



Submission by the ACT Ombudsman

ACT PUBLIC SECTOR REVIEW

CONDUCTED BY DR ALLAN HAWKE AC

Submission by Mr Allan Asher
ACT Ombudsman
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INTRODUCTION AND SUMMARY

On 3 September 2010, the ACT Chief Minister, Mr Jon Stanhope MLA announced a review of the ACT Public Sector to be conducted by Dr Allan Hawke AC.

Dr Hawke was asked to examine:

- the capacity of existing public-sector structures to support the government of the day with strategic and direction-setting advice;
- effectiveness in delivering on government policies and objectives;
- performance and accountability mechanisms;
- how existing structures differentiate between the roles of policy and regulation;
- across-government coordination of service delivery; and
- structures that would improve resilience and innovation across the public sector.

The Commonwealth Ombudsman has been providing ombudsman services to the ACT jurisdiction since the inception of the Office over thirty-two years ago and we welcome the opportunity to contribute to this review.

BACKGROUND

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

- correcting administrative deficiencies through independent review of complaints about Australian 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 and like powers.

The Commonwealth Ombudsman has reported to the ACT Legislative Assembly on its ACT jurisdiction activities, since 1989, and before that to both the Commonwealth Parliament and the ACT House of Assembly, since 1977.

In 2009-10 the ACT Ombudsman jurisdiction received 676 approaches, of which 507 were about ACT Government agencies and 169 were about ACT Policing. This compares to 1977-78 when we received 94 complaints, 89 relating to various parts of the ACT administration and 5 about ACT Policing.

Our work in the ACT jurisdiction in recent years has promoted improvements in ACT public administration. Examples noted in previous [ACT Ombudsman annual reports](#) include:

- our involvement in the City Watchhouse review which resulted in changes in procedures as well as a far more reaching consideration of the way in which the Watchhouse was operated and staffed

- our investigation of a complaint about the interaction between the ACT Planning Authority (ACTPLA) and ActewAGL resulted in procedures being put in place to promote better co-ordination between ACTPLA and other agencies so as to ensure matters didn't fall between the cracks and clients disadvantaged
- our investigation of a complaint about the detention of a minor highlighted the need for the ACT Police to refine its conciliation process. Subsequently, the processes were amended to ensure that all complaint issues should be identified and dealt with appropriately
- our own motion investigation into the ACT Treasury's handling of revenue objections made a number of recommendations relating to the need to review procedures, standards, record keeping and case management. The Commissioner for Revenue conducted such a review which resulted in increased staffing in the section responsible for handling appeals to reduce timeframes for making decisions on objections, improved record keeping and case management processes.

As part of fulfilling our role to contribute to public discussion on administrative law and public administration we consider the making of submissions to, or commenting on, a range of administrative practice matters, cabinet submissions and legislation is a way of achieving that outcome.

For example, in our most recent ACT Ombudsman annual report we indicated that although our inspections of the Child Sex Offenders Register found that ACT Policing was generally compliant with their obligations under the *Crimes (Child Sex Offenders) Act 2005* (ACT) and was maintaining the Register appropriately, we had raised a concern with the Minister that the Act might not be achieving its aim of reducing the likelihood of offenders reoffending. This was because the Act, as it currently stands, does not prohibit offenders having contact with children, nor does it give police powers to monitor offenders. We recommended to the Minister that he consider legislative amendments to the Act to enable police to monitor offenders and take action when they identify a child at risk.

A NEW ERA FOR ACT GOVERNMENT OVERSIGHT?

In the just over twenty years since self government in the Australian Capital Territory, there is much in the field of accountability about which successive ACT Legislative Assemblies can be proud. The early years saw the adoption and reform of legislation relating to the auditor-general, public interest disclosure, public sector management, the release of executive documents, parliamentary scrutiny of statutory appointments and discrimination, all point to a jurisdiction with a maturing sense of self determination setting the foundations for a strong emphasis on integrity, transparency and accountability.

The past decade, however, has seen a somewhat slowing in the pace at which the ACT has kept in step with other jurisdictions in relation to broader integrity issues. For instance, while other jurisdictions are developing or have passed new legislation in relation to anti-corruption, personal privacy, freedom of information, lobbying activities, and parliamentary integrity, the ACT is still mostly relying on Australian Government agencies to provide these services or on legislation which was largely passed from the Commonwealth when self government was granted in 1989.

There is much that could be drawn from developments in other jurisdictions, most notably the recent reviews of integrity and accountability which have been conducted in Queensland, Tasmania and Victoria, and currently being conducted in South Australia.

One of the key themes which threads through the reports of these reviews is one of integration. Given the relatively small size of the ACT jurisdiction, this theme would be of significant interest to the ACT.

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 stand alone 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 provided 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 stand alone 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.

A Broader Integrity Focus

An enhanced integrity agenda should clearly not just apply to public servants, but should also hold the other arms of government to account. With this in mind, consideration should be given to how complaints about members of the ACT Legislative Assembly should best be handled, and what is the most appropriate mechanism for receiving and investigating complaints about members of the judiciary and tribunals.

The ACT Legislative Assembly has considered issues relating to Codes of Ethics and Conduct for its members over an extended period of time, and has in past years appointed an Integrity and Ethics Advisor, however, the current infrastructure does not provide an avenue for members of the community to make complaints about MLAs' conduct, or for such complaints to be properly investigated. Consistent with the position in other jurisdictions, members of staff of MLAs should similarly be covered by these provisions.

Similarly, the Commonwealth Parliament has recently considered issues relating to complaints processes for the judiciary, through a report by the Senate Standing Committee on Legal and Constitutional Affairs, on *Australia's Judicial System and the Role of Judges*. Amongst other things, the Standing Committee recommended that the High Court adopt a written complaints policy and that a judicial commission be established to handle complaints against members of the judiciary. While the size of the ACT judiciary and tribunals is relatively small, that doesn't obviate the need for a robust complaints mechanism.

Consideration should be given to specific legislation which implements Codes of Ethics across all three arms of government, with a focus on addressing the distinct issues which arise in the public sector, parliamentary and judicial arenas. Such legislation would include avenues for members of the community to complain about perceived breaches of any of the three Codes and offences for any proven misconduct in public office. Regular public reporting about the complaints received in these areas is a key element of ensuring accountability of the processes.

Building Complaints into Agency Business

Our work with ACT Government agencies over the past three decades has brought to light a range of inconsistent and, in some cases, non-existent complaint handling practices. While some agencies have semi-legislated processes which are mostly followed, other agencies have no systems or processes in place whatsoever.

There would be great advantage to establishing a baseline of acceptable complaints handling systems which all agencies would be required to meet, so that the community is able to expect the same standard of response to their complaint, regardless of the agency being complained about.

The Queensland Government has been particularly successful in this regard, through use of their public service legislation. The Queensland Public Service Commission has issued a formal Directive (No. 13/06), which mandates that state public sector agencies must have a complaint management system in place, that meets particular benchmarks. The Directive provides agencies some flexibility relating to their specific size and structure, while maintaining a core set of standards which comprise the minimum requirement on agencies.

While the ACT legislation does not appear to allow for Directives to be issued by the Commissioner for Public Administration, it does allow for the setting of 'management standards', which may relate to "the improvement of management practices and accountability". As complaint management processes are ultimately both about management improvement and accountability, we would strongly support the development of a management standard in relation to complaints processes, and believe that our [Better Practice Guide](#) in this area would provide a useful basis for such a standard.

Based on our Better Practice Guide, the standard would require agencies, when developing a new complaints handling system or when monitoring or evaluating an existing one to have regard to five elements of effective complaint handling:

- Culture – Agencies must value complaints as a means of strengthening their administration and improving their relations with the public
- Principles – An effective complaint handling system must be modelled on the principles of fairness, accessibility, responsiveness, efficiency and integration
- People – Complaint handling staff must be skilled and professional
- Process – The seven stages of complaint handling – acknowledgment, assessment, planning, investigation, response, review, and consideration of systemic issues – should be clearly outlined
- Analysis – Information about complaints should be examined as part of a continuous process of organisational review and improvement.

Following the adoption by the Commissioner for Public Administration of a complaints processes standard, a useful first step would see an assessment undertaken of complaint handling systems of all ACT agencies against the standard. We would see the ACT Ombudsman as well placed to undertake this project, subject to the provision of adequate funding.

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.

Unfinished Business?

In the 2004 publication, *The Right System for Rights Protection*, one of the key unresolved questions was the appropriate location of the official visitors for corrections, juvenile justice and mental health. Since that period, there have also been discussions about proposals for official visitors in the disability sector.

In considering how best to support the Official Visitors, it may be instructive to consider the models in other jurisdictions. The NSW Government moved responsibility for official visitors in the aged, disability and child protection sectors to the NSW Ombudsman when it merged the Community Services Commission and the Ombudsman in 2002. The Tasmanian Government has recently moved in the same direction, incorporating mental health and prisons official visitors into their Ombudsman's office.

Official visitors programs provide an important, regular and less formal avenue for people in care or custody to raise issues and express concerns about their circumstances. It is essential that they are given a properly resourced and independently supported mechanism from which to conduct their activities, and that this mechanism is separate from the agency in which they are conducting their activities. Governments across Australia are recognising the importance of these functions and expanding them into a range of areas including child

protection, foster care, aged care, disability services, boarding houses, corrections and juvenile justice.

The other area outstanding from the 2004 report is that of how to manage complaints about those community services funded by government, but provided by the non-government and private sectors. Again the NSW model is instructive, in that its legislation recognises that accountability should follow funding, with the NSW Ombudsman having jurisdiction over agencies providing community services who are funded, licensed or authorised by the Department of Community Services, the Department of Ageing, Disability and Home Care, the Minister for Community Services or the Minister for Ageing and Disability Services, including licensed boarding houses and fee-for-service agencies.

Protecting the Vulnerable

Other governments have also recognised the importance of undertaking systemic inquiries into deaths which occur while in the care or custody of the state. A number of Ombudsmen across Australia have specific responsibilities for conducting child death reviews, disability care death reviews, and more recently, aged care death reviews. Separate from coronial inquests, these reviews are much more immediate and consider the administrative, systemic and procedural issues associated with the care situation and the death, as opposed to necessarily identifying the person responsible for the death. It is important to recognise that death shouldn't be the only prompt for a review of service delivery systems and practices. The ACT may wish to consider whether a 'critical incident' review function should also be established to consider those circumstances where the death of a person in care or custody may have been narrowly avoided, and how such situations can be better managed in the future.

In the important area of child protection, the NSW Government has recognised the need for an additional level of scrutiny of those agencies which employ people to work with children. For over a decade now, the NSW Ombudsman has had the responsibility for scrutinising certain employers' investigations of reportable allegations and convictions against employees, and to keep the systems for preventing reportable conduct and handling reportable allegations under scrutiny. Agencies designated under the Act include NSW Government departments responsible for Community Services, Education and Training, Health, Juvenile Justice, Corrective Services, Sport and Recreation, and Disability, Ageing and Home Care; and non-government schools, child care centres and agencies providing substitute residential care to children.

Reportable allegations are defined in section 25A of the *Ombudsman Act 1974* (NSW) as meaning an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct. Reportable conduct means any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence); any assault, ill-treatment or neglect of a child; or any behaviour that causes psychological harm to a child, whether or not, in any case, with the consent of the child. A reportable conviction means a conviction (including a finding of guilt without the court proceeding to a conviction), in NSW or elsewhere, of an offence involving reportable conduct.

The ACT Government has recently outlined its policy position on a system for checking the backgrounds of those people who will be working with vulnerable people in a range of situations in the ACT. The addition of a process whereby an integrity agency scrutinises these processes and reports on their veracity would be a valuable contribution to the accountability of the proposed system.

Conclusions

The ACT was once a leader in integrity and government accountability, but has recently fallen behind reforms in a range of other jurisdictions. This submission outlines some of the areas where we believe the ACT needs to consider further development of their infrastructure, legislation and processes in order to enhance and entrench a strong integrity culture across the three arms of government in the ACT.

Specifically, we would recommend that:

- Consideration be given to the establishment of an ACT Integrity Commission to comprise responsibility for ombudsman, personal privacy, law enforcement inspections, freedom of information, ethical advice, anti corruption and lobbyist regulation functions;
- Legislation relating to privacy, freedom of information, ombudsman, public interest disclosure and inquiries be reviewed and modernised;
- Specific legislation be introduced which enshrines a Code of Ethics for Members of the Legislative Assembly and their staff; members of the Judiciary and Tribunals; and public servants and statutory office holders;
- A mechanism be established to receive and investigate complaints about Members of the Legislative Assembly and their staff; and about member of the Judiciary and Tribunals;
- A mandatory Management Standard be issued under the *Public Sector Management Act 1994*, which requires all departments and agencies to have in place a Complaints Management System that implements best practice and provides consistency for complainants, based on advice from the ACT Ombudsman;
- A parliamentary committee be established to scrutinise the activities of all oversight agencies, including the integrity commission, human rights commission and auditor-general;
- The integrity commission, human rights commission and auditor-general all be made officers of parliament, reporting to the Speaker and with their budgets set by parliament and sourced from the parliamentary appropriation;
- The administrative location of all Official Visitors be with an integrity agency and separate from the agency providing the services being visited;
- The Integrity Commission be given the power to investigate complaints about community services under a model similar to that which empowers the work of the NSW Ombudsman in this area;
- The Integrity Commission be given responsibility for death reviews of vulnerable people who die in the care or custody of the Territory; and
- The Integrity Commission be responsible for scrutinising the veracity of the system of working with vulnerable people checks, if it proceeds to implementation in the Territory.