



# LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

46TH PRESIDING OFFICERS AND CLERKS CONFERENCE

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## OFFICERS OF THE LEGISLATIVE ASSEMBLY

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# ACCOUNTABILITY IN THE WESTMINSTER SYSTEM OF GOVERNMENT

The evolution of the Westminster system where the legislature has primacy has led to high levels of accountability within a framework of responsible government. One element of accountability is the parliament's ability to provide independent scrutiny of the role of the executive.

Many Westminster parliaments have recognised the need for specific measures to ensure the accountability of the government of the day. The notion of officers of the parliament has been promoted as a means of aiding the scrutiny of the executive.

## OFFICERS OF PARLIAMENT

In 2006 the Victorian Public Accounts Committee reported on a legislative framework for independent officers of the parliament.<sup>1</sup> This Committee found that there was a growing tendency to develop the role to assist parliaments undertake more active accountability and scrutiny tasks. The essential characteristics of appropriate scrutiny are that there is a close relationship the parliament and clear independence from the executive.

Which roles are commonly classified as Officers of the Parliament?

Traditionally, officers of parliament have been Auditors-General and Ombudsmen, who are tasked with scrutinising the performance of the executive government and reporting on the outcomes of their work to parliaments. More recently there has been an extension of the role<sup>2</sup> and more commonly electoral commissioners have been included, on the basis that their office protects fairness in elections on behalf of the parliament and its electors.

## PROGRESS IN THE ACT

On 24 October 2013 the ACT Legislative Assembly enacted the *Officers of the Assembly Legislation Amendment Act 2013*. The Act formally recognises the ACT auditor-general, our three Electoral Commissioners and the ombudsman as officers of the Legislative Assembly.

The Act came into force on 1 July 2014 and each of these officers became more fully independent. The legislation created a much clearer separation between these officers and the executive by ensuring that:

- appointments are made by the Speaker of the Legislative Assembly;
- reporting will be done through the Speaker; and
- appropriations are separate from the general government appropriations.

## BACKGROUND

So why did the Assembly legislate in this way? The genesis of this legislation goes back to the tenure of the former Auditor-General and her rather tempestuous relationship with the ACT Government.

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<sup>1</sup> Victorian Public Accounts and Estimates Committee (VICPAEC) (2006) *Report on a Legislative Framework for Independent Officers of Parliament*, February, Parliament of Victoria

<sup>2</sup> See Attachment 1

In 2009 the then Auditor-General raised the prospect of staff cuts and cuts to audits because of a lack of funding<sup>3</sup>. Later, following a number of adverse audit findings the Government threatened that, rather than increase audit funding, the Auditor would face budget cuts<sup>4</sup> and initiated an audit of the Auditor in what the Opposition and cross-bench members considered a thinly-veiled threat to the Auditor-General<sup>5</sup>.

The subsequent *Report on the Independent Performance Audit of the Operations of the ACT Auditor General and the ACT Audit Office*<sup>6</sup> found that despite the Government's criticisms of the Auditor that

*...the ACT Audit Office is providing an important service in an efficient and effective manner ... and people of the [ACT] are achieving good value ... It achieves this notwithstanding the relatively small size of the Office, the complexity of its role and the demands upon it.*

The Assembly's Public Accounts Committee undertook an inquiry into the operation of the Auditor-General Act which covered managerial autonomy and resourcing of the ACT Auditor-General including who should set the budget for the audit office and whether the role of the ACT Auditor-General could be strengthened by becoming an independent Officer of Parliament<sup>7</sup>.

In preparing its report, the Standing Committee on Public Accounts considered a number of models of parliamentary accountability, including the UK National Audit Office (NAO) independence criteria for Commonwealth Auditors-General; the House of Representatives in New Zealand; and the UK House of Commons.

These jurisdictions arrived at the position that independence of external audit from the executive is a key principal of Parliamentary accountability, and that key accountability roles needed to function independently of both the executive and the judiciary.

This inquiry recommended among other things that:

- The Auditor-General should become an officer of the parliament; and
- An increased role for the Public Accounts Committee in:
  - appointing the Auditor-General;
  - setting the Audit's work program; and
  - determining the budget for the Auditor-General.

Following this report, the Standing Committee on Administration and Procedure conducted an inquiry into review the feasibility of establishing the position of Officer of the Parliament for the Auditor-General, the Ombudsman, the Electoral Commissioner and other statutory office holders<sup>8</sup>.

The Report looked at the emergence of officers of the parliament in other jurisdictions. Among other things, this report recommended that:

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<sup>3</sup> Select Committee on Estimates 2009-10, *Report on the Appropriation Bill 2009-10*, June 2009, p. 15

<sup>4</sup> *The Canberra Times*, "Stanhope may cut Auditor's funding", 20 June 2009, p.1

<sup>5</sup> "Stanhope's Auditor-General threats disgraceful and cowardly" Media Release 19 June 2009

<sup>6</sup> Prepared by R J Sendt, 3 May 2010 and tabled in the ACT Legislative Assembly on May 5 2010

<sup>7</sup> Standing Committee on Public Accounts, *Inquiry into the ACT Auditor-General Act 1996*, February 2011, p. 1

<sup>8</sup> Standing Committee on Administration and Procedure, *Officer of the Parliament*, March 2012, p. 2

- criteria<sup>9</sup> should be set for identifying positions that would qualify as officers of the parliament;
- the Auditor-General and, under special circumstances, the Ombudsman<sup>10</sup> should be established as officers of the parliament;
- advice on appropriations for officers of the parliament be transmitted from the Legislative Assembly to the Treasurer; and
- officers of the parliament have a separate appropriation.

## CURRENT LEGISLATION

Following the 2012, election the ALP and the Greens signed a formal agreement to form government. One of the clauses in the agreement was to establish the Auditor-General, the Ombudsman and the Electoral Commissioners as Officers of the Parliament.

Following these reports, in October 2013, the Assembly passed the Officers of the Assembly Legislation Amendment Act 2013. As a result the auditor-general, ombudsman, and electoral commissioner will become independent officers of the Legislative Assembly.

Under the new legislation, these positions will be appointed by the Speaker of the Assembly:

- based on the advice of the relevant Assembly committee;
- in accordance with the merit principles set out in the Public Sector Management Act; and
- in consultation with party leaders

The Speaker must also be satisfied that appointees are experts in their field.

The most important aspect of the legislation is that budgets for each of the officers of the legislative assembly need to be drawn up in the Legislative Assembly in consultation between specific standing committees and the Speaker. The Speaker will then transmit the budget proposals to the Treasurer who, while not bound to adopt the budget, must report and explain any failure to implement the suggested budget.

## HOW THE LEGISLATION HAS WORKED SO FAR

The legislation commenced on 1 July 2014 at which time all Officers took oaths before the Speaker.

Since then we have been bedding down the administration of the Officers of the Legislative Assembly in relationship to the Speaker. The legislation in relation to officers of the Legislative Assembly is not set and forget. As the Speaker I also have particular functions in relation to the Auditor-General and the Electoral Commission.

For instance section 25(2) of the Auditor-General Act 1996 now requires the Speaker must – if requested by the public accounts committee – engage under a contract an appropriately qualified person to conduct a strategic review of the Auditor-General.

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<sup>9</sup> See attachment 2

<sup>10</sup> In the ACT the services of the Commonwealth Ombudsman are purchased to fulfil the role of Ombudsman so the notion of appointing a commonwealth officer as an Officer of the Legislative Assembly could be problematic

One of the concerns that I have with this provision is that it appears to require that the Speaker act as an agent of the Territory in the direct procurement of a service and to enter into a contract on behalf of the Territory. This is a most unusual circumstance not observed in other parts of the ACT public sector so far as I am aware.

I have been the first Speaker to operate under these provisions since they came into effect and I am concerned that, because there is no official administrative support infrastructure, there is a risk that these requirements may not be obvious to future Speakers.

It is my view that the process embodied in section 25(2), which occurs outside the normal administrative remit of any public sector agency – including the Office of the Legislative Assembly – is not especially transparent and there is an exposure to non-compliance with government procurement and government agreement-making requirements.

I am also concerned that this provision grants the Speaker a power to commit expenditure of funds on behalf of the Territory while the umbrella framework – the Financial Management Act itself – vests no such power.

There is also a question about where funding for this strategic function might best be appropriated. The funds cannot be appropriated directly to the Office of Speaker, which is not an appropriation unit, nor should they be appropriated to the Office of the Legislative Assembly, which is not charged with administration of this particular function.

And, Mr Chair, the principle of what I am talking about also applies to other functions, such as the appointment of the Auditor-General and members of the Electoral Commission, including the Commissioner, and the appointment of an independent auditor to undertake the financial audit of the Audit Office.

With the exception of the appointment of the Auditor-General, which does not occur until the next Assembly, I have either undertaken, or am in the process of undertaking, all of these functions.

I will be working through some of these issues in coming months but I wanted to record some of my observations in the context of the upcoming appropriation with this committee.

The job of the Speaker is to transmit those budgets to the Treasurer and we have agreement that the Speaker appear before budget cabinet to make representations on behalf of the budget of the Legislative Assembly and its Officers.

The establishment of officers of the parliament could prove to be to be mere symbolism especially if the executive fails to fund the agencies as determined by the legislature. In the end there is no way of forcing the executive's hand. If it declines to fund the agency as requested then the Treasurer has to make a statement to the Legislative Assembly but there are no other sanctions.

# ATTACHMENT 1

## OFFICERS OF THE PARLIAMENT IN OTHER JURISDICTIONS

| <b>JURISDICTION AND<br/>CURRENT INFORMATION<br/>DATE</b> | <b>OFFICERS OF THE PARLIAMENT</b>  |
|--|--|
| Australia (Commonwealth)<br><br>(2008)                   | Auditor-General<br><br>Ombudsman   |
| Canada<br><br>(2008)                                     | Auditor General<br><br>Chief Electoral Officer<br><br>Commissioner of Lobbying<br><br>Commissioner of Official Languages<br><br>Conflict of Interest and Ethics Commissioner<br><br>Information Commissioner<br><br>Privacy Commissioner<br><br>Public Sector Integrity Commissioner |
| New Zealand<br><br>(2008)                                | Comptroller and Auditor-General<br><br>Ombudsman<br><br>Parliamentary Commissioner for the Environment   |

| <b>JURISDICTION AND<br/>CURRENT INFORMATION<br/>DATE</b>                          | <b>OFFICERS OF THE PARLIAMENT</b>  |
|---|--|
| Northern Ireland<br><br>(2008)  | Chief Electoral Officer<br><br>Civil Service Commissioners for Northern Ireland<br><br>Commission for Victims and Survivors<br><br>Commissioner for Public Appointments in Northern Ireland<br><br>Comptroller and Auditor General<br><br>Equality Commission for Northern Ireland<br><br>Northern Ireland Commissioner for Children and Young People<br><br>Northern Ireland Human Rights Commission<br><br>Northern Ireland Ombudsman and Commissioner for Complaints<br><br>Parades Commission<br><br>Police Ombudsman for Northern Ireland |
| Scotland<br><br>(2008)  | Auditor General for Scotland<br><br>Commissioner for Children and Young People in Scotland<br><br>Commissioner for Public Appointments in Scotland<br><br>Scottish Commission for Human Rights<br><br>Scottish Information Commissioner<br><br>Scottish Parliamentary Standards Commissioner<br><br>Scottish Public Services Ombudsman   |
| South Africa<br><br>(known as Institutions<br>Supporting Democracy)<br><br>(2011) | Auditor-General<br><br>Commission for Gender Equality<br><br>Commission for the Promotion and Protection of the Rights of Cultural,<br>Religious and Linguistic Communities<br><br>Electoral Commission<br><br>Financial and Fiscal Commission   |

| <b>JURISDICTION AND<br/>CURRENT INFORMATION<br/>DATE</b> | <b>OFFICERS OF THE PARLIAMENT</b>   |
|--|---|
|  | Human Rights Commission<br>Independent Communication Authority of South Africa<br>National Youth Development Agency<br>Pan- South African Language Board<br>Public Protector<br>Public Service Commission |
| United Kingdom<br>(2008)                                 | Comptroller and Auditor General<br>Electoral Commission<br>Parliamentary Commissioner for Standards   |
| Wales<br>(2008)  | Auditor General for Wales<br>National Assembly Commissioner for Standards<br>Public Services Ombudsman for Wales  |

# ATTACHMENT 2

