

# OVER 21 – HOW ABOUT THE KEYS?

## REVIEWING THE ACT CONSTITUTION

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Throughout the ACT's history there has been ongoing discussion regarding the most appropriate model of governance for the geographically small, land locked capital territory. Debate largely arose from the fact that for a significant period of the ACT's early history the Territory had no local or national representation. Thus models were developed, and adapted, as the population and role of the Territory changed.

As the role of the national capital developed, and the population and cityscape of Canberra continued to grow, so did the opinion that the ACT warranted not only representation at the national level, which had been achieved, but also some form of self-government.

It was not until 1978 that an advisory referendum was held regarding a formal local government model. The questions posed by the plebiscite were:

- That self-government be granted to the ACT by delegating functions to a locally elected legislative body.
- That a locally elected legislative body be established in the ACT with local government type legislative and executive functions.
- That the present arrangements for governing the ACT should continue for the time being.<sup>2</sup>

Despite support for self-government being sometimes vocal, the vote did not command majority support.<sup>3</sup> The results of the advisory referendum showed that 63.75% of the electors casting a valid vote at the referendum voted to continue with the present arrangements for the time being.<sup>4</sup>

A decade later the then Commonwealth government passed the *Australian Capital Territory (Self-Government) Act 1988* (the Act) to give the ACT a measure of self-government without conducting another plebiscite or referendum. The Act created a Legislative Assembly of 17 Members to replace the House of Assembly (also known for a period as the Legislative Assembly), which existed from 1976 to 1986, but had no executive power and limited legislative ability, with the principal function of advising the Commonwealth on matters relating to the Territory.

The first election for the new Assembly was held on 4 March 1989 and the Assembly first sat on 11 May that year. Although a decade after the plebiscite, there continued to be opposition to the creation of a territory parliament with the success of four candidates running on explicit anti self-government tickets in the first election after self-government.<sup>5</sup>

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<sup>2</sup> Mr M McRae (Ed), *Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory*, Canberra, 2009, p x.

<sup>3</sup> *ibid.*

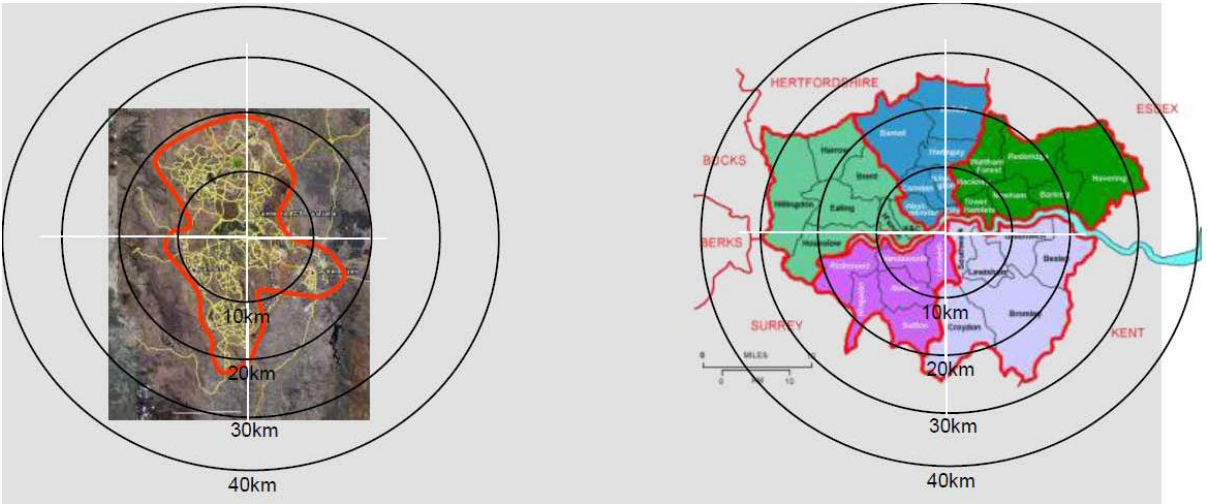
<sup>4</sup> *ibid.*, p xi.

<sup>5</sup> *ibid.* This resulted in three No-Self Government Members and one Abolish Self-Government Member being elected.

The ACT’s system of government, created by the Act, has a single legislative chamber of 17 members. Executive responsibility is vested in a Chief Minister, elected by the Assembly, and no more than four ministers, who must also be members of the legislature.<sup>6</sup> There is no representative of the Crown with the Act failing to make provision for an administrator or governor. The Parliament is responsible for a range of ‘state’ and ‘local government’ functions at the one level of administration. This is unique in Australia and results in governments with significant legislative programs.<sup>7</sup>

The case for self-government was, on purely numerical terms, overwhelming. By the late 1980s the ACT had a population of more than a quarter of a million, yet its four representatives in the Commonwealth Parliament were its only elected representatives to a body having genuine legislative authority. Whether contrasted with Australia’s smallest state, Tasmania, or cities of comparable size to Canberra, the ACT suffered a severe ‘democratic deficit’.<sup>8</sup> This deficit continues today (see table below).

The increasing pressure on members of the Legislative Assembly has grown considerably since the Assembly commenced in 1989. Firstly, the ACT population continues to grow,<sup>9</sup> and the demographics of the city are vastly different with a significant ageing population. The city also continues to grow physically with growth in the northern, southern and western sides of the city creating demand for further municipal and other services. This is demonstrated by a recent report by Dr Alan Hawke AC where he compared the size and geographical spread of the city of London to the city of Canberra as shown by the diagram below.<sup>10</sup> The extended scope of national reform, and intergovernmental responsibilities such as Ministerial Councils, with correspondingly complex legislative and regulatory schemes, also places additional pressure on the executive.<sup>11</sup> Finally, the composition of the Assembly with governments often having small majorities has placed pressure on the Committee system which is an essential element in a unicameral parliament.



<sup>6</sup> McRae, op cit, p xi.

<sup>7</sup> ibid.

<sup>8</sup> ibid.

<sup>9</sup> Population of the Australian Capital Territory, as at December 2011, was 370 000, Australian Bureau of Statistics, *Australian Demographic Statistics*, cat no 3101.0, ABS, Canberra, 2012.

<sup>10</sup> Dr A Hawke AC, *Governing the City State: One ACT Government—One ACT Public Service*, Australian Capital Territory, 2011, p 36.

<sup>11</sup> In the Seventh Assembly the Chief Minister had two extra portfolios (one being Health), the Deputy Chief Minister had three extra portfolios (one being Treasurer), one had three portfolios, one had four portfolios and one had six portfolios.

## Background and context of the review

The Standing Committee on Administration and Procedure of the ACT Legislative Assembly decided to undertake a review of the Act in acknowledgement that the role and scope of the Legislative Assembly has changed from when it was established 23 years ago. The Committee considered that a review timed to coincide with the centenary of Canberra could provide an opportunity for both the Territory and the Commonwealth to reflect on the ACT's governance arrangements.

The operation of the Act has been considered by numerous internal and external bodies since the inception of the Act. However, relatively few changes have been made by the Commonwealth during the 23 years of the Act's operation. Additionally, there has been a lack of consensus within the Legislative Assembly when discussing contentious matters of reform, particularly in relation to the appropriate membership size of the Legislative Assembly.

As the Committee was eager to capture public opinion in any review conducted, it was decided that the review should take the form of a Committee report. This approach offered the best opportunity to allow Canberra citizens and interested organisations to express a view on the Act's operation. The Speaker of the Legislative Assembly informed the Assembly on 8 December 2011 of the Committee's intention to undertake the review.

Unsurprisingly the issues that were identified as contentious in previous reports continued to occupy debate. The main areas of discussion concerned the appropriate size of the Legislative Assembly, the role of the Governor-General and the current law making restrictions on the Territory. There was broad agreement on the inclusion of a preamble and a range of technical amendments to ensure consistency between the Act and Commonwealth statute, and other ACT statutes such as the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*.

The Committee followed standard practice to develop the report and considered recent reports produced for the ACT Government and Assembly that raised matters pertaining to the Act. These included *Review of the Governance of the Australian Capital Territory*<sup>12</sup> (the Pettit Review) and *An Assessment of the Performance of the Three Branches of Government in the ACT Against Latimer House Principles*,<sup>13</sup> (the Halligan Report).

Recommendations from the 1998 Pettit review included:

- The electoral system should be revised to make it possible to maintain a modest ratio of representation established at the time the Act was passed (about 1:10,000 electors), consistent with having an odd number of seats in total and keeping the electorates geographically coherent.
- the inclusion of a preamble indicating that the Commonwealth and Governor-General should only disallow an enactment of the Assembly on the grounds that the legitimate interests of the Commonwealth require such an action.

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<sup>12</sup> Professor P Pettit, *Review of the Governance of the Australian Capital Territory*, ACT Government Printer, Canberra, 1998.

<sup>13</sup> Professor J Halligan, *An Assessment of the Performance of the Three Branches of Government in the ACT Against Latimer House Principles*, Australia and New Zealand School of Government (ANZSOG), Institute for Governance, University of Canberra, 2011.

- the Assembly have the same powers as State parliaments in respect of normal government processes.

The Halligan Report, tabled in 2011, assessed the ACT's performance against the Commonwealth Parliamentary Association Latimer House Principles, and identified areas for potential future amendment. The Report determined that the Legislative Assembly performs well against Latimer House Principles as a unicameral parliament for a small jurisdiction with wide responsibilities.

The Report additionally supported many of the earlier Pettit recommendations and argued that the Legislative Assembly needs to have its numbers substantially increased as soon as possible. The increased size and electoral arrangements should be the subject of an independent investigation that includes the Electoral Commissioner, with a major emphasis being governance capacity. Professor Halligan noted:

There has been extensive discussion of this question during the short history of self-government with a series of reviews by the ACT and the Commonwealth recommending a larger Assembly. It is perhaps quite remarkable that despite the consistency in the recommendations ... nothing has transpired.<sup>14</sup>

Professor Halligan found that a ministry of only five confounds the basic tenets of effective cabinet government, and raises questions about whether the ACT should continue to operate this type of system without an increase in its size.

The Committee also noted that there had been recent reviews of the ACT Public Service and the National Capital Authority conducted by Dr Allan Hawke AC. These reviews identified potential reforms related to the Self-Government Act. The *Governing the City State: One ACT Government—One ACT Public Service* report was released in February 2011.<sup>15</sup> The aim of the review was to ensure the configuration of the ACT public sector was best placed to meet the needs of the Government. Sections of the Hawke Review discussed matters relevant to the review of the operation of the Self-Government Act and suggested that the Self-Government Act be reformed and that the size of the Assembly and ministry be increased.

The Committee was also aware of evidence given by Commonwealth public servants from the Territories Division of the Commonwealth Department of Regional Australia, Local Government, Arts and Sport to a Senate Legal and Constitutional Affairs Legislation Committee inquiry into one aspect of the Self-Government Act on 21 March 2011 where it was stated:

What I can say though is that the Australian government has provided advice to the ACT government that the review of the self-government act is something that the ACT government could undertake of itself and that it would welcome any advice of the results of that review and would give it consideration.<sup>16</sup>

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<sup>14</sup> Halligan, op cit.

<sup>15</sup> Dr A Hawke AC, op cit, p 31.

<sup>16</sup> Mr J Yates, Senate Standing Committee on Legal and Constitutional Affairs, *Transcript of Evidence*, 21 March 2011.

The Committee conducted its inquiry during the first half of 2012 and received 24 submissions from professional associations, peak bodies, individuals, past members of the Legislative Assembly, ACT and federal governments and academics. The Committee heard from 12 witnesses over 2 days. During the public hearings the Committee was eager to seek the views of the wider community, and extended its scope to social media, establishing a Twitter account. Although many parliaments around the world use the website to provide information to the community, it appears that this may have been the first time Twitter was used in Australia as a conduit for garnering community opinion in a parliamentary public hearing.

The Twitter session trial, held on 11 May 2012, was a success, with the Committee spending an hour responding to people's thoughts, questions and suggestions on a range of aspects of the Act. In the lead up to the session taking place the Committee generated areas for discussion by posting a series of questions relating to the review on the committee Twitter feed. Examples of prompts included:

[ACTSelfGovReview @ACTSelfGovRev](#)

Any thoughts on the operation of the ACT Self-Government Act? Positives, negatives – what would you like to see?

[ACTSelfGovReview @ACTSelfGovRev](#)

Some suggest increasing the size of the Legislative Assembly from the current 17 members to 19, 21 or 25 members – what do you think? Why?

[ACTSelfGovReview @ACTSelfGovRev](#)

What role should the Governor-General have in the governance of the ACT?

[ACTSelfGovReview @ACTSelfGovRev](#)

Any thoughts or comments on how the Assembly's Committee system operates?

The Committee also utilised the program Twuffer. This allowed the Committee to upload a series of tweets and have them released via the Twitter feed at a pre-determined time. This allowed prompts to be released over the weekend, targeting different online users.

Topics raised included the size of the Assembly and role of the Commonwealth Government. Examples of tweets included references to the role of the Governor-General and the size of the Assembly:

[@ACTSelfGovRev](#) none. this provision should be removed. and I wouldn't like to see an ACT governor general created either.

[@ACTSelfGovRev](#) No. The ACT is a good example of how a government can work with no HoS. It's not necessary given appropriate legal structures

[@ACTSelfGovRev](#) Amend section 8 - Assembly to determine size (per NT), <http://tiny.cc/jtzt dw> & 2002 Standing Committee report Legal Affairs

[@actselfgovrev](#) If this power comes to Assembly, changes in size need two-thirds Assembly support or a majority of electors at referendum

Following advice from officials in the Chief Minister and Cabinet Directorate who had experience operating Twitter Cabinet sessions, the Committee decided to respond to questions from a single Twitter account. The Committee established a Twitter account specifically for the hearing. This meant that there was a single registry of questions asked and comments, and the Chair of the Committee (the Speaker, Mr Shane Rattenbury MLA) responded on behalf of the Committee. The Twitter feed was attached to a projector, so all members of the Committee were able to see the questions asked in real-time. When a question was asked or comment made, the Committee discussed a proposed response and the Chair would respond on behalf of the Committee. Individual members of the Committee used their personal Twitter accounts to advertise the public hearing session, but not to respond to matters considered by the Committee. This ensured a consistent approach and strengthened record keeping mechanisms.

The Twitter session provided the Committee with unique insights, and added value to the public hearing program. The Hansard service usually engaged during a public hearing was replaced with a record of the discussion provided by the Twitter website, which records all messages to and from the account.

# 1. KEY AREAS OF DISCUSSION

## PREAMBLE

Several submissions to the Committee's inquiry raised the possibility of including a preamble in the Act. The issue was also raised during the Committee's public hearings. The ACT Government's submission recommended that a preamble be incorporated into the Act and stated that 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."<sup>17</sup> The ACT Government's submission also stated that a preamble should reflect that "the people of the ACT give the Assembly its political mandate to govern the Territory".<sup>18</sup> Evidence given by the Attorney-General, Mr Simon Corbell MLA, confirmed the Government's view on this matter.<sup>19</sup> The submission went on to indicate that, as many of the ACT's institutions of governance had significantly matured since the beginning of self-government, a preamble should be used as an opportunity to clearly recognise this growth.<sup>20</sup>

The matter had also been raised previously by Philip Pettit in his review of governance of the ACT undertaken in 1998.<sup>21</sup> In his report, Pettit recommended that:

The Self-Government Act should contain a preamble, indicating that if the Commonwealth Parliament intervenes in Assembly business, or if the Governor-General chooses to disallow an enactment of the Assembly, then that should be on the grounds that the legitimate interests of the Commonwealth require such action.<sup>22</sup>

In making this recommendation Professor Pettit suggested that any preamble should include a statement which outlined that the Commonwealth should only enforce their powers under section 35 of the Act where the matter at hand related directly to the city of Canberra, not just because the Government of the day did not agree with a certain enactment or ideology.

The powers held by the Commonwealth under section 35 of the Act are no longer relevant as this section was repealed in 2011 by the *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cwlth). However, the Pettit recommendation is still relevant in relation to section 16 of the Act.

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<sup>17</sup> ACT Government, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, Submission 16, p 2.

<sup>18</sup> *ibid.*

<sup>19</sup> Mr S Corbell MLA, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, *Transcript of Evidence*, p 5.

<sup>20</sup> ACT Government, *op cit*, p 2.

<sup>21</sup> Pettit, *op cit*, p 35.

<sup>22</sup> *ibid.*

The issue of a preamble acknowledging or recognising the traditional custodians of the land was also raised in several submissions, with the ACT Greens,<sup>23</sup> the ACT Law Society<sup>24</sup> and the ACT Government<sup>25</sup> indicating they would support such an acknowledgement/recognition. The ACT Government's submission went on to state that "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."<sup>26</sup> The submission indicated that the suggestion had been raised with the ACT's Aboriginal and Torres Strait Islander Elected Body and that it had responded positively. Evidence given by Meredith Hunter MLA also suggested that consultation with the Indigenous community would be required were such a matter to be addressed in a preamble.<sup>27</sup> Dr Allan Hawke AC also supported the inclusion of a preamble into the Self-Government Act.<sup>28</sup>

In its submission to the inquiry the Commonwealth's Department of Regional Australia, Local Government, Arts and Sport noted that the ACT Government had indicated a desire to include a preamble in the Act. It went on to note that any recognition of the traditional owners in a preamble would need to be considered by the Australian Government at the conclusion of the review. The Department stated that it had previously advised the ACT Government that any preamble that might purport to limit the Commonwealth's powers would not be acceptable to the Australian Government.<sup>29</sup>

The Committee agreed that a preamble should be included in the Self-Government Act to clearly describe the purpose of the legislation and the Commonwealth's interests and powers in relation to the Act. The Committee also believed it would be appropriate for formal recognition of the traditional custodians to be included in the preamble and made a recommendation along those lines.

## SIZE OF THE LEGISLATIVE ASSEMBLY

Section 8 of the Self-Government Act states that:

- (1) There shall be a Legislative Assembly for the Australian Capital Territory.
- (2) Subject to subsection (3), the Assembly shall consist of 17 members.
- (3) The regulations may fix a different number of members for the purpose of subsection (2), but regulations shall not be made for that purpose except in accordance with a resolution passed by the Assembly.

Although the section allows for regulations to amend the number of members, the Assembly has never passed a resolution to alter the number of members.

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<sup>23</sup> ACT Greens, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, Submission 18, p 2.

<sup>24</sup> ACT Law Society, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, Submission 19, p 3.

<sup>25</sup> ACT Government, op cit, p 3.

<sup>26</sup> *ibid*, p 3.

<sup>27</sup> Ms M Hunter MLA, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, *Transcript of evidence*, 12 April 2012, p 41.

<sup>28</sup> Dr A Hawke AC, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, *Transcript of evidence*, 12 April 2012, p 32.

<sup>29</sup> Department of Regional Australia, Local Government, Arts and Sport (Cwlth), Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, Submission 21, p 3.



The majority of the submissions to the inquiry that canvassed the issue of the size of the Assembly suggested that the current number of members of the Assembly was inadequate. This issue also dominated the public hearings held as part of the inquiry.

The ability to change the size of the Assembly was also commented on in submissions. As stated by Professor Wettenhall:

The actual size of the Assembly is set by Commonwealth legislation (in the Self-Government Act), so the Commonwealth will need to be persuaded of the merits of any firm proposal to increase the size. There is no such limitation on the sphere of action of a state or the Northern Territory. Here we see that the ACT enjoys a more limited form of self government than do its 'partners' at the sub-national level of Australian government.<sup>30</sup>

The ACT Electoral Commission also noted that the ACT had been treated differently to all other jurisdictions in Australia. The submission noted:

By contrast, every Australian State parliament has the power to change its number of members by enactment (with New South Wales and Victoria also requiring approval of electors at a referendum in respect of the NSW Legislative Council and both houses of the Victorian parliament). The Northern Territory parliament can alter its number of members in accordance with section 13(2) of the *Northern Territory (Self-Government) Act 1978* (Cwlth), which provides that "The Legislative Assembly shall consist of such number of members as is provided by enactment."

The ACT is the only Australian parliament that cannot set its own number of members (subject in two cases to a referendum as described above), and the only Australian parliament that requires the approval of the federal Government and the federal Parliament to alter its number of members.

The Commission recommends that it would be appropriate to amend section 8 of the Self-Government Act to give the Assembly the power to set its own number of members, to bring the ACT Legislative Assembly into line with the Northern Territory Legislative Assembly.

The Commission notes that, should this power be given to the ACT Legislative Assembly, it would be entrenched under the Proportional Representation (Hare Clark) Entrenchment Act. This would effectively require this power to be exercised with multi-party support, given the requirement for a 2/3 Assembly majority if the Assembly was to set its own number of members without resorting to a referendum.<sup>31</sup>

In another submission to the inquiry, Professor George Williams AO suggested that the Self-Government Act could be usefully improved in a "modest" way by amending section 8 to allow the Assembly to determine its own size.<sup>32</sup> He pointed out that these types of amendments should be guided by the following constitutional principles of self-government:

- The Act should establish a system of self-government for the ACT.
- The system should be self-governing in the sense that it provides for local representation in the body empowered to make laws generally for the community.

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<sup>30</sup> Wettenhall, op cit, p 2.

<sup>31</sup> ACT Electoral Commission, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, Submission 9, p 15.

<sup>32</sup> Williams, op cit, p 2.

- The system would be also self-governing in that it enables the local community directly or via their representatives to set and change the terms of self government (a community cannot be said to be self-governing in this regard if a rigid system is imposed upon them).
- People living in the ACT should have the same democratic rights, entitlements and responsibilities as other Australians.<sup>33</sup>

Professor Williams AO noted that the ACT Self-Government Act fares poorly against these principles.<sup>34</sup>

The Committee in its report to the Assembly noted that in 1993 the Commonwealth Government attempted to allow the Assembly to determine its own size. In the Arts, Environment and Territories Legislation Amendment Bill 1993, the then Government introduced the following proposed amendment to the Self-Government Act:

Subsections 8 (2) and (3):

Omit the subsections, substitute:

“(2) The Assembly consists of:

- (a) 17 members; or
- (b) If an enactment provides for a different number of members—that number of members.”

The explanatory statement to the Bill indicated that:

The main purpose of the Arts, Environment and Territories Legislative Amendment Bill 1993 is to make various minor improvements to the ACT self-government legislation, which are the result of a review of the legislation conducted by the ACT administration and my department in 1992, three years after self-government. Possible more important changes are being examined and would be included in a separate Bill at a later date.

The Bill removes from the *Australian Capital Territory (Self-Government) Act 1988* limitations on the powers of the Legislative Assembly and the executive of the Territory that are no longer considered appropriate. For example, the assembly will be given power to decide the number of its members; how frequently it will meet; how laws passed by it will be notified to the public; and the level of remuneration of its members and the ministers and senior officers of the ACT Government. This brings the ACT’s degree of self-government closer to that of the Northern Territory.<sup>35</sup>

In debating the Bill, the Minister representing the Minister for the Environment, Sport and Territories, Senator Schacht, argued that:

The government believes it would be very odd to say that the ACT assembly should not have the powers that are possessed by every other federal and state government and the other territory government of Australia—that is, the Northern Territory government. I refer to the absolute power of those governments to decide their own numbers.<sup>36</sup>

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<sup>33</sup> Williams, op cit, p 1.

<sup>34</sup> *ibid.*

<sup>35</sup> Senate Debates (27.05.93), p 1420.

<sup>36</sup> Senate Debates (6.9.93), p 977.

Later he stated:

In the ACT, the 17 members represent individually a much larger proportion per elected member than is the case in the Northern Territory assembly. Therefore, it is very odd to say the ACT government representatives, 'After two elections and having established self-government, we still cannot trust you to make a decision about the members of parliament that you wish to have.'<sup>37</sup>

However, the amendments proposed by the government were not accepted by the Senate. The then Opposition argued that:

That simply is that the Liberal and National parties do not think that the current ACT assembly should be left in a position where it can determine what numbers of the assembly it will be. It was for this reason that I foreshadowed—and will move—the amendment that the determination of how many members there should be in the ACT assembly is one which, as at present, remains with this parliament, if there is to be any difference in the number of members—that is, 17 members—of the ACT Legislative Assembly, the ACT government would have to convince the government, convince the lower house of this parliament and convince this chamber that there was a need to alter that from the current number of 17 to some other number. I indicated in my speech on the second reading debate that if a good case was made to this parliament and, certainly, to the Liberal and National parties for amending that number of 17, we would not object, we would be objective about it and we would consider the matter on its merits and so determine it, but we did not think that the ACT assembly should have the power.<sup>38</sup>

The Committee formed the view that after more than 23 years of mature governance, the Australian Capital Territory should be able to set the size of its legislature in the same terms as the other States and Territories in the Australian system of government.

The Committee recommended, noting the requirements of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* regarding a special majority, that section 8 of the Self-Government Act be amended to give the Legislative Assembly the power to determine the number of its members, so as to have similar powers as the Federal Parliament and the State and Territory Parliaments.

In the event that the Self-Government Act is amended along the lines suggested by the Committee it would then be up to a future Assembly to determine an appropriate size. A number of submissions and persons appearing before the Committee made suggestions about what an appropriate size might be, with most indicating that 25 members are necessary to ensure that they Assembly can adequately fulfil the roles allocated to it (eg a ministry, shadow ministry, committees, etc).

The Committee did not form a view on what might constitute an appropriate size for the Legislative Assembly. The review did note that, in a comparison to teachers, medical practitioners, nurses, judicial officers and elected representatives on a per capita basis, there is a significant discrepancy between the ACT and other jurisdictions, as noted by the following table:

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<sup>37</sup> Senate Debates (6.9.93), p 977.

<sup>38</sup> *ibid*, p 976.

**KEY PROFESSIONS FOR EACH AUSTRALIAN JURISDICTION (PER 100 000 PEOPLE)<sup>39</sup>**

	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
Employed nurses—2009	1 091	1 267	1 133	1 094	1 595	1 389	1 268	1 954
Employed medical practitioners—2009	309	333	335	337	354	366	474	443
Elected representatives—2012	24	14.4	15.3	59.7	43.4	66.9	5.8	79.2
Primary/secondary teachers—2010	1 455	1 544	1 502	1 663	1 564	1 722	1 637	2 257
Judicial officers—2010-2011	3.6	4.5	3.3	5.5	4.6	4.0	3.8	10.9

The review further noted that if the Assembly had the power to determine its size, a number of options could be pursued. It could make use of citizens' assemblies for advice, as pointed out by Professor Pettit's submission.<sup>40</sup> It could also follow the practice of the Federal Parliament; with the mechanism provided for in Part III of the *Commonwealth Electoral Act 1918* that sets out specific formula for the electoral commission to expand the number of elected representatives as the population grows. Another path that could be taken is for the various parties/independents that make up a future Assembly to make the judgement that an increase is warranted based on; (as stated by the Canberra Business Council)

...virtually every credible inquiry or report that has been written on the [size of the Assembly] has recommended an increase in the size of the Assembly.<sup>41</sup>

Having come to that judgement, and recognising that any such decision will need a two thirds majority of the Assembly to have it passed (see *Proportional Representation (Hare Clark) Entrenchment Act 1994*), the Assembly could legislate to alter the size.

The Committee was well aware that any decision to alter the size of the Assembly would attract significant community and media attention. It notes the view of one of the organisations that appeared before it, where it was stated:

<sup>39</sup> Productivity Commission, *Report on Government Services 2012*, Australian Government, Canberra, 2012. Figures on elected representatives were compiled by the Committee research staff.

<sup>40</sup> Professor P Pettit, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, Submission No 1, p 1.

<sup>41</sup> Canberra Business Council, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, *Transcript of Evidence*, 11 May 2012, p 102

There is always going to be a political risk when you are trying to increase the size of a legislature like the Legislative Assembly. Obviously, leadership is required. It would be nice if there were some external body and some formula that you could apply automatically so that the size of the Assembly increased as the population increased or whatever. Unfortunately, that is not the case. It will be a hard ask; we are not denying that at all. But at the end of the day this is about good governance.<sup>42</sup>

## DISSOLUTION OF ASSEMBLY BY GOVERNOR-GENERAL

Section 16 of the Act currently allows the Governor-General to dissolve the Assembly if he or she believes the Assembly is incapable of performing effectively or conducts its affairs in a grossly improper manner. The ACT Government submission suggested that section 16 be amended to require the Governor-General to consult with the ACT executive before making a decision.

The Committee acknowledges that consultation with both the ACT and Commonwealth executive would be the preferred practice prior to the dissolution of the Assembly. Legal advice provided to the Clerk of the Legislative Assembly by the Solicitor-General indicated that whilst the convention is that the Governor-General acts on the advice of the executive Council (Commonwealth ministers) and whilst a Governor-General can (and should) continue to act in accordance with that convention, a specific requirement for the Governor-General to also consult with the ACT executive is achievable.<sup>43</sup>

If section 16 were amended or deleted, the Assembly could still be dissolved by an Act of the Commonwealth Parliament by suspending the Self-Government Act.

The Committee recommended that section 16 be amended to require the Governor-General to consult with the ACT executive prior to dissolving the Legislative Assembly.

## MATTERS EXCLUDED FROM POWER TO MAKE LAWS

Section 23 provides a list of matters that the ACT Legislative Assembly is prohibited from making laws in respect to. Matters are split into three categories. Section 23(1) includes matters that remain the domain of the Commonwealth such as the raising or maintaining of any naval, military or air force and the coining of money. A number of submissions suggested that the list includes matters that the ACT is now capable of managing such as censorship and the provision of police services. Subsection 23(1A) and 23(1B) relate to euthanasia, and prohibit the Assembly from passing any law in this area.

Submissions suggested that section 23 be amended to remove part, or all, of the limitations in recognition of the Assembly being an independent self-governing body. This would mean that the Assembly would be able to legislate however it wished in relation to all (or certain matters, for example copyright was one specific deletion requested) whilst in accordance with the *Commonwealth of Australia Constitution Act 1901*.

The Committee appreciated the sensitivities associated with this broad approach, particularly in relation to the matter of euthanasia, and considered it more appropriate for the section to be reframed in light of the principle of law making equality.

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<sup>42</sup> Canberra Business Council, *ibid*, p 101.

<sup>43</sup> *Advice to the Clerk of the Legislative Assembly*, received from the Solicitor-General, dated 7 August 2012.

The Committee considered it more appropriate to recommend removing particular subsections, or inserting a test that provides for the ACT Legislative Assembly to only legislate in the best interests and good governance of the people of the Territory, rather than the removal of the section as a whole.

In relation to section 23(1) the Committee notes that a number of sections in the Self-Government Act are mirrored in the Constitution and would appear, at face value, to be a duplication. The Committee, through the Clerk of the Assembly, sought legal advice from the ACT Solicitor-General on what would be the legal effect of removing section 23 in its entirety. The Solicitor-General noted that:

Should sections 23(1) (a) to (g) be removed from the Self-Government Act, any territory law that may be enacted in the area covered by these exclusions would be susceptible to being overridden by an inconsistent Commonwealth law. In the absence of a clear policy intention that the Assembly should be authorised to enact such territory laws, and in the absence of any clear understanding with the Commonwealth to that effect, the wholesale removal of section 23 from the Self-Government Act may be fruitless.<sup>44</sup>

However, the ACT Government in its submission pointed to an issue with paragraph 23(1)(g). It stated:

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.<sup>45</sup>

The Committee agreed with the Government's approach to this issue and recommended that section 23(1) be amended to remove the exemption to censorship powers.

In relation to subsections 23(1A) and 23(1B), a majority of the Committee recommended that they be removed. One Member made additional comments on this recommendation, which inter alia, put the proposition that the ACT had relatively few checks and balances, and that as a result it is not appropriate for the Assembly to have law making powers in regard to the matters contained in subsections 23(1A) and 23(1B).

## TECHNICAL AMENDMENTS

The Committee recommended that a number of technical amendments be made to enhance the compatibility of the Act with existing practice and provide additional clarity.

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<sup>44</sup> Solicitor-General, op cit, p 3.

<sup>45</sup> ACT Government, op cit, p 6.

## Conflict of interest

Section 15 of the Act provides that where a Member who is a party to, or has a direct or indirect interest in, a contract made by or on behalf of the Territory or a Territory authority shall not take part in a discussion of a matter, or vote on a question, in a meeting of the Assembly where the matter or question relates directly or indirectly to that contract. The Act goes on to state that a question concerning the application of this provision shall be decided by the Assembly and any contravention of the provision does not invalidate anything done by the Assembly.

There have been several occasions in the Legislative Assembly where members' rights to propose matters or participate in deliberations have been challenged on the grounds of conflict of interest. One of those occasions occurred on 25 March 2010 when a motion, proposing that the Standing Committee on Public Accounts inquire into the ACT Gambling and Racing Commission's report relating to the proposed sale of the Canberra Labor Club Group, was called on.<sup>46</sup> A motion was then moved seeking to exclude two ministers from the debate on the basis that they had staff who were members of the executive committee of the Australian Labor Party in the ACT, which was the subject of the inquiry and the motion to be dealt with by the Assembly. After some debate the motion to exclude the ministers was adjourned. Later in the day a further motion was agreed to by the Assembly which called on the Speaker to:

- (1) obtain advice from the Ethics and Integrity Adviser as to:
  - (a) the scope of standing order 156;
  - (b) the existence, or extent, of any conflicts of interest that may arise for members in relation to the activities of members' staff; and
  - (c) any conflicts of interest that may arise as a result of members' interests, direct or indirect, in any licence, payment, contract, lease or other transaction issued under Territory law; and
- (2) provide the Assembly with a copy of the advice received.<sup>47</sup>

The advice received from the Ethics and Integrity Adviser, Stephen Skehill, was presented to the Assembly by the Speaker on 6 May 2010.<sup>48</sup> In that advice Mr Skehill clarified that section 15 of the Self-Government Act had no equivalent in the Commonwealth Parliament or, as far as he was able to ascertain, in Australian States. He outlined provisions contained in both the Australian Constitution and the standing orders of the Senate and the House of Representatives concerning the limitations placed on members and Senators when participating in parliamentary debate in relation to conflict of interest.

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<sup>46</sup> MoP 2008-12/664.

<sup>47</sup> *ibid*, p 668.

<sup>48</sup> *ibid*, p 699.

The advice stated that:

... the standing orders of the House of Representatives and of the Senate respectively provide only that a Member must declare certain interests on a register or that a Senator with a conflict of interest may not sit as a member of a committee in relation to an inquiry being conducted ... members and Senators with interest in some contracts with the Commonwealth may still participate in parliamentary discussion and vote on matters where, on the face of section 15, Assembly members cannot.<sup>49</sup>

As a result, in section 15 the Commonwealth has imposed limitations on Assembly members that are over and above not only those to which members and Senators [of the Commonwealth Parliament] are subject but also beyond those to which members of the parliaments of other Territories are subject.<sup>50</sup>

The Committee agreed that the current wording of section 15 of the Act creates uncertainty for the legislature in relation to conflict of interest, as outlined by the Ethics and Integrity Adviser in his advice, and believed it would be appropriate to clarify the wording in section 15 to bring it more into line with provisions contained in statutes and standing orders of other Australian jurisdictions.

Subsequently, the Committee recommended that subsection 15(1) of the Act be amended to remove certain limitations placed on members of the Legislative Assembly and to make the provisions contained in subsection 15(1) less ambiguous.

## **Election matters**

### Redistributions

The ACT Electoral Commission, in its submission, recommended that, in light of the change of term for Assembly members after the 2004 election, that Section 67B (d) be amended to increase the maximum time allowable between redistributions from six years to eight years which would adhere to the principle that a redistribution be held after every second election.

The Committee considered that this was a sensible amendment and accordingly made a recommendation that the term between redistributions be changed to reflect current voting terms. The Committee recommended that section 67B (d) be amended by omitting the words “6 years” and substituting “8 years”.

### Qualifications of electors

The Committee heard evidence from the ACT Electoral commission in relation to the operation of section 67C in the Act. Subsection 67C (1) of the Act provides that a person is entitled to vote at an ACT election if the person’s name is on the Roll of the electors of the Territory for the purposes of general elections and the person would be entitled to vote at an election held on that day to choose a Member of the House of Representatives for the Territory. However, subsections 67C (2) and (3) go on to provide that an electoral enactment can increase or decrease the scope of subsection (1).

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<sup>49</sup> Ethics and Integrity Adviser, op cit, p 4.

<sup>50</sup> ibid.



It would appear that subsection 67C(1) of the Self-Government Act is in effect a transitional provision intended to provide for the franchise for ACT elections pending the making of franchise provisions in an ACT electoral enactment. Given that the ACT's electoral enactment has now qualified the right to vote from the right set out in subsection 67C(1), it is arguable that the inclusion of the reference to the House of Representatives voting entitlements is now redundant and possibly confusing.<sup>51</sup>

The ACT Electoral Commission suggested that section 67C of the Act be amended to provide that the qualifications of a person to be enrolled as an elector and to vote at an election shall be as provided by enactment. The Committee agrees that the subsection would benefit from an amendment proscribed by the Commission and made a recommendation to reflect that.

### A majority of electors

Section 26 of the Act allows the Assembly to pass an entrenching law, prescribing restrictions on the manner and form of making particular enactments. Such restrictions can include requiring a special majority to be achieved in order for an enactment to be made or subsequently amended. Under section 26(2), an entrenching law must be submitted to a referendum of the electors of the ACT.

The ACT Electoral Commission submitted that:

The meaning of the term "a majority of the electors" in this clause is arguably ambiguous. It could be taken to mean:

- half plus one of the total number of electors on the electoral roll; or
- half plus one of the total number of electors who voted at the referendum; or
- half plus one of the total number of electors who cast a formal vote at the referendum.<sup>52</sup>

Based on this, the Commission suggested that section 26 should be amended to define the term "a majority of the electors" to mean a majority of electors casting formal votes in a referendum."

The Committee agreed that section 26 could be amended as suggested in order to provide greater clarity.

### **Crown may be bound**

Section 27 provides that the Crown is not bound by an ACT law unless the Commonwealth makes a regulation specifically binding the Crown in respect of that law.

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<sup>51</sup> ACT Electoral Commission, op cit, p 18.

<sup>52</sup> ibid, p 11.

Section 27 was identified in several submissions as failing to meet its intended operational purpose. The section relies upon the Commonwealth updating its regulations every time an ACT law changes or repeals the obligations of the Commonwealth, or Commonwealth officers. This has not worked in practice and a new mechanism needs to be considered. This was supported by legal advice received from the Solicitor-General.<sup>53</sup>

There are widespread practical difficulties with the current operation of the section. For example, the Human Rights Commission noted that it has received advice that it may be possible for it to investigate complaints against Commonwealth statutory authorities, created by legislation, but not against Commonwealth Departments operating under “the Crown”.<sup>54</sup>

The Committee agreed with the submissions and recommended that section 27 be replaced with a test that ACT laws bind the Crown unless Commonwealth law has restricted such application. This would have the effect of changing the burden of regulation binding the Crown to positive Commonwealth action.

### **Notification of enactment**

Section 25 requires that when a law is passed or notified in the Assembly, it must be published.

This section appears outdated with reference to the *Territory Gazette*. Given that sections 18 and 19 of the *Legislation Act 2001* require that an ACT legislation register be established, and contains all Acts and notifiable instruments it would appear that this meets the requirement of section 25.

As such, the Committee recommended that section 25 be amended to reflect the ACT Legislation Register operating as the Territory Gazette.

## **CONCLUSION**

On the 20th anniversary of the Assembly the Speaker, Mr Shane Rattenbury MLA made a speech highlighting the path and growth of the ACT Legislative Assembly since the Self-Government Act was made law:

‘Many of us here remember the trials and tribulations associated with achieving self government in the ACT. Our community has grown and matured in the 20 years since self-government—we have had our little excitements, but our sense of having a distinct identity has also grown and the territory now confidently asserts itself as a vibrant, living city in charge of its own destiny.’

Unfortunately, the Committee found that there are many vital aspects of self government that are currently unavailable to the ACT, due to the framing of the Self-Government Act. Restrictions on law making and being able to increase the size of the Assembly are two examples. This directly contrasts with the intention of the Act.

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<sup>53</sup> Solicitor-General, op cit.

<sup>54</sup> ACT Human Rights Commission, Standing Committee on Administration and Procedure, Inquiry into the *Australian Capital Territory (Self-Government) Act 1988*, p. 4.

In 1988 when the Federal Parliament passed the Self-Government Act bringing self-government to the Australian Capital Territory, the Federal Minister for the Arts and Territories indicated in his second reading speech that:

The Australian Capital Territory (Self-Government) Bill 1988 now before the House will establish the ACT as a body politic, with the legislative and executive powers of the States and the Northern Territory ... It will allow 270 000 people the same democratic rights and social responsibilities as their fellow Australians.<sup>55</sup>

The Minister posed some relevant questions in his speech:

However, unlike every other person in this country, where a fair go is the creed by which we live, they cannot elect a member of their own community to their own government. They have no say in the decisions which affect their everyday lives. What an extraordinary admission in a country so committed to democratic ideals, and why? Are these people somehow different to other Australians? Are they second class citizens in some way? Do they not understand, or have options on, the issues that confront them daily? Can they not be trusted with their own destiny? The answer to all these questions is simple. The only difference between these people and the rest of Australia is that they live in the Australian Capital Territory.<sup>56</sup>

The Committee was of the view that similar democratic principles remain limited to the people the ACT and that an incremental approach towards equal rights to those of the States is required.

The recommendations made by the Committee were designed to ensure that the Self-Government Act lives up to those ideals and principles espoused by the Federal Minister when he introduced the Bill. That is to ensure that the residents of the Territory have the same democratic rights and responsibilities as their fellow Australians.

The reality is that the Assembly will always be subject to the wishes of the Commonwealth Parliament. In addition, unlike the Northern Territory, the ACT can have no aspirations to statehood. The ACT is and will remain the seat of government of the Commonwealth. Experience has demonstrated that when the Commonwealth Parliament has seen fit it has amended the Self-Government Act to remove certain legislative powers from the Assembly and has supported the Federal government in the steps it has taken to disallow an enactment where it felt the need to.<sup>57</sup>

The Committee is of the view that there can be incremental progress, based on equality of laws and representation between residents of the Act and other States, whilst maintaining the seat of government. Allowing the people of the ACT to determine the makeup of their parliament, and their laws, does not damage the Capital but rather makes it a greater reflection of the modern Australia that we live in everyday.

The Committee tabled its report in August, and the ACT Government is expected to reply to all the recommendations within three months. The Committee is eager to ensure that the report and the response are provided to the Commonwealth government for consideration.

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<sup>55</sup> House of Representatives Debates (19.10.88), p 1922.

<sup>56</sup> *ibid.*

<sup>57</sup> McRae, *op cit*, p xii.

The Commonwealth has a number of options for the way forward. Apart from agreeing and legislating to implement all of the report's recommendations, to rejecting all suggestions, a third way would be to sponsor a new dialogue for people of the ACT and seek their views on potential change. The Committee heard evidence about a number of communication tools available, including the establishment of a consultative committee to inform the Commonwealth in relation to reform. This would ensure that amendments are more fully understood by the community than in 1989 when there was a significant backlash to the establishment of the Assembly.

As the report had tri-party support, the Committee is confident that the Government of the day will work with the Commonwealth to take the next step and provide incremental change to celebrate the centenary of Canberra in 2013.

Since tabling the Report in August, I have had time to reflect upon the process and it is my view that it was a valuable exercise which produced a number of strong outcomes for the Assembly. The decision to review the complete operation of the Act allowed reflection in relation to what is working well, what sections have failed to adapt to modern technical practices, or modern societal values. It also allowed a large amount of public discussion on issues that often fail to generate mainstream media attention. Using the Committee setting also removed some of the political element of discussions which allowed members to consider all the proposals put forward and participate in frank discussion.

Learning from the process highlighted that timing is a factor; due to the ACT Election occurring so close to the report the Committee was very careful when advertising the inquiry and seeking input from stakeholders. Future reviews would need to be timed carefully to ensure that the Committee could actively engage through traditional and new social media tools, without appearing to hold political influence.

I am sure that there would be similar benefits experienced by jurisdictions that undertook a similar review of their constitutional framework that would enhance the good governance of that jurisdiction.