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The Secretary
Standing Committee on Administration and Procedure
Legislative Assembly for the Australian Capital Territory
Civic Square, London Circuit
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Inquiry into the feasibility of establishing the position of Officer of the Parliament

Thank you for the invitation to make a submission to this inquiry.

The ACT Electoral Commission's submission is attached.

If you would like further information, I can be contacted at elections@act.gov.au or on 6205 0033.

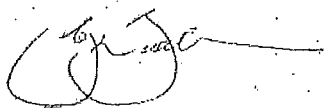
I would also be available to give evidence at a public hearing or to attend the proposed round table meeting if desired.



Phillip Green
Electoral Commissioner

20 July 2011

**ACT Electoral Commission submission to
the ACT Legislative Assembly
Standing Committee
on Administration and Procedure
in relation to its inquiry into the
feasibility of establishing the position
of Officer of the Parliament**



**Roger Beale AO
Chairperson**



**Phillip Green
Electoral Commissioner**



**Dawn Casey
Member**

20 July 2011

**Submission by the ACT Electoral Commission
to the Standing Committee on Administration and Procedure**

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

Introduction

This submission is provided to the Standing Committee on Administration and Procedure in response to its Inquiry into the feasibility of establishing the position of Officer of the Parliament. The submission addresses the issues listed in the Committee's terms of reference for this inquiry.

The following discussion is based on the Commission's understanding of the relevant legal provisions. The Committee may wish to seek formal legal advice on these issues.

Terms of reference of this inquiry

At the meeting of the ACT Legislative Assembly held on 5 May 2011, the Speaker, as Chair of the Standing Committee on Administration and Procedure, advised the Assembly of the Committee's intention to conduct a review with the following terms of reference:

- 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.

This inquiry is in response to the recommendations of the Standing Committee on Public Accounts in its Report No. 15 entitled *Inquiry into the ACT Auditor-General Act 1966* and commentary in the Hawke Report:

Summary and recommendations

The Commission considers that a compelling argument can be made for conferring the status of Officer of the Parliament on the Members of the Commission. Therefore the Commission supports this inquiry into the feasibility of establishing the position of Officer of the Parliament as it might relate to the Electoral Commission. The Commission also supports the recommendations in the Hawke review to review the status of statutory office holders and to provide key statutory office holders with appropriation funding in their own right.

The Commission makes the following recommendations for changes to legislation in this submission:

- That the *Electoral Act 1992* be amended to provide that the Commission and the Commissioner are not subject to the direction or control of the executive in respect of the performance or exercise of their functions or powers other than as explicitly provided in relevant legislation;
- That the Electoral Act be amended to explicitly provide that the Electoral Commissioner has all the powers of a chief executive¹ under the Public Sector Management Act in relation to the staff employed to assist the Commissioner; and
- That relevant legislation be amended to facilitate allocation of funds directly to the office of the Electoral Commissioner and to give direct responsibility to the Commissioner for monies spent by the Commissioner.

While these changes would not require that the Commission become Officers of the Parliament, they would be quite consistent with that status.

¹ In this submission, the term "powers of a chief executive" are intended to refer to the powers that may be conferred on a statutory office-holder under section 25 of the Public Sector Management Act, meaning the following powers in relation to the office-holder's staff as if the staff were employed in an administrative unit: the powers of the head of service relating to the appointment, engagement and employment of people; and the powers of a director-general.

Officers of the Parliament

The Standing Committee on Public Accounts, in its Report *Inquiry into the ACT Auditor-General Act 1966*, discussed the concept of making the ACT Auditor-General an Officer of the Parliament. The report identified a range of factors that could be identified as characteristics of an Officer of the Parliament. These include:

- A statutory office holder that has a unique relationship with the parliament;
- A statutory office holder that is independent of the executive government;
- A statutory office holder that is created to provide a check on the arbitrary use of power by the executive;
- A statutory office holder established in a generally standard way by an Act of Parliament;
- A statutory office holder that is appointed and dismissed with parliamentary involvement;
- A statutory office holder which is overseen by a parliamentary committee which is also responsible for the budget approval of the office holder; and
- A statutory office holder who is required to report to a specific parliamentary committee.²

The report states:

The cornerstone Officers of Parliament have been Auditors-General and Ombudsmen, who are tasked with scrutinising the performance of the Executive Government and report the outcomes of such scrutiny to Parliament. More recently, Electoral Commissioners have been added to this grouping, 'on the basis that their office protects fairness in elections on behalf of Parliament and its electors'.³

As a result of this observation, this present inquiry is reviewing 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.

This submission addresses whether the Members of the ACT Electoral Commission could be considered Officers of the Parliament within this framework, and what the implications of such a change could be.

² Standing Committee on Public Accounts (ACT), Report No. 15, *Inquiry into the ACT Auditor-General Act 1966*, February 2001, pages 19-20.

³ *Ibid*, page 19; quoting Victorian Public Accounts and Estimates Committee (VICPAEC) (2006) *Report on a Legislative Framework for Independent Officers of Parliament*, February, Parliament of Victoria, p. 24; Grove, R. (2002) 'Officers of Parliament and how their work impacts on the House', Paper presented by Clerk of the Legislative Assembly of NSW, 33rd Conference of Presiding Officers and Clerks, Brisbane, Queensland.

Could the Members of the ACT Electoral Commission be considered Officers of the Parliament?

The ACT Electoral Commission is established under the ACT's *Electoral Act 1992*.

The Commission consists of three statutory office holders – the Chairperson, the Electoral Commissioner and the other Member. The Chairperson and the Member hold office on a part-time basis, while the Electoral Commissioner is employed on a full-time basis. The Electoral Commissioner is assisted by permanent staff employed under the *Public Sector Management Act 1992* and temporary staff employed under the Public Sector Management Act and the Electoral Act.

The full Electoral Commission carries a range of overarching functions and the power to conduct reviews of decisions. The Electoral Commissioner also carries a range of powers vested in that office alone, generally related to the more detailed conduct of elections.

While the report of the Standing Committee on Public Accounts refers to the office of the Electoral Commissioner, any alteration of the status of the Commissioner would also need to apply to the other members of the Electoral Commission.

The current legislative position of the Electoral Commission reflects some but not all of the characteristics of an Officer of the Parliament as identified by the Standing Committee on Public Accounts. These are discussed below.

A statutory office holder that has a unique relationship with the parliament

The Electoral Commission has a unique relationship with the parliament. It is the body responsible for electing the members of the parliament at general elections. It elects members to fill casual vacancies. It sets electoral boundaries for the parliament, as part of an independent body that also includes the chief planner, the surveyor-general and another independent person. It conducts information campaigns about the electoral process. It also conducts a range of elections for other organisations.

A statutory office holder that is independent of the executive government

It is well accepted in Australia that it is essential that the conduct of parliamentary elections should be independent of the executive government. The ACT's Electoral Act is structured to confer a range of powers on the Electoral Commissioner and the Electoral Commission that are not subject to direction by the executive. However, there are elements of the current legislative framework that place some limitations on the independence of the Electoral Commission. These are discussed below.

A statutory office holder that is created to provide a check on the arbitrary use of power by the executive

The evolution of the modern Electoral Commissions in Australia was in large part driven by the perceived need to remove any control exercised by members of the executive over the conduct of elections for the parliament. As the executive (that is, the Ministry) is constituted of elected members of parliament, there is a clear conflict of interest inherent in giving members of the executive a role in conducting elections for members of parliament. The establishment of independent electoral management bodies has largely served to remove this conflict of interest.

A statutory office holder established in a generally standard way by an Act of Parliament

The Electoral Commission is established under the ACT's Electoral Act. The provisions related to the makeup, appointment and powers of the Electoral Commission are based on similar provisions in the *Commonwealth Electoral Act 1918*, and are in turn similar to the provisions in the equivalent electoral legislation in the other Australian States and the Northern Territory.

The fact that the Electoral Commission is established by an Act of Parliament and the fact that it is expressly largely independent of executive direction, emphasise the point that the Commission is a creation of the parliament, not the executive. Its functions are primarily aimed at servicing the need of the parliament to have elections conducted for its members that are free and fair and are independent of executive control.

A statutory office holder that is appointed and dismissed with parliamentary involvement

The members of the Electoral Commission are appointed by the executive in the ACT, however the executive must consult with the leader of each political party in the Assembly and with each independent Member of the Assembly prior to making an appointment to the Commission. Instruments of appointment of Commission members are also disallowable instruments. Therefore, while appointments to the Commission are not made by the parliament, the Members of the parliament must be consulted on the appointments and collectively the Members have the power to disallow an instrument of appointment if they see fit.

Generally, only the parliament has the power to dismiss a member of the Electoral Commission, and then only for "misbehaviour or physical or mental incapacity"⁴. The executive can suspend a Commission member from duty for these reasons, but must seek the approval of the Assembly for such a suspension to lead to a dismissal.

A statutory office holder which is overseen by a parliamentary committee which is also responsible for the budget approval of the office holder

This characteristic is not a feature of the current governance regime of the Electoral Commission. The Commission currently sits as an agency within an executive portfolio and is subject to scrutiny by the relevant Minister and by the Minister's Directorate. However, the Commission's activities are also regularly subject to oversight by various parliamentary committees, particularly the Standing Committee on Justice and Community Safety.

The Commission's budget is effectively provided by the executive through the normal budget process, with the relevant Assembly committee given only an oversight role. As discussed below, the Commission's funding is not provided directly to the Commission in the ACT budget process. Rather, an amount for "electoral services" is allocated in the budget to the relevant administrative unit, which at its own discretion retains a portion of those funds to cover administrative overheads and allocates the remaining funds to the Electoral Commission. The Director-General of the relevant administrative unit

⁴ *Electoral Act 1992* (ACT), section 17. Note a Commission member can summarily be dismissed by the executive for being absent without leave from 3 consecutive Commission meetings, for failing to disclose a conflict of interest or for being convicted of an offence punishable by imprisonment for 12 months or longer.

retains ultimate control of those funds, while the Electoral Commissioner is given financial powers by virtue of delegations from the Director-General.

A statutory office holder who is required to report to a specific parliamentary committee

This characteristic is also not a feature of the current governance regime of the Electoral Commission. The Commission currently provides formal reports to the relevant Minister, who is required to table such reports in the Assembly within specified times.

However, the Commission's activities are regularly subject to oversight by various parliamentary committees, particularly the Standing Committee on Justice and Community Safety. In its report on the 2008 election, the Commission recommended that the conduct of each general election should be routinely referred to an Assembly committee in similar fashion to the electoral matters committees that exist in the Commonwealth parliament and in several other States. As a result of that recommendation, the current ACT Government has referred the Commission's report on the 2008 election to the Standing Committee on Justice and Community Safety. While this is not an ongoing reference to a standing electoral matters committee, this inquiry could set a precedent for future routine electoral matters inquiries.

The importance of having an independent Electoral Commission

In its submission to the Standing Committee on Administration and Procedure's inquiry into the Latimer House Principles of 27 May 2009, the Commission argued that a case can be made for including electoral commissions in the list of independent bodies essential to the health of a democratic governance model.⁵

In their 2003 paper, 'Australian Electoral Law: A Stocktake', Graeme Orr, Bryan Mercurio and George Williams state:

Ultimately, the most important institutional measure in Australia for achieving free, efficient and reliable elections is ensuring electoral authority independence. Elections in Australia are characterized by centralized, professional and, by and large, completely independent electoral commissions.⁶

In his 2007 paper, 'Australia's Electoral Management Bodies – Degrees of Independence', Norm Kelly states:

it is widely accepted that, to ensure free and fair elections, electoral management bodies should be independent of the government of the day and of any political partisan connections.⁷

⁵ Some content from the ACT Electoral Commission's submission of 27 May 2009 to the Standing Committee on Administration and Procedure's inquiry into the Latimer House Principles has been incorporated in this submission.

⁶ Graeme Orr, Bryan Mercurio and George Williams (2003) 'Australian Electoral Law: A Stocktake', *Election Law Journal* 2(3), pp 399-400.

⁷ Norm Kelly (2007) 'Australia's Electoral Management Bodies – Degrees of Independence', Paper presented at the 2007 APSA conference, Monash University, p 3.

The importance of independent electoral authorities is also recognised internationally:

Historical evidence, coupled with conclusions by observers and advocacy by electoral professionals, almost unanimously indicates that independent electoral bodies serve democratic stability better than elections run by the executive branch and that permanent EMBs [Election Management Bodies] are more cost-effective than temporary ones.⁸

The status, powers and independence of the election administration and administrators, and the impartiality and transparency with which they act and are seen to be allowed to act, are fundamental to the integrity of an election. The composition, mandate and status of an election management body ... should be clearly defined to ensure its independence and non-partisan character.⁹

Every Australian federal, State and Territory parliament has recognised the need for independent electoral commissions, with the gradual adoption of statutory electoral commissions beginning with the establishment in 1984 of the first commission, the Australian Electoral Commission, and ending with the creation of the most recent Electoral Commission in South Australia in 2009. The ACT Electoral Commission was created in 1992.

However, while every Australian jurisdiction has an electoral commission, and there is general agreement that electoral commissions should be independent, the degree to which each electoral commission is "independent" varies between the jurisdictions. Paul Dacey from the Australian Electoral Commission has argued that independence is not an absolute, so that an electoral commission is either independent or not; rather he argues that the extent of independence can fall on a continuum, and that where an electoral commission falls on that continuum will depend on the extent of its institutional independence in a number of different dimensions.¹⁰

Elements of independence

Key elements of statutory independence for electoral authorities have been identified by the International Institute for Democracy and Electoral Assistance as:

- Institutional independence from the executive;
- The ability to exercise full responsibility for electoral functions;
- Power to make policy decisions independently under the legal framework;
- Composed of members outside the executive with security of tenure;

⁸ Rafael López-Pintor (2000) *Electoral Management Bodies as Institutions of Governance*, Bureau for Development Policy, United Nations Development Programme, p 12

⁹ Commonwealth Secretariat (1997), *Good Commonwealth Electoral Practice: A Working Document 1997*, p 6.

¹⁰ Paul Dacey (2005) 'What do "Impartiality", "Independence" and "Transparency" Mean? – Some Thoughts From Australia'. *Improving the Quality of Election Management*, Conference of Commonwealth Chief Election Officers, New Delhi, India, p 7.

- Ownership and management of a budget independent of day-to-day government control that does not fall within the budget of a government ministry;
- Autonomy to determine staffing needs and appointments; and
- Electoral authorities should not be part of a department of state.¹¹

Ensuring the independence of the ACT Electoral Commission

On most of these measures, the ACT Electoral Commission is independent of government to a great extent. Throughout its history, from 1992 to the present, the Commission has consistently conducted its affairs with independence and integrity. However, it is arguable that there are further steps that could be taken to strengthen the legislative guarantees of the Commission's independence.

The extent of the Commission's independence is regulated by the legislative framework in the ACT that establishes the Commission, gives it functions, and regulates its operations, including its personnel and finance powers. This legislative framework is discussed below.

The Electoral Act 1992

The *Electoral Act 1992* establishes both the 3-person Electoral Commission and the separate office of the Electoral Commissioner and the staff appointed to assist the Commissioner. It gives the Commission and the Commissioner a wide range of functions that are not expressed as subject to the direction of a Minister, the executive or a directorate.

The explicit powers given to the Minister and the executive under the Electoral Act are very limited and do not impinge on the Commission's independence. They include: the power to request advice of the Commission on specified matters; the power to receive and table Commission reports; the power to appoint Commission members (subject to consultation with Assembly Members); the power to determine their terms and conditions of employment and approve their leave; the power to suspend a Member from duty for misbehaviour or physical or mental incapacity (with such suspension subject to Assembly confirmation before a Commission member can be removed from office); and the power to make arrangements with the Commonwealth and the States for interchange of electoral staff. The Chief Minister also has the power to enter into joint roll arrangements with the Commonwealth.

The ACT's Electoral Act was modelled on the Commonwealth Electoral Act. In particular, the structure of the Commission and the office of the Commissioner and their powers are very similar in the two Acts. Dacey refers to advice from the Australian Government Solicitor in relation to the Australian Electoral Commission that is also applicable to the ACT Electoral Commission, which states:

Whilst technically part of the executive, the Commission is an independent statutory authority which, in view of its prescribed functions in relation to

¹¹ International Institute for Democracy and Electoral Assistance (2006) *Handbook on Electoral Management Design*, pp 7-9;
ACE Project, "What an Independent Model EMB Is, May Be, and Is Not",
<http://aceproject.org/ace-en/topics/em/ema/ema02/ema02a>, accessed on 8 May 2009.

electoral matters, necessarily carries out its duties free from any direction or advice given by the executive government.¹²

Dacey also lists a range of indicators that point to the statutory independence of the Australian Electoral Commission.¹³ That list can be applied to the ACT Electoral Commission as follows:

- The Commission is established as a legal entity separate from the ACT executive and the ACT Legislative Assembly;
- The Commission is not subject to ministerial or government direction in relation to the performance of its functions under the electoral legislation;
- The Commissioner is explicitly entitled to appear in a proceeding in the Court of Disputed Elections in which the validity of an election is being disputed;
- The Commissioner is empowered to seek injunctions restraining breaches or anticipated breaches of the electoral law;
- The Commissioner has power to investigate compliance with the funding and disclosure laws and other electoral laws;
- The Commission has the right to determine and express its own views on electoral matters without being subject to ministerial or governmental direction or approval;
- Members of the Commission are appointed for fixed terms with limited scope for their removal, with their remuneration determined by the Remuneration Tribunal; and
- The Commissioner has chief executive powers over the Commissioner's staff.

It can be seen that the independent nature of the Commission and the Commissioner under the Electoral Act is relatively well established, at least in relation to the exercise of electoral functions under the Electoral Act.

However, the Commission's independence under the Electoral Act is effectively determined by reading between the lines of the powers given to the Commission and the Commissioner, including those listed above. The Commission suggests that it would be desirable to amend the Electoral Act to explicitly express the Commission's independence. For example, the Tasmanian *Electoral Act 2004* states at section 10 "The Commission is not subject to the direction or control of the Minister in respect of the performance or exercise of its functions or powers."

An equivalent provision in ACT law is section 46 of the *Public Sector Management Act 1994*, which provides "The clerk [of the Legislative Assembly] is not subject to direction by the Executive in the exercise of the clerk's functions."

¹² Dacey (2005), p 5.

¹³ Dacey (2005), p 7.

The Commission suggests that a similar provision should be inserted in the ACT's Electoral Act, with a reference to the separate roles of the Commission and the Commissioner. An explicit statement in legislation along these lines would serve to prevent the Commission's independence from ever being eroded through any failure to appreciate the significance of the Commission's independence.

However, even with the insertion of such a provision in the Electoral Act, the Public Sector Management Act and the *Financial Management Act 1996* could still be interpreted as permitting some executive or directorate control of the Commission and the Commissioner.

The Public Sector Management Act 1994

The Public Sector Management Act defines 'government agency' to mean 3 distinct and mutually exclusive types of agencies: an administrative unit; a territory instrumentality; and a statutory office-holder and the staff required to assist the statutory office-holder. The office of a statutory office-holder and the staff required to assist the statutory office-holder, such as the Electoral Commissioner and his or her staff, is a separate agency from, and not contained within, an administrative unit.¹⁴

Section 25 of the Public Sector Management Act provides that a statutory office holder has all the powers of a chief executive¹⁵ in relation to the staff employed to assist the office holder, where the Chief Minister makes a notifiable instrument to that effect or where a territory law gives all the powers of a chief executive to the statutory office-holder. Such an instrument has been made in respect of the Electoral Commissioner.

It is of concern that the Electoral Commissioner's chief executive powers are dependent on an executive instrument that could be unmade at any time. It is noteworthy that other equivalent statutory officer holders, such as the Director of Public Prosecutions, the Auditor-General and the Clerk of the Legislative Assembly, each have chief executive powers under the Public Sector Management Act specified in relevant legislation. The Commission suggests that the Electoral Act should be amended to make a similar provision to ensure the independence of the Commissioner and the staff employed to assist the Commissioner.

Section 14 of the Public Sector Management Act gives the Chief Minister the power to make administrative arrangements, allocating to a Minister responsibility for 1 or more administrative units and allocating to an administrative unit responsibility for all or any of the enactments and matters for which the relevant Minister is responsible.

¹⁴ Legal advice provided by the Australian Capital Territory Government Solicitor's Office, 11 September 1998.

¹⁵ In this submission, the term "powers of a chief executive" are intended to refer to the powers that may be conferred on a statutory office-holder under section 25 of the Public Sector Management Act, meaning the following powers in relation to the office-holder's staff as if the staff were employed in an administrative unit: the powers of the head of service relating to the appointment, engagement and employment of people; and the powers of a director-general.

Section 28AA of the Public Sector Management Act gives the director-general of an administrative unit the responsibility, under the relevant Minister, for the unit's administration and business. The current administrative arrangements allocate responsibility for the Electoral Act and for electoral matters to the Attorney-General and the Directorate of Justice and Community Safety.

It is the Commission's view that the "responsibility" for the Electoral Act and for electoral matters allocated to the Attorney-General and the Directorate of Justice and Community Safety extends only to those matters for which the Minister is legally responsible. As discussed above, the conduct of the functions given to the Commission and the Commissioner are the responsibility of the Commission and the Commissioner and are not subject to the direction of the Minister. In addition, the office of the Commissioner is not part of the relevant administrative unit. While the Minister and the Minister's directorate have an oversight role and the Minister has the ability to request advice from the Commission, these roles do not permit the Minister or the Minister's directorate to direct the Commission or the Commissioner in the course of their functions.

Again, this interpretation of the relevant law involves some reading between the lines. To ensure that the provisions of the Public Sector Management Act cannot be seen as compromising the Commission's or the Commissioner's independence, the Commission suggests that the explicit legislative statement of the Commission's independence should also make it clear that the Public Sector Management Act does not override the independence of the Commission guaranteed in the Electoral Act.

The Financial Management Act 1996

The final area in which the Commission's independence is arguably limited is its budgetary situation under the Financial Management Act. In this case, the Commission's financial position clearly fails the independence test of "ownership and management of a budget independent of day-to-day government control that does not fall within the budget of a government ministry".

Orr, Mercurio and Williams state:

Practical independence of electoral agencies can only be achieved through long-term guarantees of adequate resourcing and full budgetary freedom. Not all states or territories, for instance, commit ample resources to electoral administration.¹⁶

While explicit recognition is given to statutory officer holders and their staff in the Public Sector Management Act, to the extent that these constitute discrete agencies under that Act, the Financial Management Act effectively ignores statutory office holders and their staff, and reads as if the entire ACT Public Service consisted of administrative units and Territory authorities (that is, bodies corporate established by Acts – the ACT Electoral Commission is not a body corporate). Consequently, budgeted funds for statutory officer holders are allocated to administrative units. Responsibility for those funds is allocated to the director-general of those administrative units.

¹⁶ Orr, Mercurio and Williams (2003), p 400.

Consequently statutory officer holders only receive funds through the administrative unit listed in the administrative arrangements as being responsible for the relevant legislation. Under this arrangement, statutory officer holders may only spend funds as a delegate of the relevant administrative unit director-general. While this arrangement has generally worked satisfactorily in practice in relation to the Electoral Commission, it has the potential to compromise the statutory independence of statutory officer holders, as they are reliant on an external body for funding – a body that is subject to the direction of a Minister.

An issue of note is that the amount of funds allocated in the budget papers for electoral services is not the amount allocated to the Electoral Commission. The amount in the budget papers is allocated to the Directorate of Justice and Community Safety administrative unit, which at its own discretion retains a portion of those funds to cover administrative overheads and allocates the remaining funds to the Electoral Commission. In effect, the budget for the Electoral Commission is not the electoral services amount voted on by the Legislative Assembly; rather it is an amount decided effectively by the director-general of the directorate.

While this has not been an issue in practice, in theory there is nothing to prevent the directorate from deducting funding from the electoral services budget to fund other portfolio initiatives or to find portfolio savings that are not directly related to electoral services. An issue that has arisen is related to the funding cuts announced in the 2009/2010 budget and continued since, whereby large agencies have had funding reduced by 1%, and small agencies have had funding reduced by 0.5%. As the Commission is funded through the large agency JACS, it has been required to take a 1% cut, even though by any measure the Commission is one of the ACT's smallest agencies.

The other potential threat to the Commission's independence occasioned by these financial arrangements is the possibility that the director-general of the directorate may seek to use his or her financial controls and responsibility to effectively direct the Commission or the Commissioner in the course of their functions (for example, by vetoing expenditure on particular electoral services). While this has not happened in practice, the legislative regime arguably gives this power to the director-general of the directorate.

One significant financial power that has not been delegated to the Electoral Commissioner is the power to enter into a single-select supplier contract over a specified threshold. Again, while this has not been a problem in practice, the fact that the Commissioner is required to seek approval of the JACS director-general before entering into a single-select supplier contract potentially gives the director-general the power to veto expenditure on particular electoral services.

The existing financial regime also arguably places the director-general of a directorate in an invidious position, as the Financial Management Act makes the director-general "responsible" for monies spent by otherwise independent statutory officer holders.

The Commission recognises that a significant reason why the ACT's small statutory officer holder agencies, such as the Commission, are not treated for budget purposes as discrete agencies is the small size of the agencies. However, the Commission also notes that it is the only Electoral Commission in Australia that is not directly budget-funded. It is noteworthy that the ACT model of Electoral Commission funding and relationship with its portfolio department was explicitly rejected by the Northern Territory when it established its new Electoral Commission in 2004. The Commission considers that small size of an agency should not justify a diminution of statutory independence.

The Commission therefore suggests that relevant legislation should be amended to specifically refer to allocation of funds to the Commission in a manner that respects the Commission's independence. In particular, the Commission suggests that budget allocations should be made directly to the Commission with amounts specified in the budget papers, rather than the present arrangement that divorces the Legislative Assembly from allocating funding directly to the Commission. Similarly, the Commissioner should be allocated direct responsibility for monies spent under the Commission's budget allocation.

The Commission also notes that many of the issues raised above may apply to other statutory officer holders in the ACT.

Whether it would be appropriate for the ACT Electoral Commission to be Officers of the Parliament

Implicit in the concept of establishing Officers of the Parliament is the notion that some statutory office holders are primarily providing a service to or on behalf of the Parliament that involves oversight of, and/or independence from, the executive arm of government. Therefore, when considering the separation of powers doctrine which essentially divides public bodies into the parliament, the executive and the judiciary, these statutory office holders arguably sit more naturally as agencies of the parliament rather than agencies of the executive or the judiciary.

To date, the ACT Electoral Commission (like all other Australian electoral authorities) has been treated as an agency of the executive arm of government.

This arrangement has the potential to lead to tension between the Commission's role as an independent statutory authority and its role as an agency in a Ministerial portfolio. As discussed above, the Commission's independence from the executive is not without conditions, particularly in relation to finances.

As an agency within a Ministerial portfolio, the Commission is routinely asked to comply with and to report on implementation of government initiatives. While the Commission carefully guards its independence in dealing with such requests, there is an expectation that all executive agencies, including statutory office holders, will comply with various whole of government policies. Where these policies relate to non-partisan issues, such as employment conditions and health and safety measures, the Commission has no difficulty in complying. However, where such policies are arguably partisan – such as directives relating to client service delivery (for example, a policy related to giving preferred treatment to particular community groups) – this may give rise to situations where the Commission could be seen to operate as an arm of the executive rather than as an independent body.

While in practice the Commission is careful to avoid such a perception, moving the Commission out of a Ministerial portfolio and categorising the Commission members as Officers of the Parliament could avoid the potential for this tension.

As discussed above, the Electoral Commission satisfies many of the characteristics identified as appropriate for Officers of the Parliament. However, such a move would raise several implications. These are discussed below.

The relationship between the Electoral Commission and the Minister

The Electoral Commission arguably has a special relationship with its portfolio Minister. Under section 7 of the Electoral Act, the Commission has the functions of advising the Minister on matters relating to elections, and considering, and reporting to the Minister on, matters relating to elections referred to it by the Minister. Under these functions, the Commission, and the Commissioner, routinely provide briefs and reports to the Minister. The Commissioner also routinely provides advice to the Justice and Community Safety directorate on electoral matters, and provides comments on Cabinet submissions on matters related to the Commission. The Commission also assists in the preparation of Cabinet submissions for the Minister on electoral matters and advises on answers to Ministerial correspondence.

While these advisory functions are similar to functions carried out by directorate officers, they are consistent with the Commission's independent status. The advice provided by the Commission is made on the basis that the Commission is presenting its independent views. It is common for the Commission to express views in its reports to the Assembly that are not agreed with by the Minister or the Government of the day.

The Commission also has the function of providing advice on matters relating to elections to the Assembly, the executive, administrative units, Territory authorities, political parties, Members of the Assembly and candidates at elections. Under this function, the Commission can and has provided advice to non-Government Members in similar fashion to the way in which advice is provided to the Minister. For example, the Commission routinely provides confidential advice to non-Government Members on proposed amendments to the electoral legislation.

Removing the Commission from the Minister's portfolio and establishing the Commission members as Officers of the Parliament could have the potential to alter the special relationship between the Commission and Minister. However, the Commission is careful under the existing arrangement to preserve its independent status when providing advice to both the Minister and other Assembly Members. The Commission does not consider that locating the Commission within the relevant Minister's portfolio is crucial to the maintenance of the advisory function of the Commission. On the contrary, explicitly identifying the Commission as Officers of the Parliament with a specific function of providing advice to the Minister and to other Members could be seen as strengthening the independent status of the Commission without compromising the quality or quantity of the advice provided.

The Hawke Review

In the review conducted by Allan Hawke, *Governing the City State: One ACT Government – One ACT Public Service*, published in February 2011 (the Hawke review), the report stated at pages 102-103:

It is in the number and role of statutory office holders that the propensity for the ACT Government and ACTPS to adopt models in place in state governments without necessarily analysing the need for, and intended role of, such offices is perhaps most evident. There are clear examples of offices which must exist because their roles at arm's length from the government are part of the foundation of the ACT's system of government and accountability frameworks. Offices in this grouping would include the Auditor-General, the Director of Public Prosecutions, the Human Rights Commission, and the Electoral Commissioner.

In keeping with their independence, these offices should receive appropriation funding in their own right. While the level of resourcing for those officers is properly a matter for the Government to determine in setting the Budget, it is appropriate that funding for independent office holders be appropriated directly to their offices.

Accordingly, the Hawke review made the following recommendations at page 9 in relation to statutory offices:

25. Apply the Public Interest Map to the need for, and role of, statutory office holders.
26. The proposed Chief Minister's Department adopt a standard model for the appointment and terms and conditions for fulltime and part-time statutory office holders.
27. Unless there is a clear reason not to, vest statutory decision making powers in public servants.
28. Review the arrangements of ACTPS part-time statutory office holders.
29. Subject to the Review proposed at Chapter 3, statutory office holders should receive appropriation funding in their own right.

The Commission understands that the review of the arrangements applying to statutory office holders set out in the above recommendations has not yet commenced. The Commission supports such a review and reiterates its view that the Electoral Act and other appropriate legislation should be amended to strengthen the independence of the Commission.

The Commission considers that the proposal in the Hawke review to directly fund statutory office holders is not inconsistent with the proposal to make the Commission members Officers of the Parliament. It would be appropriate to consider the two issues as part of the proposed review of statutory office holders.

Providing direct budget funding to the Commission

Should the Hawke review recommendations discussed above lead to the Commission being directly budget funded, this would increase the independent status of the Commission.

An issue that would need to be addressed if the Commission is to be directly budget funded, whether or not the Commission members are made Officers of the Parliament, is how the Commission's finances and other corporate services would be administered. At present, the office of the Commissioner includes 5 permanent officers employed under the Public Sector Management Act, including 2 officers with financial (and other) duties. If the Commission was to carry the same finance and corporate responsibilities as carried by an administrative unit, it would need additional resources to meet these needs.

The Commission considers that, rather than employing additional financial and corporate management staff, it would be appropriate for the Commission to contract a larger agency to carry out financial and corporate functions on its behalf. At present, financial management and other corporate functions that relate to the Commission are carried out by officers in the Justice and Community Safety directorate and by the ACT Government Shared Services unit in the Treasury directorate. The Commission considers that it would be appropriate that similar arrangements could continue on a service level agreement basis, with appropriate funding arrangements.

If the Commission members were to be made Officers of the Parliament, an option might be to share the Commission's corporate support arrangements with other Officers of the Parliament. For example, it might be possible for the Commission to adopt shared corporate support with the Auditor-General's office and/or the Legislative Assembly secretariat.

The impact any such changes will have on the budget for the Commission will depend on the model chosen for providing corporate support to the Commission. As the current budget funding for electoral services includes an amount used by the Commission's parent directorate to cover corporate overheads incurred by the directorate in assisting the electoral services function, some or all of this budget may be redirected to provide the Commission with corporate services under a different model. The Commission is of the view that moving to a direct funding model should not lead to substantially increased costs for electoral services.

ACT Electoral Commission, 20 July 2011