in the annals of the ACT's political history that this decision had farcical results: the wide spectrum of interest groups who had battled for and against self-government produced a mass of contesting parties, some with comical names, including around a dozen "serious anti-self-government" groups, and the ballot paper was of unprecedented size. The Australian Electoral Commission, which conducted the 4 March 1989 vote, received much criticism for the length of time it took to process the count, and later reported that the system itself was "fatally flawed". The outcome was an Assembly with five Labor and four Liberal members, but also four members from the Residents' Rally and four altogether from the No Self Government Party and the Abolish Self-Government Coalition. To form a working government, the latter group had to provide the Speaker and one cabinet minister. The stage was set for a highly unstable introduction to self-government, with two votes of no-confidence passed and two changes of government before the next election was due (Grundy 1996: 196-201).

Stage 3: Given the problems with the first arrangement, change had to come -- bringing us to the third stage of our electoral history. An "advisory referendum" held at the time of the second election on 15 February 1992 revealed that a majority of ACT residents favoured a Hare-Clark-style proportional representation system. The second Assembly decided to trial that system at the third election on 18 February 1995, dividing the territory into three multi-member constituencies for the purpose. This election was accompanied by a binding referendum on the desirability of permanent adoption of Hare-Clark, and that referendum was carried by a considerable majority. The record

shows that governmental stability came with that change (Halligan & Wettenhall 2000: 17-20). The ACT electorate now appears firmly committed to choosing the members of its own parliament through a proportional representation mechanism that has much more in common with voting for the national upper house (Senate) than for the national lower house.[3]

To conclude this section, the Institute points out that this submission has been prepared by two of its members who are both former Tasmanians, Profs Roger Wettenhall and Chris Aulich, who have had long experience of the operation of the Hare-Clark system in Tasmania. Both are strong believers in proportional representation and in the merits of that system which they consider best provides the number of seats consistent with the votes received. The Institute as a whole supports its continuation.

Of course there are operational elements of the system that could be improved, and we note some of those elements.

Electoral Commission Report on the 2008 Election, proposed changes, and outstanding issues

The Electoral Commission Report on the 2008 Election is a comprehensive and highly informative 102-page document (ACTEC 2008). It identifies a score or more of issues worthy of comment, ranging widely from developments in electronic voting through to considerations relating to the use of a tally room, voter satisfaction in polling place services, provisions for scrutiny of the counting of preferences, monitoring of the compulsory voting requirement, defamation of candidates, political advertising, and redistribution of electoral; boundaries.[4] This reporting led to 16 recommendations, and recognition that some issues will require further serious and protracted consideration.

In this category are procedures relating to the filling of casual vacancies, the disclosure of political donations, and matters dependent on reaching agreement with the Commonwealth such as removal of the current restriction on the Assembly determining its own size – there are strong views in the ACT supporting an increase in Assembly size, and if that were to happen it would raise questions about the total number of electorates and the number of members in each of them (ACTEC 2008: 79-80). The Commission has proposed also that serious consideration be given to the establishment of a special committee of the Assembly to focus on electoral matters (ACTEC 2008: 81), and to the entrenching of its own statutory independence (ACTEC 2008: 82).

In the two amending bills that also feature in the terms of reference of this Inquiry, measures are proposed for tightening the procedures relating to the filling of casual vacancies,[5] and for machinery improvements relating variously to matters such as candidate nomination, the return or forfeiture of candidate deposits, certified lists of electors, postal voting procedures, and the activities of campaign committees.[6]

The Institute has not specifically researched recent developments in the ACT electoral system, and has no suggestions to make in relation to these matters apart from noting their relevance to the current inquiry and expressing its support for moves to improve the operations of the system along lines suggested by the Electoral Commission/Commissioner and now in part built into the proposed amending legislation. It turns in the next two sections of this submission to consider the role of the Commission/Commissioner in the context of the developing notions of "integrity agencies" and "officers of parliament".

The Electoral Commission/Commissioner as an "Integrity Agency"

Over several decades the University of Canberra's public administration research effort has featured a strong interest in "non-departmental public bodies" (often described loosely as just "agencies") spread over all levels of Australian government and extending to collaborative work with similarly engaged researchers in other countries and in relevant international bodies (eg Wettenhall & Aulich 2009; Aulich et al 2010). With the rising interest in issues of integrity in government that received such a boost in Australia with the publication of the Fitzgerald Report in Queensland in 1989 (Fitzgerald 1989 and see Pope 2000, Head et al 2008), it was inevitable that this interest would extend particularly to a set of non-departmental bodies that quickly attracted the group name "integrity agencies". Leading candidates were the offices of ombudsmen and auditors-general, anti-corruption bodies and human rights commissions, and from early on there was speculation that electoral commissions belonged in this set too (Aulich 2011: 44, 46).

A vital issue was always their relationship with government and parliament (Wettenhall forthcoming). They could not perform their integrity-promoting activities properly if they were not understood and supported as independent monitors of government activity, and attention quickly attached to the statutory basis of their creation and operation and to the readiness of the creating legislature to defend them whenever clashes with government occurred. These issues received serious consideration at a conference of the International Institute of Administrative Sciences (IIAS) in Monterrey, Mexico, in 2006 in which we participated, and subsequently at a Workshop held at the University of Canberra in 2009 with the participation of a number of Australian integrity agencies.[7] A feature of the IIAS conference was a contemporary evaluation of the Mexican Federal Electoral Institute as an exemplary integrity agency (Ackerman 2006; Wettenhall 2007).

International institutions like the World Bank, the UN, the OECD and the major NGO Transparency International have all been developing guidelines and/or survey instruments relating to integrity systems and agencies generally, and Australian parliaments have taken particular note of the so-called Latimer House Principles sponsored by a group of interested professional associations, developed in a series of meetings between the Law Ministers of the Commonwealth after 1998, and adopted by the Commonwealth Heads of Government meeting at Abuja, Nigeria, in 2003 (McKinnon 2003).[8]

The Latimer House Principles are based on the conviction that the full participation of citizens in the democratic process is a key element in ensuring transparent and accountable government, and to this end they stress the importance of establishing independent oversight bodies to oversee government as a means of enhancing public confidence in the integrity and accountability of government. They identify some of the familiar types of integrity agencies, but do not explicitly refer to electoral bodies. The direct connection between electoral commissions, the generality of integrity agencies, and the Latimer House Principles is established in a document submitted by the ACT Electoral Commission to the Standing Committee on Administration and Procedure of the ACT Legislative Assembly (ACTEC 2009).

Arguing for the ACT Commission that "a case can be made for including electoral commissions in the list of independent bodies essential to the health of a democratic governance model" (ACTEC 2009: 1), Electoral Commissioner Phillip Green has performed the very useful service of identifying a number of contributions[9] to the relevant literature over the last decade or so that also make this point. As he notes, all Australian jurisdictions now have such commissions. Following Paul Dacey of the Australian Electoral Commission (Dacey 2005: 7; ACTEC 2009: 2-3), however, he also observes that

> independence is not an absolute, so that an electoral commission is either independent or not; rather, ...the extent of independence can fall on a continuum, and ... where an electoral commission falls on that continuum will depend on the extent of its institutional independence in a number of different dimensions.

There have been international efforts to identify these dimensions. Thus the Stockholm-based International Institute for Democracy and Electoral Assistance (IIDEA), of which Australia is a foundation member, has listed seven key elements of statutory independence for electoral bodies:

- institutional independence from the executive
- the ability to exercise full responsibility for electoral functions
- power to make policy decisions independently under the legal framework
- composition: members from outside the executive with security of tenure
- ownership and management of a budget independent of day-to-day government control that does not fall within the budget of a government ministry
- autonomy to determine staffing needs and appointments
- is not part of a department of state (IIDEA 2006: 7-9).[10]

The ACT's *Electoral Act 1992* established a three-member commission comprising a part-time chair, one other part-time member, and the Electoral Commissioner, all appointed for fixed terms and with limited scope for their removal; and it also established the latter separately as a statutory office whose occupant would serve as full-time chief executive. In its report to the Legislative Assembly's Standing Committee on Administration and Procedure, the ACTEC (2009: 4-5) made these comments on its own standing in relation to this issue of independence:

- (The Act) gives the Commission and the Commissioner a wide range of functions that are not expressed as subject to the direction of a Minister, the executive or a department.
- The (few) explicit powers given to the Minister and the Executive (under the Act) are very limited and do not impinge on the Commission's independence.
- ... the independent nature of the Commission and the Commissioner ... is relatively well established, at least in relation to the exercise of electoral functions under the Electoral Act.

However the Commission felt that it would be desirable to secure its position by amending the Electoral Act "to explicitly express the Commission's independence", and gave some illustrations of how that has been done elsewhere (p.5). It also expressed concern that the Commissioner's chief executive powers under the Public Sector Management Act are "dependent on an executive instrument that could be unmade at any time", and urged that these powers be specified in legislation as happens with some other statutory officer positions; and urged also that the explicit legislative statement asserting the Commission's independence should also declare that the Public Sector Management Act does not override that independence (p.6).

The Commission observed also that, in respect of its budgetary situation under the Financial Management Act, it failed the independence test. This Act, it asserted, effectively ignores statutory officer holders and their staff, so that the relevant budgeted funds are allocated to "administrative units" (ie territory departments or directorates, in this case Justice and Community Safety). Thus the electoral budget is allocated to the department, and at its own discretion the department retains a portion of those funds to cover overheads before allocating the remainder to the Commission. The ACTEC submission suggests that, while this has not so far been a serious issue in practice, it is potentially threatening to its standing and its ability to perform its functions as generally intended by its own legislation. It notes that it is the only electoral commission in Australia today that is not directly budget-funded, and it urges that appropriate legislative changes should be made (p.6-8).[11]

The ACTEC's Report on the 2008 Election, one of the documents specifically listed in the terms of reference for the current inquiry, directs attention to this other submission, and briefly repeats the proposals made in it (ACTEC 2008: 82). The Institute's position is to support all moves designed to entrench the independence of integrity agencies from the executive government, and it therefore recommends that your Committee give serious consideration to recommending that the suggested changes be made. However the Institute's position is also that all administrative bodies need to be held accountable, and that, in the case of the integrity agencies, this accountability should run directly to the legislature. For this reason, we also support the ACTEC proposal that there should be a special committee of the Legislative Assembly tasked "with a standing brief to consider and report on the conduct of each .... general election, and other relevant electoral matters" (ACTEC 2008: 81).[12]

We conclude our submission with some comments on the notion of "officers of parliament" and the relevance of that notion to the case of the ACT Electoral Commission/Commissioner.

The notion of "Officers of Parliament" and its relevance to the Electoral Commission/Commissioner[13]

Here New Zealand has been a significant innovator, just as it was when it introduced the Scandinavian notion of the ombudsman to the Anglo-Saxon world in 1962. The New Zealand Ombudsman, or Commissioner for Complaints, was seen from the beginning as an "officer of parliament", though that was not a formal title. During the 1970s and '80s, two other commissioner-like positions created by special statute were accorded a similar status, though what made them different from other statutory creations was unclear. Then, in 1989, the Finance and Expenditure Committee of the NZ parliament sought to systematise practice in this area (FECNZ 1989), and its effort gained acceptance of a process for establishing a small number of positions to be formally defined as "officers of parliament", with a special Officers of Parliament Committee to monitor the system. This monitoring includes pre-budget approval of applications for funding, recommending appointments, and developing codes of practice. In 2006 the system applied to three positions: Ombudsman, Parliamentary Commissioner for the Environment, and Controller and Auditor-General. As ex officio chair of the Officers of Parliament Committee, the Speaker is effectively "responsible Minister for the Officers of Parliament" (Beattie 2006: 143-145).

In the Australian Commonwealth system, recognition that the Auditor-General is an "independent officer of parliament" came in the rewritten Auditor-General Act 1997, but the category has not been further systematised. In the states, movement has been most notable in Victoria as a reaction to the policies of the Kennett conservative government which, among other things, sought to contract out much public sector auditing activity to private auditors and to subject the Auditor-General to a statutory board subservient to the government. The Bracks Labor government was elected in 1999 to replace Kennett on a mandate which included restoration of the independence of "key public watchdogs" (Campbell 2006). Believing that other integrity agencies could be similarly endangered, the parliament's Public Accounts and Estimates Committee began an inquiry in 2000 into "an appropriate legislative framework for independent officers of Parliament such as the Ombudsman, the Auditor-General and other statutory office holders". It wanted to clarify their relationship with parliament in such a way that their autonomy would be respected but also that very clear accountability requirements would be established (PAEC 2006: 7). The Committee's report issued in February 2006 contained a vast amount of information on the antecedents and development of the idea of the officer of parliament over a number of governance systems in the

Anglo-Saxon tradition, and had great educative value. The Committee wanted each "officer of parliament" to be associated with a specific parliamentary committee. Among other things, it noted with approval that the budgetary and administrative link between the Victorian Auditor-General and the Department of Premier and Cabinet had been removed, that that office was no longer seen as part of the Premier's (or any other minister's) portfolio, and that the Office had been assigned its own appropriation within the parliamentary framework. This was clearly a model arrangement deserving to be followed with other "officers of parliament", though more was needed – including providing that the annual report should go direct to parliament and not through a minister -- before real independence was achieved (PAEC 2006: 25-27).[14]

In Victoria the matter was given further consideration when the Brumby government set up an inquiry with a remit to review the efficiency and effectiveness of the whole "integrity and anti-corruption system", to be conducted by top-level officials rather than parliamentarians. The resulting report (known as the Proust Report after its chairwoman Elizabeth Proust) recommended the establishment of several new structures involving the integrity agencies (Proust 2010), but it has to be said here that the Electoral Commissioner was not specifically listed as one of them and that the report moved away somewhat from the idea that they were independent officers of parliament.

There have been some moves towards a clearer identification and protection of integrity agencies in some other Australian state legislatures, but to the best of our knowledge there has so far been no serious comparative research to shed light on these issues. It would be useful to commission such a survey.

The Institute's position is that electoral commissions/commissioners are so important in ensuring the effective operation of the democratic process and the integrity of the governance system that they should be entitled to full recognition as "officers of parliament" as this notion has developed. We accordingly support the ACT Electoral Commission/Commissioner in the recommendations made and outlined above aimed at ensuring full statutory independence from the executive government.

Summary

In summary, in this submission the Institute has briefly reviewed the evolution of the ACT electoral system, and expressed its general support for continuation of the present system of proportional representation and for current moves to improve the operations of that system along lines suggested by the Electoral Commission/Commissioner.

It has also commented on the role of that Commission/Commissioner in the context of growing interest in the idea of "integrity agencies" and proposed that this Commission should be firmly placed within that category in the thinking of all concerned with the conduct of the ACT electoral system. To this end, there are important issues raised by the Commission in its reports, and in the current inquiry we believe that the Standing Committee on Justice and Community Safety should give strong support to measures designed to protect the Commission in the performance of its integrity agency role. These are discussed at pages 5 and 6 of our submission.

Our submission has concluded by reviewing the rise of the notion of "officers of parliament" and, related to the general matter of the status of integrity agencies, has proposed that electoral agencies should also be regarded in this light. It is important that full statutory independence from the

executive government be secured, but with the equally important proviso that effective arrangements are in place to secure ultimate and direct accountability to the legislature.

The Institute records its strong interest in the subject matter of the present inquiry, and its readiness to be involved in further consideration of relevant issues by the Legislative Assembly and its Committees.

Notes:

1. Strategic Partnership with Industry – Research and Training (SPIRT) Grant from the Australian Research Council

2. The House of Assembly expired on 30 June 1986, and the ACT went without a representative body of any kind until the form of the self-government settlement was finally determined – there was an unsuccessful attempt to form an Assembly with single-member electorates in 1986. The story is told in Grundy 1996: chs 4-14. Though the former Assembly had no governing power itself its members were often appointed to the boards of non-departmental public authorities within the ACT jurisdiction, giving them a small taste of governmental responsibility: see Wettenhall 1984.

3. It is likely that the cause of greater stability was aided by another decision, based on a recommendation in the Pettit Report, that the term of each Assembly be increased from three to four years.

4. This occurs after every general election, for which purpose the Electoral Commission is joined by members of a Redistribution Committee to establish a formally styled Augmented Election Commission. See ACTEC 2011: 20.

5. Electoral (Casual Vacancies) Amendment Bill 2011.

6. Electoral Legislation Amendment Bill 2011.

7. Some of the papers from this Workshop will soon be published in a special issue of the journal *Policy Studies.*

8. Latimer House in Buckinghamshire, England, was the venue of the first meeting of the sponsor group in June 1998, their initial proposals moving on to the Commonwealth Law Ministers' Conference in Port of Spain, Trinidad, in 1999.

9. Australian contributions not otherwise discussed here are Orr et al 2003 and Kelly 2007. The ACTEC submission notes other international declarations of the need for independent electoral authorities: Lopez-Pintor 2000, Commonwealth Secretariat 1997.

10. Further discussed in ACE 2009. ACE --- now the Electoral Knowledge Network – was established in 1998 by a consortium of national and international bodies and its secretariat is currently housed in the IIDEA office in Stockholm.

11. The experience of integrity agencies in Australia like audit offices and human rights offices is replete with examples where governments of the day have circumscribed the activities of these agencies through tight budgetary control. Such control is more difficult when appropriations are made by parliaments on the advice of multiparty committees such as public accounts committees. For discussion, see Aulich forthcoming.

12. The ACTEC must submit an annual report as part of its own accountability framework, but the statutory requirement comes under the general ACT legislation governing annual reporting and is not especially related to its integrity agency status – as will be noted below, it was considered significant in Victoria to legislate that the annual report of the Auditor-General should go to the parliament directly -- and not through a minister. The report on a general election, such as the one that figures in the terms of reference of the present inquiry, is discretionary – when prepared it goes to the minister, but the Electoral Act (s.10A (2)) provides that, if such a report is submitted, the minister must transmit to the Assembly within six sitting days.

13. Similar information about the "officers of parliament" scheme was provided to the Public Accounts Committee of the ACT Legislative Assembly in its inquiry into the Auditor-General Act 1996 (Wettenhall 2010), and we note that that Committee in its report recommended (a) that the Auditor-General Act be amended to designate the Auditor-General as an "officer of parliament", and (b) that the Assembly's Administration and Procedure Committee should investigate the merit of establishing a framework for formally recognising such "officers of parliament" in the ACT and determining the nature of their relationship with the Assembly and the Executive, in the process ensuring that their

primary responsibility is to the Assembly: ACTPAC 2011: recommendations 1, 2. We understand that that inquiry is now under way..

14. For a fuller account, see Wettenhall forthcoming.

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