

Australian Capital Territory
OMBUDSMAN



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Ms Janice Rafferty
Secretary
Standing Committee on Administration and Procedure
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Ms Rafferty

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

I am pleased to provide the Standing Committee on Administration and Procedure with my office's submission to this inquiry. I believe this submission will establish that there are significant and tangible benefits in moving to have the statutory position of the Ombudsman made an Officer of the Parliament on an equivalent basis to that being considered for the ACT Auditor-General. These benefits include:

- reaffirming the independence and impartiality of the ACT Ombudsman, both symbolically and in fact, by detaching the reporting and funding arrangements from the Justice and Community Safety Directorate
- establishing funding arrangements for the ACT Ombudsman's office that are overseen by a parliamentary committee of the Assembly
- strengthening the links between the Ombudsman's office and Members of the Legislative Assembly through the non-partisan provision of investigative services
- under a broader Officer of the Parliament framework for statutory office holders, establishing an ACT Integrity Commission as an amalgam of existing statutory roles.

I believe this can be achieved with minimal changes to legislation and administrative arrangements.

I would like to thank the committee for this opportunity to put the case in support of making the ACT Ombudsman an Officer of the Parliament. I would be happy to appear before the committee in person to discuss this initiative and to answer any questions the committee may have in regard to my role, my office, and this submission.

Yours sincerely

Mr Allan Asher
ACT Ombudsman



**Submission by the
ACT Ombudsman**

**ACT LEGISLATIVE ASSEMBLY
STANDING COMMITTEE ON ADMINISTRATION
AND PROCEDURE**

**INQUIRY INTO THE FEASIBILITY OF ESTABLISHING
THE POSITION OF OFFICER OF THE PARLIAMENT**

Submission by Mr Allan Asher,
ACT Ombudsman
July 2011

INTRODUCTION AND SUMMARY

The ACT Ombudsman advises the ACT Legislative Assembly's Standing Committee on Administration and Procedure that there are significant and tangible benefits in moving to have the statutory position of the Ombudsman made an Officer of the Parliament on an equivalent basis to that being considered for the ACT Auditor-General. These benefits include:

- reaffirming the independence and impartiality of the ACT Ombudsman, both symbolically and in fact, by detaching the reporting and funding arrangements from the Justice and Community Safety Directorate
- establishing funding arrangements for the ACT Ombudsman's office that are overseen by a parliamentary committee of the Assembly
- strengthening the links between the Ombudsman's office and Members of the Legislative Assembly (MLAs) through the non-partisan provision of investigative services
- under a broader Officer of the Parliament framework for statutory office holders, establishing an ACT Integrity Commission as an amalgam of existing statutory roles.

Making the ACT Ombudsman an Officer of the Parliament can be achieved with minimal changes to legislation and administrative arrangements.

BACKGROUND

On 5 May 2011, the ACT Speaker, as Chair of the Assembly's Standing Committee on Administration and Procedure, advised the Assembly of the Committee's intention to conduct a review 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 establishment of the inquiry responds to the recommendations of Public Accounts Committee Report No. 15 (Inquiry into the *ACT Auditor General Act 1996*)¹ and commentary in the *ACT Public Sector Review* (the Hawke Review).²

¹ Standing Committee on Public Accounts, *Inquiry into the ACT Auditor General Act 1996*, February 2011, Report 15

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.*

² *Governing the City State, One ACT Government – One ACT Public Service*, February 2011

Although the Public Accounts Committee specifically recommended that legislative amendments should be made to designate the ACT Auditor-General as an Officer of the Parliament, the Committee also argued that a number of other positions, including the ACT Ombudsman, should be included within an Officer of the Parliament framework. The Committee decided that the Administration and Procedure Committee should undertake to consider such a framework.

The Hawke Review, apart from recommending a review of ACT statutory holder positions, did not address the issue of Officers of the Parliament.

SUBMISSION TO THE INQUIRY

The role of the ACT Ombudsman

The ACT Ombudsman safeguards the ACT community in its dealings with ACT Government agencies by:

- correcting administrative deficiencies through independent review of complaints about ACT Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance, the ACT Child Sex Offenders Register and like powers.

The Ombudsman can investigate complaints about the actions and decisions of ACT directorates and authorities to see if they are wrong, unjust, unlawful, discriminatory or unfair. The Ombudsman also seeks remedies for those affected by administration deficiencies, and acts to improve public administration generally.

The Ombudsman has strong investigatory powers. If required, officers working in ACT government agencies must produce documents and answer questions under oath during Ombudsman investigations. The ACT Ombudsman can investigate complaints about the actions or decisions of most ACT Government agencies. The ACT Ombudsman's jurisdiction to investigate is limited by a number of exclusions listed in s5(2) of the *Ombudsman Act 1989*. Also, the ACT Ombudsman does not have the jurisdiction to investigate third parties contracted by ACT Government agencies to provide services on their behalf.

If a complaint is found to be justified, the Ombudsman may recommend a remedy including that the agency reconsider or change its decision; change its rules or procedures; apologise or where appropriate, pay compensation for losses caused by the agency's decision or action.

The Ombudsman's office engages in three main types of investigation:

- investigations of individual complaints made by members of the public and/or their advocates or representatives
- investigations undertaken on the Ombudsman's 'own motion' – matters within jurisdiction that the Ombudsman decides warrant investigation regardless of whether or not a complaint has been made

- inspections of agency records or facilities where enabling legislation authorises the Ombudsman to undertake such inspections (e.g. s56 of the *Corrections Management Act 2007* authorises the ACT Ombudsman to undertake inspections of correctional centres.)

The ACT Ombudsman is also a 'proper authority' under the *Public Interest Disclosure Act 1994* (PID). This empowers the Ombudsman to receive public interest disclosures ('whistle blower' complaints) and to investigate, or oversee PID investigations conducted by other proper authorities.

Impartiality and independence of the ACT Ombudsman

The ACT community's confidence in the investigations and decisions of the Ombudsman depends on the perceived independence of the Ombudsman's office from the agencies it investigates. The *Ombudsman Act 1989* includes a number of provisions that enshrine the Ombudsman's powers to investigate fully, impartially and independently, and also protect officers and agencies from unfair public criticism by the Ombudsman and from liability for disclosing confidential information to the Ombudsman. These include:

- our investigations are conducted in private and in such manner as the Ombudsman thinks fit (s9(3))
- we do not make a report in which we set out opinions that are, either expressly or impliedly, critical of an agency or person unless the agency or person has had the opportunity to make submissions on the matter (s9(6))
- a person is not liable to any penalty under the provisions of any other enactment because of the person having furnished information to the Ombudsman when required to do so (s11(8))
- the Ombudsman and staff are required to observe strict confidentiality of information obtained through investigations (s33)
- officers can be compelled to provide information to the Ombudsman (s11 and s35) but are protected from civil action so long as the information is provided in good faith (s36).

These powers and protections enable the Ombudsman's office to conduct far reaching investigations into administrative actions of ACT Government agencies while protecting the rights of officers who divulge information to the Ombudsman in good faith. Nothing in the Act compels us to prefer any one version of events over another – we are free to reach our own conclusions based on our own independent and impartial analysis of the information available to us.

Current arrangements between the ACT Ombudsman's office and the Justice and Community Safety Directorate

Presently, the ACT Ombudsman's office reports to the ACT Attorney General through the Justice and Community Safety Directorate. We view this arrangement as somewhat anomalous as the Justice and Community Safety Directorate is an agency that also falls within our jurisdiction to investigate. We have found that the sensitivities of this arrangement are particularly manifest in dealing with complaints concerning ACT Corrective Services, the Alexander Maconochie Centre (AMC), and the ACT Government Solicitors Office. Our capacity to influence these agencies through practical and constructive feedback depends on building a relationship of trust and respect. We require unimpeded and prompt access to complete agency

records in order to investigate thoroughly. We also need an open and receptive leadership within the agency with whom to discuss our findings and recommendations. We have found the Justice and Community Safety Directorate and its agencies to be generally less responsive to our inquiries and feedback than other directorates. This may reflect a perceived imbalance in the current reporting arrangements in which the Justice and Community Safety Directorate agencies are in effect being investigated by 'one of their own'.

A key issue for the ACT Ombudsman's office has been that of funding. We consider that the current level of funding payable under the services agreement³ with the ACT Government is inadequate for us to be able to provide a quality service that the ACT community deserves. Furthermore, 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.

Both of these concerns, the Ombudsman's independence and uncompromised access to funding, can be addressed by making the Ombudsman an Officer of the Parliament. Mr John Wood, a former Deputy Ombudsman presented a paper relevant to the issue.⁴ In his paper, Wood outlined a process such that as an Officer of the Parliament, our draft budget would be submitted to a parliamentary committee for consideration who would then recommend a budget to the Executive. Wood notes that the New Zealand Ombudsman's budget is dealt with in that way.

In discussing the Commonwealth Ombudsman's funding arrangements, Wood commented:⁵

Even more worrying, perhaps, is the mechanism for funding the Office. If one wanted to curb the Ombudsman, the most effective way to do it, short of repealing the legislation, is to starve the office of resources. This is in fact what occurred in the Richardson, Pearce, and Smith terms of office. In the last instance, when the Howard Government came to office, the Prime Minister's portfolio along with others was targeted for expenditure cuts. The head of the Department whose job it was to achieve this, selected the Ombudsman for special attention and the bulk of the required savings.

In 1996 no less than \$1.9 million or 22 per cent of the annual budget was cut by the head of an agency that was subject to the Ombudsman's jurisdiction. That was at a time when the number of complaints to the Ombudsman was increasing at a rate of about 20 per cent per annum! One could speculate whether this was perhaps revenge for the previous Prime Minister *increasing* the Ombudsman's budget by the very same amount a few years earlier despite opposition from the same agency head!

Funding arrangements for the ACT Ombudsman function

The ACT Government and the Commonwealth Ombudsman first entered into a Memorandum of Understanding (MOU) in October 1998 for the Ombudsman to be

³ Services Agreement between Australian Capital Territory Government and Commonwealth Ombudsman for provision of Ombudsman services in relation to ACT government agencies and the Australian Federal Police when providing police services to the ACT, Commencing 31 March 2008

⁴ Wood, John TD, *The Commonwealth Ombudsman – Time for Independence?*, Democratic Audit of Australia – January 2005

⁵ Ibid page 4

funded to perform the functions and exercise the powers of the ACT Ombudsman. A second MOU was entered into in September 2001 for the period commencing 1 July 2001.

On 31 March 2008 the MOU was replaced by the services agreement⁶ which remains in place to the present day. Funding arrangements in the services agreement include, in addition to the annual indexation formula,⁷ the agreement that the ACT Government and the Ombudsman will review the amount of the ACT's payment if:

- there has been a variation of at least 10% in the number of issues raised by complaints made in a financial year to the ACT Ombudsman or about the community policing services, compared to the previous financial year;
- the ACT Legislative Assembly has enacted legislation which has led to, or will lead to, changes in the Ombudsman's workload requiring 20% or more of the time of a full-time staff member at the level of Senior Investigation Officer to deliver; or
- there are other factors indicating that the amount of the ACT's liability should be reviewed, including but not limited to factors such as an increase in complaints as a result of the construction and operation of an ACT prison or an increase in investigation by the ACT Ombudsman under the PID Act.

The ACT Government and the Ombudsman agreed that either party may seek variation or replacement of the services agreement for a financial year that has not commenced by providing a minimum of three months' notice in writing. They also agreed that either party could terminate the services agreement by giving a minimum of three months' notice in writing at any time.

In the event that the agreement is terminated, the ACT Government and the Ombudsman agree to provide each other with reasonable assistance to enable the functions performed by the Ombudsman or in relation to the policing arrangement to be performed by some other entity.

The Ombudsman's office made submissions to the ACT Government for funding the 2010-11 financial year regarding the increased reporting responsibilities under the Child Sex Offenders Register and surveillance devices legislation.

As reported in the last annual report, in 2009-10 the ACT Government paid an unaudited total of \$998,435 (including GST) to the Ombudsman's office for the provision of ACT Ombudsman services. Payments (including GST) were for the purposes of the *Ombudsman Act 1989* (ACT) \$470,010 and for complaint handling in relation to ACT Policing (\$528,425).

The role of an Officer of the Parliament

An Officer of the Parliament is a statutory officer who reports to the parliament, usually to the speaker or to a parliamentary committee. In its No. 15 Report, the Public Accounts Committee restated the five criteria that a New Zealand parliamentary committee had identified for determining or establishing an Officer of the Parliament:⁸

⁶ Ibid

⁷ Indexation factor = [(WPI less productivity component of 1%) x 80%] = [CPI x 20%], Wage Price Index (WPI), Consumer Price Index (CPI)

⁸ Ibid page 19

- an Officer of the Parliament is created to provide a check on the arbitrary use of power by the Executive
- an Officer of the Parliament must only discharge functions which the House of Representatives itself, if it so wished, might carry out
- Parliament should consider creating an Officer of the Parliament only rarely
- Parliament should from time to time review the appropriateness of each Officer of the Parliament's status as an Officer of the Parliament
- each Officer of the Parliament should be created in separate legislation principally devoted to that position.

The Public Accounts Committee also noted the Victorian Public Accounts and Estimates Committee as having identified four characteristics of an Officer of the Parliament:

- officers of the Parliament are established in a generally standard way by an Act of Parliament
- officers of the Parliament are appointed and dismissed with parliamentary involvement
- officers of the Parliament are overseen by a statutory parliamentary committee which is also responsible for the budget approval of the Officer
- officers of the Parliament are required to report to a specific parliamentary committee.

The Ombudsman as an Officer of the Parliament

The ACT Ombudsman either currently meets the above criteria or would have no reservations about being subject to them. We would support the development of the concept in the ACT jurisdiction and would support the move to have the ACT Ombudsman included as an Officer of the Parliament.

The former Commonwealth and ACT Ombudsman, Prof John McMillan presented a paper that outlined how the Ombudsman's office can provide a service to parliamentarians in their dealings with the executive branch of government.⁹ While this paper does not address the benefits of making the Ombudsman an Officer of the Parliament, it does highlight the broader role that the Ombudsman can play in providing services to the parliament – investigating individual complaints referred by members of parliament, making submissions to parliamentary inquiries, and publishing reports of parliamentary interest.

Prof McMillan makes the point that the powers of the Ombudsman are particularly useful for the needs of parliaments and parliamentarians seeking access to documents and decision makers. Commenting on the Commonwealth Ombudsman's powers, Prof McMillan wrote:

The *Ombudsman Act 1976* [Commonwealth] confers upon the Ombudsman the same powers as a Royal Commission to obtain documents from any

⁹ *The Ombudsman and Parliament working together, Address by Prof John McMillan, Commonwealth Ombudsman, to a seminar of State and Commonwealth Parliamentarians, Parliament House, Hobart, 14 April 2005*

agency or person, to examine witnesses under oath, and to enter premises (ss 9, 13, 14). My office invokes those formal powers only rarely, but having them means that agencies routinely allow us to inspect files and to talk directly with the actual decision-makers. That is useful in forming a view as to whether a decision was thoroughly and professionally made, or whether an issue in dispute warrants further examination. We are sometimes able to point to an error in a decision that an agency overlooked.

The evidence and documents given to an Ombudsman's office cannot be subpoenaed by another person or agency for use in legal proceedings (*Ombudsman Act* s 33, 35(8)). Investigations by the Ombudsman are required by statute to be conducted in private, and strict secrecy provisions and the *Privacy Act 1988* govern the disclosure of information (s 8(2), 35). A natural justice procedure must be followed before a finding is reached that is critical of a person or agency, allowing them to comment on the Ombudsman's draft finding (s 8(5)).

As noted above, similar powers are vested in the ACT Ombudsman. While the Ombudsman continues to report to the Attorney-General there may be some reluctance by Members of the Assembly to use these investigative services to their fullest. By detaching the ACT Ombudsman's role from the Justice and Community Safety Directorate and making the Ombudsman an Officer of the Parliament, any partisan concerns about the Ombudsman's functions should be dispelled.

Officers of the Parliament - the genesis of an ACT Integrity Commission

Looking further forward, we would see the move towards statutory officers being Officers of the Parliament as a basis on which to build an ACT Integrity Commission. In our submission¹⁰ to the Hawke Review we proposed that the time had come for the ACT Government to establish an integrated, ACT-run agency that would oversight the ACT jurisdiction. In the review, Hawke responded with the statement,

*The Review does not support the creation of further separate ACT offices without detailed analysis of the underlying issues and the problem intended to be fixed. Indeed, it is arguable whether it would be possible and if so, viable, for the ACT to seek to establish its own specialist office given its size and scope of its responsibilities. The current arrangements would appear to be a sensible approach for the ACT to adopt, allowing it to draw on the experience and capacity of its larger counterparts. The questions raised in the Ombudsman's submission should be considered as part of the review of independent office holders proposed in Chapter 3.*¹¹

It may well be that the issues that we raised could be dealt with in a review of ACT statutory office holders. However, Hawke appears to have missed the point. In effect, adoption of our proposal would not result in a creation of further, separate ACT offices, but essentially an amalgam of existing ones.

On the other hand, Hawke did comment favourably on the fact that interaction between the ACT Auditor-General with both the ACT Government and the ACT Assembly Standing Committee on Public Accounts of the Auditor-General's

¹⁰ *Submission by the ACT Ombudsman, ACT Public Sector Review, Conducted by Dr Allan Hawke AC*

¹¹ *Ibid* page 202

performance audit program had enhanced the value of the Auditor General's work. By analogy, if the work of this office had closer ongoing involvement with a parliamentary committee – because, for example, this office was an Office of the Parliament, there might be similar benefits to be realised.

Government Integrity Infrastructure

The ACT has largely relied upon Australian Government entities to provide it with government oversight services, contracting with both the Commonwealth Ombudsman and the Privacy Commissioner to undertake a range of integrity functions within the ACT jurisdiction.

There is a question about whether a more effective model would be for these functions to be established within an integrated, ACT-run agency, in order to focus much more intensively on the specific needs of the jurisdiction. A standalone ACT agency may also have more success in driving internal change to complaint handling practices and procedures across the ACT Public Service. The mix of state and local government type functions which make up the ACT Government's responsibilities do not always sit well alongside agencies providing services mainly for a national or international audience.

A stand-alone ACT Integrity Commission could not only assume those ACT services currently provided by Australian Government agencies, but could also be used to accommodate an expanded integrity regime in the ACT. This could include 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.

Integral to an effective standalone Commission would be the review and modernisation of personal privacy, right to information, ombudsman and public interest disclosure legislation. Consideration should be given to whether the current powers available under the *Inquiries Act 1991* should be granted on a standing basis to the new Commission, so the ACT Government does not have to establish separate and additional infrastructure each time it wishes to have an independent inquiry conducted into a particular issue of concern.

Parliamentary Oversight

An essential component of any system of integrity in public offices is an effective mechanism for parliamentary scrutiny of these systems. Various models have developed across Australia, with most jurisdictions now moving to ensure that there is specific parliamentary oversight of integrity agencies operating in both the public and parliamentary sectors. This is usually through Standing Committees with a function to examine the reports of such agencies and scrutinise their operations, but without the power to direct their activities.

Increasingly, it is being recognised as important that there is a level of independence in the setting of annual budgets and performance measures for integrity agencies, as there have been examples where negative reports from such agencies have resulted in retribution through unilateral budget reductions or legislative amendments which have curtailed investigatory powers. In order to maintain a thoroughly transparent funding and performance process it is essential that parliament, rather than government, set the budgets for these agencies.

The other essential element of a transparent integrity system is the issue of to whom the agencies should be accountable. Importantly, there should not be any opportunity

for even a perceived level of influence to be exerted on the agency by those Ministers or departments which it investigates. With this in mind, a number of jurisdictions now make their integrity agencies, such as Ombudsman and Auditors-General report directly to the Speaker of their parliament, instead of to Premiers, Treasurers or Attorneys-General. This ensures that their communication with the elected arm of government is unfettered by ministerial or departmental influence. Arguably, Commissioners for information and human rights should also fit within this framework in order to enshrine their independence.

In conclusion, I would like to thank the Standing Committee on Administration and Procedure for this opportunity to put the case in support of making the ACT Ombudsman an Officer of the Parliament. I would be happy to appear before the committee in person to discuss this initiative and to answer any questions the committee may have in regard to my role, my office, and this submission.

Mr Allan Asher
ACT Ombudsman