REVIEWING THE LATIMER HOUSE PRINCIPLES:
THE ACT EXPERIENCE

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Each Commonwealth country’s Parliaments, Executives and Judiciary 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.

**Latimer House Principle, the three branches of government (principle No. 1)**

**INTRODUCTION AND BACKGROUND**

The genesis of the Assembly’s adoption of the Latimer House principles can be traced back to two different papers presented at successive Presiding Officers and Clerks conferences in 2007 and 2008 by former Speaker, Wayne Berry MLA.¹ In different ways these papers set out to examine the extent to which the Assembly lived up to the high ideals of parliamentary democracy, relying on comparisons of its performance against two seminal documents: the first, the CPA study group’s 2006 work *Benchmarks for Democratic Legislatures* and the second, the *Commonwealth (Latimer) House Principles on the Three Branches of Government* themselves². These documents both articulate a strikingly similar set of foundations for maintaining and strengthening the democratic parliamentary form of government, including the importance of maintaining institutional checks and balances and the criticality of the doctrine of the separation of powers.

Speaker Berry’s papers in many ways provided the impetus for a broader discussion about how the institutional integrity of the legislature could be assured. We started to see in the ACT – amongst MLAs, public servants, academics and interested members of the community – a proper conversation about what arrangements should apply so far as: the Assembly’s budget was concerned, the role of the ACT public service in the affairs of the Legislative Assembly Secretariat; the administrative and legislative protections that might be adopted to enhance the independence of the legislative branch and so on. Following the 2008 election there was an opportunity to place the Latimer House principles at the front and centre the legislature’s thinking in these matters. In negotiating a parliamentary agreement with the ACT Greens, the government agreed that it would be appropriate to give greater prominence to the principles and indeed to adopt them as a yardstick for measuring the adequacy or otherwise of the form of democracy we practice in the territory.

On 11 December 2008, the Attorney General, Simon Corbell, moved a resolution in the Assembly calling for the endorsement and adoption of the principles. The resolution was passed with unanimous support.

The Legislative Assembly for the ACT is the first and only jurisdiction of which I am aware in which there has been a formal adoption of the Latimer House principles. In its resolution of continuing effect, the Assembly acknowledged that ‘the principles express the fundamental values they believe should govern the relationship between the three branches of government in the Australian Capital Territory’.³ The resolution was later amended, following a report on the Latimer House Principles by the Standing Committee on Administration and Procedure, to provide that a comprehensive review of ACT governance was to be undertaken once in the life of each Assembly (once every four years) to assess implementation of the principles. The resolution requires that reviews are to be conducted by a suitably qualified person appointed by the Speaker. The resolution requires that the report on the review is to be tabled in the Assembly and referred to the Standing

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² Included as Appendix A

The Review

The current Speaker, Shane Rattenbury MLA, appointed Professor John Halligan to conduct the review of the implementation of the Latimer House principles in the first part of 2011. Professor Halligan was a good fit for the review task given his longstanding interest in ACT self-government. As Research Professor of Government and Public Administration, Faculty of Business and Government at the university, Professor Halligan has conducted extensive research in relation to comparative public management and governance, public sector reform, performance management and government institutions. His review was informed by the Latimer House principles themselves, statistics relating to the business of the Assembly, the practices that have been adopted in other jurisdictions, past reviews of self government, the body of academic literature on the subject, interviews with representatives of the three arms of government, and the contributions of MLAs in Assembly debates and committee reports.

It was encouraging to see that the review found that ‘The [ACT] Legislature rates very well against Latimer Principles in terms of its relative independence from the Executive, the opportunities for private members, and the concern with enhancing the institution’. With a few minor exceptions, the legislature does perform remarkably well in this area and operates with a great deal of autonomy vis-a-vis the executive. There is a general culture of deference to the legislature in the ACT and successive executives have not generally attempted to encroach on the operations of the Assembly. I suspect that this cultural acceptance of the separation between the legislative and executive branches derives, in large part, from the prevalence of minority government in the ACT with 6 of the 7 Assemblies having formed minority governments where one of the major parties has relied on the support of crossbench members to prevail. Our particular Hare Clark electoral system, which entails proportional representation with multimember electorates, preferential voting, the prohibition of ‘how to vote’ cards and rotating candidates names on the ballot papers (Robson rotation), all serve to make the achievement of a majority government (i.e. 9 of the 17 members) a difficult task. The prevalence of minority governments in the ACT has tended to encourage compromise and the diffusion of power.

It is also true that the Assembly provides significant opportunities for non-executive members to participate in proceedings with high levels of engagement within the committee system, and a relatively high number of private members bills being passed. In relation to this first point, Professor Halligan observes that:

In a legislature of seventeen members, the membership of standing committees is likely to be dominated by non-government parties, currently the ACT Greens and the Canberra Liberals (but the ACT Greens also operate under a Parliamentary Agreement with the governing Australian

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4 For the information of delegates I have included the report as Appendix B.
5 Given that these matters are still under consideration by the Standing Committee on Administration and Procedure, the views in this paper and my own and do not necessarily reflect those of my fellow Assembly members. I have not commented on any of Halligan’s findings in relation to the judiciary.
Labor Party. Of the seven Standing Committees all but one have three members, the remaining committee (Administration and Procedure) has four. In each case there is only one government member on the committee, which means that non-government parties prevail in terms of membership.

Similarly, the roles of chairs of committees are distributed across the parties, but with one exception are currently held by opposition or cross-bench members. The ACT has a tradition of using opposition members in this position. Another example is the Select Committee on Estimates, which has five members (two from the Opposition, two from the third party, and one from the government), and a nongovernment chair.\(^8\)

It would be true to say that there has not been a ‘winner takes all’ approach adopted throughout the history of self-government. Power has traditionally been shared between members and party groups and the institutional capabilities of the Assembly have thrived as a result.

With regard to the second point, Professor Halligan observes that ‘In 2009-10, 72 bills were introduced comprising 55 from the Executive [76%] and 17 private members’ bills [23%]. This is an unusually high number for an Australian parliament (or indeed comparable parliaments overseas). Of those introduced all the Executive's bills were passed, but 10 [14%] private members' bills were also successful’.\(^9\)

Both of these measures, taken together demonstrate that there is a high level of independence and significant opportunities for participation by non-executive members in the business of the Assembly to an extent not generally observed in other parliaments.

**ASSEMBLY BUDGET CONTROL**

An all-party committee of members of parliament should review and administer parliament’s budget which should not be subject to amendment by the executive.

**Latimer House Guideline VII (6)**

In his report, Professor Halligan notes that ‘In relation to the key Latimer Principle, that the Legislature should have the power to determine and approve its budget, is not applied in ACT. This question should be reviewed once the ACT system of government as a whole acquires independent authority over its Governance and agreement is reached on a larger Assembly’.\(^10\)The Assembly does not determine the funding allocation as provided for in the relevant appropriation bill. Instead, the traditional practice has been that the executive determines the funding quantum for the Assembly after having considered a draft budget put by the Speaker after he or she has sought advice from the Standing Committee on Administration and Procedure. The Assembly as a whole has then been able to support or reject the appropriation. Speaker Berry pointed to the problems inherent in this approach in his paper on the application of the Latimer House principles in relation to the development of the Assembly’s budget, observing that:

... the development and implementation of parliaments’ budgets should not be subject to the vagaries and transient political and policy agenda of a particular government of the day. In order to sustain and nourish the institution’s accountability, legislative and representational functions,

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\(^8\) Ibid, p 9.


\(^10\) ibid, p 3.
an independent budgetary process is required; separate from those which apply to executive government departments and agencies. It is the autonomy of the parliament to decide its affairs that should take precedence over the role of the executive in developing and framing budgets to deliver on government policy.\(^{11}\)

With the recent passage of the Legislative Assembly (Office of the Legislative Assembly) Act 2012, two new arrangements have been adopted which give greater effect to the relevant Latimer House guideline. The two significant advancements in this area are that: 1. the executive is now required to table a separate appropriation bill in relation to the Assembly’s budget; and 2. where the executive departs from the funding allocation sought by the Speaker; it must table in the Assembly a statement of reasons for doing so. This brings an additional level of transparency and accountability to the budget process so far as the Assembly’s funding arrangements are concerned.

The Assembly is constrained in the extent to which it can implement this principle given the fact that s65 of the ACT’s effective constitution, the Australian Capital Territory (Self Government) Act 1988 (Cwlth) provides for the financial initiative of the crown, meaning that it is only the executive which can frame an appropriation. I believe these new arrangements bring us closer to realising the spirit, if not the letter, of the relevant Latimer House principle.

**ENLARGED ASSEMBLY**

A persistent theme to emerge in reports and reviews of self-government in the ACT over the last 20 years has been the view that more members are required to fulfil the potential of the Assembly as the legislative branch of government. The Halligan review continued this theme, observing that:

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

Without going into my personal preferences concerning the most suitable number of MLAs, it has become quite clear that a considerable increase in the size of the Assembly is required in order for the institution to acquit effectively the full range of legislative, executive, representative and accountability functions. The ACT is perhaps the most under-governed jurisdiction in Australia (see below on page 6) and there is a strong case to amend the Australian Capital Territory (Self Government) Act 1988\(^{12}\) to allow the Assembly to set its own size and, following this, to introduce a clearly defined process for increasing the number of MLAs.

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\(^{11}\) Berry op cit, p 8.

\(^{12}\) The current Act sets the number of members within the Assembly at 17 as well as the maximum number of ministers that can be appointed (5, including the Chief Minister).
### TABLE 1 - ELECTED MEMBERS AT EACH LEVEL OF GOVERNMENT

<table>
<thead>
<tr>
<th>Commonwealth</th>
<th>State/Territory</th>
<th>Local Gov</th>
<th>Total reps</th>
<th>Enrolment at 30/06/2010</th>
<th>Ratio all levels of Government</th>
<th>Ratio local and state Government</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>House of Reps*</td>
<td>Senate</td>
<td>Lower House</td>
<td>Upper House</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW</td>
<td>49</td>
<td>12</td>
<td>93</td>
<td>42</td>
<td>1,518</td>
<td>1,714</td>
</tr>
<tr>
<td>VIC</td>
<td>37</td>
<td>12</td>
<td>88</td>
<td>40</td>
<td>631</td>
<td>808</td>
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<tr>
<td>QLD</td>
<td>29</td>
<td>12</td>
<td>89</td>
<td>0</td>
<td>553</td>
<td>683</td>
</tr>
<tr>
<td>WA</td>
<td>15</td>
<td>12</td>
<td>59</td>
<td>36</td>
<td>1,278</td>
<td>1,400</td>
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<tr>
<td>SA</td>
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<td>12</td>
<td>47</td>
<td>22</td>
<td>715</td>
<td>807</td>
</tr>
<tr>
<td>TAS</td>
<td>5</td>
<td>12</td>
<td>25</td>
<td>15</td>
<td>281</td>
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<td>150</td>
<td>76</td>
<td>443</td>
<td>155</td>
<td>5,124</td>
<td>5,948</td>
</tr>
</tbody>
</table>

### SELF-GOVERNMENT AND SOVEREIGNTY

The review notes the recent advancements in the ACT’s governance arrangements following the passage in the Federal Parliament of the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010, which amongst other things removed the power of the Federal Executive through the Governor-General to override Territory laws. Professor Halligan observed that ‘Securing full-self government is already a priority of the ACT, and significant progress has recently been made with the removal of a Commonwealth Minister’s ability to reject Territory legislation, but full independence from the Commonwealth needs to be reiterated here! to underscore its importance as a fundamental basis of territory governance’. Although the Federal Parliament retains the power to overturn ACT laws, it is a major advancement that the Commonwealth executive alone no longer has this power. Speaker Rattenbury’s submission to the Senate committee examining this bill, made the following point:

*While it is accepted that the Commonwealth Parliament will always have legislative responsibilities in relation to the ACT, the existing provisions in the Self-Government Act permitting disallowance of ACT laws by the Governor-General on the instruction of the Federal Executive Council are undemocratic and are anachronistic in much the same way as are ss 58, 59 and 60 provisions in the Commonwealth Constitution.*

*In the case of the ACT, this is not an academic or theoretical point - the fact that the Federal Executive has chosen to exercise the disallowance powers under s35 of the Self-Government Act and overturn an enactment of the Legislative Assembly for the ACT, creates a high degree of uncertainty as to the extent of the democratic remit that applies in the Territory and casts into*

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14 Halligan op cit, p 4.
considerable doubt the operation of any authentic form of responsible government in this jurisdiction.

It is simply an unnecessary impost on the people of the ACT to have a Federal Executive looking over their shoulders in exercising their democratic rights. Removing s35 will strengthen the democratic character of the ACT and provide additional certainty for ACT legislators in performing their roles as elected representatives, ensuring that they are attentive to the needs and aspirations of ACT citizens, rather than the Executive of the Federal Government.15

There remains unfinished business with respect to the operation of the Australian Capital Territory (Self Government) Act 1988. As I touched on before, it is clearly desirable that the prescriptive provisions concerning the number of members of the Assembly and the maximum number of ministers should be removed and these powers be granted to the Assembly itself.

**COMMITTEE SYSTEM**

The review observed that:

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

The Assembly’s committee system in its current form involves six three-member standing committees with coverage over particular portfolio areas – 1. climate change, environment and water; 2. education, training and youth affairs; 3. planning, public works, territory and municipal services; 4. health, community and social services; 5. justice and community safety (which also performs a scrutiny of bills role); and 6. public accounts. There is also one four-member standing committee on administration and procedure which is primarily established to advise the speaker on the internal administration of the legislature itself. The Assembly creates select committees on a needs basis with a five-member select committee on estimates established each year to review the government’s appropriation bill and associated budget.

The constraints within the existing system primarily relate to the scarcity of members within the Assembly. There are obvious limitations in the extent to which committees can meaningfully explore the vast array of issues that emerge within the context of each of these broad portfolio groupings. It is also the case that individual non-executive members must sit on numerous committees at the same time which means that each member is required to get across an extraordinary range of policy detail, a situation not typically encountered by members in larger legislative bodies. Professor Halligan seems to concur with this view noting in his report that ‘The resources of the committee, including the size of its membership, need to be strengthened’.16

The review observed that, ‘Greater use should be made of the committee system for the consideration of legislation’.17 While there are always benefits in parliamentary committees scrutinising proposed legislation, to undertake this role effectively would almost certainly require an increase in the number of members who sit on committees. The same applies in relation to Professor Halligan’s finding that the

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16 Ibid, p 3.
17 Ibid, p 3.
resources of the public accounts committee, ‘including the size of its membership, need to be strengthened’. 18

Within these constraints our committee system performs remarkably well and the level of advice and support provided by committee secretaries within the Office of the Legislative Assembly is of a very high calibre.

CONCLUSION

I see the predominant value of the review process as being to enliven discussion about our governance arrangements and as a potential catalyst for strengthening and refining the ACT’s existing institutional capabilities and structures. The review rated the ACT Legislative as performing well against the Latimer principles and the benchmarks of the Commonwealth Parliamentary Association, noting that, ‘The Assembly has had relatively more independence, compared to comparable systems operating within a Westminster tradition because a one-party majority in the Assembly is the exception’. 19 I believe that the review process has been a positive one and will help inform the changes necessary to make the ACT’s form of governance even more effective. The fact that the review process will be repeated each Assembly is also positive and brings a continuous improvement mechanism to bear, one that doesn’t allow us to rest on our laurels or to become complacent. I see value in the suggestion contained within the 2004 publication of the Commonwealth Latimer House principles on the Three Branches of Government relating to the ‘creation of a monitoring procedure outside official Commonwealth processes’. It is noted in the document that such a procedure could ‘initially... involve an “annual report” on the implementation of the Guidelines in all Commonwealth jurisdictions, noting “good” and “bad” practice’. 20 In this way, all Commonwealth jurisdictions could better gauge their performance on a continuum, identifying their strengths, areas where improvements can be made, and participating in a broader, constructive, dialogue about how to give best effect to the guidelines and the principles underpinning them.

I would like to thank Mr David Skinner, Manager, Strategy and Parliamentary Education, Office of the Legislative Assembly, for assistance in preparing this paper.

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18 Ibid, p 3.
19 Ibid, p 7.