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4 June 2009

Mr Shane Rattenbury MLA
Chair
Standing Committee on Administration and Procedure
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
SUBMISSION NUMBER	6
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Dear Mr ^{Shane}Rattenbury

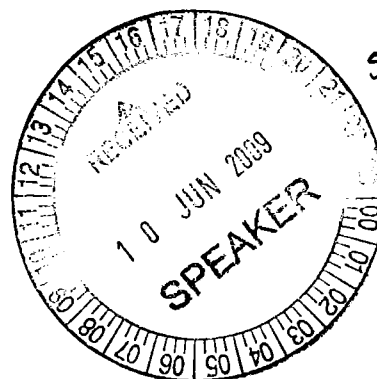
Thank you for the invitation to make a submission to the Committee's *Inquiry into the appropriate mechanisms to coordinate and evaluate the implementation of the Latimer House Principles in the Governance of the ACT*.

I have attached the submission from my office which, in summary, suggests that the Principles be endorsed by the Assembly and considered by its Committees, both through an audit and as a continuing test for legislation and programs considered. The submission also raises a challenging issue about the proper characterisation of oversight agencies such as this office. I am sorry it has taken a little longer than the time allowed.

My officers and I would be available, if requested by the Committee, to appear and speak to the submission. Our contact officers for this matter are Ms Anna Clendinning, Senior Assistant Ombudsman (anna.cleddinning@ombudsman.gov.au, tel: 6276 0156) and Ms Gabrielle Hurley, Director, ACT Team, (gabrielle.hurley@ombudsman.gov.au, tel: 6276 3748).

Yours sincerely


Prof. John McMillan
ACT Ombudsman



Submission by the ACT Ombudsman

INQUIRY INTO THE APPROPRIATE MECHANISMS TO COORDINATE AND EVALUATE THE IMPLEMENTATION OF THE LATIMER HOUSE PRINCIPLES IN THE GOVERNANCE OF THE ACT

Submission by the ACT Ombudsman, Prof. John McMillan

May 2009

INTRODUCTION AND SUMMARY

The ACT Ombudsman (the Ombudsman) forms part of a structure devised by the ACT Government to ensure transparent and effective public administration. There are corresponding offices in every Australian jurisdiction and in many other countries.

A key feature of the Ombudsman's oversight function is the ability to conduct independent review of complaints about ACT Government agencies. The Standing Committee on Administration and Procedure (the Committee) is inquiring into the appropriate mechanisms to coordinate and evaluate the implementation of the Latimer House Principles (the Principles) in the governance of the ACT.

BACKGROUND

The office of Ombudsman is established under the *Ombudsman Act 1989*, and the office is held by the person occupying the office of Commonwealth Ombudsman under the *Ombudsman Act 1976* (Cth). The Ombudsman investigates administrative actions, following a complaint or on the Ombudsman's own motion. The Ombudsman also has functions under the *Freedom of Information Act 1982*, the *Public Interest Disclosure Act 1994* and the *Crimes (Child Sex Offenders) Act 2005*.

The Ombudsman manages his office's ACT operations within the same office accommodation and using the same pool of staff as are used for Commonwealth matters, although some staff tend to specialise in the ACT. The ancillary services used for the ACT function – information technology and communications, legal, financial and human resources – are the same as those used for the Ombudsman's Commonwealth functions. The benefits of this arrangement include that the Ombudsman has access to enough staff and other functions to be able to manage temporary peaks and troughs in the office's ACT caseload and the capacity to apply lessons learnt in one area of work to another.

In all areas of its work, the Ombudsman's office has strong coercive powers to require the production of information and documents or that people attend and answer questions in relation to an investigation, usually under oath or affirmation. The office's strong preference is not to use these powers other than where necessary (for example where there is resistance). In the same way, while the Ombudsman can issue reports containing critical opinion and recommendations for change and remedy, the office has a preference for less formal resolutions that enable agencies to make their own decisions about what to do when an action has been under investigation.

Formal issues

The Ombudsman's jurisdiction does not extend to the actions of Ministers, judges, magistrates, coroners, court officers carrying out functions of a judicial nature, tribunals in the exercise of deliberative functions, Royal Commissions, Boards of Inquiry or Judicial Commissions. The Ombudsman Act contains special provisions, enabling the Ombudsman to decline to investigate a matter better dealt with by a court or tribunal and precluding the investigation of matters that a complainant has taken to a court or tribunal, unless there are 'special reasons'.

Actions of the Assembly and its Members are outside the Ombudsman's jurisdiction, although in some circumstances the Ombudsman may express an opinion that a rule of law or provision of an enactment is unreasonable, unjust, oppressive or improperly discriminatory. In practice, this is likely to happen only where an investigation has highlighted an unintended, anomalous or disproportionate result from the operation of a law or the application of a rule or policy. The Ombudsman does not see his office as having a role in reviewing or second-guessing the merits of laws and policies that have been endorsed by Government or the Assembly.

The Ombudsman provides assurance to the community in its dealings with ACT Government agencies by:

- assisting people to resolve complaints about government administrative action
- identifying administrative deficiencies through independent review of ACT Government administrative action and proposing corrective action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- developing policies and principles for accountability.

RESPONSE TO TERMS OF REFERENCE

The Principles

The Principles would be applicable in the ACT to the extent they are not contradictory to the Commonwealth *Constitution* and the *Australian Capital Territory (Self-Government) Act 1988*.

The Ombudsman understands the Principles to recognise that the Westminster system traditionally recognises three branches of government - legislative, judicial and executive - and comprehends the following elements.

There are obligations on each branch to guarantee the rule of law, the protection of human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

There is mutual respect for the proper separation of powers and functions between the legislative and judicial branches, enabling both legislators and judicial officers to carry out their functions without interference.

There is an independent judiciary, appointed on merit, with equality of opportunity and the removal of discrimination and with tenure and remuneration protected. Judges should be subject to suspension or removal only on limited grounds and following a fair process.

Judicial institutions are adequately resourced, court proceedings are generally open and decisions are made public. The legal profession is competent and independent and it is legitimate to criticise the performance of judicial functions.

Appointment to public office depends on merit and proven integrity with the establishment of measures to reflect the composition of the community.

There should be guidelines for ethical conduct, specifically addressing conflict of interest, applying to Ministers, parliamentarians, judicial officers and office holders.

The executive should be accountable to the parliament and the actions of government should be subject to judicial scrutiny.

The parliament should examine proposed laws, with public input as appropriate. Parliaments and governments should engage with civil society to ensure participation.

Parliaments should consider international instruments or regional conventions.

There should be zero tolerance of corruption and government should be accountable and transparent. Steps to achieve this include the establishment of oversight bodies and an independent media.

Application to the ACT

General

The constitutional underpinnings for the ACT satisfy or reflect some of the Principles.

The Self-Government Act:

- deals with conflict of interest in the Assembly
- sets out the privileges etc of the Assembly and its members
- requires Executive members to sit in the Assembly
- gives the Supreme Court a protected jurisdiction
- provides a fair process for the removal of judges
- requires that certain official salaries are determined independently.

Other legislation exists that reflect the Principles, for example:

- express provision for judicial review of most executive action
- the creation of an Auditor-General and a whistleblowing scheme that reflect the need for integrity and probity, and an abhorrence of corruption
- the creation of oversight bodies such as the Ombudsman to monitor executive action
- the *Freedom of Information Act 1989* and the *Territory Records Act 2002*.

As with any jurisdiction, there is room for occasional tension between the branches of government in the ACT. The Executive may see its capacity to implement government policy act as constrained by judicial rulings in individual cases. The Legislature may be frustrated by difficulty in obtaining information from the Executive that the Legislature considers necessary for the proper performance of its functions. The Judiciary may consider the resources allocated to it by the Executive and the Legislature to be inadequate. Any combination is possible, and the critical point is that these issues be resolved without disturbing the historic balances between the branches.

Specific to Ombudsman

The office of Ombudsman exists for a number of purposes. Some of these would be shared with other administrative oversight and integrity agencies or are consistent with what those agencies do.

The Ombudsman:

- provides any person with an accessible mechanism to ensure that they can complain about the actions of Executive officials and that complaints will be examined, independently and impartially
- provides a low cost mechanism that can investigate any matter of administration that comes to the attention of the Ombudsman and that seems to warrant investigation
- ensures that adverse opinion about the actions of officials, reached after a fair process, is made known to Ministers. This enhances the capacity of Ministers to manage the functions for which they are responsible, and it enables Ministers to be held accountable. These factors, and the possibility of criticism, contribute to the development by the Executive and its officials of attitudes that value good processes and integrity and that abhor corruption
- provides the Legislature with a capacity, through Ombudsman's Annual Reports and other reports, to develop a picture of the overall health of the public administration of the ACT
- provides an efficient and effective mechanism for the performance of sensitive functions, such as the oversight of the way the Australian Federal Police manages the records of child sex offenders.

Possible action

Apart from a mechanism wholly outside the ambit of government, any structure to coordinate and evaluate the implementation of the Principles must derive from one or more of the branches of government. If, hypothetically, a mechanism could be established outside any of the branches of government, it would need to derive authority from government to make the necessary inquiries. It would need to report to government to ensure that its deliberations are considered and receive a response. Thus, it is inevitable that one or more branches of government will be involved in ensuring that the Principles are implemented.

The Ombudsman considers that the Principles warrant formal endorsement by the Assembly, to an extent consistent with the ACT's status as a political entity for which the Commonwealth may also legislate. That action alone should set the ground rules against which conduct can be judged.

Compliance with the Principles is a matter which could be relevant to the deliberations of any Assembly Committee when evaluating proposed legislation or any other matter. A breach or failure to meet the standards espoused in the Principles should be a matter that the Committee could identify in its report to the Assembly.

It may be useful, in commencing this process, if the Assembly were to determine that an appropriate Committee should audit existing legislation, processes and requirements to ensure that the Principles are given effect to the greatest extent possible.

The Ombudsman notes, for example, that at the Commonwealth level, the Senate Legal and Constitutional Affairs Committee is inquiring into *Australia's judicial system and the role of judges*. The Terms of Reference include issues of appointment, complaint, jurisdiction and judicial complaints. The ACT may wish to draw on its conclusions in framing those issues against the standards in the Principles.

The position of oversight agencies

Traditionally, oversight agencies such as the Ombudsman have been characterised as forming part of the executive branch of government. However, some of these agencies have features – including independence from direction, impartiality and qualified immunity from suit - that suggest they may occupy an unusual place in that branch.

Although less than central to questions about the implementation of the Principles, the Ombudsman considers that at some point it may be appropriate to examine the role and characterisation of oversight agencies. Traditional Westminster notions do not always adapt to the work of bodies such as:

- the Ombudsman
- the Auditor-General
- the Human Rights Commission
- the ACT Civil and Administrative Tribunal
- the Privacy Commissioner
- the Independent Competition and Regulatory Commission
- the Commissioner for Sustainability and the Environment
- the Occupational Health and Safety Commissioner.