

The right system for rights protection

August 2004

An ACT Government Position Paper on the System of Statutory Oversight in the ACT

Including the Government Responses to the Review of Statutory Oversight and Community Advocacy Agencies, and the Submission to Government on the Disability Commissioner from the Disability Reform Legislative Reform Working Group

Chief Minister's Foreword

The Right System for Rights Protection is a foundation document that proposes major structural reform for the ACT's statutory oversight agencies.

The health of a community can be measured by the extent to which it is prepared to care for—and support—its most vulnerable members. This, of course, is a key principle underpinning policies and actions arising out of *The Canberra Social Plan*, *The Canberra Plan* and the *Human Rights Act 2004*.

Both the Board of Inquiry into Disability Services and the ACT Health Review emphasised the need for a more integrated approach to statutory oversight and community advocacy functions.

This paper outlines the Government's intention to establish a new structure for statutory oversight in the ACT that is more streamlined and accessible and will deliver better quality services to the community.

The starting point for this paper is that the ACT should have a system that supports and protects Canberra's most vulnerable citizens as well as one that is more efficient and flexible than the current system. It should also be a system that will stand the test of time.

Accessibility is a key aspect of ensuring that we respond appropriately to the needs of the most vulnerable in our community and those who are unable to adequately represent themselves.

The new structure retains Commissioners with specific responsibilities for particular issues. This increases the transparency, accessibility and accountability of the statutory oversight system as a whole.

At the same time, the structure will enable Commissioners to share resources and expertise more easily than under current arrangements, increasing the consistency and coordination of oversight activities.

The Right System for Rights Protection reflects a strong Government commitment to protect and promote citizens' rights and improve government accountability. I am confident these new arrangements will work into the future and engender the public trust and confidence that is so essential to its success.

Jon Stanhope MLA
Chief Minister
August 2004

*“The Right
System for
Rights Protection
is a foundation
document”*

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Executive Summary

In April 2003, the ACT Government commissioned the Foundation for Effective Markets and Governance (FEMAG) to conduct a Review of Statutory Oversight and Community Advocacy Agencies. The Review looked at a broad range of statutory oversight and community advocacy bodies, taking a holistic view of the system so that it could make recommendations on improvements in the system as a whole.

The final report of the Review was received by the ACT Government in October 2003 and released for public comment in December 2003. The Government received thirteen submissions in response to the Review report.

New Administrative Arrangements

Through the review of oversight arrangements, the Government aimed to identify the statutory oversight model which would be the most appropriate for the ACT into the future.

The FEMAG Review report confirmed the need identified in the Reid Report to consolidate the existing complaint bodies to ensure an optimum system for consumers and citizens, and to allow flexibility in the use of resources. The report noted that “a series of small stand-alone agencies will not be able to undertake the challenging tasks expected of them”.

The ACT Government will establish a new structure for statutory oversight in the ACT which delivers better quality services to the community and to Government and will be both more efficient and more flexible than current arrangements.

The ACT Government’s model establishes a Human Rights and Service Review Commission, comprising the Human Rights Commissioner, Discrimination Commissioner, Health Services Commissioner, Disability Services Commissioner and Community Services Commissioner. Commissioners will be appointed for five year terms.

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The model allows for a President of the Commission to be responsible for the management of one office. The key role of the President will be to receive complaints under all relevant legislation. The President may delegate the handling of complaints to the other Commissioners, but will be responsible for undertaking conciliation where this is appropriate. Each Commissioner will have statutory functions and powers relevant to their areas of responsibility to undertake monitoring, compliance and community education activities, as well as the investigation of complaints.

Given the relatively small population of the ACT, there is no need for a large number of full time Commissioners. However, a structure which encompasses Commissioners with specific responsibilities for particular issues will increase the transparency, accessibility and accountability of the statutory oversight system. This model strikes a balance between these considerations by enabling the appointment of Commissioners on a full time or part time basis, as appropriate to the workload associated with their responsibilities, and the sharing of administrative costs and staff between offices.

The model also provides the flexibility to introduce additional responsibilities and Commissioners in the future, with relevant functions allocated to existing Commissioners or new appointees.

The Human Rights and Service Review Commission will report to the Attorney-General. This will not restrict Commissioners from reporting and providing recommendations directly to individual Ministers and agencies in relation to matters within their portfolios. Nor is it intended to inhibit ongoing contact with Chief Executives in relation to quality assurance or other matters.

A Disability Services Commissioner will be established under new legislation and have functions and powers which enable him or her to undertake monitoring and compliance activities as well as investigating complaints received about disability services.

The Government will also establish a Community Services Commissioner, whose specific responsibilities will be the subject of further consultation, but are likely to include oversight of social housing and homelessness services.

The ACT Ombudsman will remain separate, with these services continuing to be provided by the Commonwealth Ombudsman. There is value in maintaining this arrangement, which gives the ACT Ombudsman access to a highly developed management system for the type of issues handled. However, the ACT Government will take this opportunity to clarify and expand the Ombudsman's jurisdiction and powers.

There are currently no significant changes proposed to the structure of the Office of the Community Advocate (OCA), except for the inclusion of Official Visitors within its responsibilities. In order to better

reflect its role, however, the Government considers that it is timely to change the title of the Community Advocate to the “ACT Public Advocate”.

Official Visitors will be given additional powers including the right to require the provision of information by those running a visited facility. Official Visitors will be located with the ACT Public Advocate. The similarity of functions and availability of collegiate support are advantages to locating with the ACT Public Advocate.

As stated in the Government’s Supplementary Response to the Standing Committee Inquiry into the Rights, Interests and Well Being of Children and Young People, the role of Official Visitors is being considered in the review of the *Children and Young People Act 1999* and in the development of the role of the Commissioner for Children and Young People. Some further changes to the roles of the Official Visitors for child protection and youth justice may arise from these processes.

Community advocacy

The ACT Government supports the FEMAG assessment that the ACT community sector has the capacity and tradition to operate community advocacy agencies effectively and efficiently. The Government therefore supports retaining the existing model of community advocacy being provided by non-government community organisations.

FEMAG’s findings about gaps in the availability of individual advocacy will be referred to the Joint Community Government Reference Group for consideration in the broader context of prioritising actions to meet the needs of the most at-risk members of the community.

Legislation

The Government will develop omnibus legislation to establish the Human Rights and Service Review Commission. The legislative changes will establish a core set of consistent processes for handling complaints applying to all of the proposed Commissioners. The consideration of an appropriate legislative model and drafting of new legislation and amendments to existing legislation will take a number of months to finalise.

It is intended that the legislation will be tabled in the ACT Legislative Assembly in March 2005.

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The ACT Government's Model for the Statutory Oversight System in the ACT

Section One

Context

Background

In April 2003, the ACT Government commissioned the Foundation for Effective Markets and Governance (FEMAG) to conduct a Review of Statutory Oversight and Community Advocacy Agencies. The review looked at a broad range of statutory oversight and community advocacy bodies, taking a holistic view of the system so that it could make recommendations on improving the system as a whole.

The terms of reference for the FEMAG Review (see Box 1) were the subject of community consultation conducted by the ACT Council of Social Service (ACTCOSS) in November 2002. During the review, FEMAG held discussions with over 200 people, including meeting with representatives of over 50 organisations and participating in a forum organised for the disability sector by ACTCOSS, ACROD and the Client Guardian Forum.

This section of the paper responds to the FEMAG Review but does not directly address all of its recommendations (a complete response to the FEMAG Review is included in Section Two). This position paper also takes account of issues raised and recommendations made by:

- the Board of Inquiry into Disability Services (the Board of Inquiry Report), which was tabled in the ACT Legislative Assembly in February 2002, and the Government Response tabled in September 2002
- the ACT Health Review, conducted by Michael Reid and Associates and released in May 2002 (the Reid Report), and the Government Response released in June 2002
- the Disability Reform Legislative Reform Working Group's submission to Government on the Disability Commissioner, provided in November 2003
- the Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management (the Vardon Report), the first report of which was received from Ms Cheryl Vardon on 14 May 2004.

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In line with the above reviews, submission and ACT Government responses, this paper deals only with statutory oversight and community advocacy as they relate to the protection of rights and provision of appropriate services for individuals and disadvantaged groups within the community. It does not consider mechanisms related to commercial matters such as fair trading or the application of competition policy.

Introduction

Statutory oversight

In most jurisdictions that are comparable to the ACT, oversight bodies are established to improve government accountability, protect and promote citizens’ rights and ensure that people who consider that a service provider has not met its obligations under law have an opportunity to seek redress. Such agencies or officials are known as statutory oversight bodies when they are established under legislation. Usually called an Ombudsman or Commissioner, they generally have three main functions:

- investigation and conciliation of complaints, with the basis on which a complaint can be made defined under legislation
- systemic oversight of government processes, services provided in a particular field (for example, health services) or services for a particular group of people (for example, children), and
- promotion of, and community education in relation to, quality improvement in services, citizens’ rights and/or the issues facing a particular group of people.

As a small jurisdiction, a major challenge for the ACT in establishing an appropriate statutory oversight system is to balance the availability of clearly identifiable statutory oversight bodies and relevant expertise with resource constraints and the need for efficiency. This tension is reflected in advice to the Government from experts and the broader community. For example, the Reid Report found that the current number of complaints agencies was excessive for a population of 300,000. On the other hand, there have recently been a number of calls for new complaints and oversight bodies to be established with responsibility for specific areas, such as disability services, community services and children’s services and rights.

Community advocacy

Advocacy refers to action taken by an individual or organisation on behalf of, or in support of, another individual, organisation or group of people in order to achieve a desired outcome or an improvement in their circumstances. For the purposes of this paper, and in line with the FEMAG Report, community advocacy refers to advocacy activity that is undertaken by community organisations, businesses or

individuals on behalf of a disadvantaged individual or group of people. Such advocacy may be focussed on achieving a specific outcome for an individual (individual advocacy) or influencing the community or service system (systemic advocacy) on the basis of trends in individual cases. Again, this is consistent with FEMAG's usage, which in turn was taken largely from the work of the National Disability Advocacy Program.

While community advocacy is related to oversight—in that advocates may be involved in supporting complainants, and both community advocacy and statutory oversight bodies have a role in driving systemic change—the functions of the two groups are generally quite distinct. In particular, where statutory oversight agencies handle complaints, it is critical that they are independent of both the complainant and the body which is the subject of the complaint. An advocate, on the other hand, would provide representative support and advice to one party (in the case of community advocates, usually the complainant).

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Box 1 Terms of reference for the Review of Statutory Oversight and Community Advocacy Agencies

In relation to statutory oversight agencies:

a To examine, consult and report on the statutory oversight functions and powers of the following agencies:

- Community and Health Services Complaints Commissioner
- Community and Health Rights Advisory Council
- Discrimination Commissioner
- Community Advocate
- Management Assessment Panel and Care Coordination Office
- ACT Ombudsman
- Official Visitors (mental health, disability, child protection and youth justice)

Taking into account the following enabling legislation:

- *Community and Health Services Complaints Act 1993*
- *Ombudsman Act 1989*
- *Community Advocate Act 1991*
- *Children and Young People Act 1999*
- *Guardianship and Management of Property Act 1991*
- *Mental Health (Treatment and Care) Act 1994*
- *Discrimination Act 1991*
- *Disability Services Act 1991*

In addition to their responsibilities under other legislation.

With a view to determining if:

- 1 there are implications for existing agencies and office holders flowing on from the roles and functions of the proposed new statutory position of a Disability Services Commissioner and where that position could be appropriately located
- 2 complaints in relation to disability services should be investigated by any new or existing agency
- 3 overlap currently exists between statutory oversight agencies or their legislative roles or functions, and if so, where there may be opportunities for greater clarity of roles and responsibilities
- 4 on the basis of similar legislation in other jurisdictions, there are gaps in the coverage of statutory oversight agencies in the ACT

- 5 where gaps do exist, it is possible to integrate new functions into existing or improved structures
- 6 complaints mechanisms within statutory oversight agencies are effective and efficient and if not, provide advice on improvement mechanisms and performance measures including to the reporting of complaints management processes and outcomes, particularly with regard to consistency across agencies
- 7 there are adequate internal and external review and appeals mechanisms and if not, what these should be
- 8 there is a logical conclusion to the current complaints handling processes conducted by statutory oversight agencies
- 9 statutory oversight and advocacy agencies adequately contribute to service improvement and enhance the rights of consumers
- 10 the Management Assessment Panel and the Care Coordination Office are in the appropriate administrative location and if not, recommend where they should be.

In relation to Community Advocacy Agencies:

b To examine, consult and report on the role and function of community advocacy agencies;

With a view to determining if:

- 1 overlap currently exists between statutory oversight and advocacy agencies or their functions, and if so, where there may be opportunities for greater clarity of roles and responsibilities
- 2 on the basis of similar legislation, arrangements and models of best practice in other jurisdictions, there are gaps in the coverage of advocacy agencies in the ACT
- 3 advocacy agencies adequately contribute to service improvement and enhance the rights of consumers
- 4 there is potential for other advocacy models to be considered, including whether standards should apply to community advocacy and if so, what form these standards should take.

Current arrangements in the ACT

The ACT statutory oversight system has grown over time on an ad hoc basis, leading to inconsistencies in the way that bodies have been constituted and in their functions, processes, powers and reporting mechanisms. The following sections summarise the existing arrangements.

Statutory bodies

Under the ACT's statutory oversight system the following bodies currently have relevant oversight powers and functions:

- ACT Ombudsman
- Community and Health Services Complaints Commissioner
- Community and Health Rights Advisory Council
- Human Rights and Discrimination Commissioner
- Community Advocate
- Care Co-ordinator
- Official Visitors for mental health, child protection and youth justice.

The ACT Government has committed to establishing a Disability Services Commissioner and Official Visitors for disability, in response to the Board of Inquiry Report. It has also committed to establishing a Commissioner for Children and Young People, in response to the Vardon Report.

The existing statutory oversight system broadly covers:

- ACT Government services and actions
- discriminatory conduct or decisions generally
- health, aged care and disability services.

In addition, a number of community groups have called for the establishment of a Commissioner with oversight responsibility for the broad range of community services (including homelessness support services), which are not covered by the existing Commissioners.

Non-statutory bodies

Non-statutory government bodies include the Management Assessment Panel (MAP), the Care Co-ordination Office (CCO) and the Housing Review Committee (HRC). The MAP and CCO are currently located within the Office of the Community Advocate (OCA).

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The MAP provides independent facilitation to improve the co-ordination of services for individuals with complex needs who present a danger to themselves or others and who are not being appropriately supported. It also has a role in identifying and drawing departments’ attention to systemic issues which prevent appropriate responses from being implemented.

The CCO’s role is to oversee the care and support of people who are placed on a community order by the Mental Health Tribunal.

The HRC was created to review decisions made under the *Housing Assistance Act 1987* where a client raises an objection. The Committee, which comprises community members with relevant expertise, makes recommendations to the Commissioner for Housing on how objections might be resolved equitably. Further rights of review are available through the ACT Administrative Appeals Tribunal and the ACT Ombudsman.

Community advocacy

Existing non-government agencies provide both individual advocacy (including formal legal representation) and systemic advocacy. The areas in which this advocacy are provided have been influenced by the availability of Government funding. For example, as FEMAG noted, the role of advocacy is clearly recognised by all governments and funded under Commonwealth-State-Territory Agreements in relation to people with a disability and consumers and potential consumers of Home and Community Care services.

The broader environment

Statutory oversight does not occur in isolation. Other statutory bodies such as the Legal Aid Office, the Guardianship and Management of Property Tribunal and the Mental Health Tribunal also have a role in protecting the interests of disadvantaged persons.

The Legal Aid Office improves access to the justice system for such persons through the provision of legal assistance. The Guardianship and Management of Property Tribunal may make a guardianship and/or management order when a person lacks the ability to make their own decisions, and when there are serious consequences to their health or welfare. In addition, the Mental Health Tribunal may make orders in respect of persons with a mental illness or mental dysfunction.

The FEMAG Review noted that Government services in relation to ‘legal aid, prosecution, enforcement, arbitration, determination and adjudication are integral elements of the overall regulatory regime’, but are not part of the oversight system that was considered by this review.

Findings and recommendations of relevant reviews

ACT Health Review

The Reid Report found that the current number of complaints agencies was excessive for a population of 300,000 people and that some rationalisation was needed. This finding provided the impetus for the FEMAG Review. In releasing the Government Response to the Reid Report and announcing the review of statutory oversight arrangements in June 2002, the Chief Minister said the Government would consider the possible rationalisation of some of the functions of existing community advocacy and watchdog bodies. These included the Community and Health Services Complaints Commissioner, the Community Advocate and the Community and Health Rights Advisory Council.

Board of Inquiry into Disability Services

The Board of Inquiry Report included a number of recommendations relating to the system of statutory oversight, as well as individual entities within the system.

Overall, the report found that the rights and interests of people with disabilities had not been adequately or effectively protected by the policies and systems operating in the ACT. It identified significant failures in relation to the monitoring and accountability of service delivery, and that there was not sufficient scrutiny of the management of disability services and programs.

The Report highlighted certain provisions from the *NSW Community Services (Complaints, Reviews and Monitoring) Act 1993* and recommended that it could be used as a model in formulating complaints mechanisms in the ACT.

In September 2002, the Minister for Disability, Housing and Community Services tabled the Government Response to the Recommendations of the Board of Inquiry Report in the ACT Legislative Assembly. The Government Response noted that a number of issues raised in the Report and the Government Response would be considered in the context of the Review of Statutory Oversight and Community Advocacy Agencies.

These issues included:

- the role of the proposed Disability Services Commissioner
- the appropriate recipient of complaints about disability services
- the appropriate administrative location of the Management Assessment Panel and the Care Co-ordination Office.

“the rights and interests of people with disabilities had not been adequately or effectively protected”

“FEMAG identified a number of shortcomings in the statutory oversight and community advocacy system”

Submission from the Disability Reform Legislative Reform Working Group on the Disability Commissioner

The Disability Reform Legislative Reform Working Group provided a submission to the ACT Government on the establishment of a Disability Commissioner in November 2003. This submission was provided in response to the Government Response to Recommendation One of the Report of the Board of Inquiry into Disability Services. It recognised the inclusion of a Disability Commissioner in the scope of the Review of Statutory Oversight and Community Advocacy Agencies.

The Working Group submission contained proposals on the establishment of a Disability Commissioner and associated legislation, roles, functions and powers. The submission made a number of useful recommendations concerning the operation of a Disability Commissioner which the Government supports.

The Government Response to the Submission of the Working Group is at Section Three of this position paper.

Review of Statutory Oversight and Community Advocacy Agencies

FEMAG identified a number of shortcomings in the statutory oversight and community advocacy system including:

- an inability of the overall system to deliver desirable and appropriate outcomes because of the lack of resources or facilities
- that the complaints process was not as efficient and effective as it could be, particularly in relation to timeliness
- barriers to joint or collaborative approaches by oversight agencies, sharing of information and referral of complaints
- that the powers of Official Visitors are not adequate for their current role and their independence is seen to be questionable as a result of the fact that they are located within the departments whose services they oversight
- there is no specific mechanism for external merits review for any of the bodies and that internal review mechanisms are insufficient
- areas where the need for individual advocacy is not met include health, housing, homelessness, discrimination, children and young people and Indigenous people, and
- advocacy agencies make a significant contribution to enhance the rights of consumers, which could be increased if the relationships between advocacy agencies and service providers were less adversarial and more collaborative.

FEMAG made thirty recommendations in total. The most significant in relation to considering a new structure for statutory oversight in the ACT are those that relate to the amalgamation of services and resources.

The four options identified were:

- 1 ACT Rights and Complaints Commission:** One office would be created encompassing the roles of the Discrimination, Health Complaints and Disability Services Commissioners, with the Ombudsman remaining a separate office. FEMAG suggested three possible variations within this model, ranging from a model where all responsibilities are conferred on a Rights and Complaints Commissioner who can then direct different sections of the office (1(a)) to a model under which there are specific Commissioners for each area who effectively act as Deputies to a Chair of the Commission (1(c)).
- 2 Part amalgamation:** The Human Rights and Discrimination Commissioner would remain in a separate Human Rights Office, with the ACT Ombudsman taking on responsibility for health, disability and community services. These latter responsibilities would be delegated to Deputy Ombudsmen. The model would require that the ACT appoint its own Ombudsman.
- 3 Full amalgamation:** One office is created (Human Rights and Ombudsman Commission) with two principal Commissioners—the Human Rights and Discrimination Commissioner and the Ombudsman. Under this model, the Ombudsman would assume responsibility for health, disability and community services. The Human Rights and Discrimination Commissioner and the Ombudsman would act jointly in managing the body and submit a single Annual Report.
- 4 Co-location or collaborative model:** All Commissioners retain all their independent functions, including the power to deal with complaints, however they are co-located with shared services. A senior officer would be appointed to manage the common functions and support services. The Ombudsman would also be part of the co-location and shared services. The youth and mental health Official Visitors would be located in this office, as would the Management Assessment Panel and Care Coordination Office.

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FEMAG acknowledges that the role of the Community Advocate is not readily conducive to co-location or amalgamation with statutory oversight agencies. Accordingly, none of the options proposes a change to the arrangements for the Community Advocate.

The report states that each option is preferable to the current position in the ACT, where each Commissioner has his/her own office and staff. FEMAG recommends that the fourth option, co-location with shared services, be implemented.

While the Government supports a co-location arrangement, the main difficulty with the FEMAG preferred option (option 4) is that it does not seek to significantly rationalise the governance of independent oversight bodies nor the extent of their functions. Instead, this option merely provides for a shared services arrangement. This is a pertinent fact given the possible addition of other Commissioners in the future.

FEMAG's options of part and full amalgamation (options 2 and 3) are not considered suitable because they do not provide adequate visibility for disability and health services issues. These models may lead to confusion for consumers who wish to make a complaint, as well as playing down the key service improvement and community education functions within each area.

The Government is therefore proposing a variation of FEMAG's option 1(c).

Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management

The first report of this review was received by the Government on 14 May 2004 and released with the Government Response on 25 May 2004. In its initial response to the report, the Government agreed to establish an independent Commissioner for Children and Young People, with its roles and responsibilities to be determined.

The report did not make any recommendations in relation to the roles of Official Visitors for child protection and youth justice. However, the establishment of the Commissioner and the implementation of new administrative arrangements for policy development and delivery of services for children and young people may affect their roles.

The Report on the Audit and Case Review was released in early August 2004, along with the Government's response to that report and a strategy for implementing the recommendations of the review.

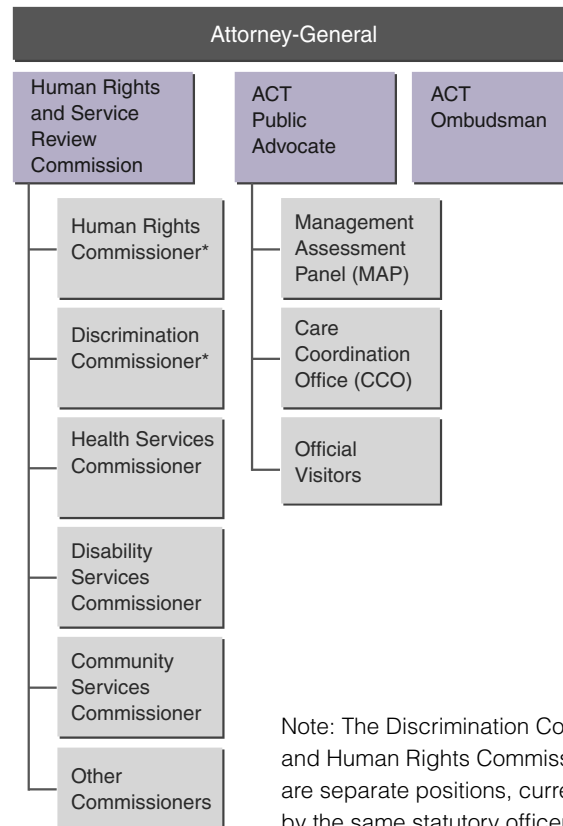
Summary of proposed new arrangements

New structure for statutory oversight in the ACT

Through the review of oversight arrangements, the Government aimed to identify the statutory oversight model which would be the most appropriate for the ACT into the future. A key aim is to establish a model that delivers better quality services to the community and Government, with increased efficiency and flexibility. The Government's model is based on FEMAG's option 1(c), as illustrated in Figure 1.

The potential for additional statutory positions to be established, such as an ACT Privacy Commissioner, make it essential for the new model to enable the appointment of persons to fill these roles, on either a part time or full time basis, without requiring significant additional administrative resources.

Figure 1:
New statutory oversight system



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The FEMAG report confirmed the need identified in the Reid Report to consolidate the existing complaint bodies to ensure an optimum system for consumers and citizens and to allow flexibility in the use of resources. The report noted that a series of small stand-alone agencies will not be able to undertake the challenging tasks expected of them.

Human Rights and Service Review Commission

Overview

The proposed model establishes the Human Rights and Service Review Commission (HRSRC), comprising the Human Rights Commissioner, Discrimination Commissioner, Health Services Commissioner, Disability Services Commissioner and Community Services Commissioner.

The model allows for a President of the Commission to be responsible for the management of one office. This will be an executive position similar to the President of the Human Rights and Equal Opportunity Commission. The key role of the President will be to receive complaints under all relevant legislation. The President may delegate the handling of complaints to the other Commissioners. However, the President will be responsible for undertaking conciliation where that is appropriate, in order to ensure the separation of conciliation and investigation functions within the HRSRC.

Each Commissioner will have statutory functions and powers relevant to their areas of responsibility to undertake monitoring, mediation, referral, compliance and community education activities as well as undertaking the investigation of complaints.

Given the relatively small population of the ACT, there is no need for a large number of full time Commissioners. However, the Government considers that a structure which encompasses Commissioners with specific responsibilities for particular issues increases the transparency, accessibility and accountability of the statutory oversight system. The new model strikes a balance between these considerations by enabling the appointment of Commissioners on a part time basis, where appropriate, and the sharing of administrative costs and staff between offices.

The model also provides the flexibility to introduce additional responsibilities and Commissioners in the future, with relevant functions allocated to existing Commissioners or new appointees.

The Government supports the FEMAG recommendation that the statutory office holders have the power to engage in joint investigations, whether as a result of complaints or under an ‘own motion’ power. Joint investigations will require the consent of the complainant, adherence to a person’s right to privacy and

the associated requirements of the Commonwealth *Privacy Act 1988* and, where applicable, the ACT *Health Records (Privacy and Access) Act 1997*. To the extent that there are inappropriate barriers to joint investigations in the respective legislation, these will be removed. Commissioners will also continue to be able to undertake joint consideration of complaints with relevant boards and other professional bodies.

Reporting and responsibility

The Commission will be established within the Justice and Community Safety portfolio and report directly to the Attorney-General. However, this will not prevent Commissioners from reporting or making recommendations directly to other Ministers or relevant agencies where a matter is of direct interest. In addition, any Minister may request, through the Attorney-General, that a Commissioner review a matter that is relevant to his or her portfolio.

Appeal and enforcement mechanisms

The Board of Inquiry into Disability Services Report recommended that where there are occasions of failure to implement a Commissioner's recommendations within a required timeframe, these cases should be subject to review by a tribunal (the ACT Administrative Appeals Tribunal was proposed), whose decisions should replace those of the original decision-maker. The report stated that the tribunal should be given power to enforce those decisions. The Disability Reform Group, in its response to the Board of Inquiry Report, supported this position.

The issue was also highlighted by FEMAG, with a recommendation that to deal with circumstances where a respondent deliberately delays recommended action, or fails to take that action, consideration be given to enabling Commissioners (Health, Disability and Community Services) to have recourse to an appropriate tribunal in order to have recommendations implemented.

As FEMAG identified, this is a complex issue. Increasing the power of Commissioners necessarily changes their role and their relationships with complainants, those who are the subject of complaints and, potentially, the communities that they oversight. Increasing enforcement is also generally balanced by reducing powers to compel information during investigations.

The Government considers that the primary responsibility for implementing recommendations relating to public sector services should remain with the relevant Minister. It would not be appropriate to enable a tribunal to require a Government or community agency to change its policy or funding arrangements, which necessarily reflect choices made in an environment of scarce resources and competing priorities.

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To address the issue of greater ‘enforceability’ of Commissioners’ recommendations, the Government proposes to introduce a process of public shaming. It is proposed that the President of the HRSRC would adopt an approach similar to that used by the Australian Government’s Equal Opportunity for Women in the Workplace Agency. The President would be given the power to use public shaming in relation to those organisations, individuals and businesses that fail to comply with HRSRC’s recommendations or requests, within specified time limits outlined in the new legislation. In giving effect to this power, it is proposed that the President regularly publish details of non-compliant entities and the nature of their non-compliance. This power will be subject to privacy considerations and will be reviewed within two years of the establishment of the HRSRC to determine whether it is an effective mechanism for improving compliance with recommendations.

New arrangements for the Office of the Community Advocate

As noted by FEMAG, the Community Advocate’s role is fundamentally different from the other oversight agencies. The Community Advocate has a range of statutory functions and powers with respect to children and young people, and adults with a mental illness or impaired decision making ability, who require protection from abuse, exploitation or neglect. The OCA combines the functions of Public Guardian and Public Advocate in a statutory role, as well as undertaking high-level monitoring in relation to services for children and young people and those people with a mental illness or dysfunction.

FEMAG recommended a change of title for the Community Advocate, to better reflect its role, suggesting ‘Public Representative and Guardian’. The OCA supported a change of title but considered that the FEMAG recommendation reflected a poor understanding of its role and suggested the alternative title ‘ACT Public Advocate’. The Government agrees with the OCA’s suggestion and will implement a change in title for the Community Advocate to the ‘ACT Public Advocate’.

There will be some flow on changes to the OCA as a consequence of establishing the HRSRC. The changes will be largely in relation to the OCA’s functions under legislation, to avoid duplication with the functions of Commissioners within the HRSRC (particularly the Disability Services Commissioner). They will not have a significant impact on the work that the OCA currently undertakes.

The ACT Public Advocate will also assume responsibility for Official Visitors. It is considered that the similarity of functions and availability of collegiate support provide advantages to locating Official Visitors within the office of the ACT Public Advocate.

Provision of systemic and individual advocacy

The Government supports the FEMAG Review recommendation that the ACT continues to use the model of providing for the community's advocacy needs through the funding of non-government community based organisations. The Government agrees with FEMAG's assessment that the ACT is well endowed in regard to having a community that has the capacity and tradition to operate such organisations effectively and efficiently.

The Government supports retaining the existing role and funding of community advocacy agencies which provide systemic advocacy. It also recognises the valuable role played by providers of individual advocacy in supporting the most vulnerable members of the community.

As a flagship commitment under *Building Our Community: The Canberra Social Plan*, the Government has established the Community Inclusion Board and Fund. The Community Inclusion Fund is designed to assist the most vulnerable members of our community as part of a concerted attack on the causes of poverty and social exclusion.

The Government has also established a Joint Community Government Reference Group to examine issues related to the viability and sustainability of the community sector. Its role is to provide high level policy advice to the Community Inclusion Board to support the board in performing its functions, which include making recommendations to the Government on funding priorities. FEMAG's findings about gaps in the availability of individual advocacy will be referred to the Joint Community Government Reference Group for consideration in the broader context of prioritising actions to meet the needs of the most at-risk members of the community.

The Joint Community Government Reference Group will also take account of other relevant Government commitments, such as the ACT Homelessness Strategy action to "ensure that people who are at risk of homelessness or those who are homeless have access to individual advocacy services".

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Detail of the new arrangements

Human Rights and Service Review Commission

The structure of the Human Rights and Service Review Commission will be similar to the Commonwealth Human Rights and Equal Opportunity Commission (HREOC), comprising a President and specialist Commissioners. The Government has chosen this model to support the role of specialist Commissioners, acknowledging the strong relationships they are able to establish with their constituent groups. Policy, education and monitoring services and major reviews will be the responsibility of these Commissioners.

The President will also have statutory functions in relation to community information and education on issues such as human rights. Both the President and specialist Commissioners will have a role in promoting service improvement generally as part of the core business of the Commission.

The President will be responsible for all complaints received. The key role of the President will be to receive complaints under all relevant legislation and to delegate them to the relevant Commissioner for investigation and resolution. The President will be responsible for ensuring that complaints processes are consistently applied and well understood by all parties and for undertaking conciliation where it is appropriate to resolve a complaint.

Box 2 outlines the proposed complaints process. The complaints management process will be based on best practice, incorporating the different legal and cultural environments that currently exist in the different agencies.

Establishing the Commission will promote the availability of complaints processes generally by providing a single entry point. It is expected that those groups more at risk of not accessing complaints services, such as people with an intellectual disability, will be better able to find and use these services.

The President will be the senior member of the Commission and will be responsible for managing the administrative affairs of the Commission, including staffing issues. The Commission will be appropriately staffed to provide a range of common services to support the President and all Commissioners as well as specialist staff and possible specialist units. All staff will be staff of the Commission and not of the individual Commissioners, consistent with the HREOC model. This structure will also facilitate a common understanding of the functions of each of the Commissioners and reduce duplication of effort between Commissioners.

Commissioners, including the President, will be appointed for five year terms, similar to the Community Advocate and the ACT Ombudsman. Commissioners will be appointed on a full time or part time basis depending on the workload to be handled, and one person may be appointed to hold more than one part time position.

The Commission will accept complaints in a variety of forms including written (including braille), oral and email. However, the current requirement that complaints be in writing is the primary means of ensuring an accurate record of the complaint. If complaints are accepted in other forms they will need to be converted to an accurate written record by the Commission.

Box 2 Complaints process under the Human Rights and Service Review Commission

- 1 A complaint is received
- 2 it is delegated by the President to the relevant Commissioner for investigation
- 3 the Commissioner will conduct a preliminary assessment and decide whether the complaint may be dealt with under the relevant legislation or declined—this decision is notified to the parties to the complaint
- 4 if it is considered appropriate, the complaint is conciliated by the President with a view to assisting the parties to agree on a mutually satisfactory outcome
- 5 in the case of service delivery related complaints, if conciliation or other voluntary approaches to resolving the complaint are unsuccessful, the matter may be investigated by the Commissioner and the Commissioner may make recommendations for action to the service provider
- 6 the service provider is then required to advise the Commissioner, in writing, of what action it has taken in order to remedy the grievances referred to in the notice
- 7 in the case of complaints about health professionals, one of a variety of pathways may be pursued, in line with the *Health Professionals Act 2004*
- 8 in the case of discrimination complaints, if conciliation is unsuccessful, the Commissioner notifies the parties and the onus is on the complainant to then require the Commissioner to refer the complaint to the Tribunal
- 9 the Tribunal determines the matter and makes an order.

“the role of the
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under the new
arrangements”

The Government notes that a review of the *Australian Human Rights Commission Legislation Bill 2003* is currently adjourned in the Senate. The amendments proposed in the bill have been criticised on a number of grounds, particularly the amendments relating to the structure of the Commission and the amendments relating to the Commission’s ability to intervene in court proceedings. These concerns have been taken into account when developing the ACT’s HRSRC model.

Discrimination Commissioner

The ACT Human Rights Office will change from being a small, independent office, which is headed by the ACT Human Rights and Discrimination Commissioner, to a part of the HRSRC.

The Discrimination Commissioner will have responsibility for investigating formal complaints of discrimination, sexual harassment and vilification under the *Discrimination Act 1991*. However, the conciliation function currently performed by the Commissioner will become the responsibility of the President of the HRSRC. This will allow the Discrimination Commissioner to focus more on the investigation of complaints and will provide a systemic investigation function that is not presently part of the Commissioner’s role.

As under current arrangements, the Discrimination Tribunal will continue to hear complaints that are referred to it by the Commissioner. Complaints are not automatically referred. The Commissioner notifies the parties that conciliation is to proceed or that the conciliation is unlikely to be successful, and the onus is on the complainant to then require the Commissioner to refer the complaint to the Tribunal. The Commissioner may be joined as a party to Discrimination Tribunal proceedings by written notice of the Tribunal.

Human Rights Commissioner

The role of the Human Rights Commissioner will remain unchanged under the new arrangements. The Human Rights Commissioner is established under the *Human Rights Act 2004* which commenced on 1 July 2004. The *Human Rights Act 2004* provides that the Discrimination Commissioner is to be the Human Rights Commissioner and therefore the same administrative changes apply.

The Human Rights Commissioner’s functions are:

- to review the effect of territory laws, including the common law, on human rights, and report in writing to the Attorney-General on the results of the review

- to provide education about human rights and the *Human Rights Act 2004*
- to advise the Attorney-General on anything relevant to the operation of the *Human Rights Act 2004*.

The Human Rights Commissioner may also intervene in a proceeding before a court that involves the application of the *Human Rights Act 2004* with the leave of the court.

Health Services Commissioner

The disability services complaints function currently provided for in the *Community and Health Services Complaints Act 1993* will be transferred from the Community and Health Services Complaints Commissioner to the newly established Disability Services Commissioner. Given this change in functions, the Commissioner's title will be changed to the Health Services Commissioner.

The Health Services Commissioner will retain responsibility for overseeing and investigating complaints in relation to health and aged services. This decision is made on the basis that the vast majority of services covered by the term 'aged services' under the *Community and Health Services Complaints Act 1993* are the responsibility of ACT Health, under the Home and Community Care Program.

Community and Health Rights Advisory Council

The Community and Health Rights Advisory Council is established under the *Community and Health Services Complaints Act 1993*. However, it has been in abeyance since 2002 due to difficulties experienced with its operation. The Council was of the view that the powers granted under the Act did not allow it to fulfil an effective role in reviewing the processes followed by the Commissioner.

The Council's functions were:

- to advise the Community and Health Services Complaints Commissioner and the Minister in relation to handling of complaints in general
- to advise on informing the community about the complaints process
- to otherwise bring relevant issues to the Commissioner's attention.

In line with FEMAG's recommendation, the Government will not re-establish the Council and references to it will be removed from the legislation.

“the Health Services Commissioner will retain responsibility for overseeing and investigating complaints in relation to health and aged services”

“functions and powers available to the Disability Services Commissioner will be limited to disability service activities”

Disability Services Commissioner

The Government will establish a Disability Services Commissioner with functions and powers which enable him or her to undertake monitoring and compliance activities as well as supporting the investigation of complaints received. This includes identifying, inquiring into and reviewing issues relating to the quality of services for people with a disability.

As part of the HRSRC, the Disability Services Commissioner will report to the Attorney-General, as recommended by FEMAG and the Disability Reform Legislative Reform Working Group. This will ensure the independence of the Commissioner and be consistent with the approach proposed for other Commissioners under the HRSRC. The Attorney-General and the Minister with responsibility for disability services (through the Attorney-General) would be able to direct the Commissioner to inquire into systemic issues in relation to disability services.

Functions and powers available to the Disability Services Commissioner will be limited to disability service activities to ensure minimum overlap with the functions of other Commissioners.

The Commissioner will be empowered to do whatever is reasonable to ensure that persons who wish to make a complaint concerning disability services are able to do so. This may include encouraging and assisting service providers to develop and improve procedures for responding to user complaints and educating the community on the procedures for making complaints.

The main functions of the Disability Services Commissioner will be to:

- monitor the quality of disability services
- conduct inquiries and review issues relating to the quality of disability services
- investigate complaints by people with a disability and other people regarding the quality of a disability service
- encourage and assist complainants and service providers, where possible, to resolve complaints through internal complaints handling processes
- make recommendations to disability service providers to improve and rectify services, either in response to a complaint or as a result of monitoring or the Commissioner's own inquiries
- make recommendations to the Attorney-General and/or the relevant Minister, government agency or non-government organisation on improvements to services, and
- provide education, training and support to disability service providers and the public to promote the improvement of service quality.

Services to be monitored, and about which complaints may be made, may be funded and/or provided by either Government or non-government organisations.

FEMAG recommended that the Disability Services Commissioner should also have responsibility for oversight of aged services and suggested that the Commissioner should be called the Disability and Community Services Commissioner (reflecting the current definition of community services in the *Community and Health Services Complaints Act 1993*). As noted above, the Government does not support this recommendation and considers it is more appropriate for responsibility for complaints about aged services to remain with the Health Services Commissioner.

Community Services Commissioner

It is intended that the Community Services Commissioner will have functions and powers which enable him or her to undertake monitoring and compliance activities and to investigate complaints about a broad range of community services not covered by existing arrangements.

The scope of services to fall under these arrangements is yet to be determined, and will be the subject of further consultation. However, the Commissioner may have responsibility in relation to such services as:

- public and community housing
- homelessness services
- emergency relief services
- youth services
- generalist community services
- counselling and support services.

The main functions of the Commissioner in relation to such services would be similar to the functions of the Disability Services Commissioner. This includes identifying and inquiring into issues relating to the quality and safety of community services.

Privacy Commissioner

Privacy obligations within the ACT public sector are currently covered by the Commonwealth *Privacy Act 1988*. The Act also covers the privacy responsibilities of the private sector, following amendments in

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2000. Complaints under this Act are investigated by the Commonwealth Privacy Commissioner. However, the ACT Government is intending to introduce its own privacy legislation and establish an ACT Privacy Commissioner. This Commissioner will be established within the HRSRC.

ACT Ombudsman

The ACT Ombudsman will remain separate from the HRSRC, with these services continuing to be provided by the Commonwealth Ombudsman.

The Government has noted FEMAG’s recommendation that the ACT Ombudsman be empowered to deal with a complaint by conciliation, similar to provisions in the NSW Ombudsman legislation. The Commonwealth Ombudsman does not currently have any conciliation functions and the inclusion of these functions for the ACT Ombudsman would require the specific agreement of the Australian Government to expand the capabilities of the Commonwealth Ombudsman’s Office to fulfil this additional role. The ACT Government will pursue this issue with the Australian Government.

The Government also intends to clarify the Ombudsman’s jurisdiction in relation to contractors providing services on behalf of the Government by amending the definition of “prescribed authority” in the *Ombudsman Act 1989*. Jurisdiction will apply to contractors who take administrative action on behalf of the Government. This change will require consultation with the Australian Government.

The Government agrees with FEMAG that the oversight bodies should be subject to the jurisdiction of the Ombudsman in regard to review of their administrative processes. The jurisdiction of the Ombudsman shall therefore be extended to reviewing the administrative process of the HRSRC and the ACT Public Advocate.

ACT Public Advocate

Office of the Community Advocate

There are currently no changes proposed to the structure of the OCA, except for the inclusion of Official Visitors within its responsibilities. In order to better reflect its role, the Government considers that it is timely to change the title of the Community Advocate to the “ACT Public Advocate”.

There will be some flow on effects to the functions of the ACT Public Advocate as a consequence of creating Commissioners with responsibility for overseeing the provision of services for its client groups. The implications will be assessed in detail during the development of legislation to establish the HRSRC.

Management Assessment Panel and Care Co-ordination Office

The Government does not intend to change the role of the MAP nor of the CCO as a result of this review process, noting the amendments to the care coordination system which are currently underway. Both the MAP and CCO will continue to be located within the office of the ACT Public Advocate. This position is supported by all three bodies.

Official Visitors

The Official Visitors for mental health, child protection and youth justice will relocate to the office of the ACT Public Advocate. The similarity of functions and availability of collegiate support provide advantages to locating within the office of the ACT Public Advocate. Official Visitors for child protection and youth justice and the OCA support this change.

The need for accessible complaints mechanisms is acknowledged and supported and the Government therefore supports widening the scope of Official Visitors' functions in relation to mental health. It will also proceed with the introduction of Official Visitors for disability, the details of which will be determined in consultation with the Disability Advisory Council, and assess the feasibility and appropriateness of establishing an Official Visitor for people who are homeless within supported accommodation services.

Official Visitors will be given additional powers, including the right to require the provision of information by those running a visited facility. The role of the Mental Health Official Visitors will be expanded to include persons subject to community care orders.

The role and functions of the child protection and youth justice Official Visitors may be impacted by the establishment of the Commissioner for Children and Young People, depending on its roles and functions.

An extension of the role of the Official Visitors will require amendments to the *Children and Young People Act 1999* and the *Mental Health (Treatment and Care) Act 1994*. The *Children and Young People Act 1999* is currently under review and the impact of extending Official Visitors' roles will be considered as part of the review.

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Community advocacy agencies

A key finding of the FEMAG Review was the need for better understanding between community advocacy bodies and government agencies about their respective roles. The Joint Community Government Reference Group and the ongoing work of the Community Engagement Unit within the Chief Minister's Department are largely aimed at improving understanding and collaboration between government agencies and the community sector, including agencies which undertake systemic and/or individual advocacy. The unit also arranges training for ACT Government officials in community engagement and will consider FEMAG's suggestion of regular seminars for all stakeholders with the purpose of improving mutual understanding between advocacy organisations and public policy makers.

The Community Engagement Unit, through the Joint Community Government Reference Group, has also been developing a Community Engagement Code of Practice which will include principles for engaging with stakeholders, including advocacy organisations.

Implementation of the new arrangements

Legislation to establish the Human Rights and Service Review Commission

The HRSRC is expected to be established in 2005. The Government proposes to develop omnibus legislation to establish the new body. A wide range of existing legislation will be significantly affected by the new arrangements.

The new legislation will establish a core set of consistent processes for handling complaints. These will apply to all of the proposed Commissioners. The consideration of an appropriate legislative model and drafting of new legislation will take a number of months to negotiate and resolve. It is intended that legislation be introduced in March 2005.

The Government also supports FEMAG's view that complaints legislation should enable any person to make a complaint, as this emphasises the accessibility of the system and its focus on improvement of services and practices. Where these provisions are introduced, care will be taken to ensure that the interests of the person who is alleged to have been wronged are protected, such that a complaint cannot be made on their behalf against their interests or wishes. This will be in addition to standard clauses which allow Commissioners not to proceed with complaints that are determined to be frivolous or vexatious.

Legislation to establish the Disability Services Commissioner

It was initially proposed, in the Government Response to the Board of Inquiry Report, that the Disability Services Commissioner be established through amendments to the *Disability Services Act 1991*. However, the establishment of the Disability Services Commissioner would be more easily facilitated through separate legislation than by amending the *Disability Services Act 1991*. The Disability Reform Legislative Reform Working Group supported this latter approach.

The proposed legislation, which may be incorporated within legislation to establish the HRSRC, will include elements drawn from the *Community and Health Services Complaints Act 1993* and the *Discrimination Act 1991*, as appropriate, taking account of recommendations of the FEMAG Review.

Reference documents

Report of the Board of Inquiry into Disability Services

http://www.dhcs.act.gov.au/DisabilityACT/Reports/Final_Report.pdf

Government Response to the Recommendations of the Report of the Board of Inquiry into Disability Services

<http://www.dhcs.act.gov.au/DisabilityACT/Publications/GovtResponse.pdf>

Report of the ACT Health Review

<http://health.act.gov.au/c/health?a=sendfile&ft=p&fid=1083912925&sid=>

Government Response to the Report of the ACT Health Review

<http://health.act.gov.au/c/health?a=sendfile&ft=p&fid=1083912990&sid=>

Report of the Review of Statutory Oversight and Community Advocacy Agencies

http://www.dhcs.act.gov.au/pubs/Final_Report_03-10-0311.rtf

Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management, related reports and Government responses

http://www.cmd.act.gov.au/child_protection_review/

ACT Legislation

<http://www.legislation.act.gov.au/>

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Government Response to the Review of Statutory Oversight and Community Advocacy Agencies

Section Two

Introduction

In April 2003, the Government commissioned the Foundation for Effective Markets and Governance (FEMAG) to conduct a Review of Statutory Oversight and Community Advocacy Agencies. The review looked at a broad range of statutory oversight and community advocacy bodies, taking a holistic view of the system so that it could make recommendations on improvements in the system as a whole.

Statutory Oversight

The FEMAG Review identified a number of shortcomings in the statutory oversight system relating to the efficiency and effectiveness of the current system and proposed a new structure for statutory oversight in the ACT, including options for amalgamating services and resources. The Government Response takes account of these issues and the advice of stakeholders and government agencies.

The Government will respond to the main structural issues by establishing a new structure for statutory oversight in the ACT which will be both more efficient and more flexible than current arrangements.

The Government's model establishes the Human Rights and Service Review Commission, comprising the Human Rights Commissioner, Discrimination Commissioner, Health Services Commissioner, Disability Services Commissioner and Community Services Commissioner. The model allows for a President of the Commission to be responsible for the management of one office to receive complaints under all relevant legislation and to undertake a conciliation role within the HRSRC as appropriate. Individual Commissioners will have statutory functions and powers to undertake mediation, monitoring, referral, compliance and community education activities, as well as undertaking the investigation of complaints. Details of the model are provided in section one of this paper.

The ACT Ombudsman will remain separate, with these services continuing to be provided by the Commonwealth Ombudsman.

Community Advocacy

The ACT Government supports the FEMAG assessment that the ACT community sector has the capacity and tradition to operate community advocacy agencies effectively and efficiently. The Government therefore supports retaining the existing model of community advocacy being provided by non-government community organisations.

Recommendation	Government Response
<p>Recommendation 1</p> <p>Because of the importance of the Commonwealth Ombudsman's role as ACT Ombudsman, we recommend that the Commonwealth, when filling the Commonwealth position, consult the ACT Government.</p>	<p>Agreed in-principle</p> <p>The Attorney General will write to the Prime Minister seeking consideration of this matter in the present review of the Commonwealth Ombudsman Act. It should be noted that the appointment of the Commonwealth Ombudsman is outside of the direct influence of the ACT.</p>
<p>Recommendation 2</p> <p>We recommend that a provision enabling the Ombudsman to deal with a complaint by conciliation, similar to that in the NSW ombudsman legislation, be added to the ACT Act.</p>	<p>Agreed in-principle</p> <p>As ACT Ombudsman functions are performed by the Commonwealth Ombudsman, the implementation of this recommendation will require negotiation with the Australian Government. The Commonwealth Ombudsman does not currently have any conciliation functions. The inclusion of these functions for the ACT Ombudsman would require the specific agreement of the Australian Government to expand the capabilities of the Commonwealth Ombudsman's Office to fulfil this additional role. The Attorney-General will write to the Prime Minister seeking consideration of this matter in the present review of the Commonwealth Ombudsman Act.</p>
<p>Recommendation 3</p> <p>We recommend that any doubt about the Ombudsman's jurisdiction in relation to contractors providing services on behalf of the Government be removed.</p>	<p>Agreed in-principle</p> <p>The implementation of this recommendation will require amendment to the definition of "prescribed authority" in the ACT's <i>Ombudsman Act 1989</i>. This should only apply to contractors who take administrative action on behalf of the Government. The Attorney-General will also write to the Prime Minister seeking consideration of this matter in the present review of the Commonwealth Ombudsman Act.</p>

Recommendation

Recommendation 4

We recommend that the disability services complaints function (as provided for in Schedule 1.5 the *Community and Health Services Complaints Act 1993*) be transferred from the Community and Health Services Commissioner to the Disability Services Commissioner. We also recommend that, because the nature of the other community services complaints are more akin to those relating to disability services than health, they be transferred to this office.

Government Response

Agreed in-part

The Government will establish a Disability Services Commissioner to have functions and powers which enable him/her to undertake monitoring and compliance activities as well as supporting the investigation of complaints received about disability services. The Commissioner will be established within the Human Rights and Service Review Commission.

The Government supports the disability services complaints function (as provided for in Schedule 1.5 the *Community and Health Services Complaints Act 1993*) being transferred from the Community and Health Services Complaints Commissioner to the newly established Disability Services Commissioner. However, powers that currently exist for the Community and Health Services Complaints Commissioner to investigate complaints in relation to aged services will be retained by the Health Services Commissioner.

It should be noted that the *Community and Health Services Complaints Act 1993* does not relate to broader community services, which will be included in the scope of the Community Services Commissioner's responsibilities, subject to further consultation.

Recommendation 5

We recommend that rather than having a power to issue binding directives the Disability Services Commissioner be granted the power to recommend to the Minister that the Minister issue any binding directives to improve and rectify services.

Not agreed

An independent statutory office holder should not refer decisions to the Minister for enforcement, as to do so removes the apparent and actual independence of the office.

Functions and powers available to the Disability Services Commissioner will include making recommendations to the Attorney-General and to relevant Ministers and agencies on improvements to services.

Rather than pursuing the path of binding directives or a tribunal structure (see Recommendation 12), the Government is proposing to give the President of the Human Rights and Service Review Commission the power to publicly name organisations which fail to comply with the Commission's recommendations.

Recommendation

Government Response

Recommendation 6

We strongly support the views of the Official Visitors for both sectors, and recommend that their scope be widened. For the child protection and youth justice Official Visitors this should include any shelters where young people are located for protection. For the mental health Official Visitors this should include persons subject to community care orders.

Agreed

Official visitors will be provided additional powers including the right to require the provision of information by those running a visited facility. The Government will also expand the role of mental health Official Visitors to include community mental health services and persons subject to community care orders.

An extension of the role of the Official Visitors will require amendments to the *Children and Young People Act 1999* and the *Mental Health Act 1994*. The *Children and Young People Act 1999* is currently under review and the impact of extending Official Visitors' roles will be considered as part of the review.

The Government notes that the role and functions of the child protection and youth justice Official Visitors may be impacted by the establishment of the Commissioner for Children and Young People, depending on its roles and functions.

Recommendation 7

We recommend that necessary amendments to the Health Records legislation be considered, in order to enable mental health Official Visitors to have access to all patient records, subject to the patient's consent, in order that they may carry out their verification duties.

Agreed in-principle

The specific problem with the *Health Records (Privacy and Access) Act 1997* is not explained in the report. Any changes to this Act require careful consideration to ensure they are not contrary to the National Privacy Principles in the *Privacy Act 1988*.

The Health Privacy Principles in that Act already allow for disclosure of personal health information where the consumer consents.

Recommendation

Government Response

Recommendation 8

We recommend that similar powers available to the Mental Health Official Visitors (s122A *Mental Health Act 1994*) be granted to the child protection and youth justice Official Visitors in the *Children and Young People Act 1999*.

Agreed in-principle

An extension of the role of the Official Visitors will require amendments to the *Children and Young People Act 1999*. The *Children and Young People Act 1999* is currently under review and the impact of extending Official Visitors roles will be considered as part of the review.

The Government notes that the role and functions of the child protection and youth justice Official Visitors may be impacted by the establishment of the Commissioner for Children and Young People, depending on its roles and functions.

Recommendation 9

We recommend that for administrative purposes and to safeguard their independence, Official Visitors be located within an Office of Community Visitors located with the other independent oversight bodies. We also suggest that consideration be given to changing their title to Community Visitors. The proposed Community Visitors for disability should also be located within this Office.

Not agreed

The Government supports Official Visitors relocating to the OCA (to be renamed the ACT Public Advocate). The similarity of functions and nature of their roles provide advantages to locating within the OCA. Official Visitors should not be closely aligned with formal complaint mechanisms as this would undermine the usefulness and immediacy of their roles. The Official Visitors for child protection and youth justice and the OCA expressed support for the OCA as the appropriate location for this function.

Official Visitors will retain their current titles. 'Community Visitors' are volunteers under an Australian Government Initiative—Community Visitors and Home Visitors Scheme. This may lead to confusion regarding their respective roles.

The Government notes that the role and functions of the child protection and youth justice Official Visitors may be impacted by the establishment of the Commissioner for Children and Young People, depending on its roles and functions.

Recommendation

Recommendation 10

We recommend that the Human Rights Office, the office of the Community and Health Services Complaints Commissioner, and the proposed Disability Services Commissioner be co-located with the office of the ACT Ombudsman (i.e. the Commonwealth Ombudsman's Office).

We recommend that:

- the ambit of operation of the Discrimination Commissioner remain as currently
- the current Community and Health Services Complaints Commissioner be responsible for health complaints and become the Health Complaints (or Services) Commissioner
- the proposed Disability Services Commissioner, in addition to the functions proposed by the Government, take over responsibility for disability and community services complaints from the Community and Health Services Complaints Commissioner, but have recommendatory powers only. That office would be the Disability and Community Services Commissioner.

Government Response

Agreed in-part

The Government will establish an independent Human Rights and Service Review Commission, which will comprise the Human Rights Commissioner, Discrimination Commissioner, Health Services Commissioner, Disability Services Commissioner and Community Services Commissioner.

The ACT Ombudsman is to remain separate from the Commission, with these services continuing to be provided by the Commonwealth Ombudsman.

The Government will establish a Disability Services Commissioner to be responsible for monitoring and complaints handling in relation to disability services.

The Government considers it appropriate that, with the disability service complaints function transferring to another Commissioner, there is a change in title for the Community and Health Services Complaints Commissioner to the Health Services Commissioner, and that this Commissioner continues to be responsible for handling complaints relating to aged services.

While the Government supports a co-location arrangement, the main difficulty with the FEMAG preferred option 4, is that it does not seek to rationalise the number of independent oversight bodies or any of their functions. Instead, the option merely provides for a shared services arrangement.

Recommendation

Recommendation 11

We recommend that there be a range of common services for all the oversight offices under a General Manager, Operations. These would include staff for:

- the entry and assistance point, a facility that should be operated with the involvement and support of the ACT and Commonwealth Ombudsman
- information, education, and outreach
- monitoring and major reviews
- policy and legal advice, and
- administrative support.

Government Response

Agreed in-part

The establishment of a Human Rights and Service Review Commission allows for a single entry point for monitoring, compliance and community education activities. The Commission will be appropriately staffed to provide a range of common services for all the oversight offices that will allow for the sharing of administrative costs and staff between offices, as well as the conduct of joint investigations. These may include staff for information and outreach, as well as administrative support. The Commission will also promote service improvement as a fundamental part of its role.

Policy, education and monitoring services and major reviews would largely remain the responsibility of individual Commissioners. There may be some limitations on the use of common staff for education, monitoring and major reviews where statutory office holders have these functions specifically conferred by legislation. For example, the Discrimination Commissioner has specific education functions under section 112 of the *Discrimination Act 1991*. It would not be appropriate to remove these legislative functions.

The ACT Ombudsman is to remain separate from the Commission, with these services continuing to be provided by the Commonwealth Ombudsman.

Recommendation

Government Response

Recommendation 12

We recommend that to deal with circumstances where a respondent deliberately delays recommended action, or fails to take that action, consideration be given to enabling the Health Complaints (or Services) Commissioner and the proposed Disability and Community Services Commissioner to have recourse to an appropriate tribunal in order to have recommendations implemented.

Not agreed

The effect of this recommendation is ultimately that 'recommendations' made by Commissioners are enforceable.

If this is the case, it would be more straightforward to simply provide that the Commissioner may make orders and provide a mechanism for review of those orders. It is not appropriate for a Tribunal to 'enforce' orders that it has not made.

As noted by FEMAG, increasing the power of Commissioners necessarily changes their role and their relationships with complainants, those about who complaints are made and, potentially, the community they oversight. Increasing enforcement is also generally balanced by reducing powers to compel information during an investigation.

Instead of pursuing a tribunal solution, it is proposed that the President of the Human Rights and Service Review Commission be given the power to publish the names of organisations who do not provide the Commission with information or comply with its recommendations within specified time limits outlined in the new legislation.

Recommendation 13

We recommend that complaints to any statutory office holder be accepted orally or in writing.

Agreed

The Human Rights and Service Review Commission will accept complaints in a variety of forms including written (including braille), oral and email. However, the current requirement that complaints be in writing is the primary means of ensuring an accurate record of the complaint. If complaints are accepted in other forms they will need to be converted to an accurate written record by the Commission.

Recommendation	Government Response
<p>Recommendation 14</p> <p>We recommend that the Discrimination Act be amended to enable complaints to be made by persons on behalf of others.</p>	<p>Not agreed</p> <p>The <i>Discrimination Act 1991</i> already allows an agent to make a complaint on behalf of an aggrieved person. The aggrieved person must either appoint the agent, or the agent must be authorised by the Commissioner to act on behalf of an aggrieved person who, in the opinion of the Commissioner, is unable to make a complaint or authorise an agent to act.</p> <p>The report identifies that this does not take account of situations where the aggrieved person may not recognise that they have been discriminated against (for example, because of an intellectual disability). This situation may be adequately addressed through the person making a complaint as a next friend of the aggrieved person.</p> <p>The Government believes that the current Act adequately ensures access to a complaints process for aggrieved persons.</p>
<p>Recommendation 15</p> <p>We recommend that the reach of the Community and Health Services Complaints Act be extended to enable any person to make a complaint. This should be reflected in the Disability Services Commissioner's legislation as well. Discretion for the Commissioner not to investigate a complaint could be based on provisions similar to those in section 8 of the <i>NSW Health Care Complaints Act 1993</i>.</p>	<p>Agreed in-principle</p> <p>The Government agrees that legislation should enable any person to make a complaint in relation to a health, disability, aged or community service, as this emphasises the accessibility of the system and its focus on improvement of services and practices, and that these provisions should be based on the <i>NSW Health Care Complaints Act 1993</i>.</p> <p>However, the rights of individuals not to make a complaint, or not to be involved in a complaints process, must also be protected. Therefore, provisions will also be made for a Commissioner to discontinue with a complaint (or part of a complaint) if it is considered frivolous, vexatious, not made in good faith or made against the wishes of the person who is alleged to have been wronged.</p>

Recommendation

Government Response

Recommendation 16

We recommend that consideration be given to a provision in each of the relevant pieces of legislation, that protects complainants in circumstances where they are at risk of being victimised in some way or of suffering a detriment by virtue of having made a complaint. This protection should extend to persons who otherwise give information or produce documents to a person exercising a function under the relevant legislation.

Agreed

The Government will develop a provision in each of the relevant pieces of legislation that protects complainants in circumstances where they are at risk of being victimised in some way or of suffering a detriment by virtue of having made a complaint. This protection will extend to persons who otherwise give information or produce documents to a person exercising a function under the relevant legislation.

The provision will be structured similarly to section 68 of the *Discrimination Act 1991*.

Recommendation 17

We recommend that all the oversight bodies be made subject to the jurisdiction of the Ombudsman. This would require amendment of s5(2)(h) of the Ombudsman Act.

Agreed in-part

The Government supports all the oversight bodies being made subject to the jurisdiction of the Ombudsman in relation to their administrative processes, however it is inconsistent with the independent scrutiny role of those oversight bodies to have the statutory functions of investigation, monitoring and conciliation subject to the Ombudsman's jurisdiction.

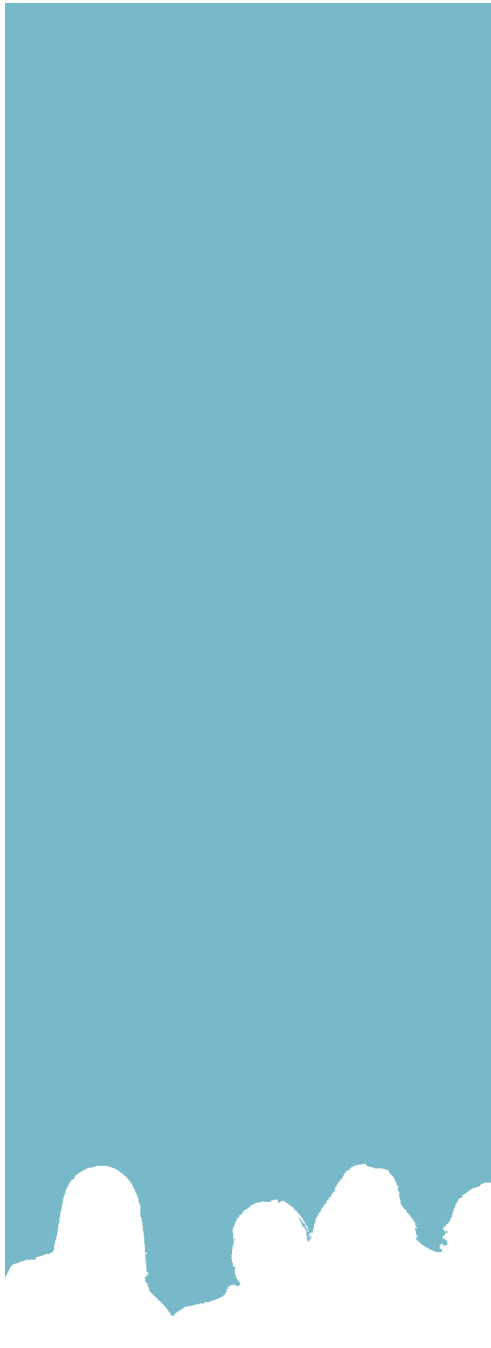
Recommendation 18

We recommend that the Ombudsman have power to investigate complaints about the Community Advocate. We recommend that rather than provide a specific reference to the Community Advocate being within jurisdiction, that the prohibition against the Ombudsman investigating action taken by an agency in relation to a community service or health service be amended to bring such services provided by a Government entity within jurisdiction.

Agreed in-part

As with the response to Recommendation 17, it is appropriate that extension to the power of the Ombudsman only relate to administrative actions taken by the Community Advocate (to be renamed the ACT Public Advocate).

Recommendation	Government Response
<p>Recommendation 19</p> <p>We recommend that the complaint bodies inform their clients of the length of intervals for reporting progress on their complaints.</p>	<p>Agreed</p> <p>The legislation to establish the Human Rights and Service Review Commission will include timeframes for the investigation of complaints and for keeping complainants informed of the process and the progress of the complaint.</p>
<p>Recommendation 20</p> <p>To make best use of the available resources and expertise of the various bodies, we recommend that the statutory office holders have the power to engage in joint investigations, whether as a result of complaints or under an 'own motion' power. In relation to complaints we mean that each would individually investigate agreed identified issue/s of the complaint. To the extent that there are any barriers to such joint investigations in the respective legislation, we recommend that these be removed.</p>	<p>Agreed</p> <p>Statutory office holders will be able to engage in joint investigations and to individually investigate agreed identified issue/s of the complaint, where consent of the complainant has been received. To the extent that there are any barriers to such joint investigations in the respective legislation, these will be removed.</p>
<p>Recommendation 21</p> <p>We are also in agreement with the Advocate, and others, that it is timely to consider a change of title for the office of Community Advocate, to better reflect its role, and recommend that a title along the lines of Public Representative and Guardian may be more apposite.</p>	<p>Agreed in-part</p> <p>The Government supports the OCA's alternate title suggestion 'ACT Public Advocate'.</p>
<p>Recommendation 22</p> <p>We recommend that the Management Assessment Panel (MAP) and the Care Co-ordination Office (CCO) be located together with the consolidated oversight bodies, with support provided through the proposed General Manager Operations.</p>	<p>Not agreed</p> <p>The Government position is for the MAP and CCO to remain located within the Community Advocate (to be renamed the ACT Public Advocate). This position is supported by all three bodies.</p> <p>The MAP and CCO are not considered to have a statutory oversight function and are part of a service system which may be the subject of complaints to the Human Rights and Service Review Commission. Therefore, there would be the potential for a perceived conflict of interest if the MAP and CCO were co-located with the Commission.</p>



Recommendation	Government Response
<p>Recommendation 23</p> <p>We recommend that an object requiring the fostering of a positive attitude to complaints and monitoring, be included in all the relevant legislation.</p>	<p>Agreed</p> <p>The Government will develop an object requiring the fostering of a positive attitude to complaints and monitoring, for inclusion in all the relevant legislation.</p>
<p>Recommendation 24</p> <p>We recommend against the re-establishment of a statutory Health and Community Rights Advisory Council.</p>	<p>Agreed</p> <p>The Government will not re-establish the Council, noting it has been in abeyance since 2002.</p>
<p>Recommendation 25</p> <p>We recommend that the Housing Review Committee be reformed as an external complaints body co-located with the other external complaints bodies. We do not consider that it needs to be statutorily based at this stage.</p>	<p>Noted</p> <p>The Government will give further consideration to appropriate appeal and complaints mechanisms in regard to housing assistance during its consultations on the role and functions of the proposed Community Services Commissioner.</p>
<p>Recommendation 26</p> <p>We recommend that the Assembly have a standing committee that oversees the work of the oversight bodies.</p>	<p>Not agreed</p> <p>The Human Rights and Service Review Commission will be accountable to the ACT Legislative Assembly and existing standing committees through the Attorney-General. It is considered that existing standing committees provide effective accountability for oversight agencies.</p>
<p>Recommendation 27</p> <p>We recommend that the ACT continue to use the model of providing for the community's advocacy needs through the funding of non-government community based organisations.</p>	<p>Agreed</p> <p>The Government agrees with FEMAG's assessment that non-government community organisations in the ACT have the capacity and tradition to perform this role efficiently and effectively.</p>

Recommendation

Government Response

Recommendation 28

We recommend that regular seminars for all the stakeholders be held with the purpose of developing mutual understanding of advocacy on the one hand and public policy processes, public administration and service management on the other.

Agreed in-principle

The Joint Community Government Reference Group and the ongoing work of the Community Engagement Unit within the Chief Minister's Department are largely aimed at improving understanding and collaboration between government agencies and the community sector, including agencies which undertake systemic and/or individual advocacy. The Unit also arranges training for ACT Government officials in community engagement and will consider FEMAG's suggestion of regular seminars for all stakeholders with the purpose of improving mutual understanding between advocacy organisations and public policy makers.

Recommendation 29

We recommend that, using the principles and standards developed under the National Disability Advocacy Program as a starting point, a process involving participation of advocacy agencies, consumer groups, service providers and all the other stakeholders be undertaken to develop principles and standards applicable to advocacy generally, together with any necessary special standards applicable to advocacy for particular groups of citizens/consumers.

Agreed in-principle

The Community Engagement Unit, through the Joint Community Government Reference Group, has been developing a Community Engagement Code of Practice which will include principles for engaging with stakeholders, including advocacy organisations.

Recommendation

Recommendation 30

We recommend that a part time Advisory Council on Consumer Advocacy be established with the following functions:

- developing and advising on policy, principles and standards for advocacy via a participative process involving all stakeholders
- advising on advocacy needs and resources required particularly in the first instance in the areas of health, housing and homelessness, discrimination, children and young people, and indigenous people and also in relation to people who are vulnerable, due to age or disability or for some other reason, whose advocacy needs are not met under current funding arrangements
- recommending funding amounts for advocacy agencies
- conducting seminars for continuing education of advocates and for relevant officials and people from service providers
- reviewing or commissioning reviews of advocacy agencies on a regular basis

We recommend that:

- the council have a membership of five or seven
- a majority of the council have a background that gives them a strong understanding of advocacy
- appointment to the council be by a process of nomination from the community and that either the Chief Minister propose appointees to an appropriate Assembly committee for approval or vice-versa.

Government Response

Not agreed

It is important that community advocacy needs and resources are considered in light of overall priorities in funding aimed at supporting vulnerable and disadvantaged Canberrans.

As a flagship commitment under *Building Our Community: The Canberra Social Plan*, the Government has established the Community Inclusion Board and Fund. The Government has also established a Joint Community Government Reference Group to examine issues related to the viability and sustainability of the community sector. Its role is to provide high level policy advice to the Community Inclusion Board to support the Board in performing its functions, which include making recommendations to the Government on funding priorities.

Issues around gaps in the availability of individual advocacy will be referred to the Joint Community Government Reference Group for consideration in the broader context.

In regard to the proposed education and review functions, there is significant overlap between the role of the Advisory Council and the functions of existing community engagement and advisory mechanisms, in particular the Community Engagement Unit and the Joint Community Government Reference Group.

Government Response to the Submission on the Disability Commissioner from the Disability Reform Legislative Reform Working Group

Section Three

Introduction

The Disability Reform Legislative Reform Working Group provided advice to the ACT Government on the establishment of a Disability Commissioner in November 2003. This submission was provided in response to the Government Response to Recommendation One of the Report of the Board of Inquiry into Disability Services and also acknowledged inclusion of a Disability Commissioner in the scope of the Review of Statutory Oversight and Community Advocacy Agencies.

This submission contained proposals on the establishment of a proposed Disability Commissioner and associated legislation, roles, functions and powers. The submission makes a number of useful recommendations concerning the operation of a Disability Commissioner that the Government supports.

The most significant difference between the ACT Government position and the submission of the Working Group is that the Government does not agree that the Commissioner should be responsible for taking complaints in relation to any aspect of the lives of people with a disability. The Disability Services Commissioner, to be established as part of the Human Rights and Service Review Commission, will take complaints in relation to disability services, as defined in the current *Community and Health Services Complaints Act 1993*.

Further details are provided in Section One of this paper.

Recommendation

Government Response

Recommendation 1.1

The Working Group proposes that the Disability Commissioner should be an independent statutory officer, responsible to the ACT Legislative Assembly through the ACT Attorney-General.

Agreed

The Government will establish a Disability Services Commissioner as part of a Human Rights and Service Review Commission to have functions and powers which enable him/her to undertake monitoring and compliance activities as well as supporting the investigation of complaints received about disability services.

The Disability Services Commissioner will report to the ACT Legislative Assembly and existing standing committees through the Attorney-General, consistent with the process for other statutory office holders.

Recommendation 1.2

The Working Group proposes that the Disability Commissioner's budget allocation be made directly by the ACT Legislative Assembly and that the Commissioner provide an Annual Report direct to the Assembly.

Not agreed

The Attorney-General will be responsible for the Disability Services Commissioner's budget allocation and annual reporting process.

Recommendation 1.3

The Working Group proposes that the legislative framework for the Disability Commissioner should be established separately from the Disability Services Act.

Agreed

The establishment of the Disability Services Commissioner is to be enacted through new legislation, possibly as part of the legislation to establish the Human Rights and Service Review Commission.

The proposed legislation will take into account the recommendations of the FEMAG Review in relation to *Community and Health Services Complaints Act 1993*.

Consequential amendments will also be required to other legislation, including the *Community and Health Services Complaints Act 1993*.

Recommendation	Government Response
<p>Recommendation 2.1</p> <p>The Working Group proposes that the Disability Commissioner's role should include the handling of complaints.</p>	<p>Agreed</p> <p>The Disability Services Commissioner will be empowered to:</p> <ul style="list-style-type: none"> ■ investigate complaints by people with a disability and other people regarding the quality of a disability service ■ encourage and assist complainants and service providers, where possible, to resolve complaints through internal complaints handling processes ■ make recommendations to disability service providers to improve and rectify services, either in response to a complaint or as a result of monitoring or the Commissioner's own inquiries ■ make recommendations to the Attorney-General and to relevant Ministers, agencies and service providers on improvements to services.

<p>Recommendation 2.2</p> <p>The group proposes that the Commissioner shall decide in relation to a complaint to do one of more of the following:</p> <ul style="list-style-type: none"> ■ decline to act on a complaint if: <ul style="list-style-type: none"> ● a complaint is deemed to be frivolous or vexatious ● a complaint cannot be resolved after due consideration ● information is provided for alternative avenues to be followed ● the complaint is outside the jurisdiction of the Commissioner ■ conciliate a complaint ■ investigate a complaint ■ make a recommendation in relation to the resolution of a complaint. 	<p>Agreed</p>
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Recommendation	Government Response
<p>Recommendation 2.3</p> <p>The Group proposes that the Disability Commissioner should explicitly encourage the use of local complaints mechanisms in the first place.</p>	<p>Agreed</p> <p>The Disability Services Commissioner will be empowered to provide education to disability service providers and the public, and support to service providers, to promote the improvement of service quality.</p>
<p>Recommendation 2.4</p> <p>The Working Group proposes that the Commissioner be required to:</p> <ul style="list-style-type: none"> ■ negotiate or liaise with all parties regarding the timeline within which a complaint will be handled ■ ensure that reasonable steps are taken to enable complainants to participate in all processes, including the provision of information in multiple formats ■ inform all parties to the complaint at an early stage of the Commissioner's complaints handling processes ■ as far as possible finalise any complaint, by resolution or recommendation, within 12 months of receipt, and ■ give reasons for any decision or recommendation relating to a complaint. 	<p>Agreed</p>
<p>Recommendation 2.5</p> <p>The Working Group proposes that in relation to any complaint lodged with the Commissioner the complainant may:</p> <ul style="list-style-type: none"> ■ seek the enforcement of a recommendation of the Commissioner by a tribunal such as the ACT Administrative Appeals Tribunal or other appropriate tribunal ■ have a procedural decision of the Commissioner reviewed by this tribunal. 	<p>Not agreed</p> <p>Rather than establishing a tribunal to 'enforce' the Disability Services Commissioner's recommendations, the Government proposes that the President of the Human Rights and Service Review Commission be given the power to publicly name people or organisations who fail to implement a recommendation of the Commission within a timeframe established under the legislation. It is proposed that this mechanism be reviewed within two years of the establishment of the Commission to assess its effectiveness.</p>

Recommendation	Government Response
<p>Recommendation 3.1</p> <p>The Working Group proposes that the Disability Commissioner should not conduct routine performance monitoring of Disability ACT service provision or any other service providers against the quality standards, but should undertake selective monitoring at his/her discretion.</p>	<p>Not agreed</p> <p>The Disability Services Commissioner will undertake both routine and random service performance audits.</p>
<p>Recommendation 3.2</p> <p>The Working Group proposes that the Commissioner should not undertake monitoring of the performance of Disability ACT against their Strategic Plan.</p>	<p>Agreed</p>
<p>Recommendation 3.3</p> <p>The Working Group proposes that the Disability Commissioner should be able to jointly conduct reviews with other government agencies, including but not limited to the Auditor-General.</p>	<p>Agreed in-part</p> <p>The Disability Services Commissioner will be able to engage in joint investigations, and to individually investigate agreed identified issue/s of the complaint with other statutory office holders.</p>

