



ACT HUMAN RIGHTS  
COMMISSION  
Australian Capital Territory

The Secretary  
Standing Committee on Administration and Procedure  
Legislative Assembly for the Australian Capital Territory  
Civic Square, London Circuit  
CANBERRA ACT 2601

**Inquiry into the feasibility of establishing the position of Officer of the Parliament**

Thank you for the invitation to make a submission to the Standing Committee on Administration and Procedure's Inquiry into the feasibility of establishing the position of Officer of the Parliament.

Please find attached our submission.

We are also available to give evidence at a public hearing or to attend the proposed round table meeting if desired.

Yours sincerely

Handwritten signature of Dr Helen Watchirs.

Dr Helen Watchirs  
Human Rights and  
Discrimination Commissioner

Handwritten signature of Alasdair Roy.

Alasdair Roy  
Children and Young People  
Commissioner

Handwritten signature of Mary Durkin.

Mary Durkin  
Health Services Commissioner  
Disability and Community  
Services Commissioner

9 August 2011



# ACT HUMAN RIGHTS COMMISSION

Australian Capital Territory

## ACT Human Rights Commission Submission to Standing Committee on Administration and Procedure

### *Inquiry into the feasibility of establishing the position of Officer of the Parliament*

The Commission believes a discussion of the level of independence of statutory office holders in the ACT is timely, particularly given the recent Hawke Review of the Public Service. This is particularly so for the Human Rights Commission, six years after our inception. The Commission sees many similarities between its functions and powers and those of statutory office holders traditionally viewed as Officers of Parliament.

#### **The Role of Officers of the Parliament**

We note that the concept of Officers of the Parliament (OP) has been adopted in other jurisdictions based on the Westminster system. For example, in some provinces in Canada, the term has been extended to cover Children's Commissioners.<sup>1</sup> Further, at the Federal level in Canada, the Human Rights Commissioner is an Officer of Parliament.<sup>2</sup> In contrast, in New Zealand, where Officers of Parliament have been given specific legislative recognition, the Human Rights Commission is not an OP. Rather, it is designated as an independent "Crown Entity" under the Crown Entities Act.

We note the recent Report of the Standing Committee on Public Accounts *Inquiry into the ACT Auditor-General Act 1966*,<sup>3</sup> which discussed the concept of making the ACT Auditor-General an Officer of Parliament. The Report identified a range of factors that could be identified as characteristics of an Officer of Parliament. These included:

- Created to provide a check on the arbitrary use of power by the Executive;
- Only discharge functions which the Parliament itself, if it so wished, might carry out;
- Should be created in separate legislation principally devoted to that position;
- Officers of Parliament should be appointed and dismissed with parliamentary involvement;

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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, 9.

<sup>2</sup> Ibid, 37.

<sup>3</sup> Standing Committee on Public Accounts (ACT), Report No. 15, *Inquiry into the ACT Auditor-General Act 1966*, February 2011.

- Overseen by a statutory parliamentary committee which is also responsible for the budget approval of the Officer.<sup>4</sup>

In 2006 the Victorian Parliament's Public Accounts and Estimates Committee (VICPAEC) released Report on a Legislative Framework for Independent Officers Of Parliament<sup>5</sup>. The Report noted that Victoria currently has three such Officers: the Auditor-General, the Ombudsman and the Electoral Commissioner. The Report stated,

*'The Committee's review found that the title 'officer of Parliament' is ambiguous. Traditionally, it has been applied to employees of the Parliamentary Departments such as the Clerk of the Legislative Assembly and the Clerk of the Legislative Council and other senior officers. The Committee's inquiry focused on a second set of positions that also fall into the category of independent officers of Parliament. These officers exist to assist Parliament, mainly in relation to its scrutiny and accountability functions, but also to protect the rights of individuals in relation to government information and fair and free elections.'*<sup>6</sup>

In considering the inclusion of additional Victorian statutory office holders as Officers of Parliament, the Report stated,

*'...the Committee considers the categorisation of officers of Parliament depends on whether the functions and responsibilities of a particular office-holder are primarily directed to serving the interests of Parliament rather than the executive government. In other words, are the functions and responsibilities of an office-holder concerned with independent review or scrutiny of the implementation of executive government policy on behalf of Parliament, or do they constitute, even with a clear and vital independent status, an inherent element of the policy framework of the government or have a judicial role. The Committee's review identified that a number of the abovementioned officers had roles which were predominantly regulatory, judicial, advisory or involve advocacy.'*

We note the comments in the 2011 ACT Public Accounts Committee's Report which cited the VICPAEC report and stated, in relation to the Human Rights and Discrimination Commissioner,

*'The Committee supports the view expressed by the VICPAEC that:  
...whilst these [other] statutory office holders require independence and autonomy to effectively carry out their responsibilities, they are established to primarily serve the interests of executive government not the parliament.'*

Nonetheless, given the broad functions of the ACT HRC, we have sought to apply the criteria established by the ACT Public Accounts Standing Committee to the current operation of our functions for the benefit of the Committee. We note in particular that Auditors-General and Ombudsmen are often cited as core Officers of Parliament. For example, the ACT Public Accounts Committee stated,

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<sup>4</sup> Ibid, 19-20.

<sup>5</sup> Victorian Public Accounts and Estimates Committee (VICPAEC) (2006) Report on a Legislative Framework for Independent Officers of Parliament, February, Parliament of Victoria, p. 24

<sup>6</sup> Ibid, 8.

*'The cornerstone Officers of Parliament have been Auditors-General and Ombudsmen, who are tasked with scrutinising the performance of the Executive Government and report the outcomes of such scrutiny to Parliament.'*<sup>7</sup>

The Commission has much in common with these positions, particularly that of the Ombudsman.

### **Role of the Commission**

The ACT Human Rights Commission was established in 2006 to promote and protect the rights and wellbeing of all people living in the Australian Capital Territory. The Commission is an independent statutory agency established by the *Human Rights Commission Act 2005* ('HRC Act').

There are three separate Commissioners within the Commission, each with different responsibilities and functions:

- Ms Mary Durkin is the Health Services Commissioner and the Disability & Community Services Commissioner;
- Mr Alasdair Roy is the Children & Young People Commissioner; and
- Dr Helen Watchirs is the Human Rights & Discrimination Commissioner.

The main objects of the Commission are detailed in s.6 of the HRC Act, which provides in summary, to:

- provide an independent, fair and accessible process for the resolution of discrimination complaints and complaints between users and providers of disability services, health services, services for children and young people and services for older people;
- identify and examine issues that affect the human rights and welfare of vulnerable groups in the community, and make recommendations to government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community;
- promote the rights of users of disability services, health services, services for children and young people and services for older people, and improvements in the provision of those services; and
- foster community discussion, and the provision of community education and information, about—
  - the HRC Act and related Acts (such as the *Human Rights Act 2004*, *Health Records (Privacy and Access) Act 1997* and *Discrimination Act 1991*);
  - the operation of the Commission; and
  - procedures for making complaints.

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<sup>7</sup> ACT Standing Committee on Public Accounts, above n.3 , 19

## **Criteria 1: Officers of Parliament are created to provide a check on the arbitrary use of power by the Executive**

The Commission's powers to provide a check on the arbitrary use of power by the Executive is evidenced by its independence, and by the fact its powers mirror those of other traditional OPs such as the Ombudsman.

### *Independence*

The Commission's independence from the Executive is best evidenced by s.16 of the Human Rights Commission Act 2005, which states:

#### *'Independence of Commission*

*The commission is not subject to the direction of anyone else in relation to the exercise of a function under this Act or a related Act; subject to section 17.'*

Section 17 states that the Minister may in writing, direct the commission to inquire into and report to the Minister in relation to a matter than can be complained about under the Act.

The Commission is also mindful of the 'Paris Principles', a set of internationally agreed principles for national human rights institutions.<sup>8</sup> While they apply to International human rights bodies, they provide a set of principles endorsed by the United Nations about the way national institutions protecting and promoting human rights should be governed and function. Independence is a key feature of these requirements.

### *Check on Arbitrary Power*

The functions of the Commission in relation to checking on Executive Power in many ways combine the traditional functions of Auditors-General and Ombudsmen, albeit in a wider array of jurisdictions. In particular, the functions and powers of the Commission are closely aligned with those of the Ombudsman. In addition to these core functions, the Commission has further roles of community education, providing advice to Government and responsibilities to undertake systematic advocacy.

### *Complaint Handling*

Ombudsmen traditionally take individual complaints regarding unfair treatment from Government agencies. For example, the ACT Ombudsman describes its functions as:

*'We consider and investigate complaints from people who believe they have been treated unfairly or unreasonably by an ACT Government department or agency.'*<sup>9</sup>

The Commission similarly takes individual complaints from individuals who believe they have been treated unfairly by public (and private) sector bodies in a range of jurisdictions, including:

- Services for children and young people, and their carers;

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<sup>8</sup> Principles relating to the Status of National Institutions. Adopted by General Assembly resolution 48/134 of 20 December 1993.

<sup>9</sup> See <http://ombudsman.act.gov.au/pages/about-us/our-office/what-we-do.php>

- Services for people with a disability, and their carers;
- Services for older people, and their carers;
- Health services; and
- Complaints of unlawful discrimination and sexual harassment.

This common ground of the Commission's functions and jurisdiction with the ACT Ombudsman is demonstrated by s.5 of the *Ombudsman Act 1989*, which prevents the Ombudsman investigating complaints which are covered by the jurisdiction of the Commission, being a disability service, a health service, a service for children and young people or a service for older people. Further, under s.6B, where the Ombudsman decides it would be more appropriate for a complaint to be handled by the Human Rights Commission, it must refer that complaint.

The Ombudsman and Commission also share complaint-handling powers. Under s.73 and s.74 of the HRC Act, the Commission may compel the production of documents in considering a complaint, and compel individuals to appear to provide information in person. These powers are mirrored in s.11 of the Ombudsman Act.

The Commission also frequently holds the Executive to account in its complaint handling functions, with services provided by the ACT Government frequently the subject of such complaints. For example, in the 2009-10 financial year:

- Health Services: 31% of health service complaints related to ACT Health;
- Disability Services: 56% of disability service complaints related to government providers;
- Children and Young People Services: Just under 55% of all complaints received and investigated by the Children and Young People Commissioner involved allegations about services provided (or not provided) by the Office for Children, Youth and Family Support (OCYFS) within the ACT Department of Disability, Housing and Community Services (DHCS). The second most common single provider subject of complaints received and investigated by the CYPC was the ACT Department of Education (DET), which accounted for just over 8% of all complaints received.
- Discrimination Complaints: The largest proportion of respondents to discrimination complaints were government respondents (25%).

While the Commission also has jurisdiction in relation to the private sector, it can be seen that the Commission's complaint handling function in relation to government is broadly consistent with that of the Ombudsmen.

### *Auditing and Systemic Oversight*

The Commission also has a range of auditing and systematic oversight functions and powers akin to the oversight role of the Ombudsman, and the functions of an Auditor-General.

For example, the ACT Auditor-General's office lists its functions as:

- to promote public accountability in the public administration of the Territory;

- to audit annual financial statements of the Territory, departments and Territory authorities; and
- to conduct performance audits.<sup>10</sup>

Performance audits are defined by the Auditor-General as a review and evaluation methodology that looks at the organisational and program elements of government performance. The objective of a performance audit is to enable the Auditor-General to express an opinion on whether, in all material respects, all or part of a Territory entity's activities have been carried out efficiently and effectively, and in compliance with relevant legislation, regulations or directions.<sup>11</sup>

The Ombudsman has own-motion inquiries function under s.5 of its Act, which enables the Ombudsman to conduct systemic reviews into matters that may be the subject of complaint to the Ombudsman.

Under s.48 of the HRC Act, the Commission has an own-motion consideration function, drafted in similar terms. The Commission has used this power to undertake a number of systemic inquiries, including some major inquiries into services delivered by government. The Health Services Commissioner undertook a Review of the Psychiatric Services Unit in 2009, with advice from the Human Rights and Discrimination Commissioner on human rights issues. Most recently, the Children and Young People Commissioner and Human Rights and Discrimination Commissioner have combined an Enquiry into the Youth Justice System and a Human Rights Audit of the Bimberi Youth Justice Centre, which also included input from the Health Services Commissioner.

Further, the ACT Human Rights Commissioner has a specific human rights audit function under s.41 of the *Human Rights Act 2004*, to audit the effect of ACT laws. This has been used to audit the human rights compliance of adult corrections facilities and the former Quamby Youth Detention Centre.

As detailed above, the ACT Human Rights Commission's functions include other systemic work such as making recommendations to government agencies on legislation, policies, practices and services that affect vulnerable groups in the community. In addition, under s.87, the Commission may, on its own initiative, give the Minister a written report about any matter of public importance related to the Commission, the Commission's functions or a matter that may be complained about under this Act.

#### **Criteria 2: Only discharge functions which the Parliament itself, if it so wished, might carry out**

The Commission is mindful that individual complaint handling is not a function that Parliament would traditionally carry out. Nonetheless, this is also traditionally seen as core work for Ombudsmen, who are also considered to be cornerstone OPs. Further, systemic reviews and oversight of the sort often undertaken by the Commission is typically the function of parliamentary committees. For example, the ACT Legislative Assembly has Standing Committees on:

- Health;<sup>12</sup>

<sup>10</sup> See <http://www.audit.act.gov.au/>

<sup>11</sup> Ibid.

<sup>12</sup> Standing Committee on Health, Community and Social Services

- Children and Young People;<sup>13</sup>
- Human Rights consideration of legislation; and<sup>14</sup>
- People with disabilities.<sup>15</sup>

These Committees routinely enquire into systemic issues relevant to the work of the Commission.

**Criteria 3: Should be created in separate legislation principally devoted to that position**

The HRC Act fulfils the requirement that the Commission be created by specific legislation, although the Act creates the four Commissioners, which combined create the Commission. This arrangement is due to the ACT's relative small size. In other jurisdictions, Commissioners of the kind contained in the HRC are created under separate statutes and hold separate offices. Nonetheless, the Commission and its statutory office holders are created by separate legislation.

**Criteria 4: Officers of Parliament should be appointed and dismissed with parliamentary involvement**

Currently, Commissioners are appointed by the Executive. This is also the case for the ACT Ombudsman.<sup>16</sup> However, statutory appointments are subject to the requirements of Division 19.3.3 of the *Legislation Act 2001* that the relevant Legislative Assembly Committee be consulted on the appointment.<sup>17</sup> The Executive may end a Commissioner's tenure early, but only in limited circumstances, for example for misbehaviour or if the person becomes bankrupt. Nonetheless, the Commission believes that greater protection for its independence would be achieved by terminations being determined by Parliament. For example, s.28 of the Ombudsman Act requires that the Executive seek the approval of the Legislative Assembly prior to the removal of an Ombudsman during their tenure.

**Criteria 5: Overseen by a statutory parliamentary committee which is also responsible for the budget approval of the Officer**

The Commission has no such relationship with a Legislative Assembly Committee currently. The Commission currently sits within the Justice and Community Safety portfolio and is subject to budgetary scrutiny by the relevant Minister and by the Minister's Directorate. However, the Commission's activities are regularly subject to oversight by various parliamentary committees, at

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<sup>13</sup> Standing Committee on Education, Training and Youth Affairs

<sup>14</sup> Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee). A function which is also specifically spelt out in s.38 of the *Human Rights Act 2004*.

<sup>15</sup> Standing Committee on Health, Community and Social Services

<sup>16</sup> See s.22 of the *Ombudsman Act 1989*.

<sup>17</sup> These requirements don't apply in certain situations, including when the proposed appointee to a statutory position is a public servant.



least annually in relation to Annual Report hearings,<sup>18</sup> and budget estimates processes.<sup>19</sup>

The Commission's budget is not provided directly to the Commission in the ACT budget process. Instead an amount is allocated in the budget to the JACS Directorate, which retains a portion of those funds to cover administrative overheads and allocates the remaining funds to the Commission. The Commission is subject to potential decisions by the Directorate executive to redirect Directorate funding which may not be consistent with Commission priorities. For example, the Commission is obliged to contribute to central Directorate Funds, such as special project funding and training funding. If such funding were retained by the Commission, it would determine its own priorities for the expenditure of that funding.

Further, the Commission's current method of providing reports to the Legislative Assembly is through the Attorney General.<sup>20</sup>

### **Recent Recommendations from independent reports**

It is worth noting that two recent independent reports into ACT Government services have recommended greater independence for the Commission.

The recent Hawke Review of the ACT Public Service made the following relevant comments in relation to the Commission.<sup>21</sup>

*'There are clear examples of offices which must exist because their roles at arm's length from the government are part of the foundation of the ACT's system of government and accountability frameworks. Offices in this grouping would include the Auditor-General, the Director of Public Prosecutions, the Human Rights Commission, and the Electoral Commissioner. In keeping with their independence, these offices should receive appropriation funding in their own right. While the level of resourcing for those officers is properly a matter for the Government to determine in setting the Budget, it is appropriate that funding for independent office holders be appropriated directly to their offices.'*

*.... A number of statutory office holders including the Human Rights Commissioner expressed concern about the lack of clarity, if not conflicts, that arise from the fact that they do not receive separate direct appropriation funding, and are instead funded through departments. The Review recommends, subject to the outcome of the process referred to at Chapter 3, statutory office holders receive direct appropriation funding.'*<sup>22</sup>

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<sup>18</sup> By the Standing Committee on Justice and Community Safety

<sup>19</sup> The Commission is routinely invited to appear before the Select Committee on Estimates.

<sup>20</sup> See above, particularly s. 87 of the HRC Act and s.41 of the HR Act.

<sup>21</sup> Allan Hawke, *Governing the City State* (2011), [http://www.actpsreview.act.gov.au/data/assets/pdf\\_file/0004/188329/Governing\\_the\\_City\\_State.pdf](http://www.actpsreview.act.gov.au/data/assets/pdf_file/0004/188329/Governing_the_City_State.pdf)

<sup>22</sup> Ibid, 103 and 148.

These comments are particularly noteworthy, given a major tenet of the Review was greater consolidation of ACT Government agencies. The Commission notes, however, that this external recognition of the Commission's independence does not appear to have been sufficiently acknowledged in decisions arising from the Review. One of the other recommendations of the Report was greater consistency in branding of ACT Government Directorates. The Government accepted this recommendation and has imposed new rules on ACT Government agencies to adopt consistent branding. Somewhat contradicting the specific recommendations of the Hawke report relating to the Commission, the Commission was not provided with an automatic exemption from these branding requirements like a range of other independent agencies. Subject to a further review, the Commission risks being obliged to abandon its own branding and instead adopt the ACT Government logo only.

The perception of independence is as important as substantive independence, and the Commission is concerned that such a requirement risks undermining our statutory independence in the eyes of the community. The fact that other statutory office holders have already secured such an exemption perhaps suggests that it is again timely to strengthen the independence of the Commission.

Consistent with this, the recent Standing Committee on Justice and Community Safety's Report on Annual and Financial Reports 2009-2010 also recommended greater financial independence for the Commission.

*'The Committee recommends that the ACT Human Rights Commission be allocated a budget appropriation as an Expense on behalf of the Territory, to ensure its independence.'*

As such, any moves to make the Commission more independent, for example through becoming an OP, would be consistent with these recent Reports. One clear financial benefit to such a move for the Commission would be a reduction in the efficiency dividend we are currently obliged to identify on an annual basis. Budget Paper 3 for the 2011-12 Budget states,

*'The dividend was applied at a rate of 0.5 per cent in 2011-12, 0.75 per cent in 2012-13, and 1 per cent in 2013-14 for agencies with GPO appropriation of less than \$20 million. For agencies with a GPO appropriation of greater than \$20 million, a rate of 1 per cent in 2011 12, 1.5 per cent in 2012 13, and 2 per cent in 2013-14 was applied.'*

As the Commission is currently considered part of the Justice and Community Safety Directorate for the purposes of the Budget, the Commission is obliged to identify the efficiency dividend rate for agencies with a GPO appropriation of over \$20 million, despite having an operating budget of only approximately \$3 million. The Budget Papers also note that the efficiency dividend was not applied at all to other independent statutory office holders such as the Independent Competition and Regulatory Commission and the Auditor General.

## **Shared Resources**

We are aware of proposals put forward by the Electoral Commission regarding shared resources for statutory office holders. We share their concerns that if we were to carry the same finance and corporate responsibilities as carried by an administrative unit, we would need additional resources to meet those needs. We see merit in the Electoral Commission's idea that, rather than employing additional financial and corporate management staff, Officers of Parliament instead share corporate support.

## **Conclusion**

While the ACT Human Rights Commission does not fulfil all of the criteria specified for Officers of Parliament, many of the differences are due to the small size of the ACT and the need to collocate similar statutory officer-holders under the one organisation. The Commission would welcome further changes to give it greater independence, and sees merit in exploring further the Officer of Parliament concept.