

STANDING COMMITTEE ON ADMINISTRATION AND
PROCEDURE

Officers of the Parliament

MARCH 2012

Report 4

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Resolution of appointment

In 1995 the Legislative Assembly for the Australian Capital Territory ('the Assembly') amended Standing Order 16, which established the Standing Committee on Administration and Procedure ('the committee').

Standing Order 16 authorises the committee to inquire into and report on, among other things, the practices and procedure of the Assembly.

Following a recommendation by the Standing Committee on Public Accounts the committee resolved on 15 April 2011 to undertake an inquiry into the feasibility of establishing the position of Officer of the Parliament, as it might relate to the Auditor-General, the Ombudsman, the Electoral Commissioner and other statutory office holders.

The Speaker informed the Assembly on 5 May 2011 of the committee's intention to undertake the review.

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RECOMMENDATIONS

Recommendation 1

- 6.7 The committee recommends that statutory office holders who meet an established criteria be made Officers of the Parliament.

Recommendation 2

- 6.13 The committee recommends that a two tiered test be established for determining whether a statutory office is appropriate to be considered for Officer of the Parliament status, and that test be as outlined in the following graph.

Recommendation 3

- 6.15 The committee recommends that the Auditor-General become an Officer of the Parliament.

Recommendation 4

- 6.20 The committee recommends that the position of Ombudsman be made an Officer of the Parliament, but that this not take effect until the ACT establishes its own Ombudsman or similar changes are made to the Commonwealth Ombudsman.

Recommendation 5

- 6.27 The committee recommends that, in the event that Officers of the Parliament are established, the Assembly should, from time to time, review the appropriateness of each Officer of Parliament's status as an Officer of the Parliament and whether new offices of Parliament should be established.

Recommendation 6

- 7.4 The committee recommends that a template be developed for use in the legislation that establishes Officers of the Parliament (for example, the Auditor General Act) so that for each Office the Act prescribes:
- the establishment of the Offices;
 - the functions of the Office;
 - the appointment process;

- the length of the appointment;
- suspension and termination of appointment;
- how remuneration and conditions of employment are determined;
- staffing arrangements;
- budget arrangements;
- reporting arrangements; and
- if the Office is subject to direction, and in what circumstances.

Recommendation 7

8.12 The committee recommends that should more than one Officer of the Parliament be created, the Standing Committee on Administration and Procedure be the committee to oversight and administer Officers of the Parliament in relation to:

- funding and budget;
- reporting requirements;
- recruitment.

Recommendation 8

8.22 The committee recommends that where there is more than one Officer of Parliament appointed, after consultation with the Officer of the Parliament, the Standing Committee on Administration and Procedure advise the Treasurer of the appropriation the committee considers should be made for the Officer of the Parliament for the financial year, and recommend to the Treasurer a draft budget for the Officer of the Parliament for the financial year.

Recommendation 9

8.23 The committee recommends that the budgets of the Officers of the Parliament be included in a separate Appropriation Bill.

Recommendation 10

8.27 That committee recommends that any requirement for the Executive Government to respond to the report of an Officer of the Parliament be legislated in the enabling legislation.

Recommendation 11

- 8.31** The committee recommends that where more than one Officer of the Parliament is appointed, Officers of the Parliament be given full autonomy with the development of their work plan, but that they be required to submit the plan to the Standing Committee on Administration and Procedure.

Recommendation 12

- 8.35** The committee recommends that merit based selection be legislated for all Officers of the Parliament.

Recommendation 13

- 8.36** The committee recommends that whenever reasonably practicable an executive search firm be employed to manage the recruitment of new Officers of the Parliament.

Recommendation 14

- 8.37** The committee recommends that where reappointment to an Office of the Parliament is an option, reappointment not take place without a merit based selection process.

Recommendation 15

- 8.40** The committee recommends that tenure for an Officer of the Parliament be determined by legislation on a case by case basis, with an appropriate term length to ensure independence.

Recommendation 16

- 8.46** The committee recommends that where more than one Officer of the Parliament is appointed, Officers of the Parliament be appointed by the Executive, but that the Standing Committee on Administration and Procedure have a veto power (similar to that now exercised by the Standing Committee on Public Accounts in relation to the appointment of the Auditor-General).

Recommendation 17

- 8.49** The committee recommends that the ACT Remuneration Tribunal determine the remuneration for an Officer of the Parliament and that the *Remuneration Tribunal Act 1995* be amended to insert Officers of the Parliament as a new Part to Schedule 1.

Recommendation 18

- 8.58** The committee recommends that where more than one Officer of Parliament is appointed, staffing arrangements for Officers of the Parliament reflect the current arrangements for the Auditor-General, namely staff are employed under the *Public Sector Management Act 1994* and the Officer of the Parliament has all the powers of the Head of the Service and Directors General in relation to the staff.

1 INTRODUCTION AND CONDUCT OF INQUIRY

Referral of the inquiry

- 1.1 In February 2011, the Standing Committee on Public Accounts Report 15, *Inquiry into the ACT Auditor-General Act 1996* was published. The Report made 41 recommendations, including:

RECOMMENDATION 1

- 3.31 The Committee recommends that the *Auditor-General Act 1996* be amended to designate the Auditor-General as an Officer of Parliament.

RECOMMENDATION 2

- 3.34 The Committee recommends that the Legislative Assembly's Administration and Procedure Committee inquire into and report on the merit of establishing a framework that formally recognises Officers of Parliament, details the nature and terms of the relationship these Officers have with the Assembly and to the Executive, and highlights that their primary responsibility is to the Assembly.

RECOMMENDATION 3

- 3.36 The Committee recommends that should the Standing Committee on Administration and Procedure recommend the establishment of a framework that formally recognises Officers of Parliament:
- (i) the Legislative Assembly Secretariat's Strategy and Parliamentary Education Office, where appropriate, should incorporate reference to Officers of Parliament and the unique roles they perform on behalf of Parliaments, into education and information services and activities

- (ii) the Legislative Assembly Secretariat's Strategy and Parliamentary Education Office should develop and publish an Assembly fact sheet on Officers of Parliament. The fact sheet should emphasise the unique relationship these Officers have with Parliament and the roles they perform on behalf of Parliaments, and
- (iii) the major seminars for ACT public servants, for which the ACT Legislative Assembly Secretariat is responsible, in particular the seminars covering the role of the ACT Legislative Assembly and the workings of Assembly Committees, should specifically include content on the unique role of Officers of Parliament and their relationship with Parliaments.

- 1.2 In response to Recommendation 2, the Standing Committee on Administration and Procedure is making an inquiry.

Terms of reference

- 1.3 To review the feasibility of establishing the position of Officer of the Parliament as it might relate to the Auditor-General, the Ombudsman, the Electoral Commissioner and other statutory office holders.

Call for submissions

- 1.4 The committee called for submissions by placing a notice on the Legislative Assembly's website, writing to the responsible minister and other stakeholders, and writing to all other Parliaments around Australia.

Submissions received

- 1.5 The committee received 14 submissions from:
- The ACT Government
 - Elections ACT
 - The ACT Auditor-General
 - The ACT Human Rights Commission
 - The ACT Ombudsman

- Professor Roger Wettenhall
- The Australian Information Commissioner
- The House of Representatives
- The New South Wales Legislative Assembly
- The NSW Legislative Council
- The South Australian House of Assembly
- The Western Australian Legislative Council
- The Western Australian Standing Committee on Estimates and Financial Operations
- Mr John Wood, Director, Baljurda Comprehensive Consulting Pty Ltd

2 BACKGROUND

- 2.1 There is no universally accepted characterisation of an Officer of the Parliament¹, nor of the categories of offices of which Officers of the Parliament can be a subset such as ‘Agents of Parliament’, ‘Constitutional watchdogs’ and ‘integrity agencies’. The term has been used to describe the Speaker of a parliament, the Clerk, the Serjeant-at-Arms’ and the Parliamentary Librarian.² However, these positions are better described as Parliamentary Officers. Notwithstanding variations in nomenclature, this inquiry accepts that Officers of the Parliament can be distinguished from other statutory offices because their governance arrangements are based on a relationship with the Parliament rather than with Executive government. This premise is supported by the literature. For example, the Constitution Unit’s Oonagh Gay and Barry Winetrobe, in their detailed 2003 analysis of Officers of the Parliament observed the term ‘is used as a device to denote a special relationship with Parliament, which is designed to emphasise independence of the executive’.³ Gay and Winetrobe expand on this point, explaining, ‘ultimately the key determinant of such Officers is their connection with Parliament, rather than the executive. Parliament has the potential to act as more than simply the arena for party government. Therefore, it is the nature and scope of that relationship between Officers and Parliament which is central to the constitutional uniqueness and importance of being an Officer’.⁴ Or, as succinctly stated by Robert Buchanan in his examination of Australian and New Zealand Officers of the Parliament, ‘an officer of parliament performs functions of a parliamentary nature, for parliament’s benefit’.⁵

¹ Consistent with the terms of reference of this inquiry, the term Officer of the Parliament is preferred to Officer of Parliament in this paper, except for when quoting verbatim.

² Thomas, P. ‘*The past, present and future of Officers of Parliament*’, Canadian Public Administration, Vol 46, No. 3 (Fall/Autumn 2003), p 292.

³ Gay, O. and Winetrobe, B. ‘*Officers of Parliament - Transforming the role*’, The Constitution Unit, University College London (2003), p 7.

⁴*Ibid*, p 9.

⁵ Buchanan R. ‘Commonwealth Experience II – Officers of Parliament in Australia and New Zealand: Building a working Model’ in Gay, O. and Winetrobe, B. ‘*Parliament’s Watchdogs: At The Crossroads*’, *Op cit*, fn 5, p 90.

2.2 Accepting that the underlying feature of an Officer of the Parliament is the primacy of that Office's relationship with the Parliament, this relationship is not without nuance. Alys Thomas' review of Welsh Officers of Parliament found that some 'do not fit the model of a "core parliamentary officer" as they are appointed by Welsh Ministers, although they report to the Assembly and Assembly members have a role in their appointment, so they are therefore something of a hybrid'.⁶ On this reasoning, some positions that are being considered as Officers of the Parliament in the ACT could be regarded as 'something of a hybrid', as they report to the Assembly through annual reports. Additionally, the Assembly has a role in the appointment of the Auditor-General under the *Auditor-General Act 1996*, section 8, and under divisions 19.3.3 of the *Legislation Act 2001*, the Assembly could have an involvement in the following ministerial appointments to statutory offices:

- Commissioner for Public Administration (*Public Sector Management Act 1994*, s 18);
- Director, Canberra Institute of Technology (*Canberra Institute of Technology Act 1987*, s 14); and
- Commissioner for the Environment (Commissioner for the Environment Act 1993, s 4).

2.3 However, it must be noted that in practice, governance arrangements for Commissioner for Public Administration and Director, Canberra Institute of Technology mean these positions are recruited as public servants, and subsequently appointed to the statutory office, with the effect of circumventing committee consultation. Additionally, the Assembly must pass a resolution before the Executive is able to terminate the appointment of several statutory office holders. While an argument could be constructed that these statutory offices are hybrid officers of the Parliament, to do so would be at odds with the accepted wisdom, custom and practice. Moreover, the legislative nod to a relationship with the Parliament for the Auditor-General and some other statutory office holders do not go so far as shift the origin of

⁶*Ibid*, p 47.

governance arrangements from a relationship with the Parliament rather to one with Executive government.

- 2.4 This inquiry therefore starts from the position that at this point in time, no ACT statutory office holder has a relationship with the Parliament that could see it characterised as an Officer of the Parliament. Having regard to the experience in other jurisdictions, this inquiry looks at:
- what governance and administration arrangements would need to change in the relationship that officer holders currently have with the Executive and with the Parliament in order to recast them as Officers of the Parliament;
 - how such a change, were it desirable, could be made and implemented; and
 - what would be gained and lost for the officer, the Parliament and the Executive if a statutory office holder's primary relationship was transferred from the Executive to the Parliament.
- 2.5 In considering these issues, the committee remained cognisant of the underlying dilemma identified by Gay and Winetrobe that '[w]atchdogs act as an indicator of the health of contemporary governance' but once 'in being, they are difficult for politicians to wind up or merge, lest an impression is created of an intention to hide scandal. But proliferation tends to undermine public trust'.⁷ This requires reflection on the substantive and symbolic considerations associated with Officers of the Parliament.

⁷ Gay, O 'The UK Perspective: Ad Hocery at the Centre' in Gay, O. and Winetrobe, B. (2008) *op cit*, fn 5, p 14.

Officers of the Parliament in other jurisdictions

- 2.6 Internationally, Officers of the Parliament have been established to address a range of matters, and the diversity is amplified by the varying governance and administration arrangements. These differences are important to note as the inconsistencies provide reassurance that the ACT could establish bespoke Officers of the Parliament without offending existing practice. It is however also important to note that the diversity of arrangements within a jurisdiction increases the resources required administering and overseeing the governance of the Officers of the Parliament.
- 2.7 The diversity of Officers of the Parliament is illustrated in Table 1, which lists officers from various national Westminster traditions. Some of these officers, such as the Auditors-General are common to most or all jurisdictions with Officers of the Parliament. Some, such as Human Rights Commissioners align with statutory office holders in the ACT and some, such as the Northern Ireland Parades Commission, meet a unique need of a particular jurisdiction. As Ruth Barry and Zoe Robinson have noted in their analysis of Northern Ireland's Officers of the Parliament, despite their different roles and functions, '[g]enerally, watchdogs promote accountability and help prevent partisanship within government and the wider public arena'.⁸ Some officers have a long history. For example, in New Zealand the first Officer of the Parliament to be expressly created by statute was the Ombudsman in 1962.⁹

⁸ Barry, R. And Robinson, Z, 'An Overview of Northern Ireland's Constitutional Watchdogs', in Gay, O. and Winetrobe, B. (2008) *Op cit fn 5*.

⁹ A Beattie, 'Officers of Parliament – the New Zealand Model', paper presented to the Australasian Study of Parliament Group Conference, Sydney, 2005, p 2.

Table 1—Officer of the Parliament in other jurisdictions

JURISDICTION AND CURRENT INFORMATION DATE	OFFICERS OF THE PARLIAMENT
Australia (Cwlth) (2008)	Auditor-General Ombudsman
Canada (2008)	Auditor General Chief Electoral Officer Commissioner of Lobbying Commissioner of Official Languages Conflict of Interest and Ethics Commissioner Information Commissioner Privacy Commissioner Public Sector Integrity Commissioner
New Zealand (2008)	Comptroller and Auditor-General Ombudsman Parliamentary Commissioner for the Environment
Northern Ireland (2008)	Chief Electoral Officer Civil Service Commissioners for Northern Ireland Commission for Victims and Survivors Commissioner for Public Appointments in Northern Ireland Comptroller and Auditor General Equality Commission for Northern Ireland Northern Ireland Commissioner for Children and Young People Northern Ireland Human Rights Commission Northern Ireland Ombudsman and Commissioner for Complaints Parades Commission Police Ombudsman for Northern Ireland
Scotland (2008)	Auditor General for Scotland Commissioner for Children and Young People in Scotland Commissioner for Public Appointments in Scotland Scottish Commission for Human Rights Scottish Information Commissioner Scottish Parliamentary Standards Commissioner Scottish Public Services Ombudsman
South Africa (known as Institutions Supporting Democracy) (2011)	Auditor-General Commission for Gender Equality Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Electoral Commission Financial and Fiscal Commission Human Rights Commission Independent Communication Authority of South Africa National Youth Development Agency

JURISDICTION AND CURRENT INFORMATION DATE	OFFICERS OF THE PARLIAMENT
	Pan- South African Language Board Public Protector Public Service Commission
United Kingdom (2008)	Comptroller and Auditor General Electoral Commission Parliamentary Commissioner for Standards
Wales (2008)	Auditor General for Wales National Assembly Commissioner for Standards Public Services Ombudsman for Wales

- 2.8 Officers of the Parliament have also been suggested in the Victorian Parliament in recent years. In February 2006 the Victorian Public Accounts and Estimates Committee (VICPAEC) presented a report entitled *Report on a Legislative Framework for Independent Officers of Parliament* which made 17 recommendations. The government responded to the report in August 2006, with the general tenor of the response indicating that the government would consider most of the recommendations for further consideration.
- 2.9 Since then the Victorian Government has taken further steps in examining reforms of the framework for Officers of the Parliament. As indicated in a submission by Professor Roger Wettenhall:

Victoria has taken some important steps in the direction advocated by VICPAEC. In the event however, this significant report was ‘trumped’ when another Victorian Labor government under the new Premier Brumby set up an inquiry to be conducted by two top-level officials rather than parliamentarians, with a wider remit to review the efficiency and effectiveness of the whole state ‘integrity and anti-corruption system’. Its report (Proust and Allen 2010) recommended establishment of several new agencies, notably:

- A Victorian Integrity and Anti-Corruption Commission (VIACC) to comprise three of the independent officers of parliament, a new Public Service Integrity Commissioner (PSIC) as its chair and several others;
- A Parliamentary Integrity Commissioner;

- An integrity Coordination Board to include the Ombudsman, the Auditor-General, the PSIC and others; and
- Here returning to the notion of an inclusive parliamentary committee, an all party Parliamentary Committee to monitor the powers and functions of the VIACC.¹⁰

At the time this report was prepared none of these reforms had been implemented, as there was a change of government in Victoria in late 2010.

¹⁰ Professor Roger Wettenhall, Submission, p 4.

3 SUMMARY OF SUBMISSIONS

The ACT Government

- 3.1 The Government submission¹¹ focused primarily on the Auditor-General, secondarily at the Electoral Commissioner and the Ombudsman, and in passing at other statutory offices.
- 3.2 The Government does not support the definition of Officer of the Parliament proposed by the Public Accounts Committee that was drawn from the New Zealand and Victorian models and Erskine May. However, the Government supported the following elements of the New Zealand model:
 - an Officer of the Parliament should only discharge functions that the Parliament might carry out; and
 - Parliament should consider creating an Officer of the Parliament only rarely.
- 3.3 Noting that 'there is no consistently adopted Officer of Parliament model, either overseas or in Australia the Government considers that it is necessary to develop a fit for purpose set of principles for future consideration by the Assembly. These should take into account the constitutional limitations of the Legislative Assembly and the Territory's governance arrangements.'
- 3.4 Turning first to the Auditor-General, the Government supported recasting this office as an Officer of the Parliament while maintaining the status quo with regard to administration. Specifically, the Government agreed a parliamentary committee should continue to oversight the administrative needs and appointment of an Officer of the Parliament but did not agree that a parliamentary committee should be responsible for budget approval.

¹¹ ACT Government, Submission No 13.

- 3.5 The Government did not support recasting any other existing statutory office as an Officer of the Parliament. In relation to the Ombudsman this was because the role of the Ombudsman is an extension of the role of the Executive Government, not of Parliament and the existing structure provides sufficient independence. In relation to the Electoral Commissioner the basis was such a change would not provide a greater degree of independence than existing arrangements.

ACT Electoral Commission

- 3.6 The Electoral Commission submission¹² considered the feasibility of the Electoral Commission being recast as an Officer of the Parliament.
- 3.7 The ACT Electoral Commission accepted the characteristics of an Officer of the Parliament proposed by the Public Accounts Committee and having regard to other commissions in Australia, recommended legislative amendments, aligned with being an Officer of the Parliament, namely to:
- provide that the Commission and Commissioner are not subject to the direction or control of the Executive unless this is explicitly provided for in legislation;
 - explicitly provide that the Electoral Commissioner have the powers of a Director General in relation to staff employed to assist the Commissioner; and
 - to allocate funds directly to the Electoral Commissioner and give the Electoral Commissioner direct responsibility for managing these funds.
- 3.8 Having set out the role of the ACT Electoral Commission, the submission noted the Commission already had some functions of an Officer of the Parliament, specifically that:
- the very nature of the Commission's role gives it a unique relationship to Parliament;

¹² ACT Electoral Commission, Submission No 4.

- as it is well accepted that it is essential that the conduct of parliamentary elections should be independent from the Executive Government, the Commission is, and should be, likewise;
 - the Commission provides a check on arbitrary use of power by the Executive as there is a clear conflict of interest if members of the Executive have a role in the work of the Commission;
 - the Commission is established under legislation with appointment provisions and powers set out in statute which is consistent with other jurisdictions;
 - while members of the Electoral Commission are appointed by the Executive, the Executive must consult with the leader of each political party, and each independent member in the Assembly, and appointment has inherent Parliamentary review because it is made by disallowable instrument and only Parliament can dismiss a member of the Electoral Commission; and
 - reports, while provided to the minister, are tabled in the Assembly.
- 3.9 The Electoral Commission noted under current arrangements it can be distinguished from Officer of the Parliament status as its budget is provided by the Executive through the normal budget process.
- 3.10 Citing various authorities, and the practicalities of exercising the Commission's functions, the Commission stressed the importance of electoral authorities being independent from Executive government identifying among key elements of this independence:
- security of tenure;
 - ownership and management of a budget independent of day to day government control that does not fall within the budget of a government ministry; and
 - autonomy to determine staffing needs and appointment.
- 3.11 The Commission outlined the consistencies between its own recommendations and recommendations made in the Hawke Review. In particular it noted the recommendation that statutory office holders receive appropriation funding in their own right.

- 3.12 The Commission made a case that these changes would have little difference in the costs of electoral services.

The ACT Auditor-General

- 3.13 The Auditor-General's submission¹³ considered the feasibility of the Auditor-General being recast as an Officer of the Parliament.
- 3.14 The Auditor-General implicitly accepted the characteristics of an Officer of the Parliament proposed by the Public Accounts Committee. On the basis of this characterisation, the submission supports the designation of the Auditor-General as an Officer of the Parliament, proffering it 'would emphasise the special relationship that exists between the Auditor-General and the ACT Legislative Assembly – a relationship in which the Auditor-General is accountable to the ACT Legislative Assembly and independent of the government of the day'. The submission notes other jurisdictions have made the Auditor-General an Officer of the Parliament.
- 3.15 The submission notes that currently the Auditor-General is not subject to the direction of the Executive or the minister in the exercise of its functions and reports to the Assembly.

The ACT Ombudsman

- 3.16 The Ombudsman's submission¹⁴ accepted the characteristics of an Officer of the Parliament proposed by the Public Accounts Committee, and states that '[t]he ACT Ombudsman either currently meets the ... criteria or would have no reservations about being subject to them.'. The submission also identifies 'significant and tangible' benefits to being recast as an Officer or Parliament, including:
- reaffirming the independence through discrete reporting and funding arrangements;

¹³ ACT Auditor-General, Submission No 8.

¹⁴ ACT Ombudsman, Submission No 6.

- establishing funding arrangements that are overseen by a parliamentary committee;
- strengthening the link between the Ombudsman and members of the Legislative Assembly; and
- under a broader Officer of the Parliament framework, establishing an ACT Integrity Commission.

3.17 Having set out the role and functions of the Ombudsman, the submission:

- states the importance of perceived independence of the Ombudsman if it is to successfully perform these functions;
- sets out existing provisions in the legislation that promote this independence; and
- sets out the following challenges to being able to perform its functions independently:
 - the Ombudsman's office reports to the Attorney-General through the Justice and Community Safety Directorate (JACS), however, it is often required to investigate and report on that Directorate, challenging perceptions of impartiality and causing friction in the relationship between the watchdog and its Directorate; and
 - funding is drawn from the larger JACS budget. As well as suggesting the funding is insufficient, the submission of the Ombudsman states 'that we should have to go cap in hand to an ACT agency about whom we might be investigating a complaint or preparing an own motion report is at best unfortunate or at worst akin to biting the hand that feeds us'.¹⁵

3.18 The Ombudsman states that the existing challenges to independence that stem from being a part of a public service directorate could be alleviated if that office became an Officer of the Parliament with a budget setting process akin to that operating in New Zealand. The submission stresses the importance for independence and transparency of Parliament determining an appropriate budget and having administrative oversight, and of direct communication between the Ombudsman and the Parliament.

¹⁵ ACT Ombudsman, Submission No 6.

- 3.19 The Ombudsman states very little legislative amendment or administrative change would be needed to achieve Officer of the Parliament status.
- 3.20 The Ombudsman also articulates the case for a more wholesale review of watchdog and review bodies in the ACT, with a view to considering the establishment of a 'stand-alone ACT Integrity Commission' that 'could be used to accommodate an expanded integrity regime in the ACT ... [including] a specific anti-corruption function, as well as modelling best practice on the registration of lobbyists, and the provision of ethical advice to ACT public servants'.¹⁶

The ACT Human Rights Commission

- 3.21 The Human Rights Commissioners accepted the characteristics of an Officer of the Parliament proposed by the Public Accounts Committee. The committee also noted that offices similar to those in the ACT Human Rights Commission are similar to those operating as Officers of the Parliament and to offices often cited as core Officers of the Parliament – Auditors-General and Ombudsmen.
- 3.22 Having set out the role of the Commissioners, the submission¹⁷ evaluated the Human Rights Offices against the criteria of an Officer of the Parliament finding in large part that although the Commissioners did not neatly align with the criteria, they were analogies with other statutory offices including:
- the Commission's power to provide a check on the arbitrary use of power by the Executive is evidenced by its independence, and the fact its powers mirror those of other traditional Officers of Parliament such as an Ombudsman when it comes to the Commission's complaint handling function in relation to the government and public service actions;
 - while mindful that individual complaint handling is not a function that Parliament would traditionally carry out, that the Ombudsman would traditionally undertake this kind of work and that some of the system

¹⁶ ACT Ombudsman, Submission No 6.

¹⁷ ACT Human Rights Commission, Submission No 9.

reviews undertaken by the Commissioners are akin to reviews undertaken by parliamentary committees; and

- the Commissioners' office is established by specific legislation.

- 3.23 The Commissioners noted they are currently appointed, and could have their appointments terminated in certain circumstances, by the Executive. Additionally, the Commission noted that there is no parliamentary committee oversight of the Commission's budget but that the budget is provided indirectly to the Commission through the budget allocation process for the JACS Directorate. The Commission also noted that while it reports to the Assembly, this is done through the conduit of the Attorney-General.
- 3.24 The Commissioners outlined that the Hawke Review and the Standing Committee on Justice and Community Safety Report on Annual and Financial Reports 2009-2010 recommend greater independence for the Human Rights Commission, and both specially recommend greater financial independence if not a discrete budget allocation.

Professor Roger Wettenhall

- 3.25 Professor Wettenhall's submission¹⁸ acknowledges that the present inquiry is consistent with the commitment to 'strong oversight institutions' included in the Parliamentary Agreement between the ALP and the Greens for the 7th Legislative Assembly and with the recommended review of statutory office holders in the Hawke Review.
- 3.26 Professor Wettenhall begins with the evolving discussion in Australia about non-departmental public bodies (NDPBs), citing the Queensland's Fitzgerald Commission on corruption (1987-89) as part of the genesis of this discussion. Since then, Professor Wettenhall suggests, there has been an exponential growth globally in the number of NDPBs, especially Auditors-General, Ombudsman, anti-corruption bodies and Human Rights Commissions. Citing the research of Adjunct Professor Ian Thynne, Professor Wettenhall promotes a

¹⁸ Professor Roger Wettenhall, Submission No 11.

governance arrangement for these bodies that is 'equipped to relate well to the legislature ... at some distance from the government'.¹⁹

3.27 Turning to Officers of Parliament, Professor Wettenhall discusses the evolution of Officers in New Zealand and, more recently, Victoria, and the political issues which influenced this evolution. Moving in his examination to the ACT, Professor Wettenhall notes:

- the 2008 endorsement by the Legislative Assembly of Latimer House Principles;
- that Objective IX of the Latimer House Principles 'deals with the "establishment of scrutiny bodies and mechanisms to oversee Government", with "Ombudsmen , Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions" nominated [because] "they can play a key role in enhancing public awareness of good governance and rule of law issues"' ;²⁰
- the Standing Committee on Administration and Procedure has endorsed triennial independent assessment of the three arms of ACT government against the Latimer House Principles set out in the 2008 Edinburgh Plan of Action, noting also that this plan states 'there must be "an independent autonomous electoral commission with powers and security of tenure guaranteed by statute"' ;²¹
- the academic acceptance of an independent, non-partisan auditing body, noting also that this acceptance does not currently universally extend to electoral administrators;
- particular issues for the Electoral Commission, not dissimilar to that body's submission; and
- the 'excellent' Standing Committee on Public Accounts Report 15, *Inquiry into the ACT Auditor-General Act 1996*, including the recommendation that the Auditor-General be designated as an Officer of the Parliament.

¹⁹ Professor Roger Wettenhall, Submission No 11.

²⁰*Ibid.*

²¹*Ibid.*

- 3.28 Following this analysis, Professor Wettenhall suggests 'that it would be appropriate to begin drafting a framework for the establishment of a set of ACT "officers of parliament"' along the lines of the New Zealand model 'to embrace the Auditor-General, the Ombudsman and Electoral Commissioner, and that consideration should be given (and only then – when the principles are well established) to embracing also other statutory officer positions with features that link them with the legislature rather than the executive government'.²² Professor Wettenhall submits this would require a complete redraft of the relevant establishing legislation.

The Australian Information Commissioner

- 3.29 The Information Commissioner's submission²³ outlines that the Office of the Australian Information Commissioner, established under the *Australian Information Commissioner Act 2010* (Cwlth) is supported by the Privacy Commissioner and the Freedom of Information Commissioner, both statutory office holders in their own right.
- 3.30 The submission notes that some, but not all, jurisdictions have cast the Auditor-General as an Officer of the Parliament, and of those, some have other Officers of the Parliament, where those offices 'play an important part in maintaining the integrity and accountability of government'.
- 3.31 The submission suggests that one reason for differing approaches across jurisdictions is the question of whether 'statutory recognition of this kind is of practical benefit to the particular statutory office'. On this point, the submission suggests that many officers which could potentially be recast as Officers of the Parliament already operate in a context where the importance of statutory independence is accepted and respected and there would be no foreseeable advantage to being an Officer of the Parliament in place of existing mechanisms which deliver independence. The submission includes the Office of the Australian Information Commissioner among those officers who have sufficient independence within current operating parameters.

²² Professor Roger Wettenhall, Submission No 11.

²³ Australian Information Commissioner, Submission No 5.

- 3.32 The submission recognises that '[a]n emerging suggestion in the Australian context is that the independent review agencies be viewed as a separate fourth branch of government...' concluding 'there is scope within the current framework for integrity agencies to work collaboratively to support integrity and accountability in government'.²⁴

Clerk of the House of Representatives

- 3.33 The Clerk of the House of Representatives submission²⁵ states that at a Federal level the Auditor-General is the only Officer of the Parliament, although in July 2011 the Government formally agreed to a recommendation by a Joint Select Committee that a Parliamentary Budget Officer should also be established as an Officer of the Parliament. The submission distinguishes the Commonwealth Ombudsman and the Electoral Commissioner from the characteristics of an Officer of the Parliament.
- 3.34 Having set out Officers of the Parliament in New Zealand, the United Kingdom and Canada, the submission discusses different characterisations and characteristics of Officers of the Parliament concluding 'the principles set out in New Zealand and Victoria seem reasonable'.²⁶ Going on to observe '[i]n the event that the ACT Legislative Assembly did decide to institute a system of Officers of the Parliament it may wish to consider the implications, if any, in terms of parliamentary approval of budgets, the information-gathering powers of the Officers of the Parliament, and the interaction between those Officers and Assembly committees'.²⁷ The submission then sets out the experience with the Commonwealth Auditor-General:
- the Auditor-General is formally recognised as an Officer of the Parliament in the Auditor-General Act 1997 and the Auditor-General's powers and functions are set out in, and limited to, that Act;

²⁴ Australian Information Commissioner, Submission No 5.

²⁵ Clerk of the House of Representatives, Submission No 10.

²⁶*Ibid.*

²⁷*Ibid.*

- the Joint Committee of Public Accounts must, on behalf of Parliament, approve a recommended candidate before a new Auditor-General can be appointed;
- as with other public sector entities the Australian National Audit Office is funded through the federal budget process, however, the process is distinguished because unlike other agencies, the Joint Committee of Public Accounts can consider and make recommendations to Parliament about the draft budget estimates for the Australian National Audit Office;
- the Joint Committee of Public Accounts, on behalf of the Parliament, works with the Auditor-General to develop the audit work program, to review audit reports tabled in Parliament and to appoint the Independent Auditor.

3.35 Turning to the Parliamentary Budget Office, the submission explains that this position was unanimously recommended by a Joint Select Committee established to investigate the feasibility of the Office, which had been proposed during negotiations between major parties and independent members following the 2010 federal election. The Joint Select Committee recommended the office be established through statute as an Officer of the Parliament ‘...to inform the Parliament by providing independent, non-partisan and policy neutral analysis to the full Budget cycle, fiscal policy and the financial implications of proposals’.²⁸ The submission sets out the committee recommendations, which have been accepted, for governance arrangements for the new Officer of the Parliament, some of which reflect the existing arrangements for the Auditor-General, and some of which are bespoke to the role of the new office.

The New South Wales Legislative Assembly

3.36 The New South Wales Speaker’s letter of introduction to the submission²⁹ identifies that the only Officer of the Parliament in New South Wales is the Parliamentary Budget Officer (created in 2010) noting that this office has yet to be filled and a Joint Select Committee has been established to inquire into the

²⁸ Clerk of the House of Representatives, Submission No 10.

²⁹ NSW Legislative Assembly, Submission No 12.

role and functions of the office. The Speaker explains that while committees may veto the appointment of both the Auditor-General and Ombudsman, and the Parliament may pass a resolution that the Governor remove a number of statutory office holders, this does not confer Officer of the Parliament status on these positions. The Speaker concludes 'there is probably a case for limiting statutory recognition as officers of Parliament to those bodies that perform functions directly connected with the role of the Parliament, and which are undertaken to some degree on Parliament's behalf.'

- 3.37 The submission agrees with the Standing Committee on Public Accounts that the term Officer of the Parliament is not easily defined. Briefly examining New Zealand and New South Wales officers, the submission suggests the true status of an office is determined by examination of its establishing legislation. The submission also suggests that common characteristics across statutory office holders should not be assumed to define a category of office, such as Officers of the Parliament, especially as some offices may share particular characteristics, but not be recognised as falling into the same category of office.
- 3.38 In relation to the particular characteristics proposed by the Standing Committee on Public Accounts as defining Officers of the Parliament, the submission argues 'these characteristics may be shared by a range of bodies that would not normally be considered officers of Parliament but may still perform a public accountability role somewhat independently of the executive.'. The submission also argues that a requirement that office holders report to Parliament is as much a check on the power that office has as an indication of independence. In New South Wales specifically, the submission sets out that some moves have been made to increase the independence of particular statutory office holders, however the Parliament's will has at times been fettered by the Executive's power, and reforms have fallen short of Officer of the Parliament models in other jurisdictions. With regard to the Parliamentary Budget Officer, the submission provides some background on the creation and the anticipated administration and governance of the office.

3.39 Attached to the submission is a 'Historical development of Officers of Parliament' which begins with a detailed historic overview of the UK Comptroller and Auditor General, the Ombudsman in New Zealand and in the UK. Turning to Officers of the Parliament in Australia, the submission notes that unlike overseas jurisdictions:

Legislatures here exercise less control over the appointment and funding processes for statutory bodies such as the Auditor General and Ombudsman: a reflection of their own lack of financial independence as they negotiate with the Executive on the extent of their own funds and resources.

Local debate on the development of the offices of the Auditor General and Ombudsman tends to centre upon strengthening the statutory or administrative frameworks in place to support their independence and accountability, and the standard often used to evaluate the framework derives from the United Kingdom and New Zealand Officer of the Parliament schemes. Critical provisions including those dealing with appointment, term of office, funding arrangements, removal from office, submission of an annual work plan, powers, reporting direct (sic) to Parliament [and] oversight. However, the existence of such frameworks does not guarantee independence or accountability for Officers of the Parliament. Moreover, the debate about the legislative and administrative measures to support officers of Parliament also seems to occur in the absence of defining criteria as to how to identify an officer of Parliament.³⁰

3.40 The submission then cites Professor Kenneth Wiltshire's analysis of what would constitute a 'model' Ombudsman, which the submission suggests is a more relevant to considerations in the Australian context.

3.41 The annex to the submission concludes:

- the role of Officers of the Parliament has evolved from acting as an extension of the Parliament;
- for Officer of the Parliament status should:

³⁰ NSW Legislative Assembly, Submission No 12.

- be determined by functionality not common characteristic or reporting frameworks;
 - perhaps be limited to functions directly connected to Parliament's functions;
 - be based on a long-standing relationship between the office and Parliament;
- most bodies regarded as Officers of the Parliament in Australia are fettered by Executive power; and
 - it is preferable to only establish Officers of the Parliament rarely, and when doing so, to distinguish them from offices and bodies that form part of the wider system of public sector accountability.

The New South Wales Legislative Council

3.42 The submission³¹ sets out that there is no Officer of the Parliament in New South Wales, distinguishing the recently created Parliamentary Budget Officer from Officer of the Parliament status because it will not perform 'watchdog' functions. Rather, the submission explains, 'measures have been adopted to protect the independence of the State's independent integrity or "watchdog" officeholders'.³² The submission then sets out the mechanisms in place to secure the independence of the Auditor-General, the Ombudsman and the Electoral Commissioner, and in general terms for other independent officers identified in the submission, these are expanded on with greater precision in the table attached to the submission. The submission concludes that existing mechanisms are adequate for ensuring the independence of statutory office holders in New South Wales.

³¹ NSW Legislative Council, Submission No 7.

³²*Ibid.*

The South Australian House of Assembly

- 3.43 The South Australian submission³³ focused on that jurisdiction's Auditor-General and Ombudsman as the key offices in the provision of oversight of Executive and local government functions, and stated clearly that there was no momentum to change the status of either office in South Australia.
- 3.44 In relation to the Auditor-General, the submission sets out that:
- the Auditor-General in South Australia is established under legislation that also establishes the independence of the Auditor-General from the direction of the Executive;
 - the Auditor-General tables the annual report on Government to the Parliament; and
 - despite minimal contact between the Auditor-General's Department and the Economic and Finance Committee, the two have a good working relationship.
- 3.45 In relation to the Ombudsman, the submission sets out that:
- the role and workload of the Ombudsman are trending away from an incident-based approach towards an institution-based approach;
 - the Ombudsman is established under the Ombudsman Act 1972, and has a role and responsibility under three other pieces of legislation;
 - the Ombudsman does not have any formal relationship with Parliament or any of its committees, and does not routinely table any reports other than its annual report.

³³ South Australia House of Assembly, Submission No 2.

The Western Australian Legislative Council

- 3.46 The submission³⁴ argues '[i]t is unnecessary for the independence of the Auditor General or any other similar statutory office holder for the role to be considered as Officer of the Parliament. Secondly it creates uncertainty in constitutional terms as to the rights and privileges of such officers'.³⁵
- 3.47 The submission sets out that in Western Australia the Auditor-General is established as an independent Officer of the Parliament under the *Auditor-General Act (WA) 2006*, although notes it is not clear what this status means in constitutional or practical terms. In this vein, the submission also notes that there 'is no statutory definition of or established criterion to identify an officer of Parliament. In the Westminster-style Parliaments, the term has come to imply a special relationship of accountability to Parliament and an independence from the executive'.³⁶
- 3.48 Upon setting out the role of the Auditor-General, the submission explains:
- there are no implied functions or powers for either the Auditor-General or the Western Australian Parliament arising out of the Officer of the Parliament relationship;
 - the Auditor-General has unfettered discretion, and is not subject to direction in the performance of functions, however, Parliament may request a particular audit be undertaken;
 - the Auditor-General is appointed by the Governor, on recommendation of the Minister, following consultation with the Public Accounts and Estimates and Financial Operations Committees and the leader of each party with party status in the Parliament.
- 3.49 The submission then sets out the Auditor-General's wide ranging powers under the *Auditor-General Act (WA) 2006* and the requirement under that Act to establish a Joint Standing Committee on Audit, noting that to date this has not occurred. If it was established, the committee would make a

³⁴ Western Australia Legislative Council, Submission No 1.

³⁵*Ibid.*

³⁶*Ibid.*

recommendation to the Minister about the Auditor-General's budget, organisational structure and operations.

3.50 The submission then discusses whether Officer of the Parliament status gives parliamentary immunity. Although the Legislative Council does not draw any conclusion on the matter, the submission notes '[r]esponses to this question varied in each jurisdiction. I should highlight the fact that it is dangerous to generalise the legal position across Australia as legislation governing such matters can vary'.³⁷

3.51 On whether the Auditor-General should be named an Officer of the Parliament, the submission, citing supporting references, observes:

Prescribing the Auditor General as an 'Officer of Parliament' within the Act does no more than that: it does not provide any greater power to the position unless specified. The title 'Independent Commissioner' would have the same effect, as it is the provisions of the *AG Act* that stipulate the functions and powers of the Auditor General, which also provide the independence from the executive or the Parliament.³⁸

3.52 The submission then considers what constitutes an Officer of the Parliament, suggesting the Victorian construction is insufficient, and contends that only the Chief Clerk is an Officer of the Parliament by virtue of its relationship to the Parliament under the Constitution Act and the Parliamentary Privileges Act.

3.53 The submission then discusses independence for office holders, noting that '[i]ndependence is a crucial pre-requisite to the effectiveness of an Auditor-General and sets out further the governance arrangements for the Western Australian Auditor General'.

³⁷ Western Australia Legislative Council, Submission No 1.

³⁸*Ibid.*

The Western Australian Standing Committee on Estimates and Financial Operation

3.54 The submission³⁹ sets out that the Western Australian Parliament considered the independence of that State's Auditor-General in 2006 as part of a review of financial management legislation. In relation to the Auditor-General, the submission sets out:

- the Auditor-General is established as an independent Officer of the Parliament under the *Auditor-General Act (WA) 2006*;
- the Auditor-General has legislated discretion, and is not subject to direction, in the performance of functions;
- the Parliament may request a particular audit be undertaken;
- the Treasurer may request an audit of an account, although the Auditor-General may decide not to undertake the audit; and
- a Joint Committee on Audit should be established under the Auditor-General Act to recommend the budget, organisational structure and resources for the Office of the Auditor-General, although none has been established to date.

³⁹ Western Australian Legislative Assembly Standing Committee on Estimates and Financial Operations, Submission No 3.

4 THE CASE FOR OFFICERS OF THE PARLIAMENT IN THE ACT

4.1 Although they now exist in several jurisdictions nationally and globally, Officers of the Parliament are a relatively new addition to Westminster Parliaments and the introduction of Officers of the Parliament into the ACT system will need to be considered carefully. The arguments for the establishment of Officers of the Parliament are not purely academic, and must consider what is to be gained from recasting an existing statutory office holder as an Officer of the Parliament. Given the lack of uniform opinion about what constitutes an Officer of the Parliament; the diversity of functions undertaken by Officers of the Parliament; and the diversity of statutory office holders proposed for Officer of the Parliament status, the argument for Officer of the Parliament status is not as simple as being a more accurate or appropriate descriptor of an existing Office. The most common argument in favour of Officer of the Parliament status is greater independence; however while there were reservations from statutory office holders about the risk of curtailed independence through the appropriation process, neither statutory office holders nor the Government identify a lack of independence in the execution of the function of existing statutory office holders.

4.2 As one commentator succinctly put it:

Identifying agencies as servants of parliament and establishing their freedom from executive direction and control in law is a crucial foundation for their independence.⁴⁰

4.3 While the pursuit of improved or better safeguarded independence for existing statutory office holders may be advanced through Officer of the Parliament status, it cannot be divorced from the governance and administration arrangements for that office. Looking at the pursuit of Officers of the Parliament, Gay and Winetrobe found '[t]he initial issues are whether it

⁴⁰ Thomas, P. *Op cit*, fn 2.

is fair and helpful to regard the “parliamentary officers” as a discrete class of public office, and, if so, what that means in terms of their institutional arrangements and oversight by the Parliament and the Executive’.⁴¹ Assessing the case for Officers of the Parliament raises two threshold questions for consideration when advocating the establishment of Officers of the Parliament:

- (1) Could increased or better safeguarded independence be provided by changes to the governance and administration arrangements for existing statutory office holders without recasting the office as an Officer of the Parliament?
- (2) Does Officer of the Parliament status carry sufficient symbolic weight to meaningfully improve or better safeguard the independence for a recast Officer without changes to the administration and governance arrangements?

- 4.4 Statutory offices are established in legislation to preserve independence in the execution of the functions of the office, rather than having those functions executed by the general public service. Prior to the development and promulgation of Officers of the Parliament, the statutory office holder model was the mechanism used by government to demonstrate the independence of the person carrying out particular functions. As with Officers of the Parliament, independence is supported by a framework of governance and administration arrangements. Both the older and newer models offer great potential for independence, likewise, both models can see the office’s independence compromised through exploitation by the overseer. Fundamentally, it is the relationship with overseer – the Executive or Minister for most statutory office holders and the Parliament in the case of Officers of the Parliament – rather than the supporting mechanisms, which distinguishes Officers of the Parliament from statutory office holders. Accordingly, greater or better safeguarded independence may be achievable for a statutory office holder without shifting that office’s relationship with the Executive to one with the Parliament. For instance, on the topic of funding, the Auditor-General, a potential Officer of the Parliament, stated ‘[t]he issue for me is

⁴¹. *Op cit fn 5*.

around the level of funding, not necessarily who allocates that funding'.⁴² More broadly, another potential Officer of the Parliament, the Electoral Commissioner, recognises that the independence sought through Officer of the Parliament status may be provided by supporting administration and governance arrangements rather than by a revised title; for while that submission 'considers that a compelling argument can be made for conferring the status of Officer of the Parliament on the Members of the Commission' it also acknowledged that the legislative changes sought in the pursuit of greater independence 'would not require that the Commissioners become Officers of the Parliament'.⁴³

- 4.5 Given the differences which already exist across statutory office holders, there would not be a uniform set of reforms to governance and administration arrangements across the offices. In general terms, greater independence could be offered by providing discrete budgets for the Office rather than budgets subsumed within the host agency and providing greater autonomy for staffing through a model such as that used for Legal Aid Commission. Independence could be better safeguarded through formalising a requirement for merit based recruitment, for example legislating for this in the appointments as part of the *Legislation Act 2001*, and increasing the scrutiny and engagement with annual reports and other reports from the statutory office holder. However, the symbolic significance of a shift to Officer of the Parliament status should not be overlooked.
- 4.6 The Ombudsman submission makes a case that the symbolic weight of Officer of the Parliament status is more important for improving the independence of the Office than any changes to the administration and governance arrangements. The Ombudsman proposes, and seems satisfied with, an Officer of the Parliament model that 'can be achieved with minimal changes to legislative and administrative arrangements'.⁴⁴

⁴² Transcript of evidence, 13 October 2011, p 25.

⁴³ Submission of The Electoral Commission, p 2.

⁴⁴ Submission by Ombudsman, p 2.

- 4.7 Notwithstanding the independence of existing statutory office holders could be improved by either changes to the governance and administration without becoming an Officer of the Parliament, or a symbolic change in name with little other change – Philip Giddings observes ‘[i]ndependence is not an end in itself. Its purpose is to secure impartiality in such a way as to re-assure those who might wish to use the services of the ... office’.⁴⁵ This suggests that combining both actions may give a result greater than the sum of the parts. In their review of the evolution of Officers of the Parliament in Scotland, after devolution, Gay and Winetrobe found:

... the evolution of this class of ‘parliamentary officers’, however unplanned, provides opportunities for devolved Scotland to develop innovative, and effective ways of dealing with these important and sensitive core areas of public policy and administration. The Parliament, in particular, should take the initiative, through imaginative planning, in transforming what could become an undesired and intrusive administrative burden into a structured and robust internal system that is fully in tune with its underlying culture and ethos and which adds value to, and becomes mainstreamed into, its more conventional core parliamentary work.⁴⁶

- 4.8 Pragmatically, reflecting on the inconsistencies across existing statutory office holders, it could be concluded that it is difficult to remodel the governance and administration of an office with an incumbent, and that unless the political will and resources required for reviewing existing arrangements are present when an office is vacant, the arrangements supporting existing offices are unlikely to be reviewed or refined. Consequently, each office is a point-in-time reflection of best practice, and, on occasion of the political agenda of the Executive Government, at the time the Office was established. An across the board review of the governance and administration considerations for offices which are recast as Officers of the Parliament would at least catch all recast offices up to the same point-in-time. To this end, it may be that recasting existing

⁴⁵ Giddings, P ‘The Parliamentary Ombudsman: a Classical Watchdog’ in Gay, O. and Winetrobe, B. (2008), p 94.
Op cit fn 5.

⁴⁶*Op cit fn 5.*

statutory office holders as Officers of the Parliament provide an otherwise unavailable avenue to adjust the governance and administration arrangements so as to improve or better safeguard the independence for those Offices.

- 4.9 Although the concerns have been raised that implementing a more systematic regime of Officers of the Parliament than currently exists in the Territory would diminish the system of responsive government, it is considered that those concerns are unfounded. As one commentator stated:

... officers of Parliament are not displacing Parliament in its accountability roles, but rather are performing new 'professional' accountability tasks that were not previously being performed at all, and which Parliament is inherently ill-fitted to perform. This is not a displacement of Parliament, but a critically important support for the accountability role traditionally performed by Parliament.⁴⁷

- 4.10 It should also be noted that, whilst this is a significant reform of the role of Parliament, the executive has, too, reformed its way of operating, with one commentator noting that:

New types of organizations, like Crown corporations and regulatory agencies, were described as 'structural heretics', because they seemed to undermine the central constitutional principles of ministerial responsibility. More recently, the adoption of the ideas of managerialism – contracting-out, privatization, public-private partnerships, special operating agencies, etc. – represented new challenges to the traditional framework of accountability.⁴⁸

⁴⁷ Stilborn, J. 'The Officers of Parliament: More Watchdogs, More Teeth', *Better Governance*, (2008) p 255.

⁴⁸ Thomas, J. *Op cit*, fn 2. p 310.

5 THE CASE AGAINST OFFICERS OF PARLIAMENT IN THE ACT

- 5.1 Officers of the Parliament in some ways threaten to undermine the Parliament, the very institution they purport to support. This threat comes from awarding unelected officials the powers and privileges otherwise restricted to the small group of elected representatives of our community. In relation to the Canadian experience, Elise Hurtubise-Loranger's observations that 'Officers of Parliament do play a crucial role in providing the knowledge necessary to ask the right questions but ultimately, only parliamentarians and the Canadian public have the power to truly hold the government to account'.⁴⁹ Gay and Winetrobe hint at the friction that can occur if the power dynamic in the working relationship between Officer of the Parliament and the Parliament is not clearly understood. More overtly, Gay observed the friction this can create between the Parliament and Officers of the Parliament experienced in the UK:

Recent developments relating to watchdogs have not been in isolation, but are part of the wider drive towards rules-based governance, open to judicial attention. Patronage, informality and legal immunities are being replaced by extensive soft-law systems. They also represent part of the trend towards depoliticisation... Elected representatives are no longer trusted to make all decisions. Instead, experts are needed to operate impartial codes of conduct. But MPs and other elected representatives do not offer full support for this depoliticisation, as it removes important areas of influence from their control. Moreover when watchdogs investigate in terrain where there is clear party political interest, politicians are quick to criticise such bodies as out of touch.⁵⁰

⁴⁹ 'Parliament's Watchdogs: At The Crossroads', UK Study of Parliament Group, *Op cit* fn 5, p 78.

⁵⁰*Ibid*, p 12.

- 5.2 While in the Canadian context Bell observes ‘Parliament has delegated to [Officers of the Parliament] the authority to promote certain values, and Parliament can take this authority back’.⁵¹ In the context of the ACT Parliament it has not yet delegated this power, and given there is a risk that to do so may involve ceding a degree of the Parliament’s authority and position in non-elected people – albeit non-elected people the Parliament might itself select – establishing Officers of the Parliament should not be done lightly.
- 5.3 Additionally, there are costs to the Territory involved in pursuing Officers of the Parliament, even the most minimal amendments to the legislation that establish existing statutory office holder would require many hours of Parliamentary and public service time. Should Officers of the Parliament be established, there will be ongoing expenses and administrative burdens for the Parliament in managing these. There may also be significant costs with establishing the corporate and administrative support required to service Officers of the Parliament if they are extracted from the Administrative Unit which currently provides these services. It needs to be determined whether recasting existing statutory office holders as Officers of the Parliament would bring sufficient benefit to the Territory to justify the expense.
- 5.4 Returning to Giddings’ observation that ‘[i]ndependence is not an end in itself. Its purpose is to secure impartiality in such a way as to re-assure those who might wish to use the services of the ... office’⁵² it is important to consider whether existing statutory office holders lack impartiality, and whether existing arrangements raise any doubts about their ability to undertake their functions impartially. All statutory office holders who made a submission indicated that although the fact that they are sitting within Administrative Units could potentially affect impartiality, there had been no difficulty with exercising their functions independently to date. As the existing systems appear to provide sufficient independence to present the relevant offices as impartial, a shift to Officer of the Parliament status that was purely symbolic may be difficult to justify.

⁵¹ Bell, J ‘Agents of Parliament: A New Branch of Government?’, *Canadian Parliamentary Review*, Spring 2006, (2006) p 19.

⁵² Giddings, P. *Op cit* fn 45, p 94.

6 ESTABLISHMENT OF OFFICERS OF THE PARLIAMENT

- 6.1 While some jurisdictions have intentionally adopted a framework for identifying and establishing appropriate Officers of the Parliament, others have no discernable framework in place. The VICPAEC research showed that:

... officers of parliament have been given various forms of institutional frameworks. As these positions have been created, little attempt has been made to develop common principles for their relationship with Parliament or to find a generic term for them. In Canada, for example, terms used to describe officers of Parliament include 'constitutional officers', 'independent parliamentary agencies' and 'legislative officers'. In Scotland these officers are referred to as 'parliamentary officers'.⁵³

- 6.2 Gay suggests in some cases this reflects 'ad hoc expediency' at the expense of 'principled and considered thought'.⁵⁴ This is not the case in the ACT where, as this inquiry demonstrates, the Parliament is giving consideration to the issues involved with recasting existing statutory office holders as Officers of the Parliament, and with the potential to establish new officers as Officers of the Parliament.
- 6.3 Historically, auditors-general and ombudsmen have been regarded as the core Officers of the Parliament, with the main role of investigating the actions of the executive government and, in some cases, protecting the various rights of individual citizens. Recently, Electoral Commissioners have been included in this category, on the basis that their office protects fairness in elections on behalf of Parliament and its electors.⁵⁵

⁵³ Public Accounts and Estimates Committee, Parliament of Victoria, Report on a Legislative Framework for Independent Officers of Parliament, 67th Report, February 2006, p 85

⁵⁴ *Op cit fn 5*, p 11.

⁵⁵ Public Accounts and Estimates Committee, Parliament of Victoria, *op cit*, p 24.

- 6.4 The reasons for some jurisdictions not adopting a standardised system for establishing Officers of the Parliament appear to be more complex than expediency, although the variation remains difficult to fully understand or identify. Observing the differences across Westminster Parliaments, Winetrobe asks, '[i]s it simply due to ad hoc development, unique to each jurisdiction's political and constitutional circumstances? Or is it because any attempt to corral very different watchdogs together in similar governance arrangements is inherently flawed?'.⁵⁶ This issue is at the heart of much academic discussion of Officers of the Parliament. Outlining the differing approaches to establishing Officers of the Parliament, Gay observes:

... with different arrangements in various 'Westminster Model' parliaments across the globe some Commonwealth countries have sought to institutionalise, in a coherent, systematic way, an 'officers of Parliament' model, whereas the arrangements at Westminster and elsewhere in the UK have grown up in a haphazard, and often illogical, way. Yet the core questions relate not just to the need for coherence in such arrangements, but, more fundamentally, whether the very existence of such arrangements is beneficial. There is little point in devising formal processes for something that may well be inherently unhelpful to the better governance of a polity.⁵⁷

- 6.5 The answer eludes commentators, not least because Officers of the Parliament are still relatively new players in the Westminster system. Nevertheless, for the purposes of this inquiry this observation highlights that deliberation about potential Officers of the Parliament should consider the relationship and similarities between Officers, and whether these should remain informal or be formally maintained or enhanced.
- 6.6 The committee considers that there would be benefit in having officers of the parliament in the Territory. Such a move would enhance the independence (both real and perceived) of those office holders who meet the criteria, as well as enhance the level of democracy. It would also be consistent with the

⁵⁶ *Ibid*, p 115.

⁵⁷ *Ibid*, p 11.

Latimer House Principles which the Assembly adopted on 11 December 2008. Those principles state that governments are encouraged to enhance appropriate oversight bodies in accordance with national circumstances.⁵⁸ The committee notes that the recent assessment of the Latimer House Principles that was presented to the Assembly on Tuesday 15 November 2011 made a recommendation that two officers of the parliament be established.

RECOMMENDATION 1

- 6.7 **The committee recommends that statutory office holders who meet an established criteria be made Officers of the Parliament.**
- 6.8 Through this inquiry, the ACT Parliament has an opportunity to consider the extent to which any Officer of the Parliament will be established on a case by case basis or according to a template model. This decision should be influenced by the experience in other jurisdictions and idiosyncrasies of the ACT. Noting Gay's observation, it is important that the choices the ACT Parliament ultimately make in relation to establishing Officers of the Parliament are guided by a desire for better governance.
- 6.9 In Canada, a general agreement has emerged that any Officer of the Parliament meet three characteristics:
- it reports to the Parliament through the Speaker;
 - distinctive independence including a requirement that the Parliament concurs in its dismissals; and
 - a role in serving parliament.⁵⁹
- 6.10 In England, the essential characteristics there for an Officer of the Parliament are:
- parliamentary involvement in appointment and dismissal;
 - a statutory committee which is responsible for budget approval and oversight;

⁵⁸ Continuing resolution 8A on Latimer House Principles, contained in Standing and Temporary Orders and Continuing Resolutions of the Assembly as at 8 December 2011, paragraph 2(i)(i).

⁵⁹ Stillborn, J. *Op cit fn 47*. p 244.

- a specific select committee to which the Officer is bound to report; and
- staffing independent of the civil service.⁶⁰

6.11 In Victoria, the Public Accounts and Estimates Committee recommended the following criteria:

- an officer of Parliament must be created only to provide a check on the executive's use of power;
- an officer of Parliament must discharge only those functions that the Victorian Parliament, if it so wished, might carry out;
- Parliament should consider creating an officer of Parliament only on rare occasions; and
- Parliament should from time to time review the appropriateness of each officer of Parliament's status.⁶¹

6.12 In New Zealand, the criteria for an Officer of Parliament is set out in a 1989 committee report as follows:

1. An Officer of Parliament must only be created to provide a check on the arbitrary use of power by the Executive.
2. An Officer of Parliament must only be discharging functions which the House of Representatives itself, if it so wished, might carry out.
3. Parliament should consider creating an Officer of Parliament only rarely.⁶²

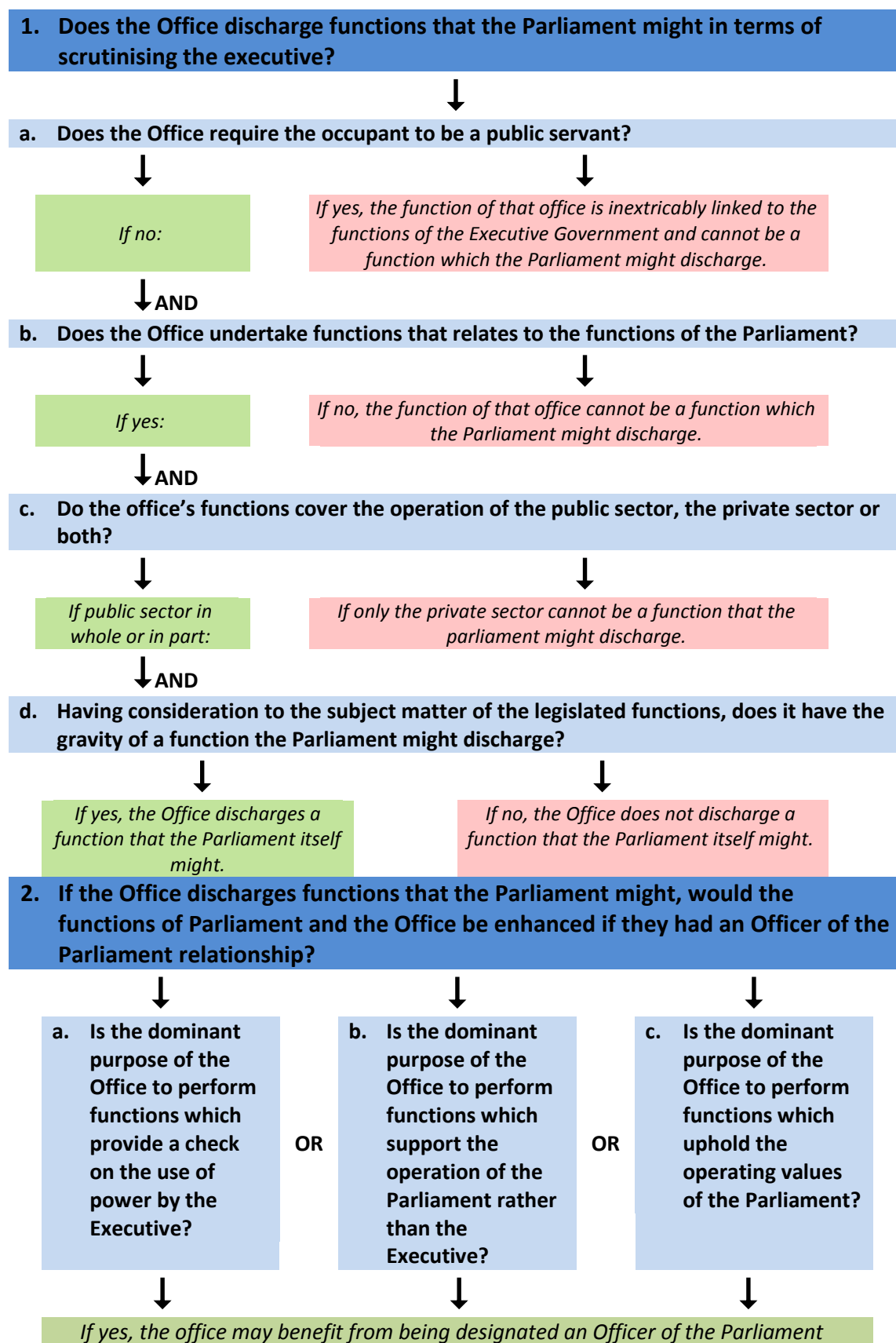
RECOMMENDATION 2

6.13 **The committee recommends that a two tiered test be established for determining whether a statutory office is appropriate to be considered for Officer of the Parliament status, and that test be as outlined in the following graph.**

⁶⁰ Oonagh Gay, 'Officers of Parliament – A Comparative Perspective', *House of Commons Library Research Paper*, 03/77, 20 October 2003, p 12.

⁶¹ Public Accounts and Estimates Committee, Parliament of Victoria, *op cit* fn 53, p 24.

⁶² Finance and Expenditure Committee 1989, New Zealand, 'Report on the Inquiry into Officers of Parliament', 1989, pp 5-6.



Auditor-General

- 6.14 As can be seen from this report, there is widespread agreement that, of all the external agencies of government, the Auditor-General is well suited to be an Officer of the Parliament. That position plays a crucial role in assisting the legislature scrutinise the expenditure of public monies. The Government in its submission supported the designation of the Auditor-General as an Officer of the Parliament, although it suggested the Commonwealth's approach was the preferred model. The Auditor-General's submission also supported the designation. Using the criteria set out in Recommendation 2 it is clear to the committee that this office meets it.

RECOMMENDATION 3

- 6.15 **The committee recommends that the Auditor-General become an Officer of the Parliament.**

Ombudsman

- 6.16 Much of the literature singles out the Ombudsman as also having a strong claim to be an Officer of the Parliament. In evidence before the committee, the Government saw the position of the Ombudsman differently. It was stated in evidence that:

If you step back to the Ombudsman, there is the suggestion, as I was providing in my previous answer, that it is properly characterised as a creature of the executive, and so should sit there. That is not to say that Mr Asher does not and should not have the capacity to speak directly to the parliament and to raise concerns in the way that he does, but in terms of the framework within which the Ombudsman sits, it is the government's submission that it is better considered within the executive.⁶³

- 6.17 The ACT Ombudsman took a very different view when he appeared before the committee. He stated:

⁶³ Transcript of evidence, 7 October 2011, p 10.

While I did read the ACT Government's submission, I would have to say that that is quite a novel approach to the role of the Ombudsman and it is certainly not the way that our office has ever conceived it—that we are part of the ACT executive.

- 6.18 The committee, using the criteria set out in Recommendation 2, clearly believes that it meets the test of being an Officer of the Parliament. However, the committee notes that the Ombudsman is also the Commonwealth Ombudsman, and that any changes it may suggest would not be effective unless identical changes were made at the Commonwealth level.
- 6.19 Changing ACT legislation would be impractical given the status of the arrangements currently employed to engage the Ombudsman.

RECOMMENDATION 4

- 6.20 **The committee recommends that the position of Ombudsman be made an Officer of the Parliament, but that this not take effect until the ACT establishes its own Ombudsman or similar changes are made to the Commonwealth Ombudsman.**

Other Statutory Officer Holders

- 6.21 The committee considered a range of other statutory office holders and applied the two tiered test as mentioned in recommendation 2. Whilst most of the office holders did not meet the test, two of the statutory office holders caused the committee to carefully consider whether they should recommend that they be made an Officer of Parliament. They were the Electoral Commissioner and the Commissioner for Sustainability and the Environment.
- 6.22 The Electoral Commissioner plays a somewhat different role than that of the Ombudsman or the Auditor-General in that it does not scrutinise the executive. However, it plays an essential role in ensuring the integrity of the electoral process. As seen in the Canadian model:

Elections Canada has to be particularly independent of political interference, not just by the government, but by all elected and non-elected officials. The agency is committed to “maintaining the

integrity of the electoral process". Its relationship with Parliament is therefore different than that of other APs (except perhaps the Ethics officers). It submits reports to Parliament to establish transparency, rather than accountability. As such, it describes itself as "an independent body set up by Parliament."

6.23 The Commissioner for Sustainability and the Environment ('The Commissioner') has a range of functions that warrant consideration as an Officer of the Parliament. The Commissioner's annual report lists its function as:

- produce state of the environment reports for the ACT; investigate complaints about the management of the environment by the Territory or a Territory authority;
- conduct investigations as directed by the Minister;
- initiate investigations into actions of an agency where these actions would have a substantial impact on the environment of the ACT; and make recommendations for consideration by government and include in its annual report the outcomes of those recommendations.

6.24 The one set of officers that the committee considered came closest to meeting the criteria was the Officers of the Human Rights Commission. The committee noted the comment of the Standing Committee on Public Accounts (ACT) that:

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 interest of executive government not the parliament

6.25 Having considered these positions carefully the committee does not consider that they should become Officers of Parliament until the concept of the Officer of Parliament is well established and clearly understood

6.26 The committee also noted the approach of the New Zealand legislature that an Officer of the Parliament should be only created rarely and that the House should, from time to time, review the appropriateness of each officer of

parliament's status as an Officer of the Parliament. The committee concurs with this approach and recommends that:

RECOMMENDATION 5

- 6.27 **The committee recommends that, in the event that Officers of the Parliament are established, the Assembly should, from time to time, review the appropriateness of each officer of parliament's status as an Officer of the Parliament and whether new offices of parliament should be established.**

7 ESTABLISHING LEGISLATION

7.1 Working from the position that Offices of the Parliament, like statutory offices, are established under legislation, the question is whether these potential offices should be established with some degree of template legislation. Currently there is some degree of commonality for the appointment of statutory office holders by virtue of the *Legislation Act 2001*, part 19.3 (Appointments). Yet any uniformity across provisions of the Act establishing statutory office holders appears to be coincidental rather than intended. Differences across the establishing provisions include different:

- requirements for appointment and dismissal;
- lengths of appointment, and renewal of appointment;
- appointment instrument requirements; and
- levels of prescription about the function of the office.

7.2 The arrangements for ACT statutory office holders are somewhat analogous with that of Canadian Officers of the Parliament. In his analysis of the emergence of Officers of the Parliament in Canada, Jeffrey Bell observed ‘confusion over the description of [Agents of Parliament] has meant confusion over their integrity and nature which will probably remain until the legislatures lay down guidelines as to the nature and function of their respective cohorts of Agencies’.⁶⁴ An alternative approach is that taken in New Zealand. In examining that system Lesley Ferguson observes, ‘New Zealand has benefited from the set of criteria devised by the Finance and Expenditure Committee in 1989 for consideration when investigating creating an officer of Parliament. Since 1989, the framework has evolved sufficiently to allow New Zealand’s officers of Parliament to operate effectively in the era of new public management and still preserve their independence The FEC’s criteria along with the definitions of other accountability-type agencies established in New Zealand by enactment of the Crown Entities Act 2004 have gone a long way to clarifying the understanding of the role of an officer of

⁶⁴ Bell, J (2006) *Op cit fn 51*, p 15.

Parliament'.⁶⁵ Alone these experiences are not sufficient to draw conclusions from; however, these observations are relatively typical of those made about a number of jurisdictions, that greater levels clarity about the role and need of Officers of the Parliament is beneficial.

- 7.3 While the best option for the ACT will be determined by the needs and conventions in this jurisdiction, the observations about lack of uniformity in Canada and the criteria in New Zealand suggest some degree of standardising when and how an Officer of the Parliament is created is worth considering. Although there is currently a diversity of arrangements in the ACT, it should not be assumed that transposing this system, which has developed inconsistently over time onto a blank canvas is the best option.

RECOMMENDATION 6

- 7.4 **The committee recommends that a template be developed for use in the legislation that establishes Officers of the Parliament (for example, the Auditor General Act) so that for each Office the Act prescribes:**
- **the establishment of the Offices;**
 - **the functions of the Office;**
 - **the appointment process;**
 - **the length of the appointment;**
 - **suspension and termination of appointment;**
 - **how remuneration and conditions of employment are determined;**
 - **staffing arrangements;**
 - **budget arrangements;**
 - **reporting arrangements; and**
 - **if the Office is subject to direction, and in what circumstances.**

⁶⁵ Ferguson, L (2008) 'Parliament's watchdogs – New Zealand's Officers of Parliament'
<http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/ca3cb73640e4b7d4ca2567ee0016638b/831f3a64a787fc61ca2576800079e635!OpenDocument>

8 GOVERNANCE AND ADMINISTRATION

- 8.1 Beyond determining which if any existing statutory office holders should be recast as Officers of the Parliament, or what criteria could be imposed on future offices to determine if they should be made Officers of the Parliament, consideration should be given to whether a standardised approach would be appropriate for the governance and administration of these potential offices. Similarly to standardising the establishment of Officers of the Parliament, there is no uniform approach across jurisdictions for governance and administration. However, the differences as much as the similarities assist with identifying key governance and administration considerations to be addressed.
- 8.2 To make an informed decision about the feasibility of establishing an Officer of the Parliament, it is important to understand the governance and administration regime that would apply to the office. Returning to Giddings' assessment, governance and administration are issues which go to the heart of the purpose such an office. Making the observation in relation to the office of Ombudsman, Giddings states, '[i]ndependence is not an end in itself. Its purpose is to secure impartiality in such a way as to re-assure those who might wish to use the services of the Ombudsman office that they will receive a genuinely fair assessment of their case. It applies not just to appointment and dismissal but also to three other aspects of the way in which the Ombudsman's office is set up: finance; staffing; and background'.⁶⁶ This is a salient point for considering Officers of the Parliament. A designation of independence of an office which lacks the infrastructure and support to operate impartially is of little or no use to the office itself, or those it purports to serve. Conversely, an office enabled by mechanisms which deliver impartiality will operate as independent with or without being expressly identified as such. Independence and accountability are crucial attributes because they confer on Officers of Parliament trust and legitimacy. Public trust

⁶⁶ *Op cit*; fn 45, p 94.

arises when Officers of Parliament are seen to be independent from government; legitimacy arises when they are held accountable to Parliament.⁶⁷

- 8.3 The mechanisms for achieving impartiality through governance and administration need not necessarily be provided for by the legislation establishing the office. In other Westminster jurisdictions these mechanisms are provided for through a diverse combination of legislative provisions, oversight committees and custom. In relation to the experience in Australia and New Zealand, Buchanan observes '[c]ombinations of partially legal frameworks (particularly in respect of funding and accountability) and convention (for example, concerning the establishment of new offices and the appointment of office holders) have emerged over time, enabling relatively strong working relationships to develop between the officers and their respective parliaments.' Buchanan proposes these arrangements are supported by 'a consistent understanding of what defines an officer of parliament, without the proliferation that is evident elsewhere' and have resulted in 'relationships [that] have tended to enhance the officers' legitimacy and effectiveness – and, arguably, the effectiveness of the parliaments themselves'.⁶⁸ Buchanan's thesis is independent, impartial and effective Officer of the Parliament models are based on a relationship of interdependence between the Parliament and the Offices, which he describes as follows:

Both the parliament and the officers of parliament are ... dependent on each other's behaviour to promote the public policy objectives of the officer of parliament concept. Moreover, the parliament furthers its integrity, both in the constitutional sense and ultimately with the public, by being seen to support the roles and functions of the officers and their independence. In turn the officers can further their credibility with the public, and provide reassurance to the parliament, by being seen to be 'in touch'. The parliament may also expect that, to the extent that an officer's independence allows, it can legitimately express a view about the overall

⁶⁷ M Fusi, 'Officers of Parliament: A Study in Government Adaptation', MA Thesis, University of Saskatchewan, 2002, p 23.

⁶⁸ Buchanan R. *Op cit*; fn 5, p 91.

direction and intentions of an officer's business, and hold an officer to account for its performance.⁶⁹

- 8.4 Interdependence, as Buchanan describes it, is achieved through governance and administration which is 'fundamentally about communication and consultation [and] which stops short of direction'.⁷⁰
- 8.5 Gay too observes the role governance and administering plays in ensuring the impartiality and effectiveness of Officers of the Parliament. However, she notes the inherent difficulty this can pose for politicians charged with the provision of this infrastructure.

Watchdogs themselves struggle with public awareness of their roles and accountabilities. When the executive and or Parliament go on the attack, following unpopular decisions or actions, watchdogs become suddenly friendless and vulnerable, so they crave supporting structures including independent staffing and funding. Parliament is in a natural position to offer this sponsorship role, which can help them rebut criticism and defend their territory.

...Parliamentarians need supportive and non party political structures to operate effective oversight, as well as offering a safe haven for these core watchdogs. But this demands much of MPs whose first loyalty remains to their party, whether in opposition or in government [T]he Westminster system mitigates against the existence of independent minded parliamentarians. But the development of the select committee system since 1979 indicates that MPs can operate for the public good with multiple identities.⁷¹

⁶⁹ *Ibid*, p 89.

⁷⁰ *Ibid*, p 89.

⁷¹ Gay, O. 'The UK Perspective: Ad Hocery at the Centre' in Gay, O. and Winetrobe, B. (2008) *Op cit*; fn 5, pp 28-29.

- 8.6 Buchanan's analysis coupled with Gidding's assessment, presents a compelling argument that if an Officer of the Parliament position is being considered, with a view to establishing an independent office that supports the Parliament, it is necessary to consider the potential governance and administration arrangements that would support that Officer before making a decision about the feasibility of establishing the Office. Gay's assessment stresses the importance that these systems are robust and universally understood and supported if they are to succeed in the necessarily political environment of the Parliament.
- 8.7 Commentators vary in the way they describe and group governance and administration concerns. Having regard to the areas considered in the literature around Officers of the Parliament, and to the operating environment on the ACT, the following areas have been considered as part of this inquiry:

Governance considerations

- relationship between committees and Officers of the Parliament;
- funding and budget;
- reporting requirements; and
- work plan development.

Administrative considerations

- recruitment;
- appointment, acting appointment and termination of appointment
- determining remuneration;
- conditions of employment; and
- staffing arrangement to support the Officer of the Parliament.

Relationship between committees and Officers of the Parliament

- 8.8 Most jurisdictions which have Officers of the Parliament involve a parliamentary committee in the oversight or the management of the Officer's function and administration of the Officer's entitlements. These committees are often established for the specific purpose of acting as a conduit between

the Officer of the Parliament and the Parliament, and are usually constituted in such a way as to reflect the constitution of the Parliament itself. The scope of a committee's role varies; however, having examined several existing models, in 2003 Gay and Winetrobe proposed a model to support a successful Officer of the Parliament regime where the committee would:

- agree the appropriate budget for each Officer, which would be met directly from the consolidated fund;
- arrange for the auditing of expenditure of each Officer;
- ensure that the annual report of each Officer is debated in an appropriate committee;
- take responsibility for ensuring that there was regular communication between Officer and Parliament, usually through the medium of a select committee.;
- be responsible for the arrangements preceding the formal appointment of an Officer by Parliament; and
- be the forum for any proposals to create a new Officer of Parliament.⁷²

8.9 As leading scholars in the area of Officers of the Parliament, this well informed proposal should be given due consideration in deliberations over the role an existing or new committee would have in relation to any Officers of the Parliament which are established in the ACT. However, it must be properly scrutinised against the operating parameters in the ACT.

8.10 The committee noted the New Zealand model where in 1989 that legislature created a select committee with a particular responsibility for the oversight of Officers of Parliament.⁷³ The committee is chaired by the Speaker. The committee's role is confined to examining bids for estimates of appropriations, appointment of auditors, creation of an Officer of Parliament and developing and reviewing codes of practice.⁷⁴ The oversight and scrutiny of each officer through the estimates and financial review process is the responsibility of the

⁷² Gay, O. and Winetrobe, B. (2003) 'Officers of Parliament - Transforming the role', The Constitution Unit, University College London, p 68.

⁷³ A Beattie, *Op cit; fn 9*, p 3.

⁷⁴ *Ibid*, p 4.

subject select committee (equivalent to our general purpose standing committees).⁷⁵ A number of submissions lend weight to the creation of just one committee to give a consistent approach.⁷⁶ As stated in Parliamentary Practice in New Zealand:

One of the most important developments in ensuring a common parliamentary approach to the position of Officer of the Parliament was the creation of a select committee with a particular responsibility for the oversight of officers of parliament.⁷⁷

- 8.11 Given that the committee has effectively recommended the creation of just one Officer of Parliament, the current arrangements that exist between the Auditor General and the Standing Committee on Public Accounts should continue for the time being as it appears to work well. However, in the event that the Assembly created additional Officers of Parliament, the committee considers that it would not be feasible to have different officers of parliament reporting to different committees. Such a model may lead to inconsistencies in practice and operation. But as noted in McGee, 'This does not by any means mean that officers of Parliament are not involved with other select committees'.⁷⁸

RECOMMENDATION 7

- 8.12 **The committee recommends that should more than one Officer of Parliament be created, the Standing Committee on Administration and Procedure be the committee to oversight and administer Officers of the Parliament in relation to:**
- **funding and budget;**
 - **reporting requirements;**
 - **recruitment.**

⁷⁵ *Ibid*, p 7.

⁷⁶ R Wettenhall, submission to Inquiry into ACT Auditor General Act 1996, p 5.

⁷⁷ David McGee, *Parliamentary Practice in New Zealand*, Third Edition, 2005, p 71.

⁷⁸ *Ibid*, p 71.

Funding and budget

8.13 The way that the budget and funding are determined for an Officer of the Parliament is considered by many, and especially by Officers themselves, to be a key indicator of the degree to which that Office is independent from the Executive Government. For example, the Standing Committee on Public Accounts Report 15, *Inquiry into the ACT Auditor-General Act 1996* discussion of this point found ‘where the Executive has influence over the budget of an Auditor-General, a form of conditional independence must exist’.⁷⁹ Viewing budget allocation as a measure of independence can be difficult to reconcile with the central tenant of Westminster systems, that the budget is the prerogative of the Executive Government. This tension is dealt with in various ways across jurisdictions. In evidence before the committee the Treasurer pointed out that:

... speaking as the Treasurer, the more agencies set themselves up in a way that is immune to efficiency dividends and achieving enhanced levels of services within existing areas or, on a resource basis, are not growing as fast as some other areas, the better for the territory’s budget outcomes. We need to apply that sort of discipline across all of our government services.⁸⁰

8.14 Any consideration of the budget and funding of potential Officers of the Parliament in the ACT must be framed within the legal parameters which dictate the roles of the Executive and the Parliament with respect of appropriation. As set out by the ACT Government Solicitor:

There is little question ... that the fundamental principles of the separation of powers doctrine, that the functions of the executive and the legislature must remain distinct, underpins the principles of responsible government in the ACT. That is, whilst the legislature, aside from its role in respect of the passage of legislation, properly retains a role to provide the means for the scrutiny and criticism of the performance of the government, it is not for the legislature to trespass onto the functions of

⁷⁹ Standing Committee on Public Accounts, Report 15, *Inquiry into the ACT Auditor-General Act 1996*, p 40.

⁸⁰ Transcript of evidence, 7 October 2011, p 4.

the executive. This must, plainly, apply in respect of financial matters – what has been widely described within countries adhering to the Westminster system of government as the ‘financial initiative’.

... Section 65 of the Self-Government Act ... recognises this by vesting exclusive responsibility for appropriation and (implicitly) for financial initiatives in the government.... In the Self-Government Act it is entrenched in the requirement that a money bill must be proposed by a Minister’.⁸¹

8.15 The ACT Government Solicitor goes on to state ‘[i]t is not within the competence of the Assembly to pass a resolution or enactment which purports to direct the executive as to how public monies are to be appropriated or that an appropriation law should be in certain terms. It may of course amend an appropriation, but not so as to increase the appropriation’.⁸²

8.16 However, there is an argument that the Parliament can have a greater influence in determining the budget and funding for independent officers than it currently has, without trespassing into financial initiative. In both the United Kingdom and New Zealand there is provision for parliamentary involvement in setting budgets for their audit offices and this has not resulted in serious constitutional problems.⁸³ Former Speaker Wayne Berry advanced the view that the separation of powers and the Latimer House Principles required a shift in the way the budget for the Parliament was determined to give the Parliament itself a much greater voice in the process. Speaker Berry noted that the Assembly, through a committee, already has a process where a draft budget is considered in accordance with the *Financial Management Act 1996*, taking into account cost and demand pressures and specific initiatives the Assembly deems necessary to perform its role effectively. The draft is then be

⁸¹ Advice provided by the Australian Capital Territory Government Solicitor and attached to the Government response to the Standing Committee on Public Accounts Report 15, *Inquiry into the Auditor General Act 1996*, p 4 of legal advice.

⁸² *Ibid*, p 7

⁸³ Thomas, P. *Op cit*; fn 2, p 301.

submitted to the Treasurer for incorporation into the appropriation bill.⁸⁴

While former Speaker Berry's observation was formed in the context of the budget of the Parliament itself, there is potential for parliamentary or committee involvement or consultation in determining the budget of Officers of the Parliament.

- 8.17 In 2003 Gay and Winetrobe observed that when the Executive has unilateral control of the budget of an Officer of the Parliament, there is a risk that the independence offered by that status will be negated. While Gay and Winetrobe were not convinced a parliamentary or committee involvement in determining the budget and funding would protect Officers of the Parliament from Executive chastisement, they too promoted it as a means of improving accountability:

Issues of appointment and budget control are important and are not merely window dressing. International experience in Canada, South Africa and Australia has shown how the executive can cut budgets and can interfere with the appointments process when watchdogs do not behave as the Government of the day would wish. This is why Parliament needs to have effective institutional mechanisms to ensure some independence of action. In the Westminster system of course, parliament and executive are fused, and governments have a major role in influencing the decisions of the parliament. This is where committees formed mainly or solely by backbenchers are important in preserving the institutional independence of a parliament. An Officer of Parliament committee would not necessarily prevent budget cuts, but would at least provide a transparent forum for discussion.⁸⁵

- 8.18 This appreciation of committee involvement supports the position of the Standing Committee on Public Accounts that 'when talking about financial independence, it is not advocating that the Auditor-General be provided with 'an open cheque book' but instead that there be more transparency and

⁸⁴ Berry, W. 'The application of the Latimer House Principles in developing a legislature's budget: parliamentary autonomy versus executive prerogative' paper presented at 38th Presiding Officers and Clerks Conference, July 2007. See also section 20 of the *Financial Management Act 1996*.

⁸⁵ Gay, O. and Winetrobe, B. (2003) *Op cit*; fn 72, p 69.

consultation as to how resources of the Auditor-General are decided'.⁸⁶ Both Canada and New Zealand have systems where an oversight committee is involved in recommending to the Treasurer amounts for the budgets of Officers of Parliament.⁸⁷

- 8.19 There is then a case that, in the pursuit of independent, impartial Officers of the Parliament in the ACT, some degree of parliamentary involvement in determining the budget for those Officers, provided it did not trespass into financial initiative, should be considered. The Hawke report noted that:

In keeping with their independence, these officers 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.⁸⁸

- 8.20 There is also an argument that Executives should treat differently the budgets of Officers of the Parliament. As stated by one commentator:

... the argument that governments must control total spending and set budgetary priorities is certainly valid for regular departments. But it is less persuasive for 'watchdog' parliamentary agencies, which are established to review executive performance. These agencies exist to assure the public that they are obtaining value for money and various forms of fairness in their dealings with government. Independent parliamentary review of executive performance should not be treated by the executive as an optional activity to be provided only after other budgetary priorities are met.⁸⁹

- 8.21 There would also be merit in separating out from the main Appropriation Bill the budgets of the Officers of the Parliament so that any changes to those budgets were more open and transparent. This practice already exists in New South Wales, with the Appropriation (Special Officers) Bill providing

⁸⁶ Standing Committee on Public Accounts Report 15, *Inquiry into the ACT Auditor-General Act 1996*, p 90.

⁸⁷ Stilborn, J. *Op cit*; fn 47, p 248.

⁸⁸ Hawke, A. 'Governing the City State: Once ACT Government – One ACT Public Service' p. 103.

⁸⁹ Thomas, P. *Op cit*; fn 2, p 302.

appropriations for the Independent Commission Against Corruption, the Ombudsman, the Electoral Commissioner and the Director of Public Prosecutions.⁹⁰

RECOMMENDATION 8

- 8.22 **The committee recommends that where there is more than one Officer of Parliament appointed, after consultation with the Officer of the Parliament, the Standing Committee on Administration and Procedure advise the Treasurer of the appropriation the committee considers should be made for the Officer of the Parliament for the financial year, and recommend to the Treasurer a draft budget for the Officer of the Parliament for the financial year.**

RECOMMENDATION 9

- 8.23 **The committee recommends that the budgets of the Officers of the Parliament be included in a separate Appropriation Bill.**

Reporting requirement

- 8.24 As with budget setting, reporting arrangements for Officers of the Parliament are considered by many commentators to be a measure of independence. Bell observed that reporting requirements can be used to influence either or both transparency and accountability in the exercise of the functions of the office.⁹¹ Ferguson also discusses the added role reporting structures have in defining the relationship between the Parliament and the Executive, observing in relation to the Auditor-General in New Zealand 'the fact that it is Parliament that the Auditor-General reports to demonstrates that Parliament, and not the Crown, controls public expenditure, and that the Government is responsible and accountable to the Parliament for that expenditure'.⁹² Reporting

⁹⁰ Russell, G. 'Officers of Parliament and how their work impacts on the House', paper presented to the 33rd Conference of Presiding Officers and Clerks, Brisbane, Qld, July 2002, p 2.

⁹¹ Bell, J (2006) *Op cit; fn 51*, p 16.

⁹² Ferguson, L (2008) *Op cit; fn 65*

requirements therefore serve both a practical and a symbolic role function in defining the role of an Officer of the Parliament.

- 8.25 Possibly more so that reporting requirement, the manner in which an Officer of the Parliament's report is responded to can significantly affect the independence and role of an Officer of the Parliament. Gay and Winetrobe observe 'Officers of parliament depend significantly on the parliament (as the recipient of their reports) for support in achieving the improvements that their reports so often urge. But the relationship has to be at arms' length to preserve their independence, and a failure to achieve action on their reports can not only stunt their effectiveness as public institutions but also lead the officers themselves into the dangerous territory of advocating for their own opinions'.⁹³
- 8.26 While reporting requirements for existing statutory office holders are currently robust in the ACT, it is important to consider if there is scope for these to be improved, or whether any symbolic changes would be required in the reporting arrangements for an existing officer which was recast as an Officer of the Parliament.

RECOMMENDATION 10

- 8.27 **The committee recommends that any requirement for the Executive Government to respond to the report of an Officer of the Parliament be legislated in the enabling legislation.**

Work plan development

- 8.28 The mandatory requirements of a statutory office holders' work plan are set out in the establishing legislation, and potentially, in the instrument of appointment. Capacity or necessity may see statutory office holders perform tasks over and above those set out in the legislation, provided to do so would be consistent with the legislated function of the Office. Independence and their prominent role in the structure of government give statutory officer

⁹³ Buchanan R. 'Officers of Parliament in Australia and New Zealand: Building a working Model' in *op cit*, fn 5, p 91.

holders a relatively high degree of autonomy in determining how best to execute their role. However, this autonomy is restricted by governance and administrative considerations such as funding or staffing levels and reporting requirements. Where an existing statutory office holder is subject to direction in the development of their work plan it is at the direction of the appointer, be that the Minister or the Executive.

- 8.29 As with existing statutory office holders, not all Officers of the Parliament have formal arrangements for developing a work plan. One jurisdiction which does is New Zealand, where the Comptroller and Auditor-General has a legislated requirement to ‘provide a draft work plan annually to the House, consult the House about any discretionary work programme priorities in the draft plan, and then indicate in the completed work plan any comments by the House that have not been taken up’.⁹⁴ The New Zealand position was a compromise position; initially the Treasury had argued strongly that Parliament be able to direct the work plan of the Auditor-General and ‘that exempting officers of Parliament from any direction was unacceptable and would allow them to escape accountability, and that if they were not to be open to direction by the executive ... the Parliament itself should have the power to direct them’.⁹⁵
- 8.30 The question for consideration in the development of Officers of the Parliament is the degree to which the Parliament would be involved in determining the work plan of such an Officer. This is not a question that can be considered in isolation, and would be affected by the decisions taken in relation to committee or parliamentary involvement in other governance matters such as budget and funding determination, reporting requirements and staffing arrangements. Ideally, committee or parliamentary involvement in setting a work plan for an Officer of the Parliament would complement the other components of their oversight role and would allow the Officer a level of autonomy appropriate for the impartial execution of the function of the Office.

⁹⁴*Ibid*, pp 84-85.

⁹⁵ Ferguson, L. *Op cit*; fn 65.

RECOMMENDATION 11

- 8.31 **The committee recommends that where more than one Officer of the Parliament is appointed, Officers of the Parliament be given full autonomy with the development of their work plan, but that they be required to submit the plan to the Standing Committee on Administration and Procedure.**

Recruitment

- 8.32 Unlike for public servants, there is no legislative imperative for statutory office holders to be recruited on merit. However, in 2005 the Assembly passed a motion which, among other things, ‘calls on the ACT Government to commit to a transparent, merit based selection process in appointing and in principle re-appointing all commissioners and statutory office holders’.⁹⁶ More recently the Parliamentary Agreement for the 7th Legislative Assembly for the ACT includes a commitment that ‘eligibility to Public Office determined only on merit and integrity’.⁹⁷ These statements of parliamentary intent suggest that recruitment to an Officer of the Parliament position would be done on a merit basis. Consideration should be given to whether, if merit based selection was decided to be appropriate, a process would be formally set out or informally understood. Consideration should also be given to whether the Parliament or an oversight committee would have a role in ensuring the agreed process was adhered to.
- 8.33 In relation to recruitment, the committee sees merit in adopting a practice similar to that currently done for the Clerk of the Legislative Assembly and the Auditor-General, namely that a committee of the Assembly have a veto power or that the Chief Minister and the Leader of the Opposition must be consulted prior to an appointment being made. Such a practice would ensure that all members of the Assembly would have a say in the appointment process to a greater degree than they currently have.

⁹⁶ Legislative Assembly for the ACT: 2005 Week 4 Hansard (16 March) pp 1105–1111.

⁹⁷ *Parliamentary Agreement for the 7th Legislative Assembly between Mr Jon Stanhope, Leader of the Australian Labor Party, ACT Branch and Ms Meredith Hunter, Parliamentary Convenor of the ACT Greens, Appendix clause 1.2 (g).*

- 8.34 The Committee notes that the New Zealand Officers of Parliament Committee engages a recruitment consultant specialising in senior government appointments to advertise any vacancy and manage a recruitment program on behalf of the committee.⁹⁸

RECOMMENDATION 12

- 8.35 **The committee recommends that merit based selection be legislated for all Officers of the Parliament.**

RECOMMENDATION 13

- 8.36 **The committee recommends that whenever reasonably practicable an executive search firm be employed to manage the recruitment of new Officers of the Parliament.**

RECOMMENDATION 14

- 8.37 **The committee recommends that where reappointment to an Office of the Parliament is an option, reappointment not take place without a merit based selection process.**

Appointment, acting appointment and termination of appointment

- 8.38 Issues for consideration with regard to appointment relate to the tenure of the appointment and the identity of the appointer. Issues with regard to termination of appointment relate to the basis on which an appointment can be ended early, who has the authority to terminate the appointment early. Termination of appointment does not include the voluntary retirement of the Office Holder. These are issues fundamentally affect the independence of an Office Holder, as Dr Hawke observed:

⁹⁸ A Beattie, *Op cit*; fn 9, p 10.

Concerns about statutory independence of decision makers and office holders go, ultimately, to public confidence that the holder of that office is able to exercise their functions free from political interference, or other outside pressure. In most cases this is achieved for relevant positions through provisions which give security of tenure. Office holders in the judiciary or the Auditor-General, for example, are able to perform their functions impartially, secure in the knowledge that they cannot be removed from office except in exceptional and defined circumstances. Because they have this security, they are able to participate robustly in public life. The corollary of that freedom is that they are far better able to resist political pressure or criticisms of the decisions that a public servant charged with statutory functions.⁹⁹

- 8.39 The diversity of tenure arrangements reflected in existing statutory office holders is akin to the diversity of arrangements for Officers of the Parliament in other jurisdictions. If existing statutory office holders are to be recast as Officers of the Parliament, consideration would need to be given to the rationale of the different arrangements, and whether it was deemed appropriate to standardise the length of appointment, the option of reappointment and the grounds on which an appointment can be termination arrangements.

RECOMMENDATION 15

- 8.40 **The committee recommends that tenure for an Officer of the Parliament be determined by legislation on a case by case basis, with an appropriate term length to ensure independence.**
- 8.41 The other question is the role that the Parliament would have in appointments and terminations of appointment. As set out in the snapshot above, the Parliament already has a role in some termination of appointment processes, where it is required to pass a resolution before the executive can terminate an appointment. The Standing Committee on Public Accounts Inquiry into the *ACT Auditor-General Act 1996* sets out examples of parliamentary involvement

⁹⁹ Hawke review, *Op cit*; fn 88 p 104.

in the appointment process across a range of jurisdictions, and considering these and the literature on the area finds:

A range of legislative alternative are available and include:

- a requirement for the Executive to consult with leaders of political parties and/or a Committee of Parliament as well as the Speaker and President
- capacity for Parliament to veto an appointment proposed by the Executive
- capacity for Parliament or a Committee of Parliament to recommend an appointment to the Executive
- appointment directly by the Parliament or a Committee of Parliament, and
- the appointment is made from candidates recommended by an independent external body (not used in Australian or New Zealand jurisdictions).

8.42 Based on their analysis, the Public Accounts Committee recommended that the *Auditor-General Act 1996* be amended to provide capacity for the Standing Committee on Public Accounts to recommend to the Executive an appointment to the Office of Auditor-General. Were the Auditor-General to be recast as an Officer of the Parliament, this recommendation should be considered. This decision would be influenced by the recommended role of an oversight committee; it would seem the corollary of a more active oversight committee that the committee had greater involvement in the appointment process. Consideration should also be given to whether a standardised approach should be taken across all Officers recast as Officers of the Parliament, or whether a bespoke model should be developed for each.

8.43 The committee is aware that the Clerk of the Legislative Assembly is appointed by the Speaker of the Assembly pursuant to the Public Sector Management Act 1994. The committee considered whether such a model may be useful for the appointment of Officers of Parliament. It would have the advantage of signifying the officers' independence from the executive. That would mean that the Speaker would approve leave for the officers, receive declarations of interests, and other associated matters in relation to the

oversight of such officers. The Speaker would be responsible for ensuring a merit based selection process was followed. The Committee recognises that there would be a departure from the normal Westminster practice of the executive appointing such officers, but sees merit in ensuring that the officers are truly seen to be independent.

- 8.44 However, the committee notes the Government response to recommendation No 9 of the Standing Committee on Public Accounts' Report No 15 which suggests a role for the Legislative Assembly to be the final arbiter for the position of Auditor-General. The Government response indicates that:

It is outside the constitutional capacity of the Legislative Assembly to be the final decision maker for this appointment.¹⁰⁰

- 8.45 Whilst the committee has some doubt about whether this is correct given that the Speaker already appoints the Clerk of the Legislative Assembly, it does not wish to make a recommendation that may be subject to legal uncertainty. Given that there is well established practice in legislatures for parliamentary committees to have a veto power, the committee considers that this model is appropriate in ensuring that the legislature has a significant role in appointing an Officer of the Parliament.

RECOMMENDATION 16

- 8.46 **The committee recommends that where more than one Officer of the Parliament is appointed, Officers of the Parliament be appointed by the Executive, but that the Standing Committee on Administration and Procedure have a veto power (similar to that now exercised by the Standing Committee on Public Accounts in relation to the appointment of the Auditor-General).**

Determining remuneration

- 8.47 Remuneration for existing statutory office holders is determined by the ACT Remuneration Tribunal under the *Remuneration Tribunal Act 1995*. The

¹⁰⁰ ACT Government, Government Response to Standing Committee on Public Accounts, Report No 15, *Inquiry into the ACT Auditor-General Act 1996*, 2010, p 6.

Remuneration Tribunal determines the Remuneration for all senior officials in the ACT, across all arms of Government, including Members of the Legislative Assembly, Directors-General and the Judiciary. While other options could be considered for determining the remuneration of Officers of the Parliament, it would seem consistent with existing arrangements in the ACT for the Remuneration Tribunal to continue to determine the remuneration for any office that is recast as an Officer of the Parliament.

- 8.48 The question would remain from where the salary of an Officer of the Parliament would be sourced. Remuneration for existing statutory office holders is paid from the budget of the Administrative Unit in which that Office sits. This would not seem to be appropriate for an Officer of the Parliament. Gay and Winetrobe observe that '[t]he salaries of UK Officers who are constitutionally independent of the Executive are met out of the consolidated fund and are not subject to the annual supply procedure, whereby each department's vote is set by the Executive and approved by Parliament. They are listed in a separate part of the Fund, known as the Standing Services. This arrangement is applied to the [Comptroller and Auditor-General], the Ombudsman, the Information Commissioner, the Chief Electoral Officer for Northern Ireland and the Electoral Commissioners. It is an important symbol of independence and should always be considered as part of the template for establishing a constitutional watchdog'.¹⁰¹

RECOMMENDATION 17

- 8.49 **The committee recommends that the ACT Remuneration Tribunal determine the remuneration for an Officer of the Parliament and that the *Remuneration Tribunal Act 1995* be amended to insert Officers of the Parliament as a new Part to Schedule 1.**

Conditions of employment

¹⁰¹ Winetrobe, B. 'Scotland's Parliamentary Commissioners: An Unplanned Experiment' in Gay, O. and Winetrobe, B. (2003) *op cit* fn 3 p 42.

- 8.50 There has been a trend in the ACT in recent years to align conditions of employment for statutory office holders with the conditions of executive staff in the ACT Public Service. Through the Public Sector Management Standards 2006 statutory office holders now receive the same entitlements as executives with regard to leave and vehicles and analogous entitlements for special benefits payments on early termination of employment and superannuation. It would not seem appropriate to contain the employment conditions for Officers of the Parliament in public sector legislation, and consideration needs to be given to whether these conditions are set out for each Officer of the Parliament in the establishing legislation, or in a new enactment providing blanket conditions of employment for all Officers of the Parliament (noting that such legislation could also deal with employment matters such as how Officers of the Parliament hire staff), or in Remuneration Tribunal Determinations.

Staffing arrangements

- 8.51 Currently statutory office holders in the ACT have one of three staffing arrangements – the most independent being autonomous; the middle ground being discrete staff employed under the *Public Sector Management Act 1994* and the least independent being no discrete staff and a reliance on staff of the host Administrative Unit for support.
- 8.52 An example of the most independent style is the Legal Aid Commissioner. Under section 20 of the *Legal Aid Act 1977*:
- (1) The commission may employ as members of the staff of the commission such people as it considers necessary to enable it to properly exercise its functions.
 - (2) The commission, if it is practicable to do so, shall make reciprocal arrangements with other legal aid commissions for the purpose of facilitating the transfer of staff between the commission and any of those other legal aid commissions.
- 8.53 An example of the most common, and middle ground is the Auditor-General. Under section 23 of the *Auditor-General Act 1996*:

- (1) The staff assisting the Auditor-General must be employed under the Public Sector Management Act.
- (2) The Auditor-General has the powers mentioned in the Public Sector Management Act, section 25 (3) in relation to the staff assisting the auditor general.

- 8.54 An example of the least independent third style is the Commissioner for Public Administration. The Commissioner for Public Administration's 2010-2011 Annual Report explained '[d]uring the reporting period the Commissioner did not have staff with discrete responsibility for supporting the office. Instead, the Commissioner relied on the capacity of staff of the [Workforce Capability and Governance] Division to support the office'.¹⁰²
- 8.55 Staffing arrangements can make a real impact on the operations of an Officer of the Parliament. Gay and Winetrobe observe that the capacity to directly appoint of staff as non civil servants assist in upholding an Officer of the Parliament's independence and distance from the Executive.¹⁰³ It would be necessary to decide then if an existing statutory office holder was recast as an Officer of the Parliament, whether their relationship with their staff was to be changed to reflect a model such as the Legal Aid Commissioner.
- 8.56 Transitioning existing staff to new employment arrangements could be complicated, but would most likely be manageable using arrangements similar to those in place for moving staff between administrative units as part of Machinery of Government Changes. Consideration would also need to be given to the corporate and human resources support that would be required to support staff operating independently to the ACT Public Service, and the extent of mobility provisions that would be inbuilt to allow staff to move between the ACT Public Service and the Officer of the Parliament's staff. Consideration would also need to be given to the staffing on-costs of having separate staffing arrangements.
- 8.57 While an independent workforce supporting an Officer of the Parliament may be more complicated than simply decreeing existing staff, one off

¹⁰² Commissioner for Public Administration, *Annual Report 2010-2011*, p 3.

¹⁰³ Gay, O. and Winetrobe, B. (2003) *Op cit; fn 3*, p 7.

administrative complications and considerations should not overshadow the ultimate goal of Officer of the Parliament status – that is, independence and impartiality in the performance of the functions of the office. There are many options which could be considered and which would support an independent workforce without disadvantaging existing staff or jeopardising the ability of the Office Holder to undertake the functions of the office as they transition between arrangements. There are also a range of options which could mitigate the cost involved in having a separate workforce supporting Officers of the Parliament.

RECOMMENDATION 18

- 8.58 **The committee recommends that where more than one Officer of Parliament is appointed, staffing arrangements for Officers of the Parliament reflect the current arrangements for the Auditor-General, namely staff are employed under the *Public Sector Management Act 1994* and the Officer of the Parliament has all the powers of the Head of the Service and Directors General in relation to the staff.**
- 8.59 The reforms contained in the recommendations of this report will significantly enhance the role and status of Officers of the Parliament and make it clearer that their primary relationship in terms of responsibility and accountability should be with the Parliament. Governments should welcome these proposals as, in the words of one commentator:

... governments have to accept that strengthened parliamentary scrutiny is in their interest because it will increase the accountability of the bureaucracy, will hopefully improve the overall responsiveness and performance of government, and will contribute, admittedly in a marginal way and over the longer term, to restoring public trust and confidence in government. A government that has confidence in its measures and actions should welcome parliamentary scrutiny, not resist it.¹⁰⁴

Shane Rattenbury, MLA

Chair

[March 2012]

¹⁰⁴ Thomas P, *Op cit; fn 2*, p 311.

GLOSSARY

Hawke Review - 'Governing the City State: Once ACT Government – One ACT Public Service' review by Dr Allan Hawke, 2011.

APPENDIX A: Hearings and witnesses

FRIDAY, 7 OCTOBER 2011

Mr Andrew Barr, Acting Chief Minister

Mr Phillip Green, Electoral Commissioner

Dr Maxine Cooper, ACT Auditor-General

Mr Allan Asher, ACT Ombudsman

Professor Roger Wettenhall

FRIDAY, 21 OCTOBER 2011

Human Rights Commission:

Dr Helen Watchirs, Human Rights and Discrimination Commissioner

Ms Mary Durkin, Health Services Commissioner and Disability and
Community Services Commissioner

Mr Alasdair Roy, Children and Young People Commissioner