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CHIEF MINISTER

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MEMBER FOR MOLONGLO

Mr Shane Rattenbury MLA
Chair
Standing Committee on Administration and Procedure
Legislative Assembly
CANBERRA ACT 2601

Dear Mr Rattenbury *Shane*

I write in relation to the Standing Committee on Administration and Procedure's *Review of the Australian Capital Territory (Self-Government) Act (Cwlth)*.

In March 2012 I wrote to the Committee informing it of the ACT Government's intention of making a submission to the review and requesting an extension until 5 April 2012 to do so.

Accordingly, please find enclosed the ACT Government's submission.

I thank the Committee for its consideration of this matter.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Chief Minister

- 5 APR 2012

ACT LEGISLATIVE ASSEMBLY

2012

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

GOVERNMENT SUBMISSION TO THE STANDING COMMITTEE ON ADMINISTRATION
AND PROCEDURE

REVIEW OF THE *AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) ACT 1988*
(CWLTH)

Presented by
Ms Katy Gallagher MLA
Chief Minister

1. Introduction

The ACT Government welcomes the opportunity to provide a submission to this inquiry and commends the Committee on undertaking such an important review. The Review provides a timely opportunity to build on recent interest shown by the Commonwealth Government in the *Australian Capital Territory (Self-Government) Act 1988* (Self-Government Act).

Since self-government in 1989, the ACT has demonstrated its capacity to govern effectively, make important decisions and provide for the needs of the community. It is on this foundation the Government considers it time for the Self-Government Act to change, to better reflect the maturity of the ACT as a self-governing jurisdiction.

Of course, there are some characteristics of the Territory that remain unchanged. The ACT's role as the national capital and seat of government is a prime example. The unique history of the ACT, and its prior administration by the Commonwealth, means a number of legacies remain. The Submission's recommendations therefore strike a balance between modernising parts of the Act in need of renewal, and retaining parts that continue to be relevant and work well.

The Government notes the current Commonwealth Government has indicated its willingness to consider the findings of an ACT-sponsored review¹. This Review provides an opportunity to present the unified views of the Assembly with respect to the Act. A unified view would reinforce to the Commonwealth Government the importance of amending the Act and the expectations of a community seeking change.

The Committee should be encouraged by the fact this review builds on previous work in this area. Recent amendments to the Act by the Commonwealth Government have demonstrated an appetite for progression and equality.

Amendments made in 2011 recognised the unnecessary nature of a Commonwealth Executive veto over laws passed in the Territory. Prior to the amendment, Professor Halligan noted in his review of the application of the Latimer Principles within the ACT:

The ACT remains in some respects a stunted system of governance that has been constrained by another level of government and lack of agreement on key strategic issues. The single most significant constraint on good governance in the ACT, apart from scale and resourcing relative to its responsibilities as a state and municipal entity, has been the *Australian Capital Territory (Self-Government) Act 1988*, which has imposed severe limitations on the autonomy and power of the jurisdiction. The right of a federal government, whether by legislation or ministerial fiat, to veto territory laws has reduced the status of the ACT to that of a protectorate².

¹ Yates, Julian, First Assistant Secretary, Territories Division, Department of Regional Australia, Regional Development and Local Government (2011), *Hansard 21 March 2011*, Reference: Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010, Senate Legal and Constitutional Affairs Legislation Committee hearing, p L&C 4.

² Halligan, John (2011) *An Assessment of the Performance of the Three Branches of Government in Against the Latimer House Principles*. A report by Professor John Halligan to the ACT Legislative Assembly Standing Committee on Administration and Procedure, p 20.

Amendments made to the Act in 2011 do not preclude Commonwealth involvement in ACT legislative processes. However, they do take this power from the hands of the Commonwealth Executive and add transparency to the process, requiring any intervention to be subject to debate in the upper and lower houses of Federal Parliament.

There are a number of other outstanding issues that, if addressed, would strengthen the ACT's ability to self-govern and improve the Territory's governance for all Canberrans.

2. A Broad Framework for Reviewing the Self-Government Act

The Review's Terms of Reference indicate the Committee is examining the Self-Government Act and associated regulations with a view to determining areas that could benefit from change.

Since the advent of self-government, the Territory's population has grown from 276,432 in 1989 to 365,421 in 2011³. The ACT Government's relationship with its Federal, State and Territory counterparts has matured and the Government actively participates in key governing forums such as the Council of Australian Governments and Standing Council on Federal Financial Relations. Through these forums the ACT exercises its right to help shape national policies in areas such as health, education and infrastructure.

It is within this context the Government's submission has been prepared. Recommended amendments improve provisions within the Act to reflect a broader vision for governance of the Territory, and its relationship with the Commonwealth Government.

3. Key issues in reviewing the Self-Government Act

The following recommendations are aimed at recognising that this important piece of legislation effectively serves as the ACT's Constitution. Sections of the Act, particularly those that set out the mechanisms for governance, should be repatriated to the control of the ACT Assembly.

The table at Attachment A sets out the Government's proposed changes to the Self-Government Act by section. The changes are considered necessary to position the Act to function in today's circumstances, which differ substantially from those prevailing in 1989. Key proposed changes are discussed below.

4.1 Inclusion of a preamble

The Government recommends a preamble be included in the Act. The preamble should outline the principle of the Territory's democratic self-determination and explicitly set out the Commonwealth's legitimate interests and powers in relation to the ACT. It should reflect that the people of the ACT give the Assembly its political mandate to govern the Territory.

³ Australian Bureau of Statistics (2011), *Australian Demographic Statistics, Jun 2011 catalogue number 3101.0* (Figures for 30 June 1989 and 30 June 2011), available at:
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3101.0Jun%202011?OpenDocument>

Many of the ACT's institutions of governance have matured significantly since self-government. The preamble should be used as an opportunity to explicitly recognise this evolution.

The Government also recommends the preamble include recognition of prior Indigenous custodianship of ACT land. Construction of the preamble should be carefully worded and have close regard to the current process for considering a similar preamble for the Australian Constitution.

This suggestion has been discussed with the ACT's Aboriginal and Torres Strait Islander Elected Body - the democratically elected voice of our Indigenous community. The response has been supportive.

The Government recommends the development of a preamble be the subject of extensive community and stakeholder consultation.

4.2 Size of the Assembly and size of the Executive

Section 8 of the Act prescribes an Assembly with 17 members. This number can be varied, but requires amendment to a Commonwealth regulation, with the agreement of the Assembly.

Ultimately, power to determine the size of the Legislative Assembly should be vested in the Assembly itself, subject to a robust process of enacted law, consistent with other Australian jurisdictions. It should not be the subject of an intergovernmental negotiation.

The issue of an appropriately sized Assembly is likely to be contentious, with different stakeholders possessing differing views. The community reasonably expects governance will be delivered cost-effectively. The Government's view is the size of the Assembly has implications for the effectiveness of Assembly processes and governance.

In his review, Professor Pettit recommended the ratio of representatives to electors be maintained at or above the very modest level of 1: 10,000 - the figure that applied in 1989. By 30 June 2010, the corresponding ratio in the Territory had increased to 1: 14,285.

Dr Allan Hawke in his review, *Governing the City State*, also set out an argument for expanding the size of the Assembly. He noted the 1984 report of the Taskforce on the Implementation of ACT Self-Government recommended that three principles should govern the size of the Assembly:

- it must be large enough to provide for adequate and fair representation of the ACT community;
- it must be able to function as a workable legislature; and
- so far as is possible it should have the capacity for adequate scrutiny of the executive government.

Dr Hawke also pointed out that as at 30 June 2010, combined State and local government level political representation is significantly lower in the ACT than in any other jurisdiction. In the ACT the ratio was 1: 14,285, compared to Tasmania at 1: 1,110 and the Northern Territory at 1: 685.

Dr Hawke argued that

“...in light of the importance of robust and accountable democratic processes in the ACT – characterised by high standards of parliamentary debate, a legislative program covering a range of complex issues, and an active Assembly Committee process – and the significant under-representation of the citizens of the ACT, there is an overwhelmingly sound case for increasing the size of the Assembly.”⁴

The Government agrees there is a strong case for reviewing the size of the Assembly. Such a review should be framed around ensuring the number of members enables adequate representation of constituents and ensures the efficacy of the Assembly’s scrutiny processes.

The task of reaching agreement within the Assembly on a desired size may be difficult. The Government therefore refers the Committee to Professor Halligan’s suggestion that:

The only means of advancing the matter is for the actual number and electoral arrangements to be the subject of an independent investigation, undertaken in conjunction with the Electoral Commissioner that gives prominence to the issues of governance raised in this report.⁵

In determining its own size, it would preferable any subsequent law on the size of the Assembly be an entrenched law under section 26 of the Self-Government Act.

Reviewing the size of the Assembly also extends logically to a review into the size of the Executive. Section 41 of the Self-Government Act sets out that the number of ministers is to be provided by enactment but, in the interim, the Executive is not to exceed five. By comparison, the Northern Territory Ministry has eight members.

The Government considers there to be strong justifications for expanding the size of the Ministry, not least of which is to reduce the considerable spread of portfolios currently carried by each minister. Ideally, the size of the Ministry should be the prerogative of the Chief Minister and, if there is to be an ACT enactment, it should only set an upper limit for the size of the Executive.

4.4 Immunity of the Commonwealth

Section 27 of the Act states that

“Except as provided by the regulations, an enactment does not bind the Crown in the right of the Commonwealth.”

On Self-Government a regulation was made binding the Crown in relation to the following laws:

⁴ Hawke, Allan (2011) *Governing the City State: One ACT Government – One ACT Public Service*, ACTPS Review Final Report, p 33.

⁵ Halligan, John (2011) *An Assessment of the Performance of the Three Branches of Government in Against the Latimer House Principles*. A report by Professor John Halligan to the ACT Legislative Assembly Standing Committee on Administration and Procedure, p 21.

Adoption of Children Ordinance 1965
Air Pollution Ordinance 1984
 Arbitration Act 1902, of New South Wales, in its application to the Territory
City Area Leases Ordinance 1936
Commercial Arbitration Ordinance 1986
Credit Ordinance 1985
Dangerous Goods Ordinance 1984
Dividing Fences Ordinance 1981
Dog Control Ordinance 1975
Electricity and Water Ordinance 1988
Law Reform (Miscellaneous Provisions) Ordinance 1955
Limitation Ordinance 1985
Machinery Ordinance 1949
Motor Traffic Ordinance 1936
Nature Conservation Ordinance 1980
Noise Control Ordinance 1988
Radiation Ordinance 1983
Sale of Goods (Vienna Convention) Ordinance 1987
Scaffolding and Lifts Ordinance 1957
Water Pollution Ordinance 1984
Weights and Measures Ordinance 1929.

This provision predates High Court decisions dealing with binding the Crown and the statute law base of the ACT has significantly changed since self-government. It is therefore timely that Section 27 be updated.

Binding the Crown, although highly desirable, can entail significant regulatory resources, thus any action to do so should first be subject to consultation between the ACT and Commonwealth Governments.

4.5 Dissolution of the Assembly

Under Section 16, the Governor-General possesses the power to dissolve the Assembly if, in his or her opinion, the Assembly is incapable of performing effectively or conducts its affairs in a grossly improper manner. In discharging these duties the Governor-General acts on the advice of Commonwealth Ministers.

This creates a situation similar to that previously arising under the recently removed Section 35, which provided the Commonwealth Executive means to disallow laws passed by the Territory.

The Act should be amended to require the Governor-General to consult with the ACT Executive before making a decision.

4.6 Limitations on the ACT's legislative powers

The ACT Legislative Assembly has a broad grant of plenary powers to make laws for the peace order and good governance of the ACT. At the time of Self-Government, the Commonwealth reserved a number of subject matters from this broad law making power – including courts and

corporations. Progressively, these exceptions have been removed as the ACT took on responsibility for all the matters dealt with by other Australian States and Territories.

There remain a couple of exceptions. The ACT cannot mint its own coins, and cannot raise its own army, navy or air-force. The ACT does not currently consider such limitations to be inappropriate.

However, some exceptions – specifically the exemption of the power for the ACT to make a law for the classification of materials for the purposes of censorship – create an unnecessary distinction between the ACT and the other States and Territories. This exemption should be removed. The people of the ACT should have no less capacity than those across the border in Queanbeyan, to seek that their members of parliament address the issue of classification. Today, the exception also may be used by those wishing to launch legal attacks on legislation considered and debated in the Assembly. The ACT should not suffer the burden of an increased risk of litigation by those disaffected by the legislative process.

The Self-Government Act should be amended to remove section 23(1)(g) and the exception to the censorship power listed in Schedule 4.

Further, sections 23 (1A) and (1B) of the Act prevents the ACT from making a law with respect to euthanasia. This constraint on the ACT's legislative power should also be removed. The Government views its inclusion as an unnecessary constraint on ACT policy choice - a constraint that is not possible in the States.

5. Other matters affecting governance of the ACT

5.1 Land planning and management

While not addressed directly in the Act, the framework for land planning and management in the ACT is relevant to the broader consideration of the ACT's authority to self-govern. The Government recognises the Commonwealth's legitimate interests in the planning and management of areas of Canberra that relate to the city's role as the national capital. However, there is potential for improved harmonisation between planning regimes.

The ACT Government welcomed the report and many of the recommendations from Dr Allan Hawke's review of the National Capital Authority (NCA) - *Canberra a Capital Place: Report of the Independent Review of the National Capital Authority*.

Dr Hawke recognised the need to clarify the role of the NCA in a contemporary context. This work is an important complement to the review of the Self-Government Act.

Proposed changes to the Self-Government Act

SECTION	NATURE OF PROVISION AND COMMENT	IMPLICATIONS FOR ACT LAW
Additions		
Add a preamble that:		
- affirms the ACT's status as the National Capital; the successful development of separate and autonomous political, representative and administrative institutions in the Territory, and that the people of the ACT give the Assembly its political mandate to govern the Territory; and - recognises the prior custodianship by Indigenous peoples of the land of the ACT.		
Deletions		
23 (1)(g), (1A) and (1B)	These provisions limit the powers of the Assembly and do not apply to other jurisdictions. Schedule 4 should also be amended to remove the exemption to censorship powers.	
Amendments and qualifications		
8 (2) and (3)	These provisions deal with the size of the Assembly. The Assembly should have the power to determine its own size.	
9	The provision (which deals with members taking an oath or affirmation of allegiance) should be amended to include reference to the ACT <i>Oaths and Affirmations Act 1984</i>. 9 (2) should be expanded to include reference to Section 6A of the ACT <i>Oaths and Affirmations Act 1984</i>. 9 (3) should be removed as enactment has occurred.	Removes uncertainty regarding reliance on the Act for oath or affirmation requirements.
14(1)(c)	Clarification of what is meant by the provision.	

	Paragraph 14(1)(c) is currently ambiguous in meaning and scope. The paragraph could be refined in line with other jurisdictions' constitutions, to better define what is considered to be direct or indirect remuneration, allowance, honorarium or reward for services in the Assembly.	
16	Section 16 covers Dissolution of the Assembly by the Governor-General. This section should be amended to require the Governor-General to consult with the ACT Executive prior to making a decision regarding the dissolution of the Assembly.	
25	Deals with the notification of ACT enactments. The provision does not reflect current practice under the <i>Legislation Act 2001</i> : • The Speaker is authorised to request notification of proposed laws under section 28 of the Legislation Act rather than the Chief Minister. • The enactment of the provisions of the Legislation Act that provide for publication and commencement of proposed laws has rendered sections 25(1) to (5) ineffective.	Consistent with <i>Legislation Act 2001</i>
27	Section 27 deals with the binding of the Commonwealth.	A review into those laws that bind the Commonwealth is suggested, as many laws have been passed since the time of self-government.

