



LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ADMINISTRATION AND PROCEDURE

(Reference: [Inquiry into the feasibility of establishing the position of officer of the parliament](#))

Members:

MR S RATTENBURY (The Chair)
MRS V DUNNE
MS A BRESNAN
MR J HARGREAVES

TRANSCRIPT OF EVIDENCE

CANBERRA

FRIDAY, 7 OCTOBER 2011

Secretary to the committee:
Ms J Rafferty (Ph: 6205 0557)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

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Amended 9 August 2011

The committee met at 9.04 am.

BARR, MR ANDREW, Acting Chief Minister

KEFFORD, MR ANDREW, Acting Deputy Director-General, Workforce Capability and Governance Division and Commissioner for Public Administration, Chief Minister and Cabinet Directorate

MAKEHAM-KIRCHNER, MR ADRIAN, Acting Director, Policy and Cabinet Division, Chief Minister and Cabinet Directorate

THE CHAIR: Good morning everyone, and welcome to the public hearing of the Standing Committee on Administration and Procedure inquiry into the feasibility of establishing the position of officer of the parliament. On behalf of the committee, I would like to thank you, minister, and your colleagues for appearing today. I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the coloured privilege statement that is before you on the table. Can you confirm for the record that you understand the privilege implications of the statement?

Mr Barr: Yes.

THE CHAIR: I also remind witnesses that the proceedings are being recorded by Hansard for transcription purposes, and you are also being webstreamed and broadcast live. Before we proceed to questions, minister, do you have a statement that you would like to make?

Mr Barr: I have been provided with a statement on behalf of the Chief Minister. I would like to thank the committee for the opportunity to appear and to advise that the government has provided a written submission to this inquiry as well as having addressed many of the issues in the government response to the Standing Committee on Public Accounts *Report 15: inquiry into the ACT Auditor-General Act 1996*.

In relation to the specific issues that the committee is considering, the government's suggested approach is supportive of amendments to the Auditor-General Act, section 9, to incorporate passages which specifically recognise the Auditor-General as an independent officer of parliament, and related provisions reinforcing the position's impartiality, along the lines of amendments made to the commonwealth Auditor-General Act 1997. We do not support the designation of other statutory officers to be established as officers of the parliament at this point, and we would recommend that we develop a fit-for-purpose framework for the Assembly that reflects our constitutional constraints as explained in the legal advice that has been provided.

We acknowledge that there is no consistently adopted officer of parliament model here in Australia or overseas. We believe that it is therefore necessary to develop a fit-for-purpose set of principles for future consideration by the Assembly. Of course, we stress that they need to take into account our constitutional limitations and our existing governance arrangements.

The government has not supported the public account committee's definition and formulation of an officer of parliament as outlined in their report No 15. That committee's definition was developed from the general characteristics of an officer of

parliament as identified by the Victorian Public Accounts and Estimates Committee. However, the designation of the officer of parliament in Victoria does not follow these recommendations. Furthermore, the application of these principles in whole is not possible in the ACT, given the different constitutional context. It is our view, though, that there is the possibility of amendments in relation to the Auditor-General Act, as I indicated.

The formulation of the Auditor-General as an officer of the parliament is appropriate, given a range of factors. Firstly, we agree that a parliamentary committee should have oversight of an officer of parliament, and this is provided for under current arrangements in the ACT—as you would be aware, it has been topical—with the Standing Committee on Public Accounts operating as the oversight committee of the ACT Auditor-General.

The government agrees that an officer of parliament should be appointed with parliamentary involvement, as is current practice. Again, as we are aware, the Standing Committee on Public Accounts has consultation and veto powers in regard to the position of Auditor-General.

However, we do not agree that a parliamentary oversight committee should be responsible for the budget of an officer of parliament. The framework for an officer of parliament in the ACT should not change existing budgetary or appointment arrangements that could usefully apply to the existing process under the ACT Auditor-General Act.

In relation to the other positions that the committee is inquiring into, we do not support the Ombudsman being designated an officer of parliament. The government considers that there are some functions such as the administrative oversight and review function that governments themselves have implemented to promote transparency and accountability across the public service, as well as effectiveness and responsiveness of government service delivery. And these are elements of executive government oversight rather than an extension of the parliament's role.

The ACT Ombudsman is such a function. It is a complaint-based role with the community as well as within government education role. It is also intended to work collaboratively within government to maintain standards of public administration. Given the nature of the role, it does require independence and it does need to report transparently to maintain public accountability. The government's view is that this is supported within the existing framework.

Similarly, the government does not support the Electoral Commissioner being designated an officer of parliament. The government is not convinced that designation of the ACT Electoral Commissioner as an officer of parliament would promote stronger independence for the operation of the commissioner.

In relation to the Electoral Commissioner, it is crucial that the position is independent from the executive. Equally, the role must be free of influence and politicisation which might come from a closer relationship with the parliament. Robust legislation with appropriate checks and balances and transparent reporting is the mechanism for achieving this outcome, in the government's view.

In relation to other statutory office holders, the government does not consider that the designation of officer of the parliament should be extended to any statutory office holders other than the Auditor-General. I think I will wrap up on that note.

THE CHAIR: Thank you. I will start with a couple of questions and then we will hear from other members of the committee. You talked about this notion of a fit-for-purpose set of principles for future consideration for an officer of parliament model in the ACT. Does the government have a view about whether it would be preferable to establish a new committee to have this oversight role in relation to the contents of these principles? For example, New Zealand has the officers of parliament committee which is tasked only with matters associated with officers of parliament. Would it have that dedicated role or, given that you said it should only be the Auditor-General, would your preference simply be to leave it with the public accounts committee?

Mr Makeham-Kirchner: The creation of new committees would obviously be a question for the Legislative Assembly but, to the extent that we have looked at the role of the officer of parliament, your observation would be correct. The public accounts committee would be the appropriate spot under this model.

THE CHAIR: I am interested in your concern about the budget for officers of parliament and the executive wanting to essentially retain control of that. Certainly the Electoral Commissioner, in his submission, has observed that—and I will be asking more about this later—because it is directed through JACS, in that case, then there is the ability for the agency to control the amount that actually goes to the commission. The government makes the appropriation to the department and then the department makes an allocation from its budget. Do you have any observations on that issue which has been raised by the commissioner?

Mr Barr: In the first instance, the threshold question is what the ACT self-government act allows by way of appropriation of money. Very sensibly, the commonwealth parliament, in granting self-government, put in a very important provision that only ministers can appropriate funding. As the territory's Treasurer, I am forever grateful for that, because we would be in a Greek-like situation if the Assembly had been allowed to appropriate money over the last 20 years. I think that is a very important protection for the people of the ACT.

In relation to the question of internal allocations for areas that are within a broader directorate, presumably one could have a debate about whether a direct appropriation to a particular agency like the Electoral Commission may be appropriate, though one would also like to think, in the context of a small government, that there are some functions—and, given the way the ACT government is structured, we are working within a larger directorate or on a whole-of-government basis—a variety of service provisions in terms of back-of-house support to an agency where it is appropriate to share resources and to have one allocation for a directorate. I am thinking about ICT, human resources and those sorts of supports, which are often provided through a larger agency, and you get economies of scale as a result.

So whilst it is very intellectually appealing, perhaps, to say, “All right; we will give every agency an individual allocation through the budget process,” that certainly

would work counter to some of the shared service arrangements that we have in place at the moment. I think it is important, though, that there is transparency so that members of the Assembly and the public are able to see, within a directorate's budget, what the allocation is to the Electoral Commission or to a range of other statutory positions.

THE CHAIR: I think your observation about the shared services is a valid one for the ACT government. I guess it is a question of whether that is taken out before the agency gets the money or the agency buys it back.

Mr Barr: Sure. Depending on the nature of the service that is purchased, some of those transactions are occurring prior to an allocation to a directorate; some are presumably internal within that directorate. I think the question of transparency is the most important one, so that people can see. But again, speaking as the Treasurer, the more agencies set themselves up in a way that is immune to efficiency dividends and achieving enhanced levels of services within existing areas or, on a resource basis, are not growing as fast as some other areas, the better for the territory's budget outcomes. We need to apply that sort of discipline across all of our government services.

MS BRESNAN: My question flows on from the one the chair just asked. In your opening statement, you talked about the importance of having independence for these agencies, and we have had a question about the funding issue. In relation to that sort of issue of funding, the Ombudsman, the Electoral Commission and the commissioners have all embraced similar issues about having to essentially go to the agency that they often have to investigate to actually ask for funding. Do you think it creates a situation where there is not a conflict but issues for independence?

Mr Barr: If you were of the view that governance, elections and the complaints mechanisms within the ACT were fundamentally broken there might be some evidence to support that assertion, but I do not think that is the case. Across all areas of ACT government, people are asked to deliver more with less on a regular basis.

MS BRESNAN: It is more that these are agencies that are set up, often, to investigate complaints in government, and that situation where they are having to go to the same agency that they are often going to have to investigate for funding creates a bit of an interesting situation.

Mr Barr: You might consider this a cynical view, but there will never be enough money to achieve the outcomes that everyone would want. So we will never have a perfect set of circumstances where the Ombudsman, where the Electoral Commissioner—where any part of government—have the resources so that they feel they can do their job to the point of approaching perfection.

MS BRESNAN: My issue is not about the funding levels—

Mr Barr: I appreciate that, but on the question of whether there is tension presumably you will have the opportunity to hear from those opposite. I would be concerned—and I need to stress that I have received no evidence that this is the case—if there was a sense that important work was not able to be undertaken and that a financial resource was there but was being withdrawn because of a sense that one government agency

did not want another to investigate its work; there is no evidence to support that. But I am conscious, as we go into another budget round, that there are \$12 billion worth of requests to spend our \$4 billion budget—and it will forever be thus. So we make allocations; directorates make allocations. We try and deliver the services as efficiently as we can, recognising that we will never fully meet the expectations of either those delivering the services or the community. That is life.

MS BRESNAN: Following on from that, in your submission in the opening statement on page 3 about the Electoral Commissioner, there is a suggestion that there would be greater politicisation if the role was a designated officer before the parliament. Could you explain why you think there would be a greater risk of politicisation, given we do have one party in control—someone could argue that we have one party in control—of that agency essentially now, and, following on from that, that it was created as an independent role in the first place, for that reason.

Mr Barr: You would look to the legislative framework that the Electoral Commissioner operates within to ensure that independence.

MS BRESNAN: I just wonder how you think there would be greater politicisation if it was actually a role of the parliament.

Mr Barr: To the extent that a parliament can become a club is a risk and so—

MS BRESNAN: What do you mean by that?

Mr Barr: There are three parties within our system, there are other parties who seek election, and I think there would be potentially some risk in thinking that moving to an arrangement around the parliament gives you any greater level of independence or accountability than a strong legislative framework. In fact, I think there are risks that it in fact goes the other way.

MS BRESNAN: That is why I am trying to work out how you think there would be greater risks of politicisation if it was a role of the parliament. I am just not clear from what you say—

Mr Barr: Okay. In our system the level of scrutiny on a government is considerably higher than the level of scrutiny on a parliament.

MS BRESNAN: So—

Mr Barr: Safety in numbers, Amanda! You can as a parliament spread the political risk across two or three political parties considerably less, and that puts the individual risk on each of the political players considerably less. If the government, if we were, to seek to get an electoral outcome or seek to influence the Electoral Commissioner through legislation or otherwise, there is no doubt a heap of scrutiny on us. But, if there is a cosy little deal done by everyone within a parliament, it is much less. I think that is just a reality.

MR HARGREAVES: Can I pick up on a couple of things there. On suggesting that the legislative framework for the oversight of the commission hitherto has been pretty

robust, I do not recall any instances where the independence of those statutory officers has been compromised since self-government; I have not heard anybody say that it has. I have heard people say that it could because of the co-location with some of the departments—children’s commissioner with community services; Electoral Commission with JACS. A hideous thought occurred to me when I was listening to that conversation and that was that there are directorates that do not have that line responsibility and if these oversight commissioners persist you could as a government put them all under the Treasury Directorate, and that would be the end of them all, would it not? Their independence would be governed—

Mr Barr: Very cynical.

MR HARGREAVES: and their money would dry up overnight. So we might just flag that as a cautionary exercise for these people—

Mr Barr: Walk around Civic Square flogging themselves on efficiency dividends.

MR HARGREAVES: I think so, and there are stocks provided by TAMS!

Mr Barr: As it should be!

MR HARGREAVES: Talking about the budget, you stated:

... the officer of the parliament must discharge functions that only the parliament may itself discharge ...

That is something that I do support. I guess that is talking about the adoption of the separation of powers. Presumably that is the basis of that view. What I am a bit worried about is this accountability notion that you were just talking about. It is a case of “who guards the guards while the guards are guarding Rome”. If the parliament, through one of its committees, can do something, the accountability presumably shrinks considerably.

You talked about a parliamentary committee having oversight of the functions of an officer of parliament. Doesn’t that actually give the parliament an executive action and should it in fact not be the case? For example, through the appointment process, the parliament actually appoints the Auditor-General. That is one of the recommendations that we have seen come through this place. It concerns me that we are asking a parliamentary committee to discharge an executive function. And that offends the doctrine of separation of powers.

Mr Makeham-Kirchner: If you look at the way the committee might work, it is more around the accountability. If you look at the elements of the officer of parliament, one of the key parts is the accountability for the discharge of that function. So that is where I think the committee’s role would most appropriately sit.

MR HARGREAVES: Does that not already exist? The parliament can virtually do whatever it wants. Does it not therefore already have the power through any one of its appropriate standing committees to hold an oversight commissioner to account? Do we really need to empower the PAC to look after the Auditor-General and JACS to

look after another one? Is it really necessary to do that legislatively?

Mr Makeham-Kirchner: If you look at the positions that are there, they do have very strong legislative structures already. So the benefit of taking it to an officer of parliament definition is one that might emphasise that independence. But beyond that, a lot of these accountability and appointment mechanisms already do exist, as you said.

MR HARGREAVES: With regard to these statutory office holders being responsible directly to the parliament, they all operate under a piece of legislation, not all of which is entrenched legislation. So is there a risk in fact that the masters of these people have the power to change that legislation whenever they so choose; whereas if it is located elsewhere, like with the executive, the executive is a servant to the parliament. Therefore the chance of it not being pre-determined is lessened.

Mr Makeham-Kirchner: To the extent that they have created the legislation, the Assembly has the ability to change the legislation.

Mr Barr: In a minority government sense, yes, the point you make is exactly right. How many elections have we had—six, seven?—and we have had one majority government. It is unlikely that the stars and moon will align again that sees that happening. That might be once every 20 years, if it ever happens again. Then you would want your structures to have that protection and separation, as you have outlined.

Mr Makeham-Kirchner: Independent of the executive structure. If you look at the history, you have had a crossbench with a mixed grouping of parties which has formed a very good check on the power of both major parties. You have had a majority government. We now have a single structure and a crossbench. So there is a lot of built-in accountability with the way the electoral outcomes feed into the structure of the Assembly.

THE CHAIR: I want to turn briefly to some issues around the Ombudsman. The Ombudsman actually flagged in his submission the idea of establishing an ACT integrity commission. He describes that as an amalgam of existing statutory roles into more of a single entity. Has the government given that any consideration, both from an outcomes point of view and from an efficiency point of view?

Mr Kefford: That is an issue that Mr Asher has raised on a number of occasions. It is a matter which we are giving some consideration. The strength of our current system is that there are a number of different channels through which members of the public and officials are able to raise concerns. I think the concern that has been expressed about that proposal comes back to the comment that the minister was making before about a fit-for-purpose structure. I suppose the question that we would need to be satisfied on is that there is a problem with our current arrangements and that a single integrity commission is the right way to resolve that. That is a matter on which I think it is fair to say our thinking is not concluded. Clearly, Mr Asher has a view on that, and we have been having conversations with him about that in the context of the work that I am describing.

If you look at the spread of responsibilities that the various commissioners have—and I should add for the record that I currently serve as Commissioner for Public Administration, so I am part of that mix, if you like—it is very broad. I think there is a question about whether the important sectoral focus that is provided by having separately identified officers is helpful to the work of those officers. I think it is an issue that is worth exploring. It is certainly the case that we should have in the ACT a structure and set of arrangements that meet the needs of our community, of the government and of the parliament in ensuring that the way in which public administration is discharged is appropriate. But I am not sure we are at the point yet where we think that a single approach in relation to the integrity commissioners, if I might call them that, is the way to go.

THE CHAIR: The Ombudsman has also flagged some issues—and perhaps this is a little outside the scope of what we are meant to be exploring today—around the ACT contracting those services from the commonwealth. Is that something that the government has given consideration to in this context? The nature of the Hawke review seems to be to reduce the number of agencies, so potentially you could see consistency there in the approach the Ombudsman is suggesting.

Mr Kefford: That is right, and there was a suggestion in the Hawke review that that issue be explored. That is the body of work that I have just described. That is not something that has been resolved yet. Again, it comes back to having in place a set of arrangements that works for us and makes sense, given the nature of our business. I think there is a distinction between, as the minister alluded to before, a series of independent commissioners who have a direct line to the parliament, a direct line to the public to raise concerns in the discharge of their functions, and the way in which we organise what I might call the back-of-house functions. There is an important principle to be maintained—that is, having established these commissioners, we should not diminish the appearance of their independence or indeed diminish their independence through the arrangements that they are located within. But it is not necessarily the case that combining the back-of-house diminishes that independence in the operation of what are in some cases very significant statutory powers.

THE CHAIR: Minister, earlier when you were speaking on the Ombudsman, I do not mean to unfairly paraphrase you here—

Mr Barr: That never happens!

THE CHAIR: You were describing the Ombudsman as being almost an instrument of the executive in how it conducts some of its functions. Could you elaborate on that a bit more? I am not sure that I quite understood what you were getting at.

Mr Barr: Mr Kefford will answer that.

Mr Kefford: I suppose the analogy is with the Civil and Administrative Tribunal: it is a creature of the executive; it is not a court. In a similar way, the Ombudsman is established as part of the executive, as a check almost on itself, with lines to the parliament, as I say. But the distinction we are drawing is that in effect the government has decided to establish an independent person with significant powers but one who is not separate from the executive but part of it—as a mechanism through

which citizens can raise concerns with the way in which we in the public service are going about doing our job.

Coming back to your question about the contractual arrangements, the decision that has been made and the position that has been adopted to this point is that, given the relative expertise and access to facilities and resources utilising, under a contractual arrangement, the commonwealth's greater capacity, that provides—for a jurisdiction like the ACT the position that has been adopted to date is that that is better than trying to fund it ourselves, that in fact we do get access to a higher quality of service by using Mr Asher and his office. Yes, there are issues of funding, and the quantum of funding, as the minister has described it, as there are across all of the ACT agencies, but I think the assessment that has been made to date is that for us to establish a body of equivalent capacity and resources would impose an even more significant drain on the territory's budget than the current set of arrangements does.

Mr Makeham-Kirchner: Can I just observe, too, picking out just the Ombudsman component, that it goes to that fundamental point that the submission makes around the officer of parliament being connected directly to the functions of the parliament. So the function of the Ombudsman, as Mr Kefford and the minister have alluded to, is linked directly to the executive. If you take some of the other commissioners you are talking about, you are talking about judicial functions, regulatory functions, advocacy functions and those sorts of things, which are not necessarily the direct function of the parliament. With that sort of definition of officer of the parliament, at the principle level there might be a bit of differentiation in the definition.

MS BRESNAN: Following on from the question the chair asked about the integrity agencies, one of the things we were talking about was funding, economies of scale and having collegiate support. There was mention of having them placed within a department. There could be another argument: that you could achieve economies of scale by having one integrity agency where those roles were placed. Could you achieve that issue of economy of scale funding by doing that?

Mr Barr: I suppose if you gained a significant level of resource, then yes.

Mr Makeham-Kirchner: That is getting into the input control, I think, as opposed to the outcomes. Each of them has legislated independence and particular things that it has to pursue. The Human Rights Commission, for example, has a range of commissioners who are designated. They get quite operational, for input-based reasons, but the outcomes and the outputs being sought by the legislation are still being fulfilled. As to whether the combination of a range of outcomes into a single bucket leads to a better level of input efficiency, I do not know that it is quite that axiomatic.

MS BRESNAN: It is an academic argument. In the submission you have said, and we have talked about it a bit already, that you would not support any role other than the Auditor-General. Is the argument for this that the executive should be maintaining some level of control over these other agencies, other than the parliament, or is it that issue that you mentioned that what the formation of the parliament is could have an influence on these bodies?

Mr Kefford: I am not sure that it is an argument of control; it is more a matter of recognising that there is a very clear alignment between the role of the Auditor-General in scrutinising the activities of government agencies and the role of the parliament in scrutinising the activities of the executive. If you step back to the Ombudsman, there is the suggestion, as I was providing in my previous answer, that it is properly characterised as a creature of the executive, and so should sit there. That is not to say that Mr Asher does not and should not have the capacity to speak directly to the parliament and to raise concerns in the way that he does, but in terms of the framework within which the Ombudsman sits, it is the government's submission that it is better considered within the executive. In relation to the Electoral Commissioner, I am not sure that I could add to the minister's previous answer.

MR HARGREAVES: Minister, can you tell me whether or not, in the context of a parent department and having statutory officers sitting within it, in the budget formation service-level agreements or some such arrangement—MOUs or whatever—would exist between those statutory office holders and the parent director-general?

Mr Barr: Certainly meeting the legislative requirements of the role, having a sufficient budget allocation to do that, apparently is in the decision-making process, at the budget cabinet level, in my experience over the last five or six years. And certainly for directors-general and their CFOs to ensure that all of those legislative requirements are met is the first call upon an agency budget. Then, to the extent that there is any discretionary allocation left over after that to pursue other activities, those occur.

MR HARGREAVES: I would be interested in that relationship and how it goes to, for example, all the directors-general and the senior executives who work for them who have performance agreements. There are determined indicators that determine the outcomes and deliverables that are contained in those agreements. Those agreements are signed off going up the line, and the D-Gs, presumably with the Chief Minister's Directorate CEO, does it in terms of the Chief Minister. I think that is how it works. So the setting of those indicators—I am interested in who and how the settings of those sorts of performance agreements with the statutory office holders work. Do they exist?

Mr Makeham-Kirchner: I would rather take a bit of advice and come back to you if that is okay.

MR HARGREAVES: I am quite happy with that. What I am going to do now is elaborate on it so that you can respond. I am also interested in the government's view on how that would work within the context of a parliament, specifically: with whom, who would approve and who would sign off on such a set, if it does exist?

Mr Makeham-Kirchner: The approval component, I think, goes to what the minister was talking about before, which is the position under section 65 of the self-government act.

MR HARGREAVES: But that only relates to funding.

Mr Makeham-Kirchner: Yes.

MR HARGREAVES: It does not relate to outcomes and other deliverables like a particular oversight officer deciding to have a certain priority in regard to retention. For example, a children's commissioner may very well decide to clamp down on truancy or something else. It has got nothing to do with the budget itself. So section 65 does not kick in then.

Somebody has to say, "Yes, I reckon that is a good idea," and sign off on it or they have total independence under the act to do whatever they like. But there has to be an accountability mechanism somewhere. Then we have got: "Did you achieve the outcomes you said you would?" Who is the person who says: "No, you did not. Lift your game," or, "Yes, you did. Congratulations"? It finds its expression in the annual reports that we see either by reading them, which is a cure for insomnia, or by reading the *Canberra Times*, which is, equally, a cure for insomnia.

I would be interested to know who would be the person who signs off. For example, would it be the chair of an oversight standing committee? Would it be the Speaker? What is the government's view? I see that being a problem with the doctrine on the separation of powers.

Mr Kefford: I think part of the answer to that would be that it may vary between various commissioners. Certainly in relation to my statutory powers as commissioner, there is a provision in the act which enables the Chief Minister to agree on what my priorities are. I report on those annual priorities, as you have outlined, through my annual report.

In relation to the Auditor-General, there is the process, which you would all be familiar with, of the Auditor-General providing a draft program to directorates and to PAC and working through that. We will need to take that on notice because I think in each case there may well be differences.

THE CHAIR: I think that would be very helpful. I think you will find that the committee would also be interested in the question Mr Hargreaves posed. We would appreciate any further advice you have on that. We are running towards the end of our time. I have one last question. It is about the recruitment of potential officers of parliament. We are in the middle of a discussion about the recruitment of the Auditor-General. Does the government have any views on how the establishment of officers of parliament might work, if that were established? There was even some discussion when the Auditor-General was appointed about whether the Assembly had a veto or not. I think that has now been resolved. Do you see the appropriate role being a veto or do you see a more active role for a potential oversight committee in regard to selection criteria and those sorts of matters?

Mr Barr: It would depend on how favourably you viewed the US system. That is perhaps one model. It is going to shock you, Mr Speaker, that I would favour an executive selection process. That is not going to surprise you, is it? That said, I am also a realist. The Auditor-General model is properly the current arrangement. I think that is reasonable.

MR HARGREAVES: The argument around the veto power is 90 per cent resolved,

in my view. I would be interested in your view on this. I am referring to the way in which the veto power is prescribed within the act. I am also interested in what time lines might apply. It says that if the committee applies the veto, then it is game over. If it does not within the 44 days, then something else happens. Does the power of veto exist within the 44 days or does it exist after the 44 days? The act is actually silent on that. There was discussion around that.

Mr Barr: It refers to the appropriate notification of powers, if you are going to move down that path. You could look at a variety of examples, I suppose. My preference would be—it is a personal view, not one I have discussed with cabinet colleagues—that the US style where, in the end, you end up having to find someone who is acceptable to everyone politically rather than necessarily having a skill set for a position would be an unfortunate step to bring into Australian politics. But people will have different views on that.

MR HARGREAVES: What I would be wanting to see is this: if the selection process which applies currently to the Auditor-General's appointment, which we do not have to worry about for another seven years, is a template to be applied to other people if officers of parliament were created and it has a hole in it, would it not be a better idea to have a look at that whole picture before the template is applied?

Mr Barr: Yes.

Mr Makeham-Kirchner: This is the fundamental reason why we are suggesting that, once you have designated or defined an officer of parliament for the purposes of the ACT Assembly, this specific framework would go through those processes. The elements of that framework might be appointment, budget creation, dismissal, suspension, remuneration. Those are all framework elements that you want to consider as part of the recommendation.

MRS DUNNE: It seems that in all of the mechanisms, in some form, in various parts of the jurisdictional area there are plenty of models for the appointment of a statutory office holder or dismissal, ranging from the Auditor-General to the Clerk of the Assembly. Then there are also a range of mechanisms for direction. The statement of planning intent, for all its failings, is essentially a mechanism for directing the planning authority and they can report on that. We do not have much in the ACT by way of oversight committees in the way the Joint Standing Committee on the National Crime Authority is an oversight committee. If we were going to have a more sophisticated operating model for officers of parliament—

MR HARGREAVES: If we had a few more members of parliament too.

MRS DUNNE: There may be some need for toughening up the oversight mechanism by virtue of a committee, whether it be, say, this committee or a specially constituted committee to oversee that. Have you thought about the sorts of powers and responsibilities that an oversight committee should take on if we are going to go down this path?

Mr Kefford: This is something to which we have turned our minds but I do not think we have concluded a view on that. As you have described, there are good precedents

in a number of other jurisdictions from which we could draw in framing something that works for a parliamentary jurisdiction the size of ours. That would be something that I would see us needing to provide further advice on once the nature of what we are dealing with had been settled on.

THE CHAIR: Members, we are running short of time. Has anyone any burning questions? No. That being the case, thank you, Treasurer and officials, for coming in today and sharing your thoughts with us. We would appreciate your taking on the few issues that have been raised. The committee will find those further thoughts very helpful. Thank you for that. When available, a proof transcript will be forwarded to you to provide an opportunity to check and provide any suggestions for corrections that you may feel are necessary. Thank you for appearing today.

Short adjournment

GREEN, MR PHILLIP, Electoral Commissioner, ACT Electoral Commission

THE CHAIR: Welcome back to the public hearing of the Standing Committee on Administration and Procedure inquiring into the feasibility of establishing the position of officer of the parliament. On behalf of the committee I would like to welcome the ACT Electoral Commission and the commissioner and I thank you in advance for appearing today. I also remind you of the protections and obligations afforded by parliamentary privilege and draw your attention to the coloured privilege statement on the table. Can you confirm that you understand the privilege implications of the statement?

Mr Green: Yes.

THE CHAIR: Thank you. I remind you that proceedings are being recorded by Hansard for transcription purposes and we are being webstreamed and broadcast live.

Before I proceed to questions from the committee, are there any opening remarks you would like to make, commissioner?

Mr Green: Thank you for the invitation to appear before the committee. I have not prepared formal remarks but I might very quickly go through the recommendations we have made in our submission, to summarise the points that we have made in our submission.

This inquiry into the creation of an officer of the parliament and the possibility that the Electoral Commissioner and indeed the full commission might be made an officer of the parliament is an opportunity for the commission to raise some recommendations it has made in other committee contexts, particularly the Latimer House inquiry, where we have pointed to the legislative regime that governs the commission and particularly governs those aspects of the commission that relate to the independence of the commission.

We have identified in our submission that one of the important features of electoral commissions, not just in the ACT but across Australia and indeed across the world, is the notion that an electoral commission should be an independent body and should be independent of direction from the executive. It is a very important aspect of having an electoral commission that that be so.

When we look at the legislative structure that the commission operates under, in practical terms we are considered to be independent. We exercise our powers without direction from the executive to a large extent. But when you look at the details of the legislative framework there are a few areas where we think our independent status could be improved.

The first recommendation we have made is that under the Electoral Act currently, if you read between the lines, you can read from that that the executive does not have the authority to direct the commission in respect of the performance of its functions. But the Electoral Act does not explicitly say that. If you look at some other acts, particularly the Tasmanian Electoral Act and an equivalent act in the territory being the act that governs the operation of the Clerk to the Assembly, there are specific

provisions that state in Tasmania that the Electoral Commissioner is not subject to direction by the executive in the course of its functions. We do not have that in the ACT so we are suggesting that that would be an appropriate thing to put into the ACT's Electoral Act.

We also have the situation in the ACT where I as Electoral Commissioner exercise powers as what used to be called chief executive—effectively now it is the powers of a director-general—over the staff employed in my office. Those powers I exercise are exercised under an instrument made, I think, by Rosemary Follett in 1994 under the old Public Sector Management Act, section 25. That being an instrument of the executive is something the executive could undo with another instrument. So the fact is that I exercise Public Sector Management Act chief executive powers at the moment that are in effect not as strengthened as are the equivalent powers, for example, given to the Director of Public Prosecutions, who does have in his act a specific clause saying that he has chief executive powers under that parent act, whereas in the ACT's Electoral Act it is not in the parent act; it is by way of an instrument.

The third recommendation we have made is really the most important one in the sense of guaranteeing the independence of the commission which relates to the allocation of funds to the commission. As was discussed with the previous witnesses, the commission is not directly budget funded under the way that the Financial Management Act works. The budget funding that is provided to the commission is provided to the directorate of justice and community safety. I think we are output 1.6 in their budget scheme.

There is a line in the budget called 'electoral services' but the amount of money that is given in the budget to electoral services is given to the JACS directorate. The JACS directorate take a portion of that, effectively at their own discretion, which they use for corporate overheads and for a range of functions that they undertake related to electoral services, and the amount of money that the Electoral Commission is allocated is allocated effectively by the director-general of JACS; it is not allocated in the budget directly to the commission. It is an amount that goes up and down according to how the director-general of JACS allocates the funding to the commission.

Because of the way the budget cycle works, we know when the budget is presented in the Assembly what the line item 'electoral services' is given in the budget, but the amount that the Electoral Commission gets from that we do not know until some months after the financial year starts. So we did not know what our budget for this financial year was until September this year. Next year, being an election year, in September we will have started the election. If the same time line applies the election will have started and we will not know what our bottom line budget is for the election year, which is a matter of concern because that is the point where we are committing to spend quite a lot of money. So the recommendation we have made is that the commission should be directly budget funded. That is also a recommendation that was made in the Hawke review, so we would support that recommendation made in the Hawke review.

Whether we need to be an officer of the parliament to achieve those things—I do not

think we do necessarily, and I can see that there are arguments both for creating the commission as an officer of the parliament and for keeping us in the directorate structure as we currently are. If you look around the country at other electoral commissions, I do not think any of them are constituted as an officer of the parliament in any of the other jurisdictions in Australia, so it is certainly not a necessary thing to happen. But if you look at the way the commission is created, we are created by the Assembly. We are not a creature of the executive; we are a function of a legislative set of powers that are given to us by the Assembly, so you could argue that we are a creature of the Assembly, not the executive. On the other hand, I do not really have a problem with the commission working within the executive structure as we are with the other statutory office holders that have been created by the Assembly in other contexts. But what the commission would like to see is a strengthening of the independence that we have.

THE CHAIR: Thank you. You have answered my very first question right at the end of your remarks there because it does strike me that the recommendations you make are not necessarily dependent on an officer of the parliament structure; they are potentially deliverable without that anyway.

Mr Green: That is correct.

THE CHAIR: So I think that is something for the community to consider. I want to touch on the specific funding issue that you have addressed. You have talked about the directorate removing a proportion of the electoral services line item in the budget for administrative overheads and the like. Can you give us an indication of the proportion—I do not have the budget papers with me but the amounts of what is allocated and what you actually receive?

Mr Green: We get the lion's share of the budget. I would have to confirm the actual dollar amounts but it is something like 95 per cent to five per cent. It is not a huge amount they take off the top but it is an amount that varies according to the different ways in which the department is seeking to make savings during the year. So in some years we will be hit with an efficiency dividend; other years we will be hit with a range of savings measures that the directorate is applying across all the business units in the portfolio. So when we get the budget papers we still will not know until the directorate has done all those calculations what our final budget will be.

THE CHAIR: You were here earlier and you would have heard Minister Barr make reference to his view that making the Electoral Commission an officer of the parliament might increase the politicisation of how the parliament dealt with the Electoral Commission. It was an interesting analysis. Do you want to make any observations on that?

Mr Green: I have difficulty in seeing how that would happen in practice. The commission has very clear powers under the Electoral Act to operate in an independent fashion. If our recommendation is taken up that there be a specific clause put in the Electoral Act that makes it clear that we are not subject to executive direction or indeed direction by an Assembly committee if we were to become an officer of the parliament, that would overcome any potential for politicisation. The way in which we operate we are very conscious that we are an independent body and

that we are not by our very nature liable to politicisation and if there were any attempts to politicise the way in which we ran our operations we would be making representations very loudly to the Assembly about that.

THE CHAIR: In a similar vein, on page 13 of your submission, there is a very interesting paragraph where you talk about essentially government policies, government initiatives, and the impact they might have on an agency such as yours. You talk about those non-partisan issues such as employment conditions and health and safety measures. You then make reference to policies that are arguably “partisan”. It is an interesting word, particularly in the context of your office. I wondered if you could elaborate on that a little.

Mr Green: I would start by saying that in all my time as commissioner, and I have been commissioner since 1994, there has never been an attempt to influence inappropriately the operations of the commission. I would like to stress that. But if you look at the way in which agencies within our portfolio are treated, you will see that we will regularly get directions from the director-general of the portfolio in relation to whole-of-government policies such as the Canberra plan. We are asked to report on implementation of government policy under the Canberra plan, just to take that as an example. Our reaction to that is that we are a statutory office, we have got statutory functions and if we are being asked to perform anything that is not within our statutory purview it is not appropriate for us to be involved in that.

Because we are just another business unit in the portfolio from some perspectives of the management of JACS, we get those kinds of requests that go to all of the agencies in JACS and we have to be constantly on the alert to be clear that we are an independent office and that we are not subject to directions. We have to be mindful when those kinds of policies are being put to us. We have to be careful that we are not overstepping our independent mark and following some direction that might not be appropriate.

THE CHAIR: I would be interested in a concrete example, though. In your submission you refer, for example, to “a policy related to giving preferred treatment to particular community groups”. I can imagine the government having an objective to increase employment opportunities for non-English speaking background persons or Indigenous persons. Are they the sorts of things that you have reservations about or are you thinking of something different?

Mr Green: I do not have any concrete example in mind, but what I am always cautious of is that, if anything does come out by way of government direction, we are mindful that we are not doing anything that is partisan or inappropriate. I cannot give you a concrete example, because there really has not been one. It is really about the potential. Because we are treated within the directorate as a business unit of the directorate, we get the same instructions that are given to the other business units in the directorate and we have to be mindful of the fact that we are actually an independent body.

THE CHAIR: Thank you; that is clearer.

MRS DUNNE: I want to dwell on the issue of you at the Electoral Commission being

treated like a business unit of a larger department. From wearing my other hat as the chair of the justice and community safety committee, there seems to me to be a perennial problem with the JACS portfolio because there are a number of statutory office holders that hang off that and there are always issues about their funding being constrained because the central agency say, “You are part of a larger organisation so you are subject to the efficiency dividend at the same rate as the department.” And any efficiency cost saving measures hit you disproportionately perhaps. Are there other areas—apart from budget funding, where you do not know the final amount of your budget until three months into the financial year—where this issue of being treated as a small part of a larger agency impacts on your statutory offices?

Mr Green: Issues that arise from time to time are usually quite minor, and we deal with those by stressing our independence. In fact, what we did reasonably recently was adopt a memorandum of understanding between the commission and, I think, the assistant director-general of JACS where we set out the legislative framework under which we operate and clarified that the commission was not subject to direction in the conduct of its operations. We also clarified that the function that the commission has of advising the minister is a function that we can exercise directly with the minister and we are not required to go through the director-general of JACS in reaching the minister with our advice.

That memorandum of understanding served to clarify situations where we have had a certain amount of friction. I do not want to overplay this, because it is not that significant, but in terms of providing advice to the minister it is clearly a statutory function of the commission that we do that. Under previous chief executives of JACS there were instances where advice that we provided to the minister was sent through the chief executive in such a way that it did not get to the minister as quickly as we would have liked. We put this memorandum of understanding in place to make sure that our advice was getting promptly to the minister without being held up.

MRS DUNNE: Was being held up the only problem or was it being massaged or adjusted?

Mr Green: We very strongly resist anything that we put up being massaged. We very carefully guard that.

MRS DUNNE: You are putting briefs up to the minister through the JACS parliamentary—

Mr Green: The ministerial services unit, yes. That means that everything is tracked and the minister’s office is aware of what is out there through the formal JACS processes of tracking ministerials and so forth. It is just an efficient way of doing it.

MRS DUNNE: On this theme, when you give up part of your budget, five per cent of your budget or whatever it is, to JACS, what are you paying for in that process?

Mr Green: That is probably a question that you should direct to JACS itself. JACS say, I think—I am fairly sure they have said this in other forums—that the money they get for electoral services is JACS money, not our money. The amount that we get given is the amount that JACS decides we need to do our functions. The money that

JACS uses out of the electoral services budget goes to fund various elements of JACS where they undertake functions that are related to the electoral services functions. They also advise the minister on electoral services, so a portion of their legal policy branch funding is funded through the electoral services budget. The chief executive and deputy chief executives of JACS provide electoral advice to the minister, so a portion of their funding will come from the electoral services budget. Their IT units, finance units and ministerial services units all do things that are related to electoral services from time to time, either servicing us or servicing the department's electoral services function. That is where that money is being spent.

MRS DUNNE: So you are dependent on JACS for IT services? What about payroll and those sorts of things?

Mr Green: We use Shared Services ICT and Shared Services personnel services for payroll support and ICT support. JACS less and less these days have a direct ICT function because they have got an outsourced Shared Services ICT person working in the portfolio. That is the person we would be dealing with within the directorate. JACS finance, in particular, has quite a lot to do with our budget. While we do account processing in house and we deal directly with Shared Services for payment of accounts and so forth, the actual higher level budget strategy work is undertaken by JACS.

MS BRESNAN: Following on from the budget issue that we have been discussing, do you have any involvement in determining the amount you get through the budget process?

Mr Green: We make submissions when we are wanting additional funding, through the portfolio and through the minister. We have a very good record of getting what we ask for. Sometimes it is not as much as we ask for but that is the nature of these things. So we make submissions to government for additional funding and we have not had difficulty getting additional funding. The actual day-to-day funding is essentially worked out on a formula where they carry forward funding received in previous years. Really, the unknowns are the tinkering at the edges with things like efficiency dividends, savings measures and so forth.

MS BRESNAN: Do the submissions have to go through the directorate, so basically you put them in and they go up with everyone else's?

Mr Green: Yes.

MS BRESNAN: You said you have a fairly good record of getting what you need. If there are insufficient funds, do you then have to go through the Director-General of JACS to get that funding?

Mr Green: If we were overspent in our budget, yes, we would have to go through the director-general.

MS BRESNAN: In the recommendations you have made, you state that it might not be necessary for the commissioner to be an officer of parliament. Given the situation you raised, and as Mrs Dunne raised, about briefs having to go through the director-

general and budget submissions having to go through the director-general, would it be preferable, in terms of the recommendations you have listed, that all three would be put in place? That addresses the issue of you being able to go directly to the minister, plus having control of the budget.

Mr Green: I am sorry?

MS BRESNAN: You talk about the Electoral Act being amended so that you are not subject to the direction or control of the director-general. That is in relation to the issue that was raised about briefs having to go through this process, plus the budget process—having control of your own budget. Would it be preferable for all three of the recommendations you have listed to be enacted rather than just the one on control of the budget?

Mr Green: Definitely, yes. I think the three things really form a package.

MR HARGREAVES: I want to talk about some of the economies of scale. You indicated quite clearly that you have been the commissioner since 1984—

Mr Green: 1994.

MR HARGREAVES: 1994? Mr Green, you said there has been no undue influence applied to the commission over the years that you have been involved. I would be interested in whether or not there have been any threats of it. Have there been any occasions when your independence has ever been compromised?

Mr Green: The short answer is no.

MR HARGREAVES: That actually is consistent with the way in which the ACT has conducted its governmental affairs. Other jurisdictions seem to be rife with all sorts of corruption and odd practices that go around, but the ACT seems to be, thus far anyway, free of that sort of stuff. I am pleased to hear that. In the economies of scale, did you say that about 95 per cent of the budget for electoral services goes to the commission and five per cent goes somewhere else?

Mr Green: It goes to the JACS Directorate.

MR HARGREAVES: In JACS, but somewhere else, and it could be for any number of different things.

Mr Green: After the meeting I will confirm exactly how much there is.

MR HARGREAVES: The rough size is good enough for where I am at. I am just trying to get a feel for it. What sort of number are we talking about here? What is the actual electoral services budget?

Mr Green: Obviously it changes between election years and non-election years.

MR HARGREAVES: I am actually interested in a non-election year. I do know that election years are rather special and there are special provisions that kick in for that.

Mr Green: For 2010-11, our budget was \$1.23 million and we underspent slightly. These are total expenses that I am talking about. Our total expenses were budgeted at \$1.23 million and our actual outcome is \$1.203 million.

MR HARGREAVES: So we are talking about \$1.2 million?

Mr Green: Yes.

MR HARGREAVES: According to my figuring, it is about \$50,000 that is disappearing into JACS?

Mr Green: I will need to confirm that. That is the amount that we get given.

MR HARGREAVES: It is of that order.

Mr Green: That is the amount that we, the commission, get given. It is not the amount that is in the budget.

MR HARGREAVES: So it is not a great amount of money in the grand scheme of things, is it?

Mr Green: It is not a huge amount of money, no. But the point that I would like to make is that, with the electoral services budget that the Assembly votes on, that is not the money that is given to the commission. We do not know what the commission gets, in this financial year's case, until three months after the financial year has started, because we have to wait for JACS to allocate that money to us.

MR HARGREAVES: I think that point is taken and understood. I am talking about what sort of impact the numbers have on your operations. I would suggest that \$50,000 is not going to have a huge impact. The notion that you do not have the money available to you or the figure available to you—that is quite a different story. I do not want to get the two confused.

Mr Green: In essence, the amount of money that JACS takes out of the electoral services budget is irrelevant to us. What matters to us is the amount of money that we get given.

MR HARGREAVES: Yes, I understand that.

Mr Green: So the quantum of what JACS takes really is not the issue. The issue is that we do not know what our budget is because it is not the budget that is voted on by the Assembly.

MR HARGREAVES: That is a bigger question, and that could be fixed by executive direction, couldn't it? It does not have to be in an act. You seem to be suggesting in your recommendations that you should have statutory independence or come out from under the wing of the directorate and be a stand-alone function. What is your staffing, full and part time, in a non-election year?

Mr Green: Our normal non-election year funding is for myself and five permanent Public Sector Management Act officers. Currently two of those officers are part time; three of them are full time. For the last few years we have had a significant boost in funding for implementing our ICT enhancements for the next election. So we have been able to employ some additional staff. But that is our normal complement.

MR HARGREAVES: The full and part-time split: is it three and two?

Mr Green: Three full time and two part time.

MR HARGREAVES: So we are actually talking about six people?

Mr Green: Yes.

MR HARGREAVES: And in an election year you grow—

Mr Green: On polling day we have about 800 people.

MR HARGREAVES: The term that they are engaged for, how many months prior to a polling day and just after it do you engage them for?

Mr Green: Most of that 800 are only on polling day. They are just polling day officials. From July next year we will increase our back-office staff quite significantly. I do not have the numbers but it is 20 or 30 people.

MR HARGREAVES: That is for what period?

Mr Green: That is from July until the election wraps up in about November.

THE CHAIR: There being no further questions, I would like to thank the Electoral Commissioner for appearing today. As usual, when available, a copy of the proof transcript will be forwarded to you, to provide an opportunity for you to check the transcript and suggest any corrections that may be needed. Thank you for taking the time to appear today.

Mr Green: Thank you.

COOPER, DR MAXINE, Auditor-General

STANTON, MR BRETT, Senior Manager, Performance Audit, Auditor-General's Office

THE CHAIR: Welcome. On behalf of the committee, I would like to thank you for appearing today on this inquiry into the feasibility of establishing a position of officer of the parliament. Can I remind you of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement before you on the table. Can you confirm for the record that you understand the privileges and obligations in the statement?

Dr Cooper: Yes, I do.

THE CHAIR: Thank you. Can I remind you also that the proceedings are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live. Before I proceed to questions from the committee—and we have obviously received your submission—do you want to make any opening remarks?

Dr Cooper: Yes, if I may. I would like to confirm that I support the conclusion in the submission dated 20 July 2011 made by my office to this committee, and that is that the Auditor-General be an officer of the parliament. I am making that statement because I am new in the role and most of the history on this issue has occurred over the last 18 months and I have only recently been appointed to the AG role.

I note that my office has not previously given comment on the issue of other roles being an officer of the parliament as we have not considered this matter to the degree that we feel we could assist the committee. To do this, it would be necessary to undertake considerable research and consider the role and functions we can think of for all independent statutory holders and identify where there were similarities. For example, the Ombudsman manages complaints. So do some of the territory's commissioners. Does this mean that if the Ombudsman was an officer of the Assembly, the parliament, the other commissioners should also, therefore, assume the same role? We think the amount of research which your committee is doing is beyond our scope at the moment, given the priorities the office has.

Since my office's submission of 20 July, the ACT government has submitted both its response to the public accounts committee report into the ACT Auditor-General Act 1996 and its submission to this standing committee. I understand that there is support for the Auditor-General to be an officer of the parliament.

There are significant and tangible benefits in having the statutory position of the Auditor-General an officer of the parliament, which is an officer, of course, of our ACT Legislative Assembly. The two key advantages, we think, are that it publicly and explicitly expresses the special relationship between the Auditor-General and the Legislative Assembly and it reinforces and shows firm and strong support for the continuing independence of the Auditor-General in the role of promoting public accountability in the public administration of the territory and in performing financial and performance audits of the public sector agencies.

I am aware that various views have been expressed about the appropriate types of

changes needed to make the Auditor-General an officer of the parliament and I think, given all the information that is now available, particularly through submissions to the standing committee on the Auditor-General Act, it is now a matter for the Assembly to resolve those issues. While there are issues to be resolved, it does appear that making the ACT Auditor-General an officer of the parliament can be achieved with limited changes to legislation and administrative arrangements, given our current high level of independence. Initiation of some of these changes to the ACT Auditor-General Act has already been agreed, and I am looking forward to those being progressed.

Given that there is overall support for the Auditor-General to be an officer of the parliament, I think the challenge now is to develop the framework in which this occurs. The framework will need to respect the circumstances of the ACT and will need to address issues that have already been canvassed, particularly in the review of the legislation governing my role; that is, the role itself, the appointment, the reporting and the funding arrangements.

I would suggest that the framework also explicitly address communication. Broadly documenting communication processes may assist the community in understanding the special relationship between the Auditor-General and the Legislative Assembly, especially the public accounts committee. Our routine communication when engaging with agencies and entities in undertaking our annual financial audit cycle and our performance cycle are included as material for the committee.

One of the issues there is that most people are not aware how much communication at the operational level the Auditor-General's Office actually has. I would like to table that for you to consider at the lower level of communication.

I would be very happy to comment on a draft framework with respect to ensuring that it could be implemented effectively with respect to those aspects over which I have direct and ongoing control. Thank you very much, committee members.

THE CHAIR: Thank you. Obviously we will have a closer look at the documents you have just handed us. Could you elaborate on how, on a day-to-day basis, the officer of the parliament status would affect your ability to perform your functions impartially?

Dr Cooper: I would argue that the functions have always been performed impartially since the office was established. They are currently being exercised in the same manner. So it would formalise something and make quite explicit in the public's mind what is actually occurring.

THE CHAIR: You just spoke about one important item being communication. I am unclear what the perceived problem is there. Could you elaborate?

Dr Cooper: I do not think it is a perceived problem. I think it is an enhancement for community understanding. Just as we are going live at this moment, the community have higher demands on us to make our communication explicit. What we have done there with the material we have presented to you is make it very explicit when we are communicating with agencies, both in the performance audit and financial audit

processes. We are intending to put these up on our website. People will often ask: “What is your communication with the Assembly? How does it all work?” All I am advocating is some form of strong information around the communication processes, because people make assumptions that may be incorrect.

THE CHAIR: You touched on how much research you have been able to do on this topic. There certainly are a range of different models in other jurisdictions for the officer of the parliament. Do you have any comments on models that you think are more or less appropriate for the ACT?

Dr Cooper: I do not. As I said, I have been with the office a short time and I emphasise that in that time it has been financial audit priorities. I am sorry, I have given priority to that. But I would respect my predecessor. I believe that about 18 months ago this issue was put to the committee in a full submission. If you would like me to go away and do more work, I could do that.

THE CHAIR: No. It was just an opportunity for you to elaborate

Dr Cooper: No. I think there is enough material available.

THE CHAIR: Mrs Dunne.

MRS DUNNE: One of the reasons, essentially, why we are here today is the issue which was raised by your predecessor about the appropriateness of budget funding and that led to her committing the Assembly to consider—and it is still in the process of considering—options of repatriating the Auditor-General’s budget allocations to the Assembly. In your admittedly limited time in the office, have you developed any thoughts about the appropriateness of the level of funding and, if so, what might be the best ways of addressing that?

Dr Cooper: The issue for me is around the level of funding, not necessarily who allocates that funding. For me, it is around the level of funding. The performance audit side is where the appropriation directs the effort to. As you say, the financial side is on a fee-for-service basis. If the Assembly would like more performance audits undertaken in a year, then more money is needed. I do not have the figures but I will ask my colleague Brett: the performance audits at the moment account for how much percentage of our budget, roughly?

Mr Stanton: Performance audits typically cost, as a notional cost for the office, about \$150,000 to \$200,000—a bit less, perhaps. So if we do six to seven a year, that is about \$1 million to \$1.2 million or \$1.3 million per year.

Dr Cooper: At the moment, of our budget, it is down at about 30 per cent of our overall budget.

Mr Stanton: I believe so.

Dr Cooper: It is around that. The performance area is the area that is of greatest growth in all jurisdictions, and it is where the community is demanding a higher level of service. I understand that the public accounts committee would like 50 per cent of

the budget allocated to performance audits, in which case we would need to at least double the number that we are currently doing. For me, it is the level of funding and, if the process were changed to facilitate that, we would deliver a far greater number of audits.

MRS DUNNE: So you are currently providing your financial audits on a fee-for-service basis and that nets the office how much?

Dr Cooper: I do not have it here.

Mr Stanton: I do not have those figures.

Dr Cooper: It is about five. Could I come back and give you the exact split? I would prefer to be fully accurate.

MRS DUNNE: I am trying to get a handle on whether you therefore increase the performance audit budget to match that.

Dr Cooper: We would need to increase it by just a bit over a million. That is my understanding.

MRS DUNNE: You are currently spending about \$2½ million on performance audits?

Dr Cooper: That is roughly—and the office management.

Mr Stanton: And the office management. Performance audits do not account for \$2½ million. It is a bit less than that.

MRS DUNNE: Sorry, I meant financial audits.

Dr Cooper: Financials are around the 2½ mark, but could I please come back?

MRS DUNNE: Yes.

Dr Cooper: Also, this year, given that the PAC would like us to increase the number of audits, we are going to put up a budget bid. We are just putting the figures forward at the moment. If it is all right with the PAC member who is here, we would be happy to share that submission with this committee.

MR HARGREAVES: I am not so sure about the appropriateness and protocol of doing that. I think that would be worth checking before actually doing that. It is probably inappropriate, actually, because it is a working document and has no conclusion at this point.

Dr Cooper: That is right.

MRS DUNNE: I want to clarify one thing. There is a formal program of performance audits but from time to time issues arise.

Dr Cooper: That is right.

THE CHAIR: How do you account for what might be called ad hoc inquiries? If something is referred to you by the Assembly or a member writes or an issue comes up, how do you fund that?

Dr Cooper: In the submission that Ms Tu Pham put forward, she made it very clear that the office just then reallocates priority within the office. In other words, the performance audits that were being progressed—

MRS DUNNE: Something falls off?

Dr Cooper: It is delayed in time. I think you have raised a very valid point for our office. If more is requested of us, I do think we need more funding. Also, another thing that is coming through is the relationship with the commonwealth in terms of funding for territories and states, and follow-the-dollar type audits—and how much the commonwealth will be expecting jurisdictional auditors-general to undertake additional audits, both financial and performance, to give the surety that the funds are being appropriately used and allocated. That is a recent, emerging issue.

MS BRESNAN: Dr Cooper, you noted in your opening statement that you had not done the research on looking at the appropriateness of having other agencies designated as officers of parliament. Do you have any views on the suggestion from the Ombudsman proposing a single integrity agency? What might be some of those interactions between different agencies if that was to occur?

Dr Cooper: One would be looking at whether or not we are creating another layer for the community to have to work through. That would be a question I would have. I am not too sure of the exact functions of that entity. I would want to know the role and its functions and then I would want to make sure, for the citizens of Canberra, that we are not creating an additional piece of process but that we are streamlining.

At the moment I am aware, from my previous role as commissioner, that the Ombudsman deals with complaints that the commissioner can also deal with. I understand there are other commissioners that deal with complaints. I am not sure of what coordination should exist between those to make sure that if you put a complaint in with one entity, you also do not lodge the same complaint with another entity. Essentially it takes some time to find out that two entities are dealing with the one complaint. I think there are issues about looking at all the commissioners and what their roles are, rather than just selecting the Ombudsman's role. I do not know whether the Ombudsman for the ACT, at the national level, is considered an officer of the parliament, because we know he wears that dual hat. But I am sure he can answer on all of those issues.

MS BRESNAN: When you talk about that layer in dealing with the community, would it be mainly around complaints and not creating any confusion?

Dr Cooper: That is right.

MS BRESNAN: There are two agencies and finding out that there are—

Dr Cooper: There are more than two. There will be human rights—

MS BRESNAN: It would depend on the complaint, I guess.

Dr Cooper: It depends on the complaint. We have, which is good for the territory, a number of commissioners. As I said, I would be looking at the role and their jurisdiction before I would actually want to comment on the issue of who should or who should not. For instance, if the Ombudsman were an officer of the parliament, therefore, if your complaint goes down that avenue versus another avenue, why would you necessarily have different treatment? What would prevail?

THE CHAIR: There seems to be general support for the Auditor-General's role to shift slightly, including from the government submission. Do you see any risks or potential disadvantages that we would need to be mindful of in establishing that kind of model?

Dr Cooper: Mrs Dunne raised the issue of budget. I think that is central. You would want to make sure that in any process that we did establish, we still had the appropriate links through the system for the case for additional budget to be heard. I think there are significant advantages in the proposal, in as much as it actually articulates something which fundamentally exists in principle at the moment.

THE CHAIR: On the question of budget, it is thought that if this role was created, the oversight committee, which in your case would be public accounts, would actually be responsible for recommending the budget amount.

Dr Cooper: Then, of course, we would put the case to them. That, to me, has no problems but it is a matter—

MR HARGREAVES: Is that the case at the moment?

Dr Cooper: The case at the moment is that they support the submission and they themselves will put up a proposal. At the moment we could have two avenues: they pursue it, and at the moment we can pursue it.

THE CHAIR: What is your current channel then—directly to government in the budget process?

Dr Cooper: I believe we can go directly—I have not done it yet—to government. I also believe the public accounts committee can put in a submission. So there is a dual process.

MR HARGREAVES: Generally speaking, Mr Chairman, with your indulgence, as a member of the PAC I indicate that the process is that the Auditor-General puts the budget forward through the normal channels through to the budget cabinet. But the Auditor-General's budget is discussed with the public accounts committee for that committee to look at it, either to recommend that it change its priority or change its directions or to support an increase in allocation. Over the last two financial years the PAC has significantly supported the request for additional funding and the

committee's expression goes directly to the Chief Minister, so you get a Legislative Assembly standing committee's letter of support accompanying the budget submission through to budget cabinet. That is how the process works at the moment.

MRS DUNNE: There is no-one who goes to budget cabinet and advocates on behalf of the Auditor-General?

MR HARGREAVES: The only person who goes to budget cabinet outside of a minister is the Speaker and that is because of the budget lines; everything else is done through a minister, in accordance with section 65 of the self-government act where ministers are the only people who can put forward appropriations, so the idea is that the formulation of the budget will be that. However, budget cabinet can and has in the past sought additional information from individuals and has had them come to budget cabinet to discuss their particular submissions.

THE CHAIR: We have sort of covered this a little bit but I just want to explore it a bit further. The various jurisdictions have various models. I guess I am back on my pitfalls question: are there any areas in jurisdictions such as New Zealand's or others where you feel that there are components of their models we would want to avoid if we were to go down this path?

Dr Cooper: I would have to—and I am very comfortable to do this if you would give me some time—and I am happy to, look at the other models and answer that question when I have spent time analysing. So mine would be quite a cursory comment which I would prefer to defer until I had looked into it. We could possibly provide for the committee—we have done some work but it is not at a stage where I feel comfortable with giving it to you—information of how it does work for auditor-generals in various jurisdictions. I would be happy to put forward a table on some of that and, if you like, give comment to that table if that would assist.

THE CHAIR: Thank you. That would be of interest. If you have points that you think would particularly help the committee in the sense of, if we are to draw a conclusion, areas that you see as potentially pitfalls would be helpful for us to be aware of.

Dr Cooper: We will do that. Thank you.

MR HARGREAVES: One more thing: there have been conversations around that the Auditor-General as an officer of the parliament should have the parliament set the budget outside the budget cabinet process. I would be interested, when you come back to the committee, in your view as to whether or not that would offend section 65 of the self-government act or not. There has been a suggestion in one of the submissions that it would and I think it would be a reasonable thing to ask the Auditor-General's office to comment on whether that offence may exist or not.

Dr Cooper: Thank you. Yes, we will take that on notice.

MS BRESNAN: My question flows on from that too. I am wondering how by creating the Auditor-General as an office of the parliament it is not just a symbolic recognition but is done in a way which strengthens the office and if you have any views on that. So it is not just saying that we are designating that role and that is it,

but other things, and whether it is that sort of process or other issues that you think might strengthen the role of the Auditor-General.

Dr Cooper: We will cover that too. Thanks.

THE CHAIR: Unless there are other questions, thank you for appearing today. You have obviously taken a few issues on notice and we look forward to your further thoughts and helping us with our deliberations.

As usual, a proof transcript will be forwarded to you to provide you with an opportunity to check it and suggest any corrections you feel may be necessary. Otherwise we thank you for your time in appearing today.

Dr Cooper: Thank you.

ASHER, MR ALLAN, Commonwealth and ACT Ombudsman, Office of the Ombudsman

THE CHAIR: On behalf of the committee, I welcome the ACT Ombudsman and thank you for taking the time to appear before this inquiry into the feasibility of establishing a position of officer of the parliament.

I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the coloured privilege statement before you on the table. Can you confirm for the record that you understand the privilege implications of the statement?

Mr Asher: I do.

THE CHAIR: Thank you. I also remind you that the proceedings are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live.

Before I proceed to questions from the committee, would you like to make any opening remarks, Mr Asher?

Mr Asher: Thank you. We have provided a submission to the working group and I would just like to say that our intention in making that submission is not so much to deal with the details about how such an arrangement if it proceeded would be put into place but, instead, to make a broader point about a step that we believe might materially enhance the effectiveness of all of the integrity agencies of the ACT and that, as I conceive our role, and indeed I believe consistently with the statute, our role includes being able to offer assurances to individual members of the parliament that the executive is acting in a way that the parliament intended. We also say that we seek to offer assurances to the Chief Minister and even to heads of directorates that the administrative processes of their directorates are being administered in ways that they intend. Then, not least but last, we offer that same assurance to members of the community who come to us with expressions of concern or complaints about administrative acts in the ACT.

The consequence of all of that is that we need—and the legislation provides this—to be independent of the executive if we are going to be able to offer assurances either to those heads of directors or to members of parliament or to the public, and the way that this is secured in a number of jurisdictions is that the ombudsman is either an officer of the parliament in the technical sense or, in cases like New South Wales where technically the ombudsman office is not an officer of the parliament but there is a parliamentary committee which receives the report of the ombudsman and reviews and provides both a measure of accountability and oversight plus a measure of protection of the independence of that office. In the ACT, for a start, we are the commonwealth Ombudsman and, more or less by a contractual arrangement, are providing ombudsman services to the ACT but through a memorandum of understanding with a particular part of the executive, Justice and Community Safety, which turns out to be one of the agencies where quite a bit of our complaints handling work is dealt with as well. So that causes some conceptual difficulties in independence areas as well as some confusion, I guess, of roles as well.

So, regardless of how the overall progress of the officer of parliament concept develops, I would urge the committee to consider the principle of how independence plus accountability is enshrined in the ACT system.

THE CHAIR: Thank you for those remarks and also for a submission which raised some very interesting issues. This morning the minister, on behalf of the Chief Minister, appeared and spoke about which agencies might be included under an officer of parliament. The views, if I reflect them, were that the Ombudsman's office was not one of those. The minister put it in the context that the Ombudsman's office is a creation and a creature of the executive, that it is perhaps a tool for the executive to reassure itself. I think you have just described that to some extent. I wonder if we could explore that point. You have elaborated it as giving assurance to the parliament, the executive and the community. The government have described it more as giving assurance to themselves. Would you like to comment on that?

Mr Asher: The institution of ombudsman is practised in different ways around the world. There are now 140 countries that have ombudsman systems. From the beginning, almost 300 years ago now, the idea of the ombudsman was to provide essentially a device by which the public could be given protection against excessive use of power by the government. Most commonly, the government exercises its power through the executive. I cannot think of too many—in fact I cannot think of any—ombudsmen who would regard themselves as being part of the executive.

Indeed, the very heart of the notion of ombudsman is a separateness from the executive. That is exhibited in the legislation—ours and many others'—in a couple of ways. Typically the government are not able to issue directions as to how a matter might be dealt with. Executives cannot determine which matters might be dealt with and which ones might not; that is a power reserved to parliament. While I did read the ACT government's submission, I would have to say that that is quite a novel approach to the role of the ombudsman and it is certainly not the way that our office has ever conceived it—that we are part of the ACT executive.

For that reason, there might be some productive further conversations with the executive about that, but I would be very surprised if the parliament thought that that was the right way in which the role of ombudsman should be exercised. If it is part of the executive, then in the ACT system that would make it part of a directorate and subject to all of the accounting conventions, funding directions, priorities and things like that of that directorate. What though, where complaints are raised, about those very matters?

It raises—not with any ill will; I am not suggesting for a moment that directorates would construe this in a way of ill will—some profound conflicts of priority and interests which would necessarily arise from that. I can see that that might render less useful to the executive the assurances that we can give. Certainly it would raise amongst members of the public a very legitimate concern that the role of ombudsman is not that that the legislation and their legitimate expectation would require.

THE CHAIR: In that context, you have spoken about the tradition and perhaps the current practices of independence of the office. What practical difference, on a day-to-day basis, would moving to an officer of the parliament type of arrangement deliver,

do you believe?

Mr Asher: I think the biggest one—and I have previously, in our annual report, put the view—is that residents of the ACT are not receiving the quality of services from government agencies to which they are entitled. Partly that is because there are funding constraints in government but it is also because there are some attitudinal issues in directorates about the role of complaints handling systems, the value of resident complaints and decision making. We feel those tensions all the time when we are putting forward proposals for change.

For example, just yesterday I was at a management meeting with integrity organisations at the Maconochie centre. We were looking at the range of issues that have come as a matter of concern to us—property issues, the disciplinary regime and all of those—which are all locked in quite tightly to the senior management structure of the Justice and Community Safety Directorate. There it would almost seem that when we are wanting to pursue complaints there are people who feel that they do not quite know what role we have and what role the senior directorate officials have in resolving those. That is partly because in agencies people perhaps do perceive us to be part of the government and not an external agency that is reflecting objectively on the administrative practices of the government.

You might note that at the end of the submission made by John McMillan, the Information Commissioner, he raised in one short paragraph a reference to what is now quite an active debate around the world around what is called the fourth arm of government: that properly conceived integrity agencies—auditors-general, human rights commissioners and people like ombudsmen—are more properly understood as of course not part of the judiciary and of course not part of the legislature but not part of the executive either. The fourth arm model, which is really another way of understanding this, is a permanent form of independence which is not for the benefit of those agencies but is for the benefit of the whole government system.

MRS DUNNE: I would like to pick up from that point if I could, Mr Asher. One of the issues is that the accountability provision mechanisms for at least two of the existing three arms are quite clear. The judiciary sits slightly to the right and above everything else. How would you envisage accountability mechanisms for what people now call the fourth arm? In relation to all the players—not just the public but the people who launch these projects—how do we ensure that the fourth arm is actually doing what it set out to do?

Mr Asher: I could argue that currently there is no accountability mechanism. We do not even appear to have our annual report reviewed by anyone. There are only the bilateral conversations that we have with government officials or the practice that I have adopted in the year that I have been the ACT Ombudsman, to sound out members of the parliament, members of the executive and the public to engage in a conversation so that we can expose ourselves to that sort of scrutiny that I think is necessary. At the very least there should be a parliamentary committee which sees itself as putting the spotlight on our performance and drawing it to our attention if, in the view of parliament, we have fallen short in some areas. Otherwise, we cannot know whether parliament perceives our performance to be either misdirected or underperformance.

Far from it being a lower level of accountability and scrutiny, some form of officer of the parliament arrangement or a parliamentary committee would enhance that. I invite members to consider their own perceptions or times when they have come to us, times when constituents have been sent to us, and whether you have felt there has been a way in which you could let us know either that something worked well or that something did not work well. We would really like that detailed feedback so that we can make our own planning, training and focal points of activity much finer.

MRS DUNNE: Could I just ask another question, a technical question? Mr Asher, you provide services to the ACT as the Ombudsman on a fee-for-service basis.

Mr Asher: Yes.

MRS DUNNE: So you are not bound up in the JACS process of HR, accounts management and those sorts of things.

Mr Asher: For some of them we are. The requirement of the ACT for the way in which we do the work is that we are bound by a number of the accounting conventions and performance reporting requirements of Justice and Community Safety, although not individual decision making for our contracts.

MRS DUNNE: What I am getting at—you touched on it more politely than I am about to—is that if you are in a situation where you are dealing with a lot of complaints in an agency and you are also dependent upon them to pay your bills, you might be waiting a long time.

Mr Asher: Yes.

MRS DUNNE: You are not in a situation of that sort in your contractual arrangement?

Mr Asher: Not in a transactional way. It is something that we are actively discussing at the moment with the Chief Minister's directorate. Our current arrangement goes back some years and is quite badly out of date, and a number of the formulas, we feel, are just way off the pace and no longer accord with the level of services that we are providing. So it is quite a material issue for us that we are currently trying to renegotiate. Sadly, it does arise from the nature of our arrangement with an individual directorate.

MRS DUNNE: Just to delve into that a bit further, is it a fee-for-service arrangement, so that you get paid quarterly or whatever on the basis of the investigations that you have undertaken?

Mr Asher: No, there is an overall formula that provides that over a number of years, if there is an efficiency dividend. But there is also a formula that provides that, should workloads in certain areas increase by more than a specified amount, the agreement needs to be reviewed. There is a combination of work that we do in policing and a separate arrangement for the rest of government. I think there are some complexities in that.

Most ombudsmen in recent years—and this is a necessity out of just cost management—rather than simply investigating individual complaints, have seen their role as one of trying, where there are systemic problems, to be able to suggest solutions that might solve these problems across a range of areas and thus reduce the cause of complaint in the first place. That means more own-motion investigations such as we have done in the ACT in a number of areas to look for ways of making the whole system work. The agreement does not reflect that at all. It does not reflect what we are doing or the value that we are able to add to administration in the ACT.

MRS DUNNE: How many staff would you have notionally allocated to doing work in the ACT, both police and other?

Mr Asher: Seven, but in addition probably as much as one-fifth of my time would be spent on ACT issues. For Helen, who is the Senior Assistant Ombudsman, it would be a quarter or so of her time. It is about eight or equivalent staffers.

MS BRESNAN: You were talking before about a committee having a role. You mention in your submission potentially having that similar relationship that the Auditor-General has with the PAC. Do you see it as being more like a general committee, similar to the New Zealand model, where there are the officers of parliament and a committee set up to oversee that, or would it be perhaps a matter of pairing the Ombudsman with the JACS committee? If so, because with PAC the Auditor-General takes a program of audits and they have some input into that, would you see it operating in a similar way if it was to go to one committee? Or would it be a matter perhaps of having that New Zealand model, where it is overseen by a more general committee?

Mr Asher: I think it would need to be a more general one if it was going to meaningfully provide a degree of accountability and scrutiny across all of our areas of work, whether it is Attorney-General's, Chief Minister's, planning, housing—all of those things. The difficulty of it being one agency such as Justice and Community Safety is that while that is a major area of our work, it is not the only one and it would not allow that degree, it seems to me, of scrutiny.

In the New Zealand model, it is the Speaker of the house who has a reasonably decisive role in resource allocation to the New Zealand Ombudsman. I would not want to make those fine details as to how that is done the key part of our submission, but I just observe that in principle, if you want a philosophy that guarantees the independence and yet retains a very high level of parliamentary scrutiny, something like that could be a sensible way to go.

MS BRESNAN: Do you think that, to have that sort of general committee, there would then have to be more than one agency made an officer of the parliament? In practical terms, the ACT is a small parliament to have one committee set up specifically to oversee one agency. Would you see it being dependent on that happening or could it operate in some other way if that sort of integrity agency, or even other agencies, were not to be determined as officers of the parliament?

Mr Asher: I am sure that the last thing the parliament, the committee and the

community want is yet more bodies set up. What I would be suggesting is that you look at the committee that is most closely capable of doing this now and perhaps give it an additional role. If you follow that earlier comment I made about the fourth arm of government, with respect to all of the bodies about which the parliament itself would say, “These aren’t part of the executive and they’re not part of us,” we want them all to feature in the overall accountability narrative for the ACT.

The Human Rights Commission would seem to me to be a possible candidate there, although that is quite clearly part of the executive in some respects. The Auditor-General is a clearer case. Again, around the world, everyone wants to maintain that degree of independence, yet it is typical, even with the commonwealth Auditor-General, that the work program for the Auditor-General is directed by the government committee. So the Auditor-General does not undertake work outside the agreed work program. In our case, work is suggested by the range of complaints that we get or observations that we make about systemic problems.

So even if all of those integrity agencies came before that committee, there would still be differences in approach. It would actually allow a good conversation, which perhaps has occurred in past years. I have only been the Australian Capital Territory Ombudsman for one year but I would benefit hugely from a collective discussion with a committee of the parliament about areas of administration that members of parliament have concerns about.

MR HARGREAVES: Mr Asher, you talk in your submission about the creation of an ACT integrity commission. Is your model just a bringing together of the oversight statutory office holders into one sort of body, addressing some minor things such as economies of scale, or is it something more than just that?

Mr Asher: It is more than that. That was in our submission to the Hawke review. I had seen a report commissioned, I think it was, by a committee of parliament five or six years ago in which Mr John Wood and some others had put forward some views about future governance in the ACT. The observation was made that there are a number of agencies at the moment which are on the very verge of being not viable. That is not just about the economics of it, which is not unimportant, but is also about critical mass and the ability to share information and to be more powerful advocates of accountability mechanisms in the territory.

We of course have the advantage that our ACT work is able to link to the broader work of our office—information systems, HR systems, reporting and even media. All of those things, for a tiny agency, become unattainable really. The ACT, as it grows, might have, as an aspiration, this integrity unit.

We said in our report to the Hawke committee that the commonwealth is perfectly willing, and indeed delighted, to have a continuing role but if the ACT wanted to do it another way we would be perfectly happy to assist in that process as well. I guess we put it slightly harsher. I think we said at the time, “If you don’t want us, we’ll go away.”

MR HARGREAVES: In August 2001, 10 years ago, the Standing Committee on Justice and Community Safety issued a report on a bill put forward by the late Trevor

Kaine, the Commission for Integrity in Government Bill 1999. Have you seen that report?

Mr Asher: No.

MR HARGREAVES: I would be interested to know your view on it, given that you have said that we should have a commission for integrity and given that it is about bringing together those oversight agencies. I would be interested in your view on whether or not you think that the comments made and the conclusions at that time, 10 years ago, are contemporary and whether you think that what we were talking about then was a step too far and that where you are going today is actually a step quite close that we could take. If you would be interested in responding to that at your leisure, that would be fine.

Mr Asher: I would be happy to do that.

THE CHAIR: Mrs Dunne.

MRS DUNNE: I am fine, thank you.

THE CHAIR: I want to ask you a question. You talked about an integrity commission. Can you highlight who you think would be in such a model or, perhaps in the context that we are looking at, whether there are other agencies which you think should be an officer of the parliament?

Mr Asher: It is linked in a way to some of the other policy discussions in the ACT. For example, there is some conversation about whether, as a consequence of the ACT's human rights code, that should be something that affects us more widely. In other words, should the Ombudsman also, in dealing with complaints that come to it, deal with them in the context of the human rights code? In which case, there would be much closer links between us and elements of the Human Rights Commission and things like that.

If a process of that sort went ahead, the answer might be slightly different if it did not. If, say, there were no other changes than this one, I would think that at the very least the Auditor-General and the body responsible for freedom of information in the ACT and the Ombudsman should certainly be part of that. Depending on whether the government was wanting to add slightly more independence to the work of the Human Rights Commission, possibly that could be included too. I understand that there are a number of different streams of thought about that.

In each case, though, I think the best place to start is not to look at what might fit together now; instead, to look ahead in time and look at the principle of what is going to give members of parliament in the ACT, ministers, senior civil servants and the public the greatest sense of assurance that decisions and policies are being implemented in fair, transparent and open ways. When taken from that lens, some of these things, even if they are complex now, by setting a goal for some years out to reach this stage, would lead to more enduring and better governance in the ACT.

THE CHAIR: I am sure you appreciate that there is no single model for officers of

parliament. I cannot remember whether you have covered this in your submission or not, but are there any aspects of the definition that you think are more or less appropriate to the ACT?

Mr Asher: Any aspects of?

THE CHAIR: Of the various ways that the notion is set out? Is there anything that you have particularly noticed that would or would not work well in the ACT?

Mr Asher: I have looked through the other submissions received. There are some very learned ones, including the one from the Western Australian parliament where they have given some thought to that. They refer to developments in the UK and things like that.

I guess that in this area one must be driven by one overriding observation, and that is the relative size of the ACT. You just want to avoid the complexity and fussiness that a lot of those arrangements might lock you into. I think radical simplicity ought to be an aspiration for administrative arrangements in the ACT.

THE CHAIR: That is a phrase that we may hear reused in this place. Are there any other questions from members of the committee?

MS BRESNAN: I have one. On the issue of funding, you noted in your submission the paper written by Mr Wood—and you have already referred to that—about the proposal for a funding mechanism that overcomes the financial initiative issue. This issue has been raised by the government. I would be interested in your view on the extent of the principle and any constitutional requirements.

Mr Asher: I understand that the government submission is putting the view that the law does not permit the parliament to play that sort of a role. A similar thing occurs at the commonwealth level. The budget for the Auditor-General, like the rest of the commonwealth, is actually set in the normal budgeting processes, with this exception: prior to the setting of that budget, the joint parliamentary committee on public accounts considers that first and provides a recommendation to the executive about the level of budget for the National Audit Office. Even if you did have a legal process where the parliament does not have appropriation power, it would certainly have the advisory power to comment on either excessiveness or, unlikely in our case, inadequacy—I think that is more likely in our case—of the overall budget.

MR HARGREAVES: The same process applies to the Auditor-General.

Mr Asher: That way, it is not a really controversial thing. You get the principle of the parliament and its committees being able to express views about these things but, again, without getting into arcane matters of constitutional reform.

THE CHAIR: Thank you for appearing before the committee today and taking our various questions. I think you have taken a number of matters on which you might provide us some further advice. We would appreciate that. When available, a proof transcript will be forwarded to you to provide an opportunity to check the transcript and any suggestions of corrections you may feel necessary. Otherwise, on behalf of

the committee, I would like to thank you for taking the time to appear today and share your ideas with us.

Mr Asher: I wonder whether I could ask whether the committee has any objections to us including some of these comments from our appearance here on our Twitter account.

THE CHAIR: No. It has all been webstreamed already.

Mr Asher: Thank you.

MR HARGREAVES: I have never been a follower of anything in my life. So knock yourself out.

Meeting adjourned from 11.34 am to 12 noon.

WETTENHALL, PROF ROGER LLEWELLYN, Visiting Professor, ANZSOG Institute for Governance, University of Canberra

THE CHAIR: Welcome to this hearing of the administration and procedures committee inquiry into the feasibility of establishing the position of the officer of the parliament. On behalf of the committee, I thank you for appearing today. I remind you of the protections and obligations afforded by parliamentary privilege and draw your attention to the coloured privilege statement before you on the table. Can I just confirm for the record that you understand the privilege implications of the statement.

Prof Wettenhall: Yes.

THE CHAIR: Thank you. I remind you that the proceedings are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live. We have your submission. Would you like to make a statement or some opening remarks before we go to questions?

Prof Wettenhall: Yes. I would like to open by saying that what I eventually submitted was longer than I had planned. The reason for that is that I found I really wanted to acknowledge what I regard as the very good work of some committees of the ACT Legislative Assembly, in this area particularly, the area that I am interested in. I think—I hope, because I support the direction that this inquiry is taking—that these reports will lead to significant practical reform.

I have to say also that I reckon they make a significant contribution to scholarship in this area. I do not think that it is so often that an academic gives praise to work of legislative committees like that; I think it is well deserved. I wanted to make that beginning comment. I am thinking of the earlier report of this committee on the Latimer House principles and the public accounts committee report on the audit act. Also, I was quite impressed by some of the statements by ACT officials who are potential candidates for officer of parliament standing in relation to some of these inquiries. I was very interested in the submissions of Phillip Green, the Electoral Commissioner, and Tu Pham, the former Auditor-General, made some very interesting submissions too. All of those, as I say, are good contributions to scholarship as well as, I hope, practical reform.

My position on integrity agencies and that leading to officers of parliament is this. I have had a long interest in statutory authorities, non-departmental public bodies. What I have noticed over the recent period is that there is much interest in a subset of non-departmental bodies which have come to be called integrity agencies. You can find that interest triggered by things like the work of Transparency International. I think in Australia you can date it back to the Fitzgerald inquiry in Queensland in 1989, on corruption. That interest is a strong interest and one that is going to be sustained, I think, for some time.

I noticed that the recent report of the ACT Ombudsman has in the forward a message in this direction, too, and it connects with the parliamentary agreement between the ALP and the Greens at the beginning of this Legislative Assembly, looking for a better structure for these integrity agencies.

One of the very important questions here is the degree of independence from government, and the need for close relationships between these positions and the legislature raises the question of government-legislature relationships. But I noticed through the literature quite a lot of use of terms like window dressing, paper tigers and tokenism. I have given you a few examples at the back of my paper: people like Dennis Pearce, when he retired from the Ombudsman position some time ago, and Ian Temby, who was the first independent anticorruption commissioner in New South Wales. And then there is a World Bank official looking at corruption agencies.

All of them are projecting a sort of message which goes like this: governments like to boast that they have good accountability arrangements, that these kinds of positions are so important and so vital to give that image of the good accountability arrangements. But if these officers are doing their jobs properly, sometimes they are going to be in conflict with governments; sometimes they are going to embarrass governments. It is almost inevitable that governments then will feel that they want to squash them, to starve them of sufficient funds to do their job and in other ways prevent them being too active in doing what they are supposed to be doing, what the legislature intended them to do when it created them.

If that happens, they cannot do their jobs properly. That leads, and Temby points it out, to this proposition that parliaments have to defend them whenever there is that sort of tension between a government and any of these bodies. Inevitably that is going to happen from time to time, and whenever you get that sort of tension parliaments have to stand up and defend them. That is where you come to the matter of the relationship between the parliament and these bodies.

This comes out of the discussion about integrity agencies, but out of it the field narrows a bit and the idea of officers of parliament emerges. That idea tells you that some of these integrity agencies have very important responsibilities in this direction. Auditors-general, ombudsmen, anticorruption bodies where they exist and human rights commissioners—they are the usual candidates, and then people explore whatever else. I have been surprised that electoral commissioners are a bit of an afterthought; I think they are a very important constituent here and it is good that another committee of this Assembly is looking at that question now.

So we get this idea of officers of parliament, and my submission talks a fair bit about that. We find the idea really jumping forward in parliamentary circles and reported by a New Zealand parliamentary committee in 1989. New Zealand acted quite quickly to establish a group of officers of parliament under an officers of parliament committee of the parliament. Then Victoria moved, as a bit of a reaction, I am pretty sure, to the way Kennett treated the auditors-general in Victoria. Victoria's public accounts and estimates committee conducted a very important inquiry. The report, published in 2006, was another one of these very significant parliamentary contributions to scholarship that really spells out a lot about the history of the idea of officers of parliament—what they are supposed to do, acknowledging the New Zealand model as an important thing to follow.

I have spelled some of that out in my paper, and in this statement I should not talk more about that, but New Zealand is the model. As I look at the reports of the ACT Legislative Assembly's inquiries, I think that there is a kind of progression. There is a

linkage between them. Your report on Latimer House principles leads into the public accounts committee's inquiry into the audit act. I think that is leading to this inquiry. There was a suggestion that you should carry this line forward. That is a very interesting progression. It shows a lot of linkage and, as I say, there is a lot of value in the reports being produced..

If you were going to move ahead to establish this system in the ACT, you should regard New Zealand as the model. You would have to thoroughly revise the statutes under which these officers operate. I will just come to that because in relation to the audit inquiry I looked pretty closely at the audit act, and it is a patchwork of bits and pieces that have been added year after year to the original act. It is not very coherent. There was even a matter of the conditions under which the Auditor-General is appointed. There is a bit here; there is a bit there; there is a little bit somewhere else. It is not pulled together in a coherent way.

I reckon that would be true of all of these bodies. I think you would have to reframe the acts. You would have to open each of them with a declaration of officers of parliament principles. You would follow with details of the functions of each of them and details of the appointment system, tenure, financing, office structures, and relationships with other parts of the government system, particularly the committee. I do not think you are going to get there unless you have an officers of parliament committee along the lines of the New Zealand model.

The overarching principle is that there should be protections for these bodies but also that they must themselves be accountable. So along the way there has to be a provision for periodic review. One report, I think Victorian, suggested that every three years there should be a serious review of each of these bodies. That is about how they are being accountable themselves. It is very important to protect them on the one hand and to ensure that they are themselves accountable on the other.

That is what I have been trying to say in my submission to you. This is a very important development, a very important governance issue. I support you in going forward to push this idea further forward.

THE CHAIR: Thank you. I am sure there will be some questions arising out of that. Both in your submission and in the comments you have just made, you particularly support the New Zealand model. Do you think there are any adaptations of the New Zealand model that you can explicitly identify that we would need to make for the ACT if we were to go down this path?

Prof Wettenhall: I perhaps have not looked at it closely enough. But you would have to acknowledge the constitutional position of the ACT in this. Immediately you have a certain difficulty in that the Ombudsman is shared with the commonwealth. There are some individual items that would need special treatment. You will not find any leads in the New Zealand model in that sort of thing. You have to make that sort of adjustment.

THE CHAIR: That is a fair point. You also spoke of the necessity of having the officers of parliament committee. One of the factors for the ACT is trying not to create too much structure, given our size. Do you think it is essential to have a

separate committee or do you think it is viable that a group such as the public accounts committee could take on those functions? Do you think there is a necessity for an absolutely separate committee or is it just—

Prof Wettenhall: The public accounts committee—for all of these bodies?

THE CHAIR: Potentially, yes.

Prof Wettenhall: I think you need an overarching committee that looks at them all. It would not be satisfactory to have one committee looking at one of them and a different committee looking at another one. There is a general principle involved and they would need to be treated consistently, I think. Maybe the public accounts committee could be that committee. In the New Zealand case, the Speaker is the chair of the committee. Some of the literature I have read actually jokingly refers to the Speaker as the “minister for the independent officers of parliament”. There is an integrating feature there that is very important.

MRS DUNNE: I will re-ask Mr Rattenbury’s question: do you see any pitfalls in the approach of creating officers of parliament with a single committee oversight like the New Zealand model? I think Mr Rattenbury asked this question of other people. Is there anything that you are aware of that we should be on the lookout for in that model?

Prof Wettenhall: The first response I have to that is that this committee will, to a degree, be aligning itself with the independent officers of parliament. So when you have a confrontation developing—it does happen; we had it between the Auditor-General and the Chief Minister a year or two ago, so this is not just fiction—if the committee is doing its job properly, it is going to side, I think in a case like that, with the Auditor-General and not with the Chief Minister. The pitfall is that this does open the way for some conflict between members of the legislature and the government.

MRS DUNNE: Members of the legislature are probably better suited to taking on the government than independent statutory office holders.

Prof Wettenhall: Yes.

MR HARGREAVES: Certainly the government member on those committees.

Prof Wettenhall: It provides awkward situations from time to time. But when people are doing their jobs conscientiously, honestly and to the best of their ability, of course there are going to be tensions like that. And this is one that would emerge for some members of parliament.

MR HARGREAVES: On that point, it is interesting that you say the parliamentary committee would naturally side with the oversight statutory office holder, and I accept that. It would be on two levels. One is that they are interwoven and the other is that the committees of the ACT Legislative Assembly are predominantly made up, the majority, of non-government members, anyway, so that is going to happen by definition. The challenge, I would expect and hope, is whether all members on those parliamentary committees can act as parliamentarians when they are in the committee

and not as politicians. If they act as politicians, it is a done deal; it is all over. If they act as parliamentarians then it is not quite. That is a challenge for new people.

THE CHAIR: Ms Bresnan, a question?

MS BRESNAN: I am not sure if you have had a look at the Ombudsman's submission and the idea of having an integrity agency or an oversight agency, where bodies such as the Ombudsman, the Auditor-General and even the human rights commissioners would sit. Do you have any views on that? That is going a step further from the officers of parliament—having those officers of parliament sit within an integrity agency. Do you have any views on that sort of model?

Prof Wettenhall: With respect to the reports I have read, of course the Victorian one was upstaged when Elizabeth Proust, under the new government, headed another inquiry. Interestingly, it was not an inquiry by members of parliament, whereas the earlier one was. Somewhere through that you get disagreement about whether you should have a two-committee structure or just one. When we were talking about the public accounts committee doing this at one stage, that would be one looking over them all. I do think treating them consistently is very important.

In some of the argument, there still should be a public accounts committee dealing just with the audit office, another committee dealing with the Ombudsman, possibly another committee dealing with the electoral office, and then having a superior committee over them all. So you would have a closer link between the first-order committee and this position than if you did not have that two-stage relationship. I do not think New Zealand does that.

MR HARGREAVES: Do we have a problem with our 17-member size of the Assembly, about how you can have those layers? In New Zealand they have a greater number to call upon. Every other parliament that I know of does. Do you think that would be a practical barrier to doing what we should be doing?

Prof Wettenhall: I do not like that. I think the issues and challenges are sufficiently similar across this range of positions we are calling officers of parliament for one committee to be the appropriate response. There is a question of the amount of resources you have got to apply to it. I prefer the idea of a single committee, although in some of the literature I have read there is a view that there should be two layers of committees.

MS BRESNAN: In your submission you also talk about the accountability of the officers of parliament themselves and having that ongoing review by parliament. Do you think the accountability to parliament directly will ensure there is that continued oversight of the officers?

Prof Wettenhall: The accountability?

MS BRESNAN: The accountability directly to the parliament. You talk about the accountability of the officers of parliament themselves and having ongoing review of their roles by the parliament.

Prof Wettenhall: Not by the parliament there, though. We do have that sort of review with the audit office now. There is an independent audit function that does do—I am not sure how frequently it is—a periodical review of the audit office. That is not by the parliament; that is by another independent group. If we had the officers of parliament committee, it would be commissioned by that committee to do the review. That would report back to the officers of parliament committee. I am just worried about the idea that parliament does the review. It has another agent to do that through this officers of parliament committee. Everyone is reporting to parliament in the long term. You have independent checking stages along the way.

MRS DUNNE: So you would submit, Professor Wettenhall, that, if we went down this path and we fixed up the audit act, one of the things we would have to do would be to create a more rigorous process of review because at the moment there is potential for review but it is not timed regularly and there had not been one for many years until quite recently, so that would be one of the things we would have to fix up?

Prof Wettenhall: Yes.

MR HARGREAVES: This is the last one from me. You talked about the integrity commission concept in your paper and you quoted quite extensive references, and I thank you for that. You have been around this place for quite a while. Are you aware of the bill introduced by the late Trevor Kaine in 1999 called the Commission for Integrity in Government Bill that he put on the table in 1999? It was the subject of an inquiry and review by the justice and community safety standing committee, which tabled its report in 2001. It essentially addressed the issue of protection against the possibility of corruption in the ACT.

We knew at the time of course of the Queensland and New South Wales experiences, and to a degree in Victoria their prison contract management was pretty heavy. We in the ACT had not experienced that level of corruption so it was hammer and walnut sort of issues. I was just wondering whether you are aware of that work, and if you are not I might just draw your attention to it for you to have a look at it.

Prof Wettenhall: Thank you. I have no recollection of that at all.

MR HARGREAVES: I will write it down for you.

Prof Wettenhall: That was in Trevor Kaine's period?

MR HARGREAVES: The late Trevor Kaine tabled the legislation—

MRS DUNNE: It was a private member's bill.

MR HARGREAVES: Yes, and the justice and community safety committee looked at it and had an inquiry. It travelled to other jurisdictions and asked people's views et cetera and came down and put its stuff forward. But it never came up for debate. I think it collapsed at the end of that particular term in 2001.

Prof Wettenhall: Thank you. I will have to look at the Trevor Kaine exercise. When you think of what happened in Queensland, there was so much need for

anticorruption remedies. There is a question about corruption on one side and integrity on the other side. Integrity is really a much broader idea than corruption. It is pretty easy to say there is not much corruption in the ACT—that there are little bits of it here and there but not major corruption such as occurred in Queensland—and so we are okay and we do not need to do anything. But that is a false way of looking at it because integrity is a much broader idea: you can breach integrity requirements without being corrupt at all.

People with the best will in the world can be in conflict and there are problems about how that lines up with structures, rules and all that sort of thing. These are integrity issues that are very important and you should not lose sight of them by saying: ‘We’re okay. We’re not corrupt.’ I think there was a bit of a danger there if you go back 10 years ago: Queensland was so much in our mind we thought we did not have to worry. But integrity is still important, apart from corruption.

THE CHAIR: That is a very interesting point. I had not thought of that. One of the issues the committee will need to consider if we go down this path is what sort of role the committee might have in the appointment of some of the statutory office holders or officers of the parliament. At the moment, as you know, for the Auditor-General the public accounts committee has a veto power. I guess the question is one of degrees, of whether a veto power is sufficient. Do you have any comment on whether the committee might play a more active role in the recruitment process, whether that be in the setting of criteria or even more active than that?

Prof Wettenhall: In the New Zealand case it is accepted that the committee does design prospectuses really—I have made a note of that in my submission—developing codes of practice for people involved in it. It is a big question you ask. I do not know how to answer that. I do not think a legislative committee should ever expect to make a final decision on an appointment. But to be consulted, to advise along the way, to express serious reservations about a person the government has in mind, and perhaps even to put forward other possible candidates—I think those things are okay for a committee to do.

MR HARGREAVES: Would that muddy up the notion and the understandings around the doctrine of the separation of powers perhaps?

Prof Wettenhall: Yes.

MRS DUNNE: I think we are doing that already, aren’t we?

MR HARGREAVES: We are stirring the pot something fierce; that is what we are doing, which is a challenge to the—

Prof Wettenhall: There has been a little tension recently, hasn’t there, about the Auditor-General’s appointment?

THE CHAIR: That is why I asked the question; it is a live issue at the moment.

MR HARGREAVES: When we talk about the doctrine of the separation of powers we talk about the three arms of governance. But I have heard quite often this phrase

“the fourth arm of governance” and it is about these independent oversight statutory officers. If that is going to be an accepted academic interpretation of the role of these people, what does that do to the doctrine?

Prof. Wettenhall: It is a symbolic thing. I was at a conference overseas talking about these things a few years ago. I can think of people from Switzerland and from South Africa who were talking about the fourth arm and the need to have a fourth arm. It is a universal notion. But I do not think our constitutional arrangements really allow for that.

MR HARGREAVES: It blows the doctrine out of the water perhaps.

Prof Wettenhall: Professor John Power emeritus from the University of Melbourne is putting forward the idea now that integrity is so important that it is a function that should be vested in the head of state position, whether it is a governor, a governor-general, a president or a king or whatever—

MRS DUNNE: We do not have one of them.

Prof Wettenhall: No, we do not have that. But he is putting forward the idea that this is so important that it has to be put up at that level. That gets in the way of separation of powers ideas too. But people are thinking about these things. I cannot see a fourth arm being developed so separate that our constitutional notions are going to accept it like that, but within that you can work along lines we have been talking about to achieve quite a lot.

THE CHAIR: I am mindful of the time—we do not want to overstay your welcome—and there being no other questions, I thank you, Professor Wettenhall, for coming today and for sharing your experience and your ideas with us. We very much appreciate it.

A proof transcript when available will be sent to you and that provides you an opportunity to check it and make any corrections you feel might be necessary. Thank you for your time today.

The committee adjourned at 12.32 pm.