REPORT OF THE REVIEW OF STATUTORY OVERSIGHT AGENCIES AND COMMUNITY ADVOCACY

October 2003

Foundation for Effective Markets and Governance

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SUMMARY OF CONCLUSIONS IN CONTEXT OF THE TERMS OF REFERENCE

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:

- (A1) 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;

Yes there are. We consider that because of the dominance of health matters in the office of the Community and Health Services Complaints Commissioner, and because of the need for particular expertise and understanding of the needs and circumstances of those with disability that complaints relating to disability services should become a function of the proposed Disability Services Commissioner. Similarly we believe that complaints relating to community services should also be transferred to that office. We recommend that to enable closer co-operation and joint projects, that the Human Rights Office, the Health Complaints (or Services) Commissioner, and the Disability and Community Services Commissioner be co-located and while having

their own dedicated staff, should have certain shared resources, under the management of a General Manager, Operations.

- (A2) complaints in relation to disability services should be investigated by any new or existing agency;

They should be investigated by the proposed Disability and Community Services Commissioner - see above.

- (A3) 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;

There is some potential overlap in relation to the coverage of the bodies, but this does not present a problem when clients are aware of their choices. We recommend that there should be concurrent jurisdiction in some areas for the Ombudsman in order for that office to play a role in relation to review of process in the other bodies.

Bearing in mind the different definition of the term 'disability' in the Community Advocate Act, in relation to certain functions of the Community Advocate, namely:

> **(a) to foster the provision of services and facilities for persons who have a disability;**
>
> **(b) to support the establishment of organisations which support such persons;**
>
> **(c) to encourage the development of programs that benefit such persons (including advocacy programs, educational programs and programs to encourage persons to act as guardians and managers);**

it may be that those functions relating to those with a disability in terms of disability services, should be conferred on the Disability and Community Services Commissioner.

The role of child protection and youth justice Official Visitors overlap to some extent with those of the Community Advocate, but agreement between the bodies has ensured the necessary oversight without duplication. Similarly there is some overlap between the role of mental health Official Visitors in being able to receive complaints and that of the Community and Health Services Complaints Commissioner. Again, co-operation has apparently prevented any problems arising, and matters are referred to the Commissioner as appropriate.

- (A4) on the basis of similar legislation in other jurisdictions, there are gaps in the coverage of statutory oversight agencies in the ACT;

While there are some minor matters that require attention, we could find no evidence of any major gaps in coverage in terms of the powers and responsibilities statutory offices under review. However, this does not mean that all areas have received the attention that has been

required. In this context, for example, we note the following "four main areas of concern" in the report of Standing Committee on Community Services and Social Equity on "The rights, interests and well-being of children and young people":

1. **the lack of external review and appropriate complaints processes regarding Family Services decision making in care and protection cases;**
2. **the lack of external review/appropriate complaints processes for decisions affecting children and young people generally (e.g., in education);**
3. **the lack of systems level advocacy for children and young people in the ACT; and**
4. **the lack of mechanisms for communication between young people and agencies making decisions that impact on them."**

In so far as implementation of our recommendations would make the overall system of oversight and complaints handling more effective and efficient these concerns would be addressed at least to some extent. It is not our place to comment on whether or not the creation of a commission for children and young people is the appropriate response.

- (A5) where gaps do exist, it is possible to integrate new functions into existing or improved structures;

The matters referred to above would be addressed by our proposals to extend the jurisdiction of the Ombudsman, and to remove any barriers standing in the way of joint or collaborative approaches by the oversight agencies, sharing of information, and referral of complaints. In addition, certain changes in relation to the operation of the Health Complaints (or Services) Commissioner, such as those envisaged by the Health Professions Bill, and exchange of information with the Chief Executive of ACT Health, would facilitate improved outcomes.

- (A6) 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;

Without undertaking a detailed review of each agency it is impossible to comment on whether or not they are efficient. There was certainly considerable comment on the time taken by the Community and Health Services Complaints Commissioner to finalise complaints, including by the Commissioner. It is our view that improved entry point consideration of and assistance with complaints in the manner we recommend should help. Additionally, we believe that consideration of

complaint management software with well developed reporting functions would assist better case management. To this end, the proposed collaboration might further assist best practice development of management reporting tools.

We have also recommended some changes for each office to improve effectiveness.

We strongly support the views of the Official Visitors for both sectors, that their jurisdiction 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. There are some other minor changes to their powers necessary.

To assist and enhance the role of Visitors we also recommend that for administrative purposes and to safeguard their independence, that they would be better 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.

- (A7) there are adequate internal and external review and appeals mechanisms and if not, what these should be;

For the Ombudsman's office, internal review is managed by the Director of Investigations, or if unable to resolve the matter, a Senior Assistant Ombudsman. For the Discrimination Commissioner and the Community and Health Services Complaints Commissioner, the respective Commissioner undertakes the review, as does the Community Advocate. We suggest that, given the importance of internal review, the level for management of complaints about the processes within the Ombudsman's office should be undertaken either by or under the direction of a Senior Assistant Ombudsman.

There is no specific mechanism for external merits review for any of these bodies. Nor is there in other jurisdictions given that the statutory office holders only make recommendations. We have suggested that in relation to the other statutory offices, the Ombudsman should be given jurisdiction to receive complaints about process or administrative action.

- (A8) there is a logical conclusion to the current complaints handling processes conducted by statutory oversight agencies;

The principal issue of concern here related to the difficulties in finalising complaints to the Community and Health Services Complaints Commissioner, or in having recommendations implemented. To address this we have recommended a process

involving the AAT. Provisions in the Health Professions Bill should also assist speedier and more effective conclusions.

For child protection and youth justice Official Visitors, complaints that they cannot deal with on the spot, or lack the power to resolve, are referred to the Community Advocate or one of the complaint bodies. A similar situation applies to the mental health Official Visitors. However, often they do not have the time or resources to follow these up. We have suggested a means to facilitate their referrals.

- (A9) complaints and advocacy agencies adequately contribute to service improvement and enhance the rights of consumers;

We were given many examples of service improvement flowing from the work of all the oversight bodies. This is particularly the case where systemic issues have been investigated. We were also given examples of lost opportunities because of the length of an investigation, lack of timely information or advice to an agency, professional board, or service provider. It was also claimed that 'timidity' in challenging professional opinions or orthodoxy had resulted in consumers' rights not being adequately addressed.

But a fundamental recurring issue was the inability of the overall system to deliver desirable and appropriate outcomes because of the lack of resources or facilities.

- (A10) the Management Assessment Panel and the Care Coordination Office are in the appropriate administrative location and if not, recommend where they should be;

We considered the view put to us that there could be the appearance of a conflict of interest in having the MAP and CCO located within the Office of the Community Advocate. Whilst we did not receive evidence of such a conflict, we believe that on balance it may be advisable to locate the two bodies together with the consolidated oversight bodies, with support provided through the proposed General Manager Operations.

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

With a view to determining if:

- (B1) 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;

Under the model of providing for the community's advocacy needs through the funding of non-government community based

organisations we do not think overlap exists. While they may be seeking to assist the same people or may deal with the same issues, the roles performed by the oversight agencies on the one hand and the advocacy agencies on the other have important differences. In relation to individual advocacy, statutory officers, even when they are established as officers of the parliament rather than the executive, are limited in the extent that they can actually advocate for an individual insofar as they are part of the state. We note the limitations on the NSW Patient Support Service in this regard for example. Statutory officers can and do effectively influence the state in relation to legislative and policy and program change, but, while some stick their necks out quite far on occasion, they cannot challenge the state beyond the scope of the powers the state has given them and those powers of course can only reflect the knowledge, information, ideas and indeed the politics at the time their statutes were formulated. They cannot be entirely quarantined from the politics of the day and it is clearly not possible for them to be as independent of the state as it is for non-state systemic advocates, even if those advocates are funded by the state.

- (B2) 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;

As we have indicated we think there are five major areas where advocacy services are not meeting needs, namely in, health, housing and homelessness, discrimination, children and young people, and indigenous people. In addition, the advocacy needs of some people who are vulnerable, due to age or disability or for some other reason, are not met under current funding arrangements.

- (B3) advocacy agencies adequately contribute to service improvement and enhance the rights of consumers;

Recognising that while this is an important function, but not the only function that such agencies serve, we believe that they do make a significant contribution. We think though that this contribution could be substantially enhanced if more collaborative problem solving, rather than adversarial, relationships were to exist between the advocacy agencies and service providers and other relevant actors. We believe implementation of our recommendations relevant to this (i.e. adoption of a clearer policy in relation to advocacy, developing a greater understanding of advocacy amongst relevant actors etc) would assist.

- (B4) 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.

It is our view that the ACT should not depart from the arrangement of

using non-government community based organisations to deliver advocacy services. We believe that, provided a community has the capacity and tradition to operate such organisations effectively and efficiently, and we believe the ACT is well endowed in this regard, there is no better model. We have already indicated a number of the things that can and should be done to get the best out of this model. Under a general policy, adoption of principles and standards is important amongst these things. This can only be done via a process which allows for full participation of the advocates themselves and all the other stakeholders. We suggest that the principles and standards developed under the National Disability Advocacy Program are suitable as a starting point for development of principles and standards applicable to advocacy generally. We suggest that it is likely to be necessary to have special standards applicable to advocacy for particular groups of citizens/consumers.

RECOMMENDATIONS

The following are our recommendations:

- ***--R1 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.***
- ***--R2 We recommend that a provision enabling the Ombudsman to deal with a complaint by conciliation, similar to that in the NSW ombudsman legislation[1], be added to the ACT Act.***
- ***--R3 We recommend that any doubt about the Ombudsman's jurisdiction in relation to contractors providing services on behalf of the Government be removed.***
- ***--R4 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 Complaints 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.***
- ***--R5 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.***
- ***--R6 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.***
- ***--R7 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.***
- ***--R8 We recommend that similar powers available to the mental health Official visitors (s122A Mental Health Act 1994) be***

[1] See s13A *Ombudsman Act 1974* (NSW)

granted to the child protection and youth justice Official Visitors in the Children and Young People Act 1999.

- ***-- R9 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.***
- ***--R10 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; and***
- ***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.***

--R11 We recommend that there be a range of common services for all the oversight offices under a General Manager, Operations[2]. 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

[2] There is precedent for this type of arrangement both in Australia and overseas. For example in Australia, the Executive Director of the Human Rights and Equal Opportunity Commission managed the staff for all the various Commissioners.

- ***--R 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.***

--R13 We recommend that complaints to any statutory office holder be accepted orally or in writing

- ***--R14 We recommend that the Discrimination Act be amended to enable complaints to be made by persons on behalf of others.***
- ***--R15 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 Service Commissioner's legislation as well. Discretion for the Commissioner not to investigate a complaint could be based on provisions similar to those in s27 of the NSW Health Complaints Act 1993.***
- ***--R16 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.***
- ***--R17 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.***
- ***--R18 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[3] be amended to bring such services provided by a government entity within jurisdiction.***
- ***--R19 We recommend that the complaint bodies inform their clients of the length of intervals for reporting progress on their complaints.***

[3] s5 (2) (m) of the *Ombudsman Act 1989* (ACT)

- ***--R20 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.***
- ***--R21 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.***
- ***--R22 We recommend that the Management Assessment Panel and the Care Co-ordination Office be located together with the consolidated oversight bodies, with support provided through the proposed General Manager Operations.***
- ***--R23 We recommend that an object requiring the fostering of a positive attitude to complaints and monitoring, be included in all the relevant legislation.***
- ***--R24 We recommend against the re-establishment of a statutory Health and Community Rights Advisory Council.***

--R25 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.

--R26 We recommend that the Assembly have a standing Committee that oversees the work of the oversight bodies

- ***--R27 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.***
- ***--R28 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.***
- ***--R29 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.

--R30 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.*

GLOSSARY OF TERMS

Some terms used in this report may have more specific meanings when defined in legislation. We have attempted to adopt common usage.

Advocacy: active, verbal support for a cause, view, or position or interceding on behalf of a person or group. (we consider in some detail what advocacy means in the context of this review in the discussion of Part B of our Terms of Reference)

Client: used interchangeably with consumer, or somebody who uses the services of another body.

Community services: in this report this has a very narrow meaning, that of a service for aged people or people with a disability

Complainant: a person or body that lodges a complaint, or on whose behalf a complaint is made.

Complaint: a statement expressing dissatisfaction with something;

Conciliation: action taken to reach agreement or restore trust or goodwill that has been lost, as a deliberate process used in dispute resolution.

Consumer: somebody who buys/ receives/uses goods or services.

Dispute: a serious disagreement or argument.

Enquiry or **inquiry**: 1. a request for information; 2. a formal investigation to determine the facts of a case.

Feedback: comments in the form of opinions about and reactions to, something, intended to provide useful information for future decisions and development.

Guardian: somebody who is legally appointed to look after the affairs of another.

Inspect: to examine something carefully in order to judge its quality and correctness.

Mediation: the intervention by an impartial third party between two sides in a dispute, in an attempt to help them reach an agreement.

Monitor: to watch over a body or something, in order to ensure that good order, conformity, or proper conduct is maintained.

Ombudsman: a person responsible for investigating and resolving complaints from members of the public about the actions of a government department or agency

Representation: 1. action or speech on behalf of another; 2. a description, statement, or account of something real or alleged, especially meant to induce a response from authority.

Statutory office: a position of duty, trust or responsibility established by a statute.

Statutory: created, regulated or imposed by a law established by a legislative body.

Suggestion: an idea or proposal put forward for consideration.

Systemic: affecting or relating to a system as a whole. For example, a systemic investigation would look at what went wrong in the systems used by a service delivery organisation that resulted in problems occurring for clients.

1. INTRODUCTION

1.1 The true health of a society can be measured by the extent to which it is prepared to care for, and support, its most vulnerable members. If the experience of this review is anything to go by, the citizens of the ACT can be truly proud of the many wonderful individuals and organisations that daily strive to achieve that measure by their selfless and dedicated work on behalf of their clients, charges, and family members. That many are still often having difficulty having their needs met is, perhaps, indicative of the distance we still have to travel.

1.2 This review is best characterised as a review of the review system in the ACT. We did not have a remit to look in detail at each component of the system, nor would that have been feasible in the time available. Thanks to the willing participation and contributions of the very many individuals and organisations, both non-government and government, with whom we spoke, we were able to gain a perception of how various parties' expectations are, and are not, being met. The frankness and honesty of those very many views was a notable hallmark.

1.3 In one way, the ACT is a microcosm of the rest of Australia; it has the same range of experiences, needs, and difficulties evident in the larger jurisdictions, and it requires therefore, similarly oriented institutions to provide assistance, services, and solutions. This applies to the policy formulation for, and provision of, services just as it does to the oversight and complaint handling bodies, and advocacy agencies. To be effective, an oversight or regulatory regime must be designed with a clear appreciation of what might be called the governance characteristics of a community. Notwithstanding its small population and territory, government in the ACT is hardly less complex than it is in the states. Moreover, in the states much of the business of government in terms of local planning, regulation and service provision is delegated to local government bodies. Thus, in the ACT a small legislature and a small ministry have disproportionately wide responsibilities in respect of lawmaking and policy formulation. In practice this means their capacity to oversee and monitor administration of the law, provision of services, and implementation of policy is limited and inevitably the burden of responsibility falls heavily on the bureaucracy. It is simply not practical for a jurisdiction with a relatively small population and thus smaller revenue base to aspire to all the institutions to the level of development and resourcing of a jurisdiction with a much larger population.

1.4 Being small has many advantages, but there are disadvantages. It does mean that the pools of expertise for the delivery of services and for the required oversight and regulation of that delivery are small. The resulting close relationships between the various players have both positive and negative aspects in terms of operation of an effective regime.

1.5 These present circumstances of the ACT have implications for oversight, complaints handling and advocacy arrangements. Given the great demands on the Assembly members and especially the Ministry, these arrangements must be particularly robust. A key element of this is that those persons charged with oversight and complaints handling responsibilities must be able to stand quite independently from those involved in delivery of services or in day-to-day decisions about the delivery of those services. And, to the extent that the ACT is characterised by close-knit relationships amongst service providers and between them and the public administrators, the role of civil society advocacy groups is especially critical.

1.6 What follows in this Report is our attempt to represent the views, opinions, suggestions, and ideas put to us and, drawing on these, our suggestions for an effective way forward.

1.7 Whatever model or system is put in place following this Review it must be based on something that will work for the future; not simply be a reaction to any past errors, failures, or mistakes – actual or alleged. As we said in our Information Paper circulated at the commencement of the Review:

> Ultimately any system set up to deal with complaints or representations, or to advocate on behalf of those in a position where they are unable to represent themselves effectively, will only succeed to the extent that they have public trust and confidence. Especially, they must meet the needs of those on whose behalf they are established. It matters not a jot if a government of the day, or a government agency or a statutory officer, thinks they have designed a great scheme, if the consumers or their representatives stay away in droves, or if those complained about ignore the recommendations or decisions of the agency.

1.8 We were contracted to undertake an independent review for the ACT Government. It is not a review on behalf of the bureaucracy, nor of the Legislative Assembly, nor of the oversight and community advocacy agencies, nor of the community at large. The views and opinions of those stakeholders were crucial to the process, but what appears here are solely the views of the FEMAG review team.

2. BACKGROUND

2.1 The ACT Government has made clear the need for an effective statutory oversight regime and effective advocacy services, for consumers of health, disability and community care services, and children and young people in care.

2.2 Following the Reports of the Board of Inquiry into Disability Services (the Gallop Report) and the Report of the Review of ACT Health (the Reid Report) the Government decided to seek an independent review of the statutory oversight functions and powers of a number of agencies as well as the role and functions of community advocacy agencies. The intention of the review was to look at the system of statutory oversight and community advocacy operating in the ACT as a whole, rather than detailed aspects of individual agencies, with a view to determining if the existing model is achieving the desired outcomes for the ACT community.

2.3 The Review was undertaken by the Foundation for Effective Markets and Governance (FEMAG) against terms of reference established by the ACT Government. The terms of reference and information about the Foundation are below.

2.4 We produced an Information Paper that was widely circulated to organisations and placed on the FEMAG and Department of Disability, Housing and Community Services' Websites. The paper outlined what we considered to be the issues that needed to be addressed. The issues were not exhaustive, but designed to stimulate comment from the various stakeholders with an interest in the advocacy and 'watchdog' bodies. A public notice was also placed in The Canberra Times on 28 and 31 May.

2.5 We wrote to all relevant consumer and community groups inviting them to respond to a questionnaire on the issues. Stakeholders were also invited to comment to us on other issues they considered relevant to the Review. A copy of the Information Paper is at Appendix A

The Foundation for Effective Markets and Governance

2.6 The Foundation is affiliated with the Australian National University, and is located within the Regulatory Institutions Network (RegNet) of the Research School of Social Sciences. It has a commitment to contribute to the welfare of people, especially the least advantaged. Its members have undertaken a wide variety of projects in Australia and developing countries.

2.7 Members of FEMAG have general experience and expertise in public policy and administration and the role of civil society in good governance. It has particular expertise in consumer protection and accountability systems. FEMAG is a non-profit organization with its members having a strong philosophical commitment to its work.

2.8 Directors, John Wood and Robin Brown, with John as the Principal, undertook the Review. Project management support was provided by Howard Hollow. Further information about FEMAG can be found at www.femag.anu.edu.au.

Terms of Reference

2.9 **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:

- 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;
- complaints in relation to disability services should be investigated by any new or existing agency;
- 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;
- on the basis of similar legislation in other jurisdictions, there are gaps

in the coverage of statutory oversight agencies in the ACT;
- where gaps do exist, it is possible to integrate new functions into existing or improved structures;
- 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;
- there are adequate internal and external review and appeals mechanisms and if not, what these should be;
- there is a logical conclusion to the current complaints handling processes conducted by statutory oversight agencies;
- complaints and advocacy agencies adequately contribute to service improvement and enhance the rights of consumers;
- the Management Assessment Panel and the Care Coordination Office are in the appropriate administrative location and if not, recommend where they should be;

2.10 **B.** To examine, consult and report on the role and function of community advocacy agencies;

With a view to determining if:
- 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;
- 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;
- advocacy agencies adequately contribute to service improvement and enhance the rights of consumers;
- 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.

Outline of Issues

2.11 We were interested in stakeholders' views about the problems generated by the number of 'watchdog' and advocacy agencies. This could relate to gaps in service, conflicts in powers, failure to implement recommendations, or overlapping functions. There are obviously different issues relating to oversight and complaint handling agencies as compared with advocacy bodies. We were also interested in obtaining views on some specific matters,

and the reasons for those views. Opinions on these general issues were sought through a set of questions, which are listed in the Information Paper at Appendix A

2.12 A set of more specific questions was included as an Attachment to the Information Paper, and a Questionnaire for more convenient use (at Appendix B), was also sent to bodies and individuals.

Consultation

2.13 More than 65 meetings and discussions, including forums and focus groups took place over three months. We met more than 200 people including more than 50 organisations.. Appendix C lists the organisations and officials consulted and indicates those who provided written comments.

Issues Raised and Concerns Expressed

2.14 Appendix D lists the issues raised and concerns expressed to us in the course of our consultations.

3. THE CURRENT SYSTEM

3.1 The System in General

3.1 1 The current system comprises a number of government oversight and complaints handling agencies, some statutory, some non-statutory, and a number of non-government community advocacy agencies largely funded by the ACT or Commonwealth Government.

3.1.2 Broadly the government part of the system as a whole that is subject to this review covers:

- discriminatory conduct or decisions generally
- health, aged care and disability services whether provided by government, the private sector or the community sector
- government services and actions generally

and functions in relation to these matters include:

- Resolution of complaints/disputes by mediation, conciliation and recommendation
- Representation of persons unable to represent themselves, or to retain a lawyer's services, in certain formal proceedings
- Promotion of certain rights people have as citizens, as employees and as consumers
- Monitoring, inspecting, investigating, reviewing, analysing services for the root cause of problems, and recommending reforms to practices, procedures and service quality standards and to policies and programs and regulation by legislation or otherwise.

3.1.3 Jurisdictions of the complaints handling bodies in the system are determined as follows by:

- who or what is providing the service or undertaking the action - i.e. the Ombudsman covers services and actions of the government generally
- what the service or action is – i.e. the Discrimination Commissioner covers discriminatory conduct or decisions generally and the Community and Health Services Complaints Commissioner covers health care services
- to whom services are provided – e.g. the Community and Health Services Complaints Commissioner covers services provided specifically for aged people or people with disabilities or their carers.

3.1.4 Thus, a person, whether or not they had a disability or were aged, with a complaint about a service generally provided to the community by the private sector, excepting a health services or service provided in, or not provided in, a discriminatory way, would take a complaint to the ACT Office of Fair Trading.

3.1.5 Legal aid, prosecution, enforcement, arbitration, determination and adjudication are integral elements of the overall regulatory regime, but are not subject to this review.

3.1.6 As to the non-government part of the system, the functions performed are:

- Advocacy, both formal, legal representation and non-legal advocacy for individuals to assist in the resolution specific problems or to assist individuals in a more general way to live as satisfactorily and fruitfully as possible as members of the community.
- Advocacy on behalf of groups with common interests, concerns or problems, or classes of people or the public at large to bring about reforms to practices, procedures and service quality standards and to policies and programs and regulation by legislation or otherwise.

3.1.7 The discussion under Part B of the Terms of Reference elaborates on the functions of the non-government community advocacy agencies.

3.1.8 The functions of the various government agencies are briefly outlined below. The functions of the statutory offices as set out in their relevant legislation are at Appendix E.

3.1.9 Below is a table which attempts to provide in a simplified form the types of function undertaken by the various bodies;

	Impartial complaints resolution	**Rights promotion**	**Monitoring, recommending reforms etc**	**Representation or advocacy on best interests basis**	**Systemic advocacy**	**Individual advocacy on partisan basis**
Ombudsman	**X**		**X**			
Comunity and Health Services Complaints Commissioner	**X**	**X**	**X**			
Disability Commissioner	**X**	**X**	**X**			
Disability Services Commissioner*	**X**	**X**	**X**			
Official Visitors	**X** (low level, referral of higher level)		**X**	**X** (informally)		
Housing Review Committee	**X**					
Office of the Community Advocate		**X** (de facto)	**X**	**X**		
Systemic advocacy NGOs					**X**	
Individual advocacy NGOs						**X**

* functions yet to be determined by government

Table of functional comparisons

3.2 Community and Health Services Complaints Commissioner

3.2.1 The Commissioner works with consumers and providers to:

- improve health and community services;
- promote consumer rights; and
- provide accessible and independent means of addressing complaints.

3.2.2 The Commissioner deals with complaints in five ways:

- Providing information and support to people who wish to complain;
- Assisting direct communication between providers and consumers;
- Assessment;
- Conciliation; and
- Investigation.

3.3 Community and Health Rights Advisory Council

3.3.1 The Council's functions are:

- 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 and
- to otherwise bring relevant issues to the Commissioner's attention.

3.4 Discrimination Commissioner

3.4.1 The Commissioner heads the ACT Human Rights Office which is a small, independent office that promotes human rights in the ACT by administering anti-discrimination law. The Commissioner investigates and, if appropriate, tries to resolve, by conciliation, formal complaints of human rights issues such as discrimination, sexual harassment and racial vilification under the Act. There is a 60 day time limit after which unresolved complaints may be taken to the Discrimination Tribunal.

3.5 Community Advocate

3.5.1 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.

3.5.2 The Advocate also has responsibilities to generally promote, and individually represent, the best interests of people who are not able to protect or represent their own interests.

3.5.3 The Advocate may be appointed emergency guardian for a person when there is the need for an urgent substitute decision or guardian of last resort on a continuing basis if there is no one willing and found suitable by the Guardianship and Management of Property Tribunal.

3.6 Management Assessment Panel and Care Coordination Office

3.6.1 The Management Assessment Panel (MAP) is a service to facilitate the coordination of case planning and service provision for members of the community whose complex service needs are poorly coordinated or inadequate. The panel will, when necessary, identify, ensure coordination of, and negotiate service provision for people who are eligible for MAP services. The services of the MAP are available for children and adults.

3.6.2 The Care Coordination Office is responsible for overseeing the care and support of people who are placed on a community care order by the Mental Health Tribunal.

3.6.3 A community care order can be made when:

- a person has a mental dysfunction, and
- because of that dysfunction, is at risk, of doing serious harm to himself, herself or others, and
- where other less-intrusive options have been tried and have failed.

3.7 ACT Ombudsman

3.7.1 The Ombudsman considers and investigates complaints about defective administration from people who believe they have been treated unfairly or unreasonably by a government department or agency. The Ombudsman's aim is to resolve complaints impartially, informally and quickly. The Ombudsman cannot override the decisions of departments or agencies nor issue directions, but rather seeks to resolve disputes by negotiation and persuasion, and if necessary, by making formal recommendations to the most senior levels of government.

3.8 Official Visitors (mental health, disability, child protection and youth justice)

3.8.1 The functions of the official visitors are:

- to inspect specified agencies providing mental health, disability, child protection and youth justice services,
- to take any complaints from people being cared for or held in those agencies, and
- to try to resolve such complaints or to seek to have them resolved by

another appropriate agency

4. PREAMBLE

4.01 For effective complaint handling, a service provider's own complaint-handling system should be given greatest focus.

4.02 There is ample evidence from our discussions with all parties, that, until recently the quality of relevant ACT government agencies' internal complaint handling processes has been in need of improvement. Thus we think it is important to make some comments on what the purpose of an internal complaint handling system should be. Of course, many of these comments apply to external complaint handling bodies as well.

4.1 What is the purpose of a complaint handling system?

4.1.1 A complaint handling system has a multiplicity of purposes, which can deliver benefits for all the participants. Such a system provides an opportunity for the consumers of an organisation's services to have their voice heard on those occasions when:

- the organisation fails to deliver its services or goods;
- they are delivered in a manner that is unacceptable to the consumer;
- the organisation fails to meet its own standards of service, or those considered generally acceptable for the industry in which the organisation operates;
- the organisation fails to meet an undertaking; or
- the organisation acts in a manner that the consumer considers to be injurious to their interests or self.

4.1.2 Secondly, a complaint handling system provides a unique opportunity for an organisation to find out what its consumers think of it, both good and bad, a window into the minds of its consumers and avoids their tarnishing the reputation of an organisation by voicing their complaints in the wider community. An organisation will fail to discover what its public thinks is wrong with it until there is a critical mass that compels attention.

4.1.3 Thirdly, a complaint handling system is an essential ingredient of a client service quality program (See Figure 1). Research has shown that effectively handling a complaint will lead to greater levels of loyalty and customer satisfaction than if there had been no problem at all.[4]

4.1.4 Finally, effective complaint handling is a major component of an accountability system. It is a declaration by an organisation that it has sufficient confidence in itself to conduct its business in the public gaze; invite complaints, deal with them properly, and report publicly on the outcomes.

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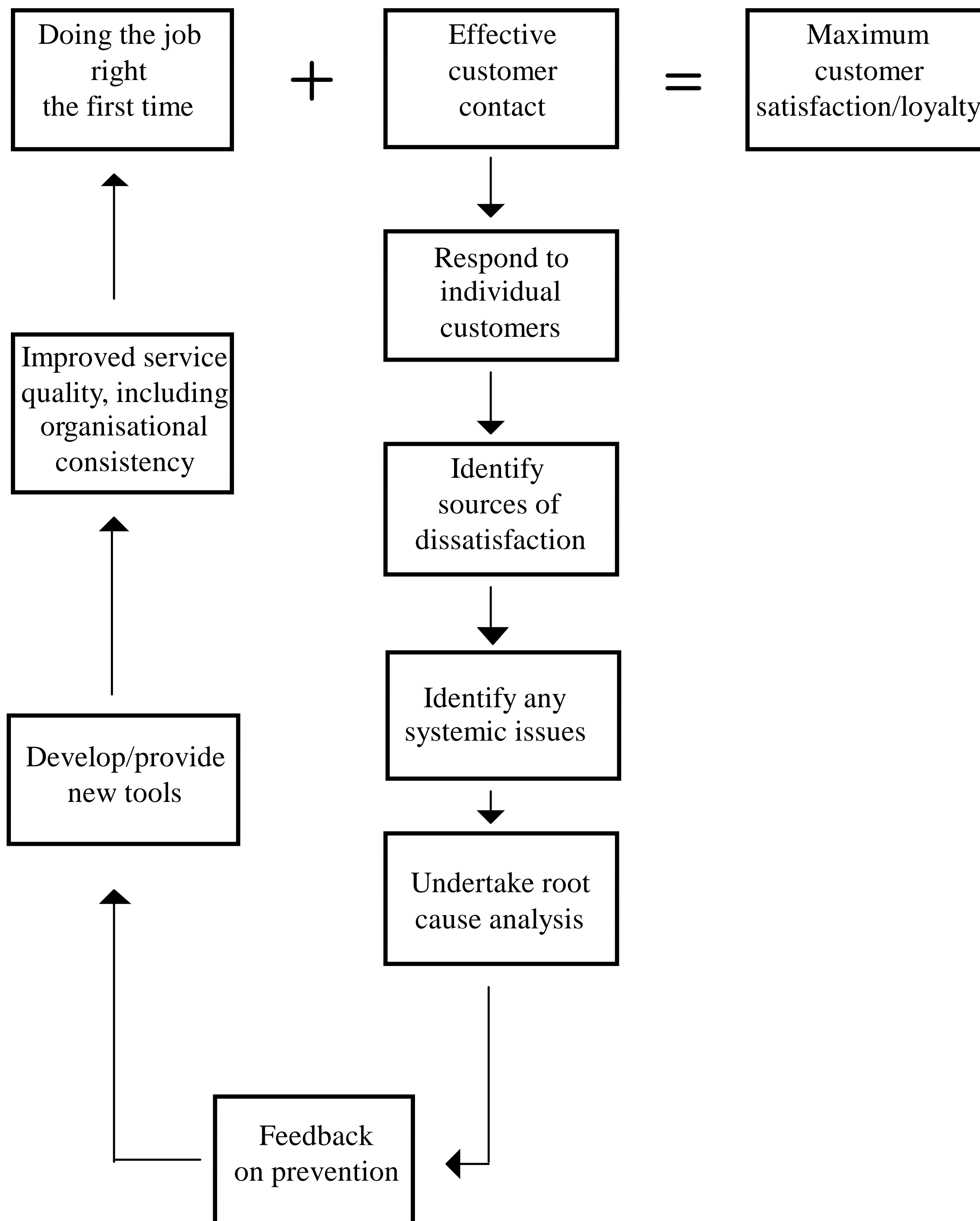
[4] See for example American Express-SOCAP Study of Consumer Complaint Behaviour in Australia, 1995

This is, the more important when the organisation receives public monies to carry out its functions.

Formula for maximising customer satisfaction and loyalty



Customers will reuse your services, and speak well of your services to others

Figure 1 (adapted from original by TARP Pty Ltd)

4.2 What do consumers expect from a complaint handling system and how do they expect to be treated?

4.2.1 Discussions with users of complaint handling systems have identified key characteristics that are required. In summary, these include:

- the consumer's ability to understand the process of complaint handling;
- that staff are fully aware of the complaint handling procedures;
- that staff understand the issues raised by the consumer;
- that complaints are easy to make;
- that consumers are respected;
- that procedures are focussed on achieving speedy resolution of complaints wherever possible;
- that initial contact is followed up in a timely manner;
- that progress is reported regularly;
- that communications are easy to understand; and
- that reasons for conclusions are explained.

4.2.2 Again, consumers have identified ways that they expect to be treated in their transactions with organisations. These include being dealt with properly, fairly, impartially, openly and responsively. (A full description is at Appendix F)

4.3 Criteria to govern ombudsmen and independent complaint bodies

4.3.1 We refer, later in this report to certain factors that are critical to the independence and impartiality of statutory oversight and complaint handling bodies. In the past, attempts have been made overseas and in Australia to undermine, influence, hinder, or otherwise affect the work of such bodies. In some cases this has been politically inspired, in some it has been the work of those in the very bureaucracy which the body was set up to oversee.[5]

4.3.2 In addition in the 1990s a rash of complaint schemes were established in industry and elsewhere, that called themselves 'ombudsmen', yet lacked many of the features that characterised those offices, especially independence of control. As a result, the international ombudsman community and those in Australia developed a set of criteria that they felt should be a minimum set of standards to apply for any body wanting to use the term 'ombudsman'. These criteria, apply to both parliamentary ombudsmen as well as industry ombudsmen, and have been adopted by the major ombudsman institutions in

[5] For example, failure to appoint a new ombudsman for a lengthy period, cutting the ombudsman's budget considerably (Australia); repealing the ombudsman's legislation (Vanuatu, Canada); politically harassing the ombudsman (Malta, Canada); etc.

Australia. By extrapolation they are criteria which it is agreed should apply to any statutory complaint handling scheme. The criteria, which address the principles of Independence, Jurisdictional Criteria, Powers, Accountability, and Accessibility, are at Appendix G.

4.4 Capture

4.4.1 Capture refers to the adoption, by a body that interacts on a regular basis with an industry, profession, organisation, group, or community with a particular culture or set of viewpoints or mores, of that culture or viewpoints or mores. This behaviour is readily observable in many fields. For example, a government department that has a policy responsibility for advising on, say, agriculture, will tend to replicate the viewpoints of the dominant interests of the agriculture industry, and will tend to see the world from that perspective.

4.4.2 Capture can develop in a complaint handling, advocacy, or oversight body. Staff of the organisation will have, in simple terms, two opposing parties to deal with – the complainant and the body complained about. The complainant is often emotional, angry about their prior experience that resulted in the complaint, and will often see the staff member dealing with the complaint as part of the same system that has caused them trouble. The party complained about (the respondent), will usually, though certainly not always, behave in a more dispassionate manner. Over time it is a natural tendency for the staff to prefer the more dispassionate approach. This is reinforced by the fact that in complaint investigations, more contact is likely with the subjects of complaints than with complainants, thus furthering the amount of exposure to the culture or views of the respondent. In time this can develop into an 'understanding' by complaint staff of respondents' positions on a whole range of matters, that are not always reasonable – 'that's how it's done'.

4.4.3 Where the respondents are professionals – doctors, psychiatrists, lawyers, engineers, police, etc. – the dominant philosophy can be particularly difficult to challenge, especially when it is voiced as 'professional judgement' or 'acceptable professional practice'. It requires a 'brave' investigator to challenge such assertions.

4.4.4 The implications of the above can be twofold:

> Firstly, staff constantly exposed to complainants without much relief, when talking about their clients will tend to refer to the culture of complaint in terms of their worst experiences. We have observed this in all sorts of complaint handling bodies in both the public and private sectors, in Australia and overseas. Thus clients may become 'bothersome'. It is a quite understandable response. It is certainly undesirable.

Secondly, an insidious characteristic of thinking like the respondent can develop within the complaint body, with an attendant partiality of perspective. This can be exacerbated (although of course that does not necessarily follow) when a complaint body, in order to gain some in-house expertise, employs staff from the professions it is overseeing. Similarly, the viewpoints of those involved in the community sector can often be distorted by their bad experiences, or those of their clients, in dealing with service providers – or, indeed, oversight bodies – that they lose faith in the ability of such bodies to be effective.

4.4.5Public trust in oversight bodies relies, above all, on the avoidance of conflicts of interest, real or apparent. To pretend that there is an instant solution would be facile. We believe there are, however, some useful practices that can be applied:

- Generally, statutory office holders in oversight agencies should not be drawn from the professions or industries that they are required to oversee;
- Staff of such agencies carrying out investigations, mediation, or conciliation should be employed because of their abilities in these areas rather than professional qualifications in those being overseen;
- Investigation staff should preferably not be employed directly from an agency they may be required to investigate (e.g. former police should not carry out investigations into complaints about police, former housing officials should not carry out investigations into complaints about housing);
- Staff with major public contact responsibilities should have varied programs to enable them to have time away from this stressful work;
- Wherever possible, all staff should have opportunities to undertake outreach work. This enables them to gain a greater appreciation of the circumstances and viewpoints of the clients who use the services of the agency, and of the service provider community, and provides a balance to their 'everyday' work;
- Where possible, staff training and development activities should be undertaken in co-operation with other relevant agencies, in order to obtain different insights, perspectives and improved practices;
- Opportunities should be developed for secondments to the agencies from the community sector and efforts made to recruit from this sector as well;
- Where appropriate, secondments could also be sought from service provider or policy agencies;
- Where professional expertise is required, consideration should be given to means of contracting this, rather than trying to employ people

with the expertise;

- Opportunities should be established to enable rotation of staff between jobs within the agency and with other like bodies;
- Oversight agencies should not be considered as organisations with defined career structures. Difficult as it may seem for those involved, there needs to be some regular turnover of staff to enable new people to bring with them fresh approaches, enthusiasm, and ideas, and to enable further career development for existing staff. Whilst it is very tempting to hold onto staff who have performed well and have developed considerable knowledge and expertise, it is a certain recipe for atrophy over time; and
- Statutory office holders should have maximum non-renewable terms of office.

5. DISCUSSION ON TERMS OF REFERENCE PART A: STATUTORY OVERSIGHT AGENCIES

5.0.1 It should be noted that the majority of the comments relating to oversight agencies in this section refer to the complaint handling bodies. Issues relating to the Office of the Community Advocate, Management Assessment Panel, Care Coordination Office, and Official Visitors are dealt with under the relevant headings.

5.1 Perceptions

5.1.1 Inevitably in a review of this kind, far more voices will be heard voicing criticism than praise. Yet many still acknowledged the dedication of statutory office holders and their staff in carrying out their responsibilities, frequently in very stressful circumstances. It is our clear assessment that no one in the organisations making up the system has done a poor job. Indeed, by and large, what these organisations have achieved is impressive given the constraints under which they operate.

5.1.2 Nevertheless it is clear to us that for those who put forward their views, and from our own enquiries, there is a distinct unease (sometimes more strongly expressed!) that the overall system is not working as effectively as it could and should. It is our conclusion that a revised structure and system and better resource usage can result in all concerned being able to do their jobs better.

5.2 Some considerations regarding the future

5.2.1 Before considering how the current oversight system can be improved, we needed to consider what other developments may affect any proposed structure we might consider optimum. As stated earlier, such a system must aim to avoid the difficulties of the past, but also be flexible enough to adapt to future changes in meeting community need.

5.2.2 In this regard a number of current developments are important to note:

1. The potential passage of Human Rights legislation establishing statutory rights for ACT citizens, and with a Human Rights Commissioner envisaged;
2. The report of Standing Committee on Community Services and Social Equity on "The rights, interests and well-being of children and young people" which recommends the creation of a statutory commission for children and young people;
3. The likelihood in the not too distant future, because of demographic trends, for pressure to mount for an Aged Person's Commissioner.

4. The current development of a Homelessness Strategy which, we are advised, includes consideration of the need for an independent statutory officer (possibly a "Homelessness Commissioner"), to ensure that the rights of people who are homeless are recognised and that, as far as possible, their needs are met.

5.2.3 Any one of these would have implications for the oversight system as a whole.

   a. A Human Rights Act would clearly affect the current Human Rights Office and the Discrimination Commissioner.
   b. A commission for children and young people would have significant implications for Family Services and the Office of the Community Advocate.
   c. Similarly an Aged Person's Commissioner would have implications for the Community and Health Services Complaints Commissioner (who already has a function to deal with complaints about services for the aged) and others.

5.2.4 What is clear is that there is no point simply creating one statutory office after another, with its attendant small staffing component and hope that they will be able to fulfil their legislative charters. As well as their responsibility to monitor developments within their sector, promote the objects of their task, educate the public and private sectors and the community at large, each would also have an important complaint handling function if their existence is to be meaningful. In practical terms that would mean each having to have dedicated staff for each of these activities plus administrative support. Going down this path would, in our view, be a recipe for failure.

5.2.5 We believe that there must be the development of a 'critical mass' for the existing complaint handling bodies and for any additional future developments of the kind outlined above. This would mean, for example, having the ability to draw on resources:

- to undertake major investigations;
- to undertake co-ordinated education programs;
- to ensure that the bodies can acquire some necessary expertise and advice on the culture, difficulties, and needs of the sectors with which they deal;
- to enable effective outreach programs to affected client groups and service providers;
- to undertake effective monitoring of service provision;
- to provide relevant training for staff;
- to provide common administrative support;
- to share facilities such as meeting, interview and conciliation rooms,

equipment, etc;
- to provide skilled conciliation or mediation services;
- to have a modest in house legal advice capacity;
- to enable some mobility and change of environment for staff;
- to utilise effective complaint management IT based systems;
- to offer assistance to consumers who lack confidence to deal with their complaint; and
- most especially to provide a one-stop entry point to all complaint services.

5.3 Issues relating to structural options

5.3.1 We firmly believe that there is a need to provide for some form of consolidation of the existing complaint bodies to ensure an optimum system for consumers and citizens, and to allow flexibility in the use of what will undoubtedly continue to be scarce resources. (This is further discussed below.) A series of small stand-alone agencies will not be able to undertake the challenging tasks expected of them.

5.3.2 We therefore considered a number of options for restructuring, with the emphasis on what is going to work best for clients, use resources most effectively, and prevent a dominance of one set of sectoral interests over another. We concluded that there were four structural options worthy of consideration. Appendix H sets out the allocation of functions under these options.

5.3.3 The common first response for reviews is to recommend a new organisation and it is tempting to design a model that puts all the functions together under an ombudsman or human rights office holder. There are some pitfalls in doing this in our view. They include:

- Institutions that have responsibilities for upholding and promoting Human Rights have, by nature, a different focus and emphasis in their work than bodies established to uphold and promote particular consumer rights and complaints related to particular services. The Discrimination Commissioner, for example has a function of eliminating discrimination. This covers all areas of activity and life within the ACT (excluding Commonwealth responsibilities), a far wider scope than the other bodies. Complaints, whilst an important element, are but one focus of attention. Human rights bodies have a set of codified rights against which to examine the facts of a complainant's experience. A complaints body **may**, in addition to its functions of investigating and attempting to resolve a complaint, have general rights which it can assess in order to assist resolution;

- The function of the ACT Ombudsman is currently provided under contract (actually a Memorandum of Understanding) by the Commonwealth Ombudsman. The implications of this are discussed below; and
- There is considerable concern within the disability community – very understandable in the light of events of the last few years - that the hard fought for recognition of the need for a Disability Commissioner, would count for little if the function was subsumed in a larger body, or where the function was carried by another office holder.

5.3.4 All options included the placement of the Management Assessment Panel and Care Co-ordination Office and the Office of the Community Visitors, and provided for common administrative support and, except for the first, a single entry and assistance point. The Office of the Community Advocate would continue outside these proposed arrangements.

5.4 Option 1: An ACT Rights and Complaints Commission

5.4.1 This would create one Office encompassing the roles of the Discrimination Commissioner, the Health Complaints (or Services) Commissioner, and the Disability and Community Services Commissioner. The ACT Ombudsman function would remain as currently, provided by the Commonwealth Ombudsman. Within this option there are also a number of ways in which functions could be carried out. These include:

a) The functions and powers of the Discrimination Commissioner, Disability and Community Services Commissioner, and Health Complaints (or Services) Commissioner are all conferred on the Rights and Complaints Commissioner, who directs different sections of the office in undertaking their work;

b) The functions and powers of the Discrimination Commissioner, Disability and Community Services Commissioner, and Health Complaints (or Services) Commissioner are all conferred on the Rights and Complaints Commissioner, who delegates the necessary powers to Deputies with functional responsibility for each area. The Rights and Complaints Commissioner, of course, may undertake one of these roles as well. The legislation could also specify that there should be Deputies for specified functions;

c) There is a Chair of the Commission, and the relevant legislation requires that there be a Commissioner with the functions and powers , respectively, of the Discrimination Commissioner, Disability and Community Services Commissioner, and Health Complaints (or Services) Commissioner. These could be undertaken by Deputy Commissioners, apart from those undertaken by the Rights and

Complaints Commissioner.

5.4.2 Positive points

- One entity for all rights and complaints functions, except for the Ombudsman
- Clear lines of accountability and responsibility
- Ombudsman separation ensures no apparent conflict when undertaking reviews of process of the Commission.
- Strong co-ordination capacity and flexibility
- Allows future offices to be integrated

5.4.3 Negative points

- The disability, health, and community services sectors might feel that focus on their needs and issues would be diminished
- Reduces options for complainants
- ACT Ombudsman will naturally have Commonwealth responsibilities as priority.
- Challenging role for the Commissioner

5.5 Option 2: Part amalgamation

5.5.1 In this model we considered maintaining the Human Rights Office as a separate entity with the Discrimination Commissioner and as the location for a Human Rights Commissioner, if that proposal comes to pass. The ACT Ombudsman would have the remaining functions of health, disability, and community services, and delegate these to a Deputy Ombudsman: Health Services and a Deputy Ombudsman: Disability and Community Services. This model would require that the ACT appoint its own ombudsman, with a consequent separation from the Commonwealth Ombudsman's office.

5.5.2 Positive points:

- The Human Rights Office is kept separate from the other bodies which have a mainly consumer rights/administrative focus
- It has the advantage of one head for the amalgamated functions of the Ombudsman type bodies with the delegation of the necessary powers to statutory Deputy Ombudsmen.
- The ACT would select its own Ombudsman who would account to it solely
- Some legislation could be consolidated.

5.5.3 Negative points:

- The ACT would lose the expertise, experience, and facilities of the Commonwealth Ombudsman's office.

- The disability, health, and community services sectors might feel that focus on their needs and issues would be diminished.

5.6 Option 3: Full amalgamation

5.6.1 This would create an ACT Human Rights and Ombudsman Commission with two principal Commissioners – the Human Rights (Discrimination) Commissioner and the Ombudsman. The Discrimination Commissioner would exercise functions and powers under the relevant legislation. Again the ACT would appoint its own ombudsman who would exercise the functions and powers as in Option 2. Jointly, they would act as a Commission in managing the body and would submit one Annual Report.

5.6.2 Positive points:

- One integrated body with clear lines of responsibility and functional demarcation.
- The ACT would select its own ombudsman who would account to it solely.
- Strong co-ordination capacity and flexibility.
- Ultimately legislation could be consolidated.

5.6.3 Negative points:

- The ACT would lose the expertise, experience, and facilities of the Commonwealth Ombudsman's office.
- The disability, health, and community services sectors might feel that focus on their needs and issues would be diminished.
- There might be some management difficulties with a body with two heads.

5.7 Option 4: Co-location or Collaborative Model

5.7.1 This option – our preferred one in all the circumstances – is further described below. In summary, the complaints bodies are all co-located, with the Commonwealth Ombudsman as the ACT Ombudsman. Each office holder would exercise functions and powers under their own legislation, and report independently of each other. Common functions and support services would come under a General manager, Operations who would report to a Board made up of the Commissioners and the Ombudsman.

5.7.2 Positive points:

- Strong focus on the particular client sectors, the development of necessary expertise, and independence for each office holder.
- The capacities of the Commonwealth Ombudsman's office available.
- Good opportunities for collaboration, and allows for amalgamation at a later time if desirable.

5.7.3 Negative points:

- ACT Ombudsman will naturally have Commonwealth responsibilities as priority.
- The Government has one extra statutory office (and in future maybe more)
- Some management complexities

5.7.4 All options, by contrast with the status quo would confer advantages of economies of scale and scope and thus better usage of available resources, and, we believe, greater efficiency and effectiveness.

5.8 Single entry and assistance point

5.8.1 In our view the single most important consideration in any new structure for a revamped external oversight and complaint handling system, is that there be one point through which all complaints come, be they in person, in writing, or by telephone. This is the first stage to ensuring the most competent assessment capable for the consumer's complaint. We note that there is already a virtual single entry point for complaints (and compliments) on the ACT Government website.

5.8.2 It is critical for us to emphasise that highly trained and knowledgeable staff must undertake this entry and assistance role. It is not a job for juniors.[6] It is at this stage that the following can take place:

- The consumer can be assisted to articulate the complaint.
- It can be determined whether the complaint is within the jurisdiction of any of the statutory schemes, and if not, whether there is some other avenue available.
- The consumer can be assisted to identify the various **issues** that the complaint may contain, and which body is best placed to deal with any of those issues. For example, a complaint may contain issues relating to disability services, discrimination, health, mental health, housing, and police.
- Discussion with the consumer to determine whether the complaint has been taken up with the service provider/agency first and if not whether that course of action should be followed first. If it has what the outcomes were.

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[6] We continue to be amazed that 27 years after exposing the inappropriateness of the practice by the Report of the Coombs Royal Commission on Australian Government Administration, that that government agencies (not necessarily the oversight agencies – this is a general point) still staff principal public contact points with often the most junior and least trained staff in the organisation!

- Discussion with the consumer to determine what outcomes or solutions they are seeking and whether their expectations are realistic.[7]
- An indication given about the consumer's preferred initial approach by the body, for example through mediation.
- A decision made by the complainant about which statutory office should have responsibility for the overall management of the complaint – that is which statutory officer will be the 'complaint manager'. For example the principal issues of complaint may relate to a disability service, but there are related health issues.
- An indication given of a likely initial time frame.

5.8.3 We emphasise that any 'assessment' of the complaint would be undertaken by the appropriate officer of the relevant statutory office. For example, the complainant might know just who the complaint should be dealt with and the officer would direct the matter to that office's staff member for assessment. On the other hand where there was doubt, the above considerations would apply to identify the most suitable body. (We are NOT suggesting that the General Manager have this power. The General Manager is there to manage resources and aid co-ordination, and to help facilitate the most efficient consideration of the complaint by the relevant office holder.)

5.8.4 Needless to say, not all these matters may be able to be attended to in one sitting, but a time for completing the assessment must be given to the consumer. While this single entry point should be able to assist the person best direct their complaint to the attention of the relevant authority, **it is not intended to restrict their right to pursue any remedy that is available**. A person is free at any time to contact the statutory office of their choice.

5.9 Considerations relating to each of the offices

5.9.1 ACT Ombudsman

5.9.1.1 The Commonwealth Ombudsman has undertaken the ACT Ombudsman function since self-government for the Territory in 1989. Apart from the ACT policing responsibilities, the dedicated resources for ACT complaints form a small proportion of the Office's work (approximately 3%) and a staff allocation of around three. However, there is a considerable added value in being part of the larger office. These include a highly developed

[7] This is an example of why experienced, knowledgeable and empathetic staff are so critical. Conducting a discussion on 'realistic outcomes or solutions' requires a great deal of tact, diplomacy, and sensitivity to the circumstances of the consumer. There are often times when the outcomes sought by the consumer simply are simply not available, or within the power of anyone to grant. It may, nevertheless, be important to try and resolve other aspects of the complaint.

complaints management system, training and development opportunities, policy and legal advice, peer support and knowledge, and access to good practice models.

5.9.1.2 We believe that in time the ACT should appoint its own Ombudsman and have its own office, but at the moment it cannot afford to lose the synergy that comes from having that larger organisation performing the function. In addition we suggest below that it can provide an appropriate avenue for review of process aspects of complaints dealt with by the other bodies should this be required.

- ***--R1 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.***

5.9.1.3 One additional tool that is currently unavailable to the Ombudsman is that of dealing with a complaint by conciliation. This is available to ombudsmen in other jurisdictions and we agree with the ACT Ombudsman that it would be desirable.

- ***--R2 We recommend that a provision enabling the Ombudsman to deal with a complaint by conciliation, similar to that in the NSW ombudsman legislation[8], be added to the ACT Act.***

5.9.1.4 There is also some question about the Ombudsman's jurisdiction in relation to contractors providing services on behalf of the Government. This has been a problem shared by the Commonwealth Ombudsman, and the subject of much comment over the last ten years. We agree with the principle, enunciated by a former Commonwealth Ombudsman, that 'accountability should follow the dollars'.

- ***--R3 We recommend that any doubt about the Ombudsman's jurisdiction in relation to contractors providing services on behalf of the Government be removed.***

5.9.1.5 There are various means by which contractors have been held to be within the jurisdiction of the ombudsman in the Australian jurisdictions. Words such as:

> '.. Administrative action by, in or on behalf of an officer of an agency is taken to be administrative action of the agency'[9]

are deemed to achieve the desired effect. The United Kingdom's ombudsman legislation, the Parliamentary Commissioner Act 1967, which of course preceded the movement to contract out services, covers these circumstances

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[8] See s13A *Ombudsman Act 1974* (NSW)

[9] See for example *Parliamentary Commissioner Act 1974* (Qld)

extremely well with its wording:

> '… the Commissioner may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority, …'

5.9.2 Human Rights Office

5.9.2.1 From the evidence available to us, the Discrimination Commissioner continues to operate as effectively as it is possible, given the few resources at her disposal. All of the concerns raised with us in relation to discrimination complaints concerned events after they have been dealt with by the Commissioner within the statutory time limit. Predominantly the cause of concern was the length of time it can take for matters to progress through the Discrimination Tribunal. It appears that there are a variety of reasons for this. Given that consideration of Tribunals was outside our remit, we are unable to comment further, except to observe that consideration should be given to undertaking some analysis of why these considerable delays appear to be occurring.

5.9.2.2 One observation made in relation to complaints about discrimination on the ground of disability, is that there is very little advocacy support to assist the client to put together their case for the Tribunal. If that is so, then it further emphasises the need for advocacy and legal advice services to the most vulnerable sectors.

5.9.2.3 Two further comments relating to the HRO should be made.

- The first is that the Commissioner reports that her time limit of 60 days for investigation of a complaint has never been exceeded. This is remarkable. It also means that, given her ridiculously few staff, other of her functions must suffer, however diligent she and her staff are. The Office, as for the Community and Health Services Complaints Commissioner, has no dedicated management, community education, policy advising or legal staff. This last means that she must rely on advice from the Government Solicitor's Office, a matter of some sensitivity when complaints may be made against other government entities. A common support unit as mentioned above would be of considerable value in enhancing the Commissioner's capacity.
- The second is our view that the Commissioner should have a discretionary power to take certain cases before the Tribunal. These might be representative cases where a number of clients are affected, or individual cases where there is a likelihood that an injustice would be done if the client's case failed to be put to the Tribunal simply because of a lack of ability, support, or resources.

5.9.2.4 Our consultations revealed that there continue to be differing views on the implications of section 27 of the Discrimination Act. We have formed no view, but suggest that this is a matter that needs to be concluded by the Government.

5.9.3 Community and Health Services Complaints Commissioner

5.9.3.1 The Complaints Commissioner is by far the largest of the current complaint bodies. In many ways it also has the most complex challenges. Its functions include complaint resolution, service improvement, promotion of user rights, and encouraging awareness of users' rights and responsibilities, as well as administration of the Health Records (Privacy and Access) Act 1997. It also exercises important functions in liaison and co-operation with the various health professions' boards. There are currently proposals to clarify and strengthen these functions through the draft Health Professionals Bill. We support the thrust of those changes relating to complaints, as they are aimed at ensuring that through the exchange of information, better reporting arrangements, and agreed actions, that more timely intervention can be taken to deal with practitioners who are operating inappropriately, or causing a risk to the health or safety of a client or the community.

5.9.3.2 Many have commented that dealing with health complaints requires a different approach to that taken in other sectors. We believe there is substance to that argument. The majority of complaints made to the Commissioner are about private practitioners in the health sector. Failure of services in the health sector can obviously have disastrous consequences for patients, and this requires that the Commissioner be ever vigilant, and prepared on occasion to challenge what may be presented as current orthodoxy.

5.9.3.3 As with some disability services, the effect on the individual, if the system fails them, can be extremely oppressive. In part this is a by-product of an intricate system such as a hospital or a mental health institution. On the other hand, it can also be a product of the power that professionals can wield at times of apparent crisis, when the client is most vulnerable and, consequently, powerless. There has also been a history of strong resistance by professionals to external scrutiny over the past two decades, in Australia and elsewhere. In the medical field there has also been evidence of long delays in investigation caused by the involvement of medical indemnity insurers following a complaint.

5.9.3.4 For these reasons, and others, the Commissioner needs to be able to report concerns to other authorities at the earliest instance. An example of this recognition is contained in the recent Memorandum of Understanding between the Commissioner and the Chief Executive of ACT Health, wherein the Commissioner agrees to provide an interim report to the Chief Executive where urgent action might be needed to avoid a risk of harm. This agreement

should be covered in amendments to the Commissioner's legislation in due course.

5.9.3.5 We consider that it would be more effective if the Commissioner's role reverted to that of health complaints, and that the community services and disability complaints functions became the responsibility of the proposed Disability Services Commissioner.

5.9.3.5 There are many suggestions for improvement contained in a draft Community and Health Services Complaints Bill prepared by the Commissioner in 2002. It is in part a response to the Gallop Inquiry and is also designed to complement the Health Professions Bill. In particular there are some important provisions relating to allowing for:

- the Commissioner to consider all activities of health professionals, whether or not they meet the definition of 'health service';
- the Commissioner to receive, accept, assess and investigate reports by health professionals as well as complaints by health service consumers;
- clarification of the assessment process and an emphasis on the identification of issues to be addressed;
- time limits for the assessment process;
- the referral of multiple issues to conciliation and allowance for multiple parties to participate in conciliation;
- the provision of information to consumers who are not complainants but whose records may be accessed as part of an investigation;
- emergency referrals to boards, when action is needed because the actions of a registered professional may put the public at risk;
- information sharing between statutory oversight agencies, to assist when complaints made to multiple agencies;
- etc.

5.9.3.6 To the extent that they are consistent with our recommendations and suggestions, we believe that the Bill provides a very good reference point for amending legislation.

5.9.3.7 We discuss the lack of advocacy services for health care consumers who do not qualify under a specific program in the later section on advocacy.

5.9.4 Disability Services Commissioner

5.9.4.1 In its response to the Gallop Report the Governments view was stated thus:

> 'The Government will legislate to create a statutory officer (Disability Services Commissioner) with powers to undertake routine and random service performance audits, conduct inquiries and reviews, issue binding directives to improve and rectify services, administer a community visitor scheme, and

provide education and support to services to assist service improvement. The Commissioner will have these powers in relation to all government funded disability services, and will be independent, reporting directly to the Minister for Disability';

and for the Disability Services Commissioner to report directly to the minister responsible for disability services, rather than to another minister, to provide a direct feedback loop on the performance of services to the minister and consequently to the department. The minister and the department will be accountable.'[10]

5.9.4.2 We agree with the importance of this proposed new position. For reasons explained previously, the disability community's faith in the existing system is not high. The importance of having an office that is dedicated to ensuring that the needs of those with a disability are met and that services to them are delivered effectively and appropriately is beyond question. For these reasons we believe that the proposed Commissioner also needs to have a complaint handling function. It is a critical tool for ensuring the efficacy and appropriateness of services and the manner of their delivery, and thus a critical link in the service quality loop and, more importantly in the establishment of the consumer's rights.

5.9.4.3 As we have previously stated, for these external complaints handling bodies to be effective, they must have the confidence of those they are established to serve. Given the existing and likely future workload of the Community and Health Services Complaints Commissioner, we do not believe that that office could also effectively take on the responsibilities proposed for the Disability Services Commissioner, with all the challenges that it entails. Indeed we believe that with the advent of the changes proposed by the Health Professions Bill, the introduction of changes resulting from the of the Health Consumer Feedback Project, and the self-initiated improvements in practices that the Commissioner is already putting in place, the health complaints function will become more onerous.

5.9.4.4 'Community service' as defined in the Community and Health Services Complaints Act 1993, means 'a service for aged people or people with a disability'.[11] As such, we believe there to be both logic in, and synergy to be gained by, the combination of complaints relating to this function with those proposed for the Disability Services Commissioner.

- ***--R4 We recommend that the disability services complaints function (as provided for in Schedule 1.5 the Community and***

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[10] ACT Government Response to the Recommendations of the Board of Inquiry into Disability Services, September 2002.

[11] See s4 of the Act.

Health Services Complaints Act 1993) be transferred from the Community and Health Services Complaints 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.

5.9.4.5 In recommending that the Commissioner have a complaint handling function we need to emphasise that this function relates to disability services **not** all services. Persons with disabilities should have the same options as any other person to access the appropriate complaint handling option. As the ACT Ombudsman put it to us:

> '……… the complaint handling system should not be structured in a way that would limit the choice of a disabled person to only one agency, for example, to the proposed Disability Services Commissioner. To do that would be to deny that person the same level of choice available to a person without a disability. For many aspects of their lives, people with disabilities will have similar interactions with government as those without – they might deal with a school, or be arrested or need to register a car or live in ACT Housing. It is therefore important that the model for complaint handling does not inadvertently reinforce the view that people with disabilities only experience conflict because of their disabilities: their needs, including for conflict resolution, should not be systematically isolated as "special" rather than normal for many purposes.'

5.9.4.6 We consider that it would be very desirable for the Disability Services Commissioner and the Community and Health Services Complaints Commissioner to work closely together generally and, as appropriate in cases of a person with disability complaining about an ordinary health service, undertake joint investigations.

5.9.4.7 The Government's response included a commitment to provide the Commissioner with power to 'issue binding directives to improve and rectify services'. To provide an office with a power such as this would, in our mind, change the nature of the relationship of the Commissioner with those subject to oversight to that of an adversary, and thus undesirable in the light of the overall intention behind creating such an office. (See comment under Recommendations versus Determinations below.)

- ***--R5 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.***

5.9.4.8 Such a power would only be used as appropriate, not as a matter of course. In some cases it might be sufficient for the Commissioner to simply make a recommendation directly to the service provider. Below we suggest a

mechanism for review of action taken or not taken to implement recommendations.

5.9.4.9 The Commissioner needs dedicated staff to assist the undertaking of designated functions. We agree with the views consistently put to us in the consultations that disability services complaints investigators/ mediators/ conciliators and monitors, need to have special experience, expertise, or qualities to put themselves into the shoes of persons with disabilities and fully understand their position and perspectives and those of their families and carers.

5.9.5 Official Visitors

5.9.5.1 Currently there are two part-time Official Visitors for child protection and youth justice, and three part-time mental health Official Visitors. Their functions are quite similar and stem from an old practice of having inspectors, with the authority of the state, inspect state institutions to ensure that persons being detained were being treated properly. This is to some extent still reflected in the current arrangements whereby in both sectors the Visitors only visit nominated institutions; in the case of the child protection and youth justice Visitors, this only applies to Quamby Detention Centre and Marlowe Cottage; in the case of the mental health Official Visitors they are restricted to in-patient care in a mental health facility.

- ***--R6 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.***

5.9.5.2 It is important that in fulfilling their obligations, for example checking records relating to medication or administration of ECT, the mental health Official Visitors have access to all patient records (subject to the patient's consent), a task which is currently limited by the Health Records legislation.

- ***--R7 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.***

5.9.5.3 In relation to the child protection and youth justice Visitors, there is some question about their right to require the provision of information by those running a visited facility.

- ***--R8 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.

5.9.5.4 It is also of concern that the administration and funding for Official Visitors is provided by the agencies with responsibility for the facilities to be overseen. The Visitors feel very uncomfortable with this relationship. The term 'Official' Visitor distinguishes these officers from others, such as volunteers or non-government advocates, but it can also convey a different meaning to clients, and we suggest consideration be given to changing the title to that used in some other jurisdictions, of 'Community' Visitor.

- ***--R9 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.***

5.9.5.5 This relocation would also enable the Visitors to more readily refer complaints that they are unable to resolve on the spot, to the relevant office holder, and allow the Visitors to track their resolution. The respective Ministers would still appoint the Visitors. It is arguable that the Visitors would be appropriately affiliated with the Office of the Community Advocate as they play a kind of advocacy role. As this role does not involve representation in formal proceedings, we consider that, on balance, the advantages of affiliation with the other oversight offices is more advantageous. As noted above the Government has decided that the Disability Services Commissioner should administer a community visitor scheme, so this location makes sense in that regard.

5.10 Consolidation[12]

5.10.1 As we stated above, we consider that the fourth structural option will, on balance and in the light of certain practicalities especially the current arrangement for the ACT Ombudsman, best meet the ACT's statutory oversight requirements over the coming years.

- ***--R10 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).***

[12] Definition: 'increasing of the strength, stability, or depth of a person's or group's success'

- ***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; and***
- ***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.***

5.10.2 Each statutory office would be independent, and have its own dedicated complement of staff.

--R11 We recommend that there be a range of common services for all the oversight offices under a General Manager, Operations[13]. 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***

5.10.3 Such a model enables specialised knowledge and expertise to be applied to issues that are a key priority for the particular offices. Other issues could be referred to the entity best able to deal with them.

5.10.4 For example, a complaint may be lodged by or on behalf of a person with disability that, after consideration and discussion with the complainant, primarily focuses on abuse by an employee of a government disability service provider. The complaint might additionally raise matters to do with a health service, and some aspect of maladministration such as failure to provide information to the person. In such an instance it would be agreed that the Disability and Community Services Commissioner would have management of the complaint and the principal issue, but that it would be expeditious for the Health Complaints (or Services) Commissioner to consider the health

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[13] There is precedent for this type of arrangement both in Australia and overseas. For example in Australia, the Executive Director of the Human Rights and Equal Opportunity Commission managed the staff for all the various Commissioners.

issue and for the Ombudsman to consider the maladministration issue.

5.10.5 We recognise that in the disability area, though it is not uncommon in other areas, a person might present with what appears to be a complaint about a relatively simple issue, but that a more complex and/or fundamental problem lies behind this issue. It would be necessary for the personnel initially dealing with the complaint to be highly trained such that they have very comprehensive understanding of the circumstances and special needs of people with disabilities and of issues involved in the provision of disability services.

5.10.6 We note that it would continue to be necessary for budgets to be available to contract in additional legal services and specialist advisers.

5.10.7 An important function of such a general operations office would be to assist people in obtaining any advocacy services they might require.

5.10.8 Future Offices

5.10.8.1 Any of the possible additional statutory offices that we noted earlier (Human Rights Commissioner, Children's and Young Persons' Commissioner, Aged Person's Commissioner and Homelessness Commissioner) could be quite readily accommodated in this recommended consolidated arrangement.

5.10.9 Administration

5.10.9.1 The General Manager would also be responsible for providing the necessary support for the proposed co-location of Community Visitors, and for the Management Assessment Panel and Care Co-ordination Office and the Housing Review Committee.

5.10.9.2 The oversight of the joint operations would be undertaken by a board consisting of the three Commissioners and the Ombudsman, with, say, the Discrimination Commissioner as Chair. As a suggestion, there could be an appropriation for the consolidated office, with subdivisions for each of the Commissioners' dedicated resources for which they would each account in their Annual Reports. The Discrimination Commissioner could include the accounting for the joint operations under the General Manager in her Annual Report.

5.10.10 Ministerial responsibility

5.10.10.1 The key to which Minister has responsibility for these offices is that they should be separate from the portfolios providing services which they review. To ensure this form of independence we recommend that the responsibility should lie either with the Chief Minister or the Attorney-General. This of course in no way inhibits their ability to make reports to, or provide advice to, relevant Ministers, in the same way in which the

Ombudsman can[14].

5.10.11 Conciliation

5.10.11.1 Conciliation can be an effective mechanism of complaint resolution. In the case of the discrimination complaints it is the mechanism, which, if unsuccessful can be followed by arbitration by the Discrimination Tribunal. For other kinds of complaints it is an option. As a general rule it is not appropriate for a person to attempt to conciliate a complaint and, if unsuccessful, then to make a decision on that complaint, whether it is of a recommendatory or determinitive character. Current procedures under the system in the ACT accord with this general rule.

5.10.11.2 Under any of the four structural options, it could be appropriate to establish a conciliation office as part of a consolidated system that could be employed in resolution of any of the classes of complaints.

5.11 Recommendations versus Determinations

5.11.1 Throughout this review as with others in our experience, a common call is to give the complaint handler, the power to direct that certain things should be done or make binding determinations, rather than simply make recommendations. It is an understandable response, particularly where there seems to be no progress or response to recommendations already made.

5.11.2 Without going into deep discussion, the issues are these: if a body has the power to make a binding determination, certain conditions apply to the person making the determination, to the powers available to obtain evidence, and to the rights of appeal of an affected body. When ombudsman offices were first instituted, it was considered that the most important function that they had was to find out the facts and circumstances that led up to or caused some aspect of maladministration. Consequently, they were granted what are often described as 'Royal Commission' powers; to obtain information from any person, to answer questions, to require people to give evidence under oath, etc. These considerable powers are, then, balanced by the fact that the office holder can only make recommendations and that evidence gained in the process of investigation cannot be used against the person in legal proceedings. If one has a process that culminates in a determination, the powers of the authority are considerably less, and the proceedings become more adversarial in nature, with more attendant extensive appeal rights.

5.11.3 The various complaints bodies that have been established have, thus, in relation to process, followed the ombudsman model.

5.11.4 We are concerned, however by comments made to us that there are

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[14] See, for example, s18 (6) *Ombudsman Act 1989* (ACT)

occasions where a respondent deliberately delays recommended action, or fails to take that action.

5.11.5 The Gallop report recommended:

> (iv) That failure to implement the Commissioner's recommendations be able to be reviewed on the merits by the ACT Administrative Appeals Tribunal whose decisions should replace those of the original decision-maker. The Tribunal should be given power to enforce those decisions (see Part 5, Sections 40-44 of the NSW Act)

5.11.6 The NSW provisions were effectively repealed by the amending legislation[15] when responsibility for the functions of the Community Services Commission was transferred to the NSW Ombudsman in 2002.

- ***--R 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.***

5.11.7 The ACT AAT could be the appropriate forum, but the recommendations of the relevant office-holders would need to be defined as reviewable decisions for the purposes of the AAT Act. Alternatively, the newly established Consumer and Trader Tribunal might be an appropriate forum. This would not apply to matters that are appropriately dealt with by the health professions boards or the proposed Health Professions Tribunal.

5.11.8 We are attracted to a model along the lines of one considered by ACT Health where:

- Monitoring by the Commissioner indicates a failure to implement the recommendation(s);
- The Commissioner issues a notice to the provider to implement specified decisions, and the provider is given the opportunity to have the notice reviewed on its merits by the tribunal;
- There is a legislative requirement to comply with the notice - if no review is sought –or with the notice as agreed to or varied by the tribunal.

5.11.9 We recognise that there is a risk of the commissioners becoming embroiled in lengthy, adversarial and possibly acrimonious litigation which could take up excessive amounts of their time and compromise the independent status of their office. The option, then, would need to be used with great judiciousness.

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[15] *Community Services Legislation Amendment Act 2002* (NSW)

5.11.10 We considered the position of the complainant in this context. We concluded that rather than the complainant taking a matter to the tribunal in the event that the Commissioner failed so to do, the complainant would best serve their interest by making a complaint to the Ombudsman.

5.12 Systemic versus individual attention

5.12.1 As recently as about ten years ago, almost all the resources of ombudsman, advocacy, and major complaint bodies were dedicated to the resolution of individual complaints. The focus in the intervening period has changed that remarkably. The logic for this shift in emphasis is irresistible. Unless we look at the underlying causes of complaint and address the system that generates them, the only certainty is that the number of complaints will increase beyond the capacity of the external bodies to handle them. Thus oversight bodies have two very good reasons to place increased attention and resources on systemic issues arising from complaints or their own perceptions:

1. The desire to prevent the complained about actions re-occurring and affecting more and more people; and
2. To prevent themselves by being submerged by an ever-increasing number of complaints and thus maintain their capacity to undertake all their functions.

5.12.2 Pursuing the systemic route reduces the incidence of complaints that are irritants in the system, but this must not be allowed to become a mechanism for oversight bodies, and indeed advocacy agencies, to get rid of "irritating" complainants. We are not saying that this is a characteristic of any of the bodies involved in this review, simply that they need, as they well know, to guard against it. The primary purpose for the establishment of these schemes is to provide an avenue of redress for those who consider they have been wronged, or suffered a detriment at the hands of those entrusted, directly or indirectly with state power or authority. That fact must never be overlooked. The scarce resources dedicated to carrying out the functions of the oversight bodies should not be allowed to be swallowed up in performing a quality assurance role for service providers or policy advisers. A careful balance needs to be maintained and, in doing so, the body operates at its most effective level.

5.13 Manner of making complaints

5.13.1 Apart from the Ombudsman, the legislation for the other complaint bodies requires that complaints be in writing. That is not to say that they

cannot accept oral complaints, they can in defined circumstances[16], and do. We understand the arguments put forward about why this can be a good provision including; that it helps the consumer think out the matter, that it deters vexatious complaints, and provides the complaint body with a record of the complaint in the consumer's own words. We do not accept however that these well-intentioned views override the importance that needs to be attached to the right for the consumer to make the complaint in the manner which most suits them, so far as is possible, and reduces the barriers that currently exist for some.

5.13.2 It is of course open to the complaint body to assist the consumer to put their complaint in writing if this will be of benefit to its resolution, as it will be for it to request some written information relating to some aspect of the complaint.

5.13.3 The Community and Health Services Complaints Commissioner pointed out the following reasons for preferring complaints in writing, in that they allow:

- Allow for the Commissioner to be satisfied as to the identity of the complainant, particularly in light of section 21 of the Act and the legal processes that may follow an investigation by the Commissioner
- Allow the complaint to be made in the words of the complainant
- Mean that the complainant 'owns' their complaint and must 'stand by' their allegations
- Facilitate a considered presentation of the complaint
- Allow effective and efficient collection, by using a prescribed complaint form, of the information necessary for assessment and action on the complaint
- Circumvent inaccurate summary or transcription of the complaint in terms of language, tone and/or fact by complaint handlers
- Ensure the respondent is presented with the complainant's version of events and to know all the allegations against them
- Reduces the likelihood of the complaint being perceived as the 'Commissioner's complaint' and perceptions of partiality
- Enable a procedurally fair process
- Allow that if the matter proceeds to a disciplinary body, at which the Commissioner is a party, then such documents are required as an essential item in a Brief of Evidence; and that it is
- Not realistic to deal with serious matters without primary evidence.

[16] See for example s26(2) and 26(3) of the *Community and Health Services Complaints Act 1993* (ACT)

5.13.4 It will obviously be necessary, on occasions, for the complaint to be produced or verified in written form for the purposes of presentation of evidence to a respondent. Where it is critical to the resolution of the complaint to obtain such information, and the consumer fails to produce it, the office holder can be given discretion to close the complaint, following such notification to the consumer.[17]

--R13 We recommend that complaints to any statutory office holder be accepted orally or in writing

5. 14 Who may make a complaint

5.14.1 Currently different criteria apply to who may make a complaint to the different complaint bodies. They are:

- for the Ombudsman:
  - any person, with the Ombudsman having the discretion not to investigate a complaint in certain defined circumstances (s6 Ombudsman Act 1989);
- for the Community and Health Services Complaints Commissioner (s21 Community and Health Services Complaints Act 1993):

  A complaint to the commissioner about a community service or health service sought, used or received by, or administered to, a user may be made by the user or, if it is difficult or impossible for the user to make a complaint, or to make a complaint that complies with section 26 (1)—

  (a) if the user has attained the age of 18 years—by a person appointed by the user to make the complaint on the user's behalf; or

  (b) if the user has not attained the age of 18 years—by a parent or guardian of the user; or

  (c) if a person, under any other law or an order of a court, has the care of the affairs of the user—by that person; or

  (d) by a person approved by the commissioner to make the complaint on the user's behalf.
- For the Discrimination Commissioner (s72 Discrimination Act 1991):

  (1) A complaint alleging that a person has done an act that is unlawful under part 3, 5 or 7 or section 66 may be lodged with the commissioner by—

[17] See s7 (2) of the *Ombudsman Act* 1989 (ACT), and s26(5) and s28(4) *Community and Health Services Complaints Act(1993* (ACT).

(a) a person aggrieved by the act; or

(b) an agent acting on behalf of 1 or more persons aggrieved by the act.

Note If a form is approved under s 126A (Approved forms—commissioner) for a complaint, the form must be used.

(2) A person shall not act as an agent unless the person is—

(a) authorised in writing to so act on behalf of the aggrieved person or persons concerned; or

(b) authorised by the commissioner to act on behalf of an aggrieved person who, in the opinion of the commissioner based on reasonable grounds, is unable to make a complaint or authorise an agent to act.

(3) A complaint may be made jointly by 2 or more persons.

5.14.2 We consider that the current criteria used for the Discrimination Commissioner is unnecessarily restrictive, and potentially excludes a person who is unaware of the discrimination (e.g. a person with an intellectual disability) to have a complaint made on their behalf. Under the Human Rights and Equal Opportunity Commission Act 1986 (Cth), a complaint can be made by any person on behalf of another person without the need for the person lodging the complaint to be the agent of the person aggrieved[18].

- ***--R14 We recommend that the Discrimination Act be amended to enable complaints to be made by persons on behalf of others.***

5.14.3 To restrict complaints to the Community and Health Services Complaints Commissioner to users or those acting on behalf of a user is unduly restrictive in our view. We are aware of many instances where a 'user' of a health service, and indeed their families feared retribution if they made a complaint. Such instances do not fall under the protection of s73 of the Act. Our understanding is that it is a fear of what treatment (or lack thereof) they will receive after making a complaint that is at issue.

5.14.4 In our view legislation establishing who may complain should be couched as universally as possible to emphasise the importance of the accessibility of the system, and its focus on improvement of services and practices. Any justifiable qualifications on the ability to complain should then be phrased as discretionary powers available to the office holder.

- ***--R15 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 Service Commissioner's legislation as well. Discretion for the Commissioner not to investigate a complaint could be based on***

[18] Paragraph 46P(2)(c) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

provisions similar to those in s27 of the NSW Health Complaints Act 1993.

5.15 Protection against retribution

- ***--R16 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.***

5.15.1 In addition to the usual definitional criteria, a detriment should be defined to include withdrawal of services, receiving lesser services than would normally be expected in the circumstances, or receiving treatment that was unusual or punitive in its application.

5.16 Process reviews

5.16.1 Internal review

5.16.1.1 For the Ombudsman's office, internal review is managed by the Director of Investigations, or if unable to resolve the matter, a Senior Assistant Ombudsman. For the Discrimination Commissioner and the Community and Health Services Complaints Commissioner, the respective Commissioner undertakes the review, as does the Community Advocate. We suggest that, given the importance of internal review, the level for management of complaints about the processes within the Ombudsman's office should be undertaken either by or under the direction of a Senior Assistant Ombudsman.

5.16.2 External review

5.16.2.1 In an external complaints review or ombudsman process, it is inappropriate to have a system of merits review for those bodies. At the end of the day they account to the Government and the Assembly. Review of the law applying (e.g. challenge to the jurisdiction of a body) is of course available through the Courts, Freedom of Information challenges through the AAT, and review of reasons for decisions through the Administrative Decisions (Judicial Review) Act 1989.

5.16.2.2 We do support the view that there be a mechanism for reviewing the **process** by which a body arrives at its decisions or recommendations. Rather than creating special councils or committees, as has been done in NSW - for example for their Health Complaints Commission - we favour providing for this avenue through the Ombudsman. That office is very familiar with the

issues and criteria involved, as they are part and parcel of its administrative review function.

- ***--R17 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.***

5.16.2.3 There was for some time dispute about the Ombudsman's jurisdiction over the OCA, because the Ombudsman cannot investigate actions of any ACT agency providing a community or health service[19] and must refer such complaints to the Community and Health Services Complaints Commissioner. We understand that this has been partially resolved by means of discussion between the Ombudsman and the Community Advocate. We consider that this is an unsatisfactory solution in the longer term.

- ***--R18 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[20] be amended to bring such services provided by a government entity within jurisdiction.***

5.16.2.4 While this in effect gives concurrent jurisdiction to the Ombudsman, the Health Services Complaints Commissioner, and the proposed Disability Services Commissioner, we do not believe this poses a major problem, and is not unknown in other jurisdictions. For example, the Commonwealth Ombudsman has jurisdiction over the actions of Telstra, even though the Telecommunications Industry Ombudsman (TIO) in fact deals with all complaints about Telstra that are within the TIO's jurisdiction. It in fact provides an additional safeguard against matters falling through any gaps in jurisdiction that may become apparent.

5.17 Referral of complaints

5.17.1 There has been some doubt in the past about the capacity of the oversight bodies to refer matters to one another, because of issues relating to whether the body chosen to refer to has jurisdiction – such as the Community Advocate instance. Providing for concurrent jurisdiction should remove such doubt. In addition a provision such as that in the Ombudsman Act providing discretion to the Ombudsman to refer a matter to another statutory office

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[19] These terms are defined by reference to the *Community and Health Services Complaints Act 1993* (NSW).

[20] s5 (2) (m) of the *Ombudsman Act 1989* (ACT)

holder in the interests of convenience and effectiveness could be replicated in the other office holders' legislation.[21] There is also a useful provision for referral in the draft Community and Health Services Complaints Bill prepared in 2002.

5.18 Provision of information to complainants

5.18.1 One of the common issues raised with us was the importance of complainants being kept informed of the progress of complaint handling. In almost every survey of users of complaint handling schemes this is one of the top two concerns flagged, and the one that induces the most lack of faith in the system. It is simply inexcusable that complainants are not regularly informed and usually indicates an inadequacy in the organisation's complaint management system. There are many complaint management software programs available today that have built-in reporting capabilities which automatically alert investigators to required actions, including reporting back to the complainant. These should be part and parcel of any good system.

5.18.2 We note that the Ombudsman's 'Client Service Charter' undertakes '…to keep you informed of the progress of our inquiries at regular intervals.' We consider this a good start, but believe that complainants are entitled to a more specific commitment from the bodies.

- ***--R19 We recommend that the complaint bodies inform their clients of the length of intervals for reporting progress on their complaints.***

5.18.3 It should also be made clear that the bodies have a duty to inform any person who made a complaint of the outcome of that complaint, even if they were not a direct 'user' or 'consumer'. While it may not be possible in all circumstances to provide full details of a report to complainants (e.g. where there are confidential matters considered during conciliation) attempts should be made to be as forthcoming as possible. Clearly, guardians of a person involved in a complaint should be similarly kept informed.

5.19 Management of complaints

5.19.1 When complaint case loads get high, it becomes critical that bodies have effective complaint management systems, to ensure that requests for information are complied with, that complainants are kept informed of progress, that time limits are being met, that staff are not falling behind in their overall performance, that key information is being properly recorded, that reports to agencies/providers are being produced; and so on. When an

[21] See s6A of *Ombudsman Act 1989* (ACT)

office is a small one, it is tempting to believe that one person can keep on top of all that. They may, for a while. It is not good management practice however. Putting aside the 'falling under a truck' scenario. Good complaints management is a key requirement for all aspects of a complaint handling body's practice. It should reflect the practices established in office manuals and statutory requirements. Some of the oversight bodies have come some way in this regard.

5.19.2 We believe that consideration of complaint management software with well developed reporting functions would assist better case management. To this end, consideration should be given to replicating the best features and functions of the Commonwealth Ombudsman's complaint management system and that of the Community and Health Services Complaints Commissioner. The collaboration model proposed should facilitate this development. In saying this, we recognise that the Community and Health Services Complaints Commissioner has put a lot into the development of the RAEMOC software, in conjunction with other health complaints bodies and ACT Health. This will enable comparability of outputs from the various organisations, which should be very useful in benchmarking with like bodies. We are not saying that this should be abandoned, but rather that that the collaboration might further assist best practice development of the management reporting tools.

5.20 Collaboration

- ***--R20 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.***

5.20.1 In particular it is important for them to be able to consult and if necessary share information with each other and other statutory entities.

5.21 Office of the Community Advocate

5.21.1 The Community Advocate's role is fundamentally different from the other oversight agencies, as is evident from a perusal of the Advocate's functions. The Community Advocate's current role has developed considerably since its origins as a Youth Advocate. The range of work undertaken by the Office of the Community Advocate (OCA) is extensive

and, by virtue of the concerns dealt with, very taxing. Both as Advocate and Guardian of last resort, many of the issues dealt with are highly sensitive, frequently complex, and often, seemingly intractable. As with the other agencies within the Review, we did not undertake a detailed analysis of the OCA's work. That has been reported on elsewhere, including the Annual Reports of the Advocate. While much of the representational work remains, the Advocate, as with the complaint bodies, now devotes more attention to systemic matters than in the past.

5.21.2 It appears to us that to the extent that there was any anecdotal criticism of the OCA, it rested largely on a different set of values or criteria being applied to advocacy. This boils down to one view that promotes 'best interests' advocacy – represented by the OCA, and another view that promotes 'partisan' (or 'expressed wish' or 'rights based') advocacy – represented by the community sector advocacy agencies. We have commented on this elsewhere in this Report.

5.21.3 We also considered whether there was any potential for a conflict of interest by virtue of the Community Advocate also being the Guardian. In most Australian jurisdictions, the Public Advocate is also the Public Guardian, although the functions variously performed are not identical.

5.21.4 The only circumstance in which we consider there is potential for conflict is where a matter relating to a person for whom the Advocate is guardian goes to the Management Assessment Panel. We were advised that in this instance the Advocate, as a matter of policy, does not go to MAP meetings. We acknowledge this, but nevertheless suggest that consideration should be given to reflecting this principle in the relevant legislation.

- ***--R21 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.***

5.21.5 *Possible Children's and Young Person's Commissioner*

5.21.5.1 Earlier we mentioned future developments that may affect the system of oversight, one of which is the possibility of a Children's and Young Person's Commissioner. If the Government decides on this course, there would be considerable implications for the OCA. It seems to us that it would be well placed to take over that role. This would, however, mean that further consideration would need to be given to whether an office that would act as a representative for certain persons was still needed; where it is best located – e.g. would the legal aid office be suitable; or whether those functions could be undertaken by community based advocacy agencies.

5.21.5.2 It would in our view be inappropriate for any of the existing or proposed statutory complaints bodies to undertake individual advocacy, as

this would compromise the critically important impartiality that is central to their roles.

5.22 Management Assessment Panel and Care Co-ordination Office

5.22.1 The Management Assessment Panel (MAP) and the Care Co-ordination Office (CCO) are both located within the OCA. This is predominantly so that they are located independently of the government agencies with whom they consult and negotiate. It is also because the work of the OCA is relevant to that of the two bodies. The MAP does not have a statutory base, nor would there be any point in providing one, as its work is concerned with obtaining appropriate services and management for particular persons. Care Co-ordination is provided for in the Mental Health Act.[22].

5.22.2 The work of the MAP perhaps best typifies the observation made earlier in this Report that oversight agencies and complaint bodies can, at the end of the day, only recommend outcomes that are deliverable. Much of MAP's time and energy is spent trying to solve the most intractable of cases, those where the client fits no particular program category, where there may be multiple issues of dysfunction, and where no appropriate facilities exist. It is noteworthy that the process seems to produce acceptable outcomes on many occasions but, equally, many of the outcomes are no real solution. We believe that it is critical for all involved to pay careful heed to the observations of MAP's current and former Chairs to the potential consequences, for the individuals and the wider community, of failing to provide a greater range of support options for these cases.

5.22.3 We were told that there had been a few occasions where the MAP had considered cases where the person affected had not been informed of the meeting. We were unable to confirm this claim. We would simply observe that as a matter of policy the person, their guardian or their advocate should be informed of any meeting where consideration is being given to their case, and given the opportunity to attend. If the Panel declines for some reason to provide this opportunity, reasons should be provided to the person, guardian, or advocate.

5.22.4 We understand the view put to us that there could be the appearance of a conflict of interest in having the MAP and CCO located within the OCA. Whilst we did not receive evidence of such a conflict, we believe that on balance that it may be advisable to locate the two bodies together with the consolidated oversight bodies, with support provided through the proposed General Manager Operations. As the Chair of MAP has observed:

> '..the core of the argument is for any placement to provide guaranteed

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[22] See s29 *Mental Health (Treatment and Care) Act 1994* (ACT)

independence from specific service agencies so as to avoid possible public perceptions of bias, and for protection of client records on a confidential basis. The submission (to this Review) suggested it was logistically sensible for the two (CCO and MAP) to be co-located, given their small staff requirements and some over-lap of clientele. In addition, it is important for the MAP and CCO to be serviced by professionally qualified personnel who receive adequate and timely collegiate professional advice and support.'

- ***--R22 We recommend that the Management Assessment Panel and the Care Co-ordination Office be located together with the consolidated oversight bodies, with support provided through the proposed General Manager Operations.***

5.23 Other 'community services'

5.23.1 The term 'community services', in the context of the oversight bodies has a very narrow definition – 'a service for aged people or people with a disability'. During our consultations, many pointed out the current major gap in coverage by complaint handling agencies of the broader range of community services provided in the ACT by non-government service providers. These could include services provided for youth, those provided under the Supported Assistance Accommodation Program (SAAP), child care, and regional community service NGOs, educational services, and so on.

5.23.2 This raises some very fundamental issues about accountability and the desirable reach of the state in relation to 'control' of such activities. We believe that if steps are to be taken in this direction, a much wider community debate would need to precede it than was possible as part of this Review (but see also 'Internal complaint handling' below).

5.24 Internal complaint handling

5.24.1 Government agencies

5.24.1.1 In our Preamble we said '..that up until now, the quality of relevant ACT government agencies' internal complaint handling processes has been in need of improvement.' We were heartened to hear, and see some evidence, that the service delivery agencies are working strenuously to achieve this.

5.24.1.2 In particular we wish to acknowledge ACT Health's Consumer Feedback Project. The quality of the product in terms of documentation and the consumer participation in this project are noteworthy. They provide the foundations of what could be a first rate system. It goes without saying (although we will say it) that the proof will be in its implementation. The assertion in Standard 1 of the Consumer Feedback Standards, for example, that 'The health service has a consumer-centred feedback system' will be

watched closely by many with interest.

5.24.1.3 To achieve the objects established by this project will, undoubtedly, require a culture change within the various elements of ACT Health. It will also require the dedication of the required resources, and continuous commitment from the Chief Executive down. In such circumstances, early monitoring of progress in implementation tends to be critical, so that the momentum generated by developing the standards is not lost, and external review at an early stage also proves to be of great value.

5.24.1.4 Internal complaint handling is often described as presenting the organisation with a 'gift' - an opportunity to receive a valued critique of what is going wrong or how something might be handled better. It is not only an occasion to resolve discontent and make amends for mistakes or, indeed, to improve the quality of service delivery, but also to challenge 'orthodox' practices and seek better, or best practice, models for undertaking one's tasks. By taking ownership of these opportunities, an organisation not only contributes to continual development of its own staff with improved outcomes for its clients, but it also escapes the glare of unwanted external criticism.

5.24.1.5 Surveys of complaints received by external complaint handling bodies, both in Australia and overseas, have consistently shown that between one quarter to a third of complaints received relate to quality of service matters – behaviour, timeliness, poor communication and the like. **These are matters that should never have to reach an external body.** It is also known that when an effective internal complaint handling system is put in place, the number of such complaints reduces significantly.[23]

5.24.1.6 We believe that it is important that the oversight bodies play an active role in the monitoring of the agencies' complaint handling systems through the provision of advice and occasional 'own motion' reviews. The Ombudsman in particular has experience in this field both at both the Commonwealth and ACT levels. This provides an example of where the collaborative model provides an opportunity for joint work by the complaint bodies drawing on the requisite expertise in process and sectoral issues.

5.24.1.7 While some agencies are already doing this, or are in the process of doing so, we also suggest that the Government consider directing all public sector agencies providing services to the public to publish a guide for consumers which clearly sets out complaint and external review arrangements.

5.24.2 Non-government service providers

[23] See, for example, commentary in past Annual Reports of the Commonwealth Ombudsman, and the Australian Banking Industry Ombudsman.

5.24.2.1 The same basic principles apply to non-government service providers. Some services receiving funding under various programs are required to have complaints mechanisms in place, some are not. We believe that as a general principle those bodies receiving government funding for the provision of services to individuals should have a complaints handling process in place, and that there should be an avenue for external review of complaints. Such a mechanism could be provided through one of the statutory schemes, though there are some important broader issues, as indicated above, to consider.

5.24.2.2 For small organisations with few clients, having a dedicated complaint capacity within the organisation may clearly not be feasible, though it should document the process that is available. It may be better to co-operate with other like organisations to establish a workable system, with the assistance of, or under the aegis of, a peak body.

5.24.2.3 There are several ways in which the Government can ensure that complaints processes are in place such as funding contracts, or accreditation requirements. As suggested for government agencies above, a requirement to publish a guide for consumers which clearly sets out complaint and external review arrangements could be made a contractual obligation for relevant government funded or contracted service provision organisations.

5.24.3 Internal and external review of complaint handling systems

5.23.3.1 Top management of the organisation should review the complaints-handling process on a regular basis to include such elements as to:

- ensure its continuing suitability, adequacy and effectiveness,
- identify and address instances of nonconformity with health, safety, consumer, regulatory and other legal requirements,
- identify and correct service deficiencies,
- identify and correct process deficiencies,
- assess opportunities for improvement and the need for changes to the complaints-handling process and services offered,
- evaluate potential changes to the complaints-handling policy, objectives and targets.[24]

5.24.3.2 For government and non-government agencies alike, a good principle is to ensure that in addition to continuous monitoring, an external review is undertaken of their internal complaint handling systems at least every three years.

5.24.4 Objects – attitudes to complaints and monitoring

5.24.4.1 Finally we agree with the many that we spoke to, that it is important

[24] Adapted from the draft International Standard ISO 10018 *Complaints handling – Guidelines for Organisations.* See also the Australian Standard on Complaints Handling AS4269.

to reflect in governing legislation the importance of complaint handling in the services covered. In its submission to the Gallop Inquiry, ACTCOSS urged that something equivalent be included in the relevant ACT legislation to that in the then NSW Community Services legislation namely:

> 'to foster, in community services and programs, and in related services and programs, an atmosphere in which complaints and independent monitoring are viewed positively as ways of enhancing the delivery of those services and programs'

- ***--R23 We recommend that an object requiring the fostering of a positive attitude to complaints and monitoring, be included in all the relevant legislation.***

5.25 Health and Community Rights Advisory Council and outreach

5.25.1 The Advisory Council was established by amendment to the Community and Health Services Complaints Act[25] in 1997. Its functions are:

- to advise the Minister and the commissioner in relation to the redress of grievances relating to community services and health services or their provision; and
- to advise the Minister on—
  - i) the means of educating and informing users, providers and the public on the availability of means for making community service and health service complaints or expressing grievances in relation to community services and health services or their provision; and
  - ii) the operation of this Act; and
  - iii) any other matter on which the Minister requests the advice of the council; and
- to refer to the commissioner any matter that may properly be dealt with by the commissioner under this Act and that, in the view of the council, should be so referred.

5.25.2 Its membership is to be drawn from those representing the interests of users of health, aged care, and disability services; service providers; and other expertise or experience that can contribute to the Council. As we understand it, due to disagreements over whether it had the power to review individual case records, the Chair of the Council did not consider it could fulfil its functions and resigned in 2002. The Council has not met since.

5.25.3 The key issue for the Council was that it believed it could play a useful

[25] See s 61 *Community and Health Services Complaints Act 1993* (ACT)

role in undertaking a review of the process followed by the Commissioner, when complaints were made about his operation.

5.25.4 As we have recommended that the Ombudsman should undertake this role, we see no reason to have a Council to carry out this function. As observed earlier, we also believe that it is crucial for the Health Complaints (or Services) Commissioner, the proposed Disability and Community Services Commissioner, the Discrimination Commissioner, and the Ombudsman to have regular outreach activities as a high priority task. If this activity, designed both to promote their functions and citizens' rights to access their services, and to gain a deeper understanding of the issues and concerns of the relevant interests and communities, is undertaken zealously, we do not believe a specialist Council of this nature is required for the oversight bodies. Of course it is also up to them to establish more formal consultative mechanisms if they and their constituencies believe it would be profitable.

5.25.5 More broadly focussed bodies such as the new Disability Advisory Council will likely play a more useful role insofar as Ministers' advice is concerned.

- ***--R24 We recommend against the re-establishment of a statutory Health and Community Rights Advisory Council.***

5.25.6 As we later recommend, though, we do believe that the Assembly should have a standing Committee that oversees the work of the oversight bodies.

5.26 Housing Review Committee

5.26.1 Public housing

5.26.1.1 Public housing clients in the ACT are able to appeal against certain decisions made by ACT Housing. There are two levels of review. The first level of review is conducted by a senior officer in the area where the original decision was made. This includes both housing assistance matters such as eligibility, re-housing and rental rebate assistance, and tenancy matters such as eviction, property maintenance and succession of tenancy.

5.26.1.2 Second level reviews for tenancy matters are dealt with by the Residential Tenancies Tribunal (RTT). Second level appeals on housing assistance matters are dealt with by the Housing Review Committee (HRC). To formally appeal to the HRC, clients must submit an 'Application for Review' form within 28 days of receipt of the letter from ACT Housing outlining the original decision.

5.26.1.3 The HRC is made up of community representatives and provides an independent and confidential review of decisions. Appellants may present their concerns to a meeting of the HRC and may be assisted by a friend, relative, community advocate or non-legal adviser. ACT Housing also has the

opportunity to make a statement regarding the decision under review. Appellants are given any such statement before consideration by the HRC.

5.26.1.4 The HRC makes recommendations to ACT Housing in relation to review of decisions. We are advised that the very large majority of its recommendations are followed.

5.26.1.5 Appellants may take housing assistance matters to the Administrative Appeals Tribunal if unsatisfied with the outcome of consideration by the HRC. In any case, complaints can be taken to the ACT Ombudsman.

> ***--R25 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.***

5.26.2 Community housing

5.26.2.1 Community housing providers in the ACT include not-for-profit associations or cooperatives, specialist non-government organisations providing both housing assistance and support services for people with special needs and tenant cooperatives. We understand that most have some form of internal complaints process and that a number have based these processes on the National Community Housing Standards Manual.

5.26.2.2 A discussion paper on complaints appeals processes for community housing applicants and tenants in the ACT has been prepared by the National Community Housing Forum for the ACT Department of Disability, Housing and Community Services. This has yet to be publicly released. We think that we should not pre-empt consideration of this paper.

5.27 Other Issues

5.27.1 Terms of office

5.27.1.1 We suggested that statutory office holders should have maximum non-renewable terms of office in our discussion on capture. We emphasise that we are making no comment on the performance of any of the statutory office holders whose organisations were involved in this review. However, from observations, experience, and relevant practice in many other jurisdictions, including overseas we have formed the view that maximum non-renewable terms of office are generally desirable. There are several reasons for arriving at this conclusion predominantly relating to the independence and effectiveness of the office.

5.27.1.2 Firstly, for these bodies, the statutory office holder **is** the organisation for legal purposes, and in practice is the single greatest influence on how the body as a whole will perform and be viewed by the citizenry, the government and the parliament. Legislation can carefully define the powers, functions, and even the modus operandi of a statutory office. What it cannot do is

design the personality of the occupant of that office. These positions require that their occupants exercise good judgement, and judgement is, by definition, a subjective matter.

5.27.1.3 When selecting people suitable for such office, governments and parliaments will obviously look for objective evidence that the person is capable of undertaking the onerous undertakings of that office. But they will also be looking for personality characteristics that, **in their view**, make the person the particular one suitable to do the job at that point in time. Those preferences may vary. They may be that the person is held in high esteem in the community; that they would be 'safe' and not rock the ship of state too much; that they would bring innovation and reform to the position; that they possess certain experience and insight that bring a high degree of professionalism to the office; and so on.

5.27.1.4 The point is that these requirements will vary over time. An office holder, who is there too long, may cast the whole organisation into their own mould, and one, which may be very resistant to adaptation when it is needed.

5.27.1.5 It has also been observed that where an office holder is eligible for reappointment at the end of their term, they may modify their method of operation – by suppressing public comment, for example.

5.27.1.6 More compelling to us, however is the fact that an organisation needs to be refreshed from time to time, and that dictates non-renewable terms. For renewable terms, an initial period of five years is common. For a non-renewable term, in our view the period should be seven years. If a non-renewable term were accepted, we consider that it might well be desirable to provide for an exceptional extension of up to one year, in circumstances where the office holder was in the midst of a crucial investigation that required their continued involvement.

5.27.2 Method of appointment and accountability

5.27.2.1 Australia, as with other countries, has a very mixed bag when it comes to methods for appointing statutory office holders for oversight bodies. They range from appointments by the Head of State on the advice of the Executive through appointments by a Minister, to appointment by a parliament and many variations thereof.

5.27.2.2 In circumstances where the body has oversight of agencies for which a Minister is responsible, we believe that it is clearly inappropriate for that Minister to appoint the office holder. For similar reasons we believe it is preferable that the Legislative Assembly play at least an informed part in such important appointments.

5.27.2.3 We are attracted to the model whereby the Executive chooses the candidate for statutory office, and proposes their appointment to an Assembly Committee, which would effectively have a veto power. The

Community and Health Services Complaints Commissioner is appointed in this way and it is akin to the provisions applying in New South Wales for the appointment of the Ombudsman and the Health Complaints Commissioner[26].

5.27.2.4 Given the nature of these positions, we also suggest that consideration be given to advertising vacancies as a matter of course, and that independent selection committees be used to make recommendations for appointments to government.

5.27.2.5 In similar vein we believe that the budget for these bodies needs to be subject to Assembly consideration. History has shown that where governments have been upset with the activities of complaint handling bodies, the simplest mechanism for restraining them has been to cut their funding. That the process for advising the government to take this action comes from departments subject to the body's oversight is particularly inappropriate. New Zealand, as with so many things, has come up with a model used for their Parliamentary Officers, including the Ombudsman, which we feel would be applicable in the ACT. After discussion with the Department of Finance, the Chief Ombudsman submits his budget for the forthcoming year to a Parliamentary Committee. That Committee discusses the Ombudsman's last Annual Report and his Plan for the coming year and then makes a recommendation on the Budget amount to the Executive. It is our understanding that the Government has always accepted this recommendation. This allows independent scrutiny and consideration by the Parliament, but still leaves the necessary appropriation with the Executive.

5.27.2.6 We suggest that a practice similar to that employed in New Zealand for assessment of the budget of the oversight agencies by an Assembly Committee be considered for the ACT.

5.27.2.7 Office holders must be able to report directly to relevant Ministers where necessary. If a relevant Minister fails to take action on recommendations within their power, the office holder must be able to report to the Assembly. As a general principle, providing natural justice has been observed, such officers must also be free to make public reports.

5.27.2.8 Annual Reports by the office holders (including the Official Visitors) to the Assembly should be fundamental.

5.27.2.9 We accept that the small size of the Assembly places constraints on its capacity to undertake all the committee functions possible in larger parliaments. We also accept that the 'compact' nature of the ACT means that nothing much escapes the attention of media scrutiny. We also note, however, that there are few Ministers responsible for many departments and agencies. When things go wrong, they are still dependent, predominantly, on briefings

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[26] See for example s78 *Health Complaints Act 1993* (NSW).

from those departments or agencies.

5.27.2.10 It does not require a learned treatise on public administration to point out that when it comes to the method for accounting by statutory offices - which are overseeing the actions of the state carried out by agencies for whom a Minister of the Executive is responsible - that the parliament has an important role to play.

> ***--R26 We recommend that the Assembly have a standing Committee that oversees the work of the oversight bodies***

6. DISCUSSION ON TERMS OF REFERENCE PART B: COMMUNITY ADVOCACY

6.1 What is advocacy?

6.1.1 None of the determinations Part B of our Terms of Reference requires can be made without a common understanding of what is meant by ' advocacy'. The latin 'advocatus' means ' one called in to help'. We suggest that since the dawn of civilisation it is likely that people have called on the service of others to intercede or speak on their behalf in negotiations or resolution of disputes. Everyone, as an infant or child, has had parents and perhaps older siblings and others advocate for them. And most of us have used or will use lawyers or other professionals to act for us in matters which require some level of specialist expertise. So advocacy to assist people, who for one reason or another need help to uphold their rights or maintain or advance their interests, should be seen as a very ordinary thing. But some of us need an extra-ordinary level of advocacy for much or all of our lives because of the personal circumstances fate has dealt us. And of course not one of us can know whether ill health, accident or advancing years will put us in our future in the position of needing an extra-ordinary level of advocacy.

6.1.2 In addition, all of us are beneficiaries, more or less, of advocacy in the public policy and legislative processes. This is advocacy to advance the public interest or the interests of groups of people who may be disadvantaged by extant policies or laws or to address systemic failures in public administration and regulation affecting citizens in general or groups of citizens.

6.1.3 We note that the National Disability Advocacy Program recognises advocacy as follows:

> '1. Individual Advocacy
>
> Action taken to encourage and assist individuals with a disability to achieve and maintain their rights as citizens and to achieve equity of access and participation in the community.
>
> Strategies may include speaking or standing up for the person with a disability, supporting the person to represent their own interests and making sure people know about the different ways they can have a say.
>
> 2. Systemic Advocacy
>
> Action taken to introduce, influence or produce broad change in the community to ensure the rights of people with disabilities are attained and upheld. Examples may include the pursuit of changes in legislation, policy and practices of agencies providing services to people with disabilities and government policy.
>
> Strategies may include advocacy development, law reform, community development, community education and group advocacy.'

6.1.4 For the purposes of this review we will use the following description of

the kinds of advocacy:

1. Individual Advocacy –

   action taken to encourage and assist individuals to achieve and maintain their rights as citizens, including as consumers, and to achieve equity of access to goods and services and participation in the community.

- Strategies may include standing up for the person or speaking for them including representing them in more or less formal decision making proceedings, supporting the person (perhaps with the assistance of family and friends) to represent their own interests and making sure people know about the different ways they can have a say.
- An advocate might form a long-term relationship with one person and work for them and them alone (often called citizen advocacy) or work for a number of individuals to assist resolution of particular matters or mainly work in the supporting mode. In the first category (citizen advocacy) advocates are usually volunteers supported by organisations, while in the other categories advocates are usually remunerated at least to some extent.
- All forms of individual advocacy require considerable skills and understanding of principles and standards and advocates, whether voluntary or remunerated, require training.

2. Systemic Advocacy - Group and Public Interest –

   action taken to introduce, influence or produce broad change in the community to ensure the rights of all citizens, including as consumers, or groups of citizens are attained and upheld and/or the public interest is properly recognised. Examples may include the pursuit of changes in public policy, legislation and regulation, and the programs, goods and services of government, business and community sector organisations.

- Strategies may include participation in the various public policy development and legislative change processes including as citizen/community/consumer/public interest members of advisory and regulatory bodies, advocacy development, community development, community education and group advocacy.

6.1.5 The role of advocacy is clearly recognised by government in the ACT, as indeed it is by the Federal Government and other state/territory governments. In the ACT, *inter alia*, this is demonstrated by the ' COMPACT', the agreement on partnership between the community sector and ACT Government, which was adopted under the former Government and reaffirmed under the present. Specifically in relation to advocacy for people with disabilities and consumers and potential consumers of HACC services,

the role of advocacy is clearly recognised by all governments and funded. (Commonwealth State Territory Agreement).

6.1.6 Under the National Disability Advocacy Program, contracts with advocacy organisations define advocacy as:

> ' speaking, acting or writing with minimal conflict of interest on behalf of a person or group, in order to promote, protect and defend the welfare of and justice for, either the person or group by:
>
> Being on their side and no-one else's;
>
> Being primarily concerned with their fundamental needs; and
>
> Remaining loyal and accountable to them in a way which is emphatic and vigorous.'

6.1.7 While it refers to advocacy in relation to people with disabilities, we think this is appropriate for individual and group advocacy for the purposes of this review in general. We will not attempt to define public interest advocacy beyond the description under systemic advocacy above.

6.1.8 The Question of Interest

6.1.8.1 A public interest advocate must operate on the basis of some kind of analysis of the public interest in relation to the matter in question. The public policy or legislative process is then expected to comprehend any other analyses and produce an optimal result.

6.1.8.2 An advocate for a group or individual might usually be expected to act on the basis of the expressed wants or wishes of the group or individual. The question arises, though, as to how to proceed if the expressed wants or wishes of the group or individual are not consonant with the best interest of that group or individual. Difficulties might also arise where those expressed wants or wishes are not consonant with the best interests of others, maybe family or friends or the community at large. There is debate over how an advocate or advocacy organisation should deal with these difficulties. That is should they or it work:

- in a more or less partisan way and, within limits, advocate according to expressed wants or wishes, or
- according to some judgement as to the best interests of the client or client group, or
- according to some judgement of other or wider community interests?

6.1.8.3 One's right to make use of the legal system and to engage a lawyer to act as one's advocate on the basis of one's expressed wants and wishes is beyond question in our society. While lawyers might be expected to assist one in determining the course of action most likely to effect one's best interest, they are obliged nevertheless to act on one's instructions. In advising their client, lawyers are not obliged to take into account the interests of others or the community at large except insofar as the law requires. This is the

responsibility of the legislature in framing laws in the first place or amending them and maybe of the judiciary in interpreting laws depending on the applicability of general legal principles. In our view, it is quite arguable that advocacy services should be seen in the same way and the objective in providing any advocacy service should be to afford the client the same right. And thus it is for others in the advocacy process, not the advocate, but rather those charged with resolving complaints, to take on the burden of making judgements on the best interest of a person making a complaint and of weighing up the interests of others and the community at large.

6.1.8.4 However, we are impressed by the ADACAS policy on best interests and expressed wishes which states, *inter alia*:

> ' When might the advocate work towards a different outcome from that sought by the person for whom we are providing advocacy?
>
> An ADACAS advocate may not advocate for, or support the person to do something which:
>
> - is illegal. This includes suicide, causing harm to others or damage to property.
> - may not be illegal, but causes direct disadvantage to other vulnerable people. For example, when a person wishes to undertake an action which might place their child at risk, and there are no ways to prevent the possible harm to the child.
> - places the person themselves at risk, and where there are no practical ways to protect the client by reducing the risk to acceptable levels, and/or minimising the possible damage.'

6.1.8.5 We think that application of this rather higher standard than is required of lawyers is desirable. It is likely to result in fewer inappropriate matters coming before service provider or complaint resolution decision-makers and in smoother, more cooperative and productive working arrangements as between advocates and other actors in general.

6.1.8.6 We note also the issue of dealing with the circumstances of a person expressing a desire for an outcome that is based on a clearly un-informed choice or based on the choices that the community happens to offer, but which might be appropriate to the person's needs.

6.1.8.7 Clearly the job of the advocate is one which involves making very difficult judgements. There are, broadly, two types of errors that the advocate must take great care to avoid:

> Type 1 advocacy error – advocating for the expressed wants and wishes of a client when that is not actually in their best interest.
>
> Type 2 advocacy error – misjudging the best interest of a client and persuading them that the result they are seeking is not in their best interest when it actually is.

6.1.8.8 We think that Christopher Newell, in an address ' Ethics? I just do what the client directs'[27], nicely summarised the issue for advocates with the following question:

> ' Will we affirm our role as moral actors, rather than as value-neutral loud speakers?'

6.2 What is the most effective way for the advocacy needs of the community to be met?

6.2.1 Independence and control

6.2.1.1 If an advocate is to avoid conflict of interest and is to be on the side of the client and no-one else's, it seems to us that they must be able to operate as independently as possible with respect to the persons, natural or corporate, who are making the decisions that are the subject of the advocacy. There would normally be no problem if:

- an advocate is contracted and remunerated directly by the client (as is the case when one engages a lawyer)
- an advocate is remunerated by the state, but the advocacy is directed toward a private corporation (for profit or not-for-profit)
- an advocate is remunerated by a private corporation (for profit or not-for-profit) and the advocacy is directed toward another, unconnected private corporation or the state (in respect of decisions about or services provided to an individual or in respect of laws, policies or programs)

6.2.1.2 It is where the advocacy is directed toward the state and the advocate is remunerated by the state that questions arise. It might be the case that in the USA, and perhaps some other countries, advocacy could be largely funded from private philanthropic sources. In Australia, for the foreseeable future, however, advocacy will need to be substantially funded by the state. The nature of the relationship the advocate has with the state or particular arms of the state, can be fashioned to limit the negative effects of this dependency. The relationship can be more or less ' arms length' . At one extreme, the least ' arms length' might be where an advocate is an official or employee of the government agency the subject of the agency. At the other end of the spectrum the state might, under some act of the legislature, provide for an assured proportion of the government's annual budget to be granted to non-government advocacy organisations with minimal prescription on the application of the funding. Clearly there is a trade off as between control of the use of the community's resources and independence of the advocate. Arrangements which appropriately balance these requirements

[27] National Aged Care Advocacy Workshop, Hobart Tasmania, 15th April 2003

will lie between these extremes.

6.2.2 Collaborator or adversary?

6.2.2.1 It seems to us that there is another trade off to be made against independence. An advocate operating at large arms length might be less able to work cooperatively with those whose decisions or views they might be seeking to influence. In other words a very arms length advocate might be at risk of having to deal with the 'if you're not with us, you're against us' perception, that is they are more likely to be seen as an adversary rather than a collaborator in a common problem solving endeavour. This will depend on the style and approach of both advocates and decision makers that will, in turn, depend on the prevailing attitudes or culture.

6.2.3 Horses for courses

6.2.3.1 Our observation is that different arrangements might be required for different purposes or circumstances or groups of citizens. We note that different arrangements operate in different jurisdictions. For example in NSW the Patient Support Office, which is part of the Health Care Complaints Commission, provides services which can be seen as advocacy support while stopping short of advocating for consumers (see I). While in New Zealand disability and health advocacy is provided by non-government non-profit organisations funded by the Health and Disability Commissioner and accountable to the Director of Advocacy in the Commissioner's office. (see Appendix J) And in Western Australia the Health Consumers' Council, funded by the Health Department provides advocacy services though it is relatively autonomous in its delivery of those services.

6.2.3.2 In the ACT a range of advocacy services are provided by a number of non-government community based organisations with funding coming from the Commonwealth and the Territory Governments in the proportion of about 2/3rd and 1/3rd respectively.

6.2.3.3 We observed in our introductory remarks that being relatively small the ACT is characterised by close-knit relationships amongst service providers and between them and the public administrators. In larger jurisdictions it might be quite workable for advocacy to be provided by state agencies. It is our view that the ACT should not depart from the arrangement of using non-government community based organisations to deliver advocacy services. As our introductory remarks indicated, our community is blessed with a very healthy civil society, so, perhaps unlike some other communities, there is a more than adequate tradition and skill base for the effective operation of community sector organisations.

6.2.3.4 In this context, we should refer to the role of the Community Advocate. We have already suggested that this office should be re-named perhaps to Public Representative. On the basis of our foregoing discussion of the

question ' What is Advocacy?' we think the name Community Advocate is inappropriate and conveys the wrong impression of the role of the office.

- ***--R27 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.***

6.3 Funding Arrangements and Independence

6.3.1 As we have noted, advocacy organizations get their funding from both the Commonwealth and the ACT Governments. It is our understanding that in some cases funding to advocacy organizations is administered by agencies that are also responsible for the delivery of services and/or policy development which is the subject of the advocacy being funded. An advocacy organisation might, for example, have to make representations in relation to the adequacy of performance monitoring in respect of certain services to the same officials responsible for the performance monitoring of the organisation. We consider that such a ' biting the hand that feeds you' situation has significant potential to compromise the ability of advocates to operate independently in the interests of their clients.

6.3.2 It is self evident that agencies contracted to provide services must not also be contracted to provide advocacy in relation to those services. More than this, we think that, as a general rule, advocacy services should be kept separate from provision of other services. Thus we would consider it inappropriate for an organisation providing services for the aged, for example, to be contracted to provide advocacy services for youth. Our concern is that the interest such an organisation might have in renewing its contract for the former services might compromise its effectiveness in performing the latter services.

6.4 Gaps in advocacy services

6.4.1 Our consultations indicated that in the ACT there are five major areas where advocacy services were not meeting needs, namely in, health, housing and homelessness, discrimination, children and young people, and indigenous people.

6.4.2 Health

6.4.2.1 The Health Care Consumers' Association is the only organisation with any significant capacity to advocate in the health policy and services area. While it does take up matters on behalf of individuals from time to time its limited resources are such that it must concentrate on systemic advocacy. We are satisfied that there is a significant number of health care consumers who have problems with health service providers in respect of which they the

need advocacy assistance. We note that when consumers contact the Community and Health Services Complaints Commissioner they are offered considerable assistance, within the limits of the Commissioner's resources to pursue their complaints. We note also that the hospitals have arrangements to assist consumers in pursuing complaints for example the Canberra Hospital has two Consumer Liaison Officers with this as one of their major functions. However, we consider that an advocacy service similar to that provided in Western Australia is required. In our experience, and from what we have learnt in our consultations, there are a significant number of consumers, beyond those with a particular disability, who are not sufficiently empowered or self-confident to pursue what might be a very well founded complaint about a health service without an advocate at their side. For anyone, making a complaint about a doctor or a hospital, is not the same as taking a defective product back to a department store. But for a consumer with perhaps limited education or limited English and perhaps suffering from an illness or injury it is likely to be extremely daunting.

6.4.2.2 We heard that many such consumers are so dis-empowered and uneasy or anxious about challenging service providers they will not approach consumer liaison officers at hospitals for example and about dealing with officialdom they will not go to the Community and Health Services Complaints Commissioner. We are convinced that a community based health services advocacy organisation that can present itself as able to take the part of the consumer could play a very valuable role.

6.4.3 Housing and Homelessness

6.4.3.1 The Tenants' Union is able to provide advice to people with problems in the housing area and some legal assistance in partnership with the Welfare Rights & Legal Centre. The Union's resources, which come from interest on rental bond moneys and from membership subscriptions, are limited however and like the Health Care Consumers' Association it has to make systemic advocacy its priority.

6.4.3.2 In other states the total amount of rental bond moneys is obviously much greater than in the ACT. The resources that tenants' organisations must devote to systemic advocacy though are not proportionate, as clearly policy and legislative development issues do not expand commensurately with the size of the population. They therefore have greater capacity to provide individual advocacy services and to develop and maintain the required skills.

6.4.3.3 The Welfare Rights & Legal Centre's legal assistance in the housing area is limited by its resources (it receives funding from the Department of Disability, Housing and Community Services). Its services are restricted to people on a low income, which effectively means tenants of public housing. People who are in the private rental market, but who may be little better off than public housing tenants are unlikely to be able to afford to utilise paid

legal services in relation to tenancy matters.

6.4.3.4 Our consultations strongly suggest that there is a high level of unmet need for individual advocacy services (both general and legal) in relation to housing and homelessness. We understand that this is such that advocacy is being demanded of workers providing services under the Community Linkages Program even though this is outside their remit.

6.4.4 Discrimination

6.4.4.1 The Discrimination Commissioner has told us that the Human Rights Office gives as much assistance as it can, consistent with the need to remain impartial, including provision of interpreters and scribes to complainants free of charge. However, the Commissioner observes, and we concur, that pursuing a complaint under the Discrimination Act is a daunting prospect for anyone, but especially for some groups such as people with a psychological condition, indigenous people and first generation people with a non-Anglo-Saxon ethnic background.

6.4.4.2 The Commissioner has expressed the view to us that 'a major weakness of the current system is the extreme shortage of good, affordable advocacy for people pursuing complaints….including 'next friend'/personal advocacy and legal representation' and that 'People who make discrimination complaints…rarely have the resources to pay for professional services'.

6.4.4.3 We note that the President of the Discrimination Tribunal has commented in his Annual Report and otherwise on the extreme difficulty for the Tribunal of dealing efficiently with numbers of unrepresented clients. We note also that Legal Aid is not available for discrimination matters.

6.4.5 Children and young people

6.4.5.1 The Youth Coalition of the ACT has the capacity to provide quite an effective systemic advocacy voice, but resources for individual advocacy for children and young people are limited. The various youth services do undertake some individual advocacy, but they are not set up to meet this need. There is operating at present the First Stop Legal and Referral Service for Young People. This is made possible by some funding from the ACT Legal Aid Office and volunteer legal and para-legal services from a law firm and ANU law students. The funding for this service finishes in November. We note that the Youth Coalition of the ACT's budget submission recommended the Government monitor the impact and outcomes of this service with a view to providing funding for its continuation and expansion.

6.4.6 Indigenous people

6.4.6.1 Many of our consultations revealed clear indications that advocacy services that were appropriate to the circumstances and requirements of indigenous people fell well below needs. We understand that, quite often,

indigenous people have to seek assistance from agencies outside the ACT. It seems to us that consideration of boosting the resources of indigenous peoples' community organisations to enable them to develop their advocacy capacity is required. Rather than attempting to develop such capacity in all the specialist areas, we think the modus operandi of indigenous peoples' advocates working in cooperation with specialist advocates is the practical way to proceed.

6.4.7 Gaps due to constraints under program funding

6.4.7.1 Both funding for support services for people with disability and people who are ageing and funding for advocacy in relation to those services is provided under the same Commonwealth and ACT legislation and programs respectively. This means that access to advocacy funded under these programs is determined by the target group specified in the acts, and any regulations. 6.4.7.2 Thus:

- eligibility for access to advocacy is determined by a person's need for support services in relation to a specified functional impairment , not on their general need for advocacy because of their vulnerability;
- advocacy is largely restricted to matters relating to services funded under the program, e.g. advocacy funding under the HACC program can only be used in relation to HACC services.

6.4.7.3 We think consideration needs to be given to providing advocacy agencies some level of general funding that they can use on a discretionary basis to meet the needs of people who fall outside the current categories.

6.5 The level of advocacy resources

6.5.1 Apart form these gaps our consultations revealed a clear message that the level of advocacy resources for areas that are funded falls well below the need. As a general rule, the advocacy organisations we consulted advised us that they were able to provide services for no more than about half of the people seeking assistance. We were told that in addition to the people that they actually have to turn away there is likely to be a significant number who do not approach them for assistance because they are aware that the organisations cannot meet the demand.

6.5.2 It is beyond the scope of this review to systematically gather the data necessary to determine figures as to the current shortfall in advocacy resources. More over, such figures would not be useful for anything but the short-term. The need for advocacy is dependent on a number of factors, which either will or should change. Clearly the ageing of the population alone will increase the potential number of advocacy clients. On the other hand though, at some level the need for advocacy is a function of the responsiveness of policy and program development and the adequacy of

resourcing and administration of services including of course the effectiveness and efficiency of feedback and complaints mechanisms both internal and external. Our consultations give us some confidence that there is a new commitment in respect of all of these factors. This review itself is evidence of the government's commitment at the highest levels and our meetings with senior executives convinced us of their commitment. The recent developments in internal feedback and complaint systems are examples of the practical realisation of this commitment.

6.5.3 We do not say there is not a considerable amount to be done for this commitment to percolate throughout the relevant government and non-government agencies. And indeed we see implementation of our recommendations in relation to the statutory agencies subject to this review as a critical in spreading this commitment.

6.5.4 All of this means that assessments of resourcing needs have to be made on an annual basis.

6.6 The need for better understandings amongst officials, service managers and advocates

6.6.1 As our earlier discussion makes clear, understanding advocacy, its role and functions and how advocacy organisations operate is far from straight forward. It is important therefore that those officials who have the responsibility of managing advocacy funding programs either have an appropriate professional background or are given the requisite training. We understand that this has not always been the case; that too often officials with an inappropriate background and or inadequate knowledge or experience of advocacy are asked take over these responsibilities and there are avoidable inefficiencies while they climb the learning curve.

6.6.2 It is equally important for officials involved in policy and program development, all involved in service management and all those involved in internal and external complaints handling to have a sound understanding of advocacy if their relationships with advocates are to be as productive as they should be. In turn, advocates must have a good appreciation of the realities of public policy processes, public administration and service management.

- ***--R28 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.***

6.7 Principles and Standards

6.7.1 There has been much discussion and work on development of principles

and standards, codes of practice etc for advocacy in various forums in Australia over the last few years. Similar developments are occurring overseas. For example the UK Department of Health is currently consulting on a draft code of practice.

6.7.2 A review of the National Disability Advocacy Program, which reported in 1999, recommended that a code of practice be developed and incorporated into contracts with advocacy service providers. These contracts have been revised accordingly.

6.7.3 The Commonwealth Government has undertaken a lengthy consultative process resulting in a position statement that provides for common agreement on some of these matters. Our consultations revealed broad support for this statement and we think it represents a good basis for policy development in the ACT. We note that in any case, under the Commonwealth State/Territory Disability Agreement, the ACT Government is obliged to adopt the statement in respect of the advocacy programs it funds for people with disability.

6.7.4 We note also that the Commonwealth Department of Health and Aged Care has funded the development of a "Manual of Standards for Advocacy Agencies" for use by the National Advocacy Network.

- ***--R29 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.***

6.8 Consumer Representation

6.8.1 Our terms of Reference require consideration of whether "advocacy agencies adequately contribute to service improvement and enhance the rights of consumers". We believe representation of the interests of consumers on government and agency committees is a key part of this. We observe that there is now quite a sound appreciation of the value that consumer representatives can bring to the deliberations of these committees in many areas of government, but this does not appear to be universal.

6.8.2 What is of concern is that in some cases consumer representatives are very much on their own, serving on committees without an adequate level of resource/information backup. In our experience, on committees, especially large committees with a significant proportion of well resourced professionals, a single consumer has a very difficult job. Consideration should

be given to appointing more than one consumer representative to most committees and a sufficient number to balance representation from producer/service provider representatives.

6.8.3 A further matter of considerable concern is that many consumer representatives are serving with no financial compensation for the time they give.

6.8.4 The Commonwealth Consumer Affairs Advisory Council (CCAAC) has adopted a number of principles on consumer representation [28]. We draw attention in particular to the following:

> 'To adequately fulfil their roles, consumer representatives require adequate resourcing. This involves:
>
> 1. Payment of sitting fees or, depending on the body, an annual salary.
>
>   No person should be expected to sacrifice their normal salary in order to contribute as a consumer representative. Apart from the lack of equity in such a position, it devalues the role of the representative. Where the body concerned has been set up by government, payment must obviously be consistent with the remuneration guidelines already established.
>
> 2. Payment of expenses.
>
>   No person should be 'out of pocket' as a result of their role.
>
> 3. Access to ongoing training and other professional development.
>
>   All members of an organisation need skill development. Members of Boards, advisory committees and similar bodies are not exceptions. The argument could be made in fact, that their need is paramount, given the importance of the role.
>
>   Bodies appointing consumer representatives in particular, should consider facilitating the attendance of these representatives at appropriate consumer or industry conferences. Many of these events provide opportunities for consumer representatives to share information, to access specific training and consider industry-wide or systemic issues arising from their roles.
>
> Council notes that all three points above apply equally to industry representatives as well as consumer representatives.'

6.8.5 Noting the words ' sacrifice their normal salary', we understand that the Council could be expected to modify this to recognise that a representative's time should be compensated in any case. We suggest that the principles of the Commonwealth Consumer Affairs Advisory Council on consumer representation be considered for adoption throughout government in the ACT.

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[28] CCAAC, *Principles for Appointment of Consumer Representatives: A Process for Governments and Industry*, Canberra, May 2002

6.9 Government Policy on Advocacy and need for an Advisory Council on Consumer Advocacy

6.9.1 The Government's support of strong and effective consumer advocacy is evident and implicit in many of its policies and programs. However we believe the forgoing argues strongly for the Government to adopt a comprehensive and clear policy statement on advocacy. We think a part time advisory council on consumer advocacy could make a very valuable contribution to development of such policy, to addressing the concerns we have raised and to the delivery of the advocacy services needed by our community generally.

6.9.2 We considered whether such a body could act as a conduit for funding for advocacy so as to overcome the problems of independence we have discussed. This would add an extra layer of administration and the council would have to be resourced accordingly. We concluded that current tendering and contracting arrangements should remain and that it would be sufficient to have such a council looking on from the side and being able to comment publicly on the provision and operation of advocacy services in general. We think that this would contribute well to a generally stronger understanding of advocacy and to appropriate relationships operating between advocacy organisations and government agencies.

--R30 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***.

APPENDIX A: INFORMATION PAPER

Foundation for Effective Markets and Governance
REVIEW OF COMMUNITY ADVOCACY AND STATUTORY OVERSIGHT AGENCIES:
INFORMATION & CONSULTATION PAPER

Background

The ACT Government recognises the need for an effective statutory oversight regime and effective advocacy services, for consumers of health, disability and community care services, and children and young people in care.

Following the Reports of the Board of Inquiry into Disability Services (the Gallop Report) and the Report of the Review of ACT Health (the Reid Report) the Government decided to seek an independent review of the statutory oversight functions and powers of a number of agencies as well as the role and functions of community advocacy agencies. The intention of the review is to look at the system of statutory oversight and community advocacy operating in the ACT as a whole, rather than detailed aspects of individual agencies, with a view to determining if the existing model is achieving the desired outcomes for the ACT community.

The purpose of this paper is to provide information to stakeholders about the Review.

The Review is being undertaken by the Foundation for Effective Markets and Governance (the Foundation) against terms of reference established by the ACT Government. Information about the Foundation and the terms of reference are set out below in **2.** and **3.**

We have also included with the paper an outline of what we, at this stage, consider to be the issues that we will need to address – see **4.** below. The issues are not exhaustive, but are designed to stimulate comment from the various stakeholders with an interest in the advocacy and 'watchdog' bodies.

To enable us to get an overview of how organisations and individuals perceive the statutory complaint and oversight bodies, we are seeking your views on a wide range of matters. In particular we are interested in obtaining your comments on the strengths and weaknesses of these bodies and on ways in which the complaints, advocacy and oversight system can be improved. We are writing to all relevant consumer and community groups inviting them to respond to a questionnaire on the issues shortly. Stakeholders are also very welcome to comment to us on other issues they consider relevant to the Review.

Ultimately any system set up to deal with complaints or representations, or to advocate on behalf of those in a position where they are unable to represent

themselves effectively, will only succeed to the extent that they have public trust and confidence. Especially, they must meet the needs of those on whose behalf they are established. It matters not a jot if a government of the day, or a government agency or a statutory officer, thinks they have designed a great scheme, if the consumers or their representatives stay away in droves, or if those complained about ignore the recommendations or decisions of the agency.

We will also be undertaking a wide range of discussions and consultation with the various stakeholders of these agencies – see listing at **5.** In seeking your views, suggestions, ideas, and comments, we are aware that the perceptions will differ depending on your relation to the agency, i.e. whether you are a consumer, a service provider, an agency staff person, an agency head, a carer, representative, family member, professional, guardian, etc. but those different perceptions are important for us to have.

Finally we have set out in **6.** below our proposed time table for this Review.

How you can be involved

We have identified a number of general questions in this paper, and some more detailed ones in the attachment. These are designed to stimulate your views and ideas, **not to make anybody right or wrong**. If you are a body that we will be meeting (see **5.** below), you may wish to use these as a base for our discussion. In any case, we invite you to respond, wherever possible, to any of the questions in writing, as this will ensure that valuable comment is not overlooked. We have also developed a formatted Questionnaire if you would prefer to use that facility.

Additional copies of this paper and the Questionnaire can be found on the Web at http://www.dhcs.act.gov.au/ or http://www.femag.anu.edu.au after 1 June 2003.

You can also contact the Review Co-ordination Group within the Department of Disability, Housing and Community Services by E-mail at review-oversight-advocacy@act.gov.au

FEMAG's contact details are provided at the end of the paper.

1. Introduction

In his report of May 2002, Michael Reid observed:

> 'Finally it became apparent during the review that there are a plethora of both community advocacy groups and 'watchdog' agencies with responsibilities for some aspects of the public/private/NGO health sector.
>
> In community advocacy, there is:
>
> ACT Disability and Aged Care Advocacy Service;
>
> Carer Advocacy Service;
>
> People First;

Advocacy Action; and

Citizen's Advocacy.

While for 'watchdog' agencies, in addition to complaints management within individual organizations, there is:

Office of the Community Advocate;

Health and Disability Complaints Unit;

Ombudsman;

Commonwealth Employment Advocacy Service;

Privacy Commission;

Human Rights Commission; and

Guardian and Management Tribunal.

For a population of 300,000, this is excessive. As one parent of a disabled child told the review:

" the existence of so many agencies does not ensure better scrutiny but, there is significant buckpassing and inadequate responsibility".

Clearly any consolidation of watchdog agencies in the health sector cannot be considered in isolation – a whole government response is necessary.'

He recommended that:

> 'Some rationalisation of the community advocacy and watchdog agencies is warranted.'

The Government's acceptance of this recommendation led to the Review.

2. The Foundation for Effective Markets and Governance

The Foundation is affiliated with the Australian National University. It has a commitment to contribute to the welfare of people, especially the least advantaged. It and its members have undertaken a number of projects in Australia and developing countries.

Members of the Foundation have general experience and expertise in public policy and administration and the role of civil society in good governance. It has particular expertise in consumer protection and accountability systems. The Foundation is a non-profit organization with its members having a strong philosophical commitment to the Foundation's work.

The project will be undertaken by Directors, John Wood and Robin Brown, with John as the Principal. Project management support will be provided by Howard Hollow. As with its other projects, the Foundation will draw upon the particular skills, knowledge and experience of its members. With this project, that will particularly include Professor John Braithwaite. Advice will also be provided by Professor Robin Creyke, Professor of Administrative Law, ANU.

3. Terms of reference

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:

- 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;
- complaints in relation to disability services should be investigated by any new or existing agency;
- 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;
- on the basis of similar legislation in other jurisdictions, there are gaps in the coverage of statutory oversight agencies in the ACT;
- where gaps do exist, it is possible to integrate new functions into existing or improved structures;
- 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;
- there are adequate internal and external review and appeals mechanisms and if not, what these should be;
- there is a logical conclusion to the current complaints handling processes conducted by statutory oversight agencies;
- complaints and advocacy agencies adequately contribute to service improvement and enhance the rights of consumers;
- the Management Assessment Panel and the Care Coordination Office are in the appropriate administrative location and if not, recommend where they should be;

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

With a view to determining if:

- 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;
- 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;
- advocacy agencies adequately contribute to service improvement and enhance the rights of consumers;
- 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;

4. General Issues

We are interested in stakeholders' views about the problems generated by the number of advocacy and 'watchdog' agencies. This could relate to gaps in service, conflicts in powers, failure to implement recommendations, or overlapping functions. There are obviously different issues relating to complaint handling agencies as compared with advocacy bodies. We are also interested in your views on some specific matters, and your reasons for those views.

- What is your general view of the operation of the current system of:
  - complaint handling agencies:
  - community advocacy;

  in terms of strengths and weaknesses?
- Is it easy to find out to whom a complaint or representation should be

taken?

- Do you find clients being referred from body to body too frequently?
- Do you think there are adequate mechanisms for appeal against, or review of, findings or decisions made by 'watchdog'/complaint agencies?
- Can you give examples where overlap has affected you, or someone on whose behalf you act, adversely?
- Can you identify any gaps in the current system that have, or have had the potential to, let people down in terms of exercising their right to complain, or have a problem addressed?
- Have you experienced conflicting advice or outcomes from different 'watchdog' bodies?
- Do you have a view on the functions of the existing bodies that might be best accommodated together to ensure better processes and outcomes for consumers, their representatives, and other stakeholders?
- Are you aware of any areas of importance (in the eyes of consumers) that are not within the scope of the agency, and that you consider should be? (an example might be that certain persons or organisations are not subject to scrutiny by the agency – for instance, the actions of Ministers are not subject to investigation by the Ombudsman)
- Should the function of Guardian remain with, or be separate from, the Community Advocate?
- To ensure maximum effectiveness, where should the Management Assessment Panel and the Care Coordination Office be located?
- Should there be limits on the time taken by agencies or other bodies to implement recommendations or decisions of complaint bodies?
- Are there circumstances which would justify giving a complaint body which has recommendatory or conciliation powers only, a decision making power?

More specific question are set out in the Attachment to this paper.

5. Stakeholders

The Foundation proposes to contact the following during the course of the Review:

- Assembly Members
- Government: agency officials, statutory office holders, advisory bodies
- Consumer groups/community groups - the following community advocacy agencies:

  Welfare Rights and Legal Centre
  C.A.R.E. Credit and Debt Counselling Service
  Women's Legal Centre

Youth Legal Centre
Tenants' Union
ACT Disability and Aged Care Service
Carer Advocacy Service
People First
Advocacy Action
Citizen's Advocacy

- Other interested groups - for example: ACTCOSS, DPI, ACROD, ACOTA, CHF, health consumer groups, church groups etc

- Health and other relevant professionals - for example nurses, social workers, doctors, psychologists and other registered health service providers, and lawyers, with consultation to be through professional associations and other established professional groups

- Other interested groups - for example service provider associations and other industry groups, relevant academics and other observers

- A selection of relevant groups in other jurisdictions will also consulted.

6. Timetable for conduct of Review

Note - timing may be affected by the number of groups/interests identified

Week 1: 26 May

- Website notice
- Public notice in Canberra Times
- Mail out to known stakeholder groups

All of the above will announce the review and invite interested organisations and individuals to contact the Department of Housing, Disability and Community Services in the first instance. The Department will set up a dedicated phone line.

The website and mail out will include this paper comprising:

- background to the review
- information on the review consultants
- consultation questions on issues and performance
- a statement on how the review will be conducted including a consultation plan noting that attention will be paid to accessibility e.g. times for meetings, language, signing etc
- A separate Questionnaire.

Weeks 2 and 3: 2 – 9 June

- Meeting with peak stakeholder groups
- Meetings with Departmental executives and statutory office holders
- Known stakeholder group representatives contacted to commence

arrangements for consultation meetings.

Weeks 4 to 6: 16 –30 June

Consultation meetings with stakeholder groups

Venue, time of day, day of week and format will be tailored to requirements of the group concerned.

Format will include:

- Introduction of FEMAG review consultants
- Outline of review
- General opportunity for group to present issues it has identified/concerns it has regarding the current system(s)
- Identification of priority issues/concerns
- Specific suggestions for improvement and solutions group has developed in the context of Government's stated position (response to Gallop and Reid)
- Discussion of specific issues review team has identified if not already raised and others that arise in the meeting.

Responses to contacts from individuals

- questionnaires to be sent out
- additional follow-up to elicit particular or general experiences with complaint handling especially in regard to effectiveness, efficiency and humanity dependent on time available

Weeks 7 to 10: 7 July – 4 August

16 July - Deadline for return of questionnaires and other written input

Consultation meetings continue

Input analysed

Week 11: 11 August

Possible public forum to present and test analysis of input from consultations dependent on level of interest. It is suggested that this be for consumer stakeholders. Numbers would need to be limited to be effective.
Meetings to be held with other stakeholder groups as required

Weeks 12 to 15: 18 August – 8 September

Finalisation and submission of report – 12 September

Foundation for Effective Markets and Governance:

Brief CV for the FEMAG team

John Wood is a former Deputy Commonwealth Ombudsman and former Director of the Federal Bureau of Consumer Affairs. He is currently a consultant advising various countries on ombudsman schemes and is an Australian Consumers' Association (ACA) Council Member. He has had a long history of involvement with the community sector, including ACTCOSS

and ACOSS.

Robin Brown is the former Chair and CEO of the Australian Federation of Consumer Organisations and member of a number of government and industry advisory and regulatory bodies. He has been involved in the establishment and operation of a number of complaint handling schemes. He has participated in projects with consumer groups and officials in developing countries. He is also a Council Member of ACA.

Howard Hollow is a former senior officer of the Australian Competition and Consumer Commission (ACCC). He has in recent years been involved in a number of consumer and competition law projects in developing countries and is the Foundation's director of projects.

John Braithwaite is a Federation Fellow and Professor, Law Program, Research School of Social Sciences at the ANU.

Robin Creyke is Professor of Administrative Law in the Faculty of Law at the ANU.

FEMAG CONTACTS

Foundation for Effective Markets and Governance

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John Wood: 6247 8435; Email: baljurda@ozemail.com.au

Robin Brown: 6285 1667; Email: jonijiro@bigpond.net.au

Howard Hollow: 6125 1512; Email: howard.hollow@anu.edu.au

APPENDIX B: QUESTIONNAIRE

REVIEW OF COMMUNITY ADVOCACY & STATUTORY OVERSIGHT AGENCIES

Questionnaire for clients and other stakeholders

This Questionnaire is designed to assist the Review Team assess your views on the various agencies covered by the Review. We are NOT undertaking this for quantitative purposes, but for views on quality. Questions 18 to 31 at the end of the Questionnaire are more open ended, on aspects of the overall system of advocacy and oversight agencies. You are of course free to answer as many or as few questions as you wish. Clearly where questions relate to complaint handling, they may not be applicable to non-complaint handling bodies – eg. the Community Advocate, Community and Health Rights Advisory Council, Management Assessment Panel, etc. Some of the questions may not be relevant to you or your organisation. We will not be reporting on anybody's specific responses.

Name of the agency on which you are commenting:

…………………..……………………………………………………………

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

Name of individual or Name of organisation completing the Questionnaire;

…………………………………………………………………………………………………

Name of contact within Organisation;…………………………………………………………..

Your contact details:

Telephone number:……………………………………...

Fax number:………………………………………………...

Email address:…………………………………………………………..

PLEASE NOTE: If you would like an extra copy to comment on another agency, please feel free to copy this or contact us and we will send another copy. You can also download a copy from the Web at http://www.dhcs.act.gov.au/ **or** http://www.femag.anu.edu.au **after 1 June 2003.**

On completion of this Questionnaire, please return it to:

FEMAG (Foundation for Effective Markets and Governance)
c/- RegNet, Research School of Social Science
Australian National University ACT 0200
Tel: 61-2-6125 1512; Fax: 61-2-6125 1507; Email: femag@anu.edu.au

Client and Stakeholders' Questionnaire

PLEASE NOTE: If you want to write your responses, please feel free to do so. It would be helpful if you could quote the Question number beside each response. There are some more general questions at the end of this questionnaire. If you would like assistance completing it, please contact us and we will try and provide assistance.

Q1. Can you identify five strengths and five weaknesses of the agency?

Strengths	Weaknesses
1. ………………………………………………………………………… ……………………………………………………..	1. ………………………………………………………………………………… ……………………………………………..
2. ………………………………………………………………………… ……………………………………………………..	2. ………………………………………………………………………………… ……………………………………………..
3. ………………………………………………………………………… ……………………………………………………..	3. ………………………………………………………………………………… ……………………………………………..
4. ………………………………………………………………………… ……………………………………………………..	4. ………………………………………………………………………………… ……………………………………………..
5. ………………………………………………………………………… ……………………………………………………..	5. ………………………………………………………………………………… ……………………………………………..

Q2. What do you consider could be done to improve the performance of the agency?

....
....
....

Agency Purpose	Extremely Satisfied				Not at all satisfied	Not applicable
Q3. How satisfied are you.................. ***Circle <u>one</u> number only***						
a. ....that the stated purpose of the agency accurately reflects its operation...	**1**	**2**	**3**	**4**	**5**	**6**

Agency Commitment	Extremely Satisfied				Not at all satisfied	Not applicable
Q4. How satisfied are you.................. ***Circle <u>one</u> number only for each part of the question below***						
a. ....that the agency demonstrates its commitment by the way it undertakes its work...	**1**	**2**	**3**	**4**	**5**	**6**

b. …. that the agency demonstrates its commitment by the way it undertakes it treats its clients and other stakeholders …………………………………………………………………	**1**	**2**	**3**	**4**	**5**	**6**
c. ….with the way it documents its procedures………..…..	**1**	**2**	**3**	**4**	**5**	**6**

Agency Visibility	**Extremely Satisfied**				**Not at all satisfied**	**Not applicable**
Q5. How satisfied are you………………. ***Circle one number only for each part of the question below***						
a. ….with the ease of obtaining information about the agency or its operation………………………………………	**1**	**2**	**3**	**4**	**5**	**6**
b. ….with the appropriateness to the client groups who might use the agency, of the forms in which information is made available…………………………………………………	**1**	**2**	**3**	**4**	**5**	**6**
ba. If No, please give details………………………………	……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ………………………………………………………………………………					
c. Is this information available at service points or places used by clients or their representatives? ***Tick one box only***	Yes θ	No θ	Sometimes θ	Don't know θ	Not applicable θ	

Agency Fairness and Objectivity	Yes	No	Sometimes	Don't know	Not applicable
Q6. ***Tick one box only*** **a.** Are the procedures that need to be followed by clients simple?..	θ	θ	θ	θ	θ
b. Do you consider the agency to be impartial?...........	θ	θ	θ	θ	θ
c. Do any specific interests or stakeholder views appear to be over-represented?	θ	θ	θ	θ	θ
ca. If yes, please tell us which interests they are, and whether they affect the ability of a client, or potential client, to have their complaint, representation or concern properly addressed	....				
d. Are the proceedings of the agency conducted confidentially?..	θ	θ	θ	θ	θ
e. Are understandable and full reasons for decisions given, and in a timely manner?..	θ	θ	θ	θ	θ

Agency's Client Focus	Yes	No	Sometimes	Don't know	Not applicable
Q7. **a.** Has the agency consulted you about aspects of its operation? ***Tick <u>one</u> box only***	θ	θ	θ	θ	θ
b. What particular measures are undertaken to ensure clients' concerns are accurately understood by agency staff? **Please give details**……………………………………………..	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………				

Agency Effectiveness	
Q8. **a.** Have any recommendations or decisions of the agency been ignored, or not acted upon? **If yes, please give details**………………………………	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………

b. Who considers and analyses data on outcomes, and how frequently? **Please give details**……………………………………………..	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………
c. What methods are used for testing client satisfaction? **Please give details**……………………………………………..	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………
d. Are you aware of overlaps with other agencys? **If yes, please give details**……………………………	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………
e. Are you aware of any gaps in the coverage of the agency? **If yes, please give details**……………………………	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………
f. What method is used for determining systemic issues or problems? **Please give details**……………………………………………..	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………

g. Does the agency have an internal mechanism for handling complaints about itself? **Please give details**………………………………………………..	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………

Agency Continual Improvement	
Q9. **a.** What method is used for determining staff satisfaction? **Please give details**………………………………………………..	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………
b. Who considers information on client satisfaction? **Please give details**………………………………………………..	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………

Agency Accountability	
Q10. **a.** How are data about complaints or representations made available? **Please give details**………………………………………………..	…………………………………………………………………………… …………………………………………………………………………… …………………………………………………………………………… ……………………………………………………………………………

b. To whom and in what manner does the agency account? **Please give details……………………………………………..**	…………………………………………………………………… …………………………………………………………………… …………………………………………………………………… ……………………………………………………………………
c. How often is the agency reviewed………………	
ca. ……..internally…………………………………….. **Please give details……………………………………………..**	…………………………………………………………………… …………………………………………………………………… …………………………………………………………………… ……………………………………………………………………
cb. ……..externally……………………………………. **Please give details……………………………………………..**	…………………………………………………………………… …………………………………………………………………… …………………………………………………………………… ……………………………………………………………………
d. How are the results of reviews communicated externally?? **Please give details……………………………………………..**	…………………………………………………………………… …………………………………………………………………… …………………………………………………………………… ……………………………………………………………………

Agency Responsiveness	Yes	No	Sometimes	Don't know	Not applicable

Q11. ***Tick one box only*** **a.** Is there any fear of retribution among those who might need the services of the agency?	θ	θ	θ	θ	θ	
b. Does the agency have timeliness standards?	θ	θ	θ	θ	θ	
c. Are there clear lines of authority within the agency?	θ	θ	θ	θ	θ	
d. Are anonymous complaints or representation able to be made?	θ	θ	θ	θ	θ	
e. Are complaints or representations frequently transferred to another agency?	θ	θ	θ	θ	θ	
How satisfied are you………………. ***Circle one number only for each part of the question below***	**Extremely Satisfied**				**Not at all satisfied**	**Not applicable**
f. ……….with the timeliness of the agency's processes	**1**	**2**	**3**	**4**	**5**	**6**
g. ……….with the regularity of information provided about the progress on complaints or representations	**1**	**2**	**3**	**4**	**5**	**6**

Agency Accessibility	Yes	No	Sometimes	Don't know	Not applicable

Q12. **a.** Is it easy to contact the agency?	θ	θ	θ	θ	θ
Are clients given, as a matter of course, information about….					
b. ……..their rights and responsibilities?	θ	θ	θ	θ	θ
c. ………the agency's service standards?	θ	θ	θ	θ	θ
d……….how to make a complaint or representation?	θ	θ	θ	θ	θ
e. ………the complaint or representation handling procedure?	θ	θ	θ	θ	θ
f. ……….possible outcomes?	θ	θ	θ	θ	θ
g. Does the agency promote its contact details?	θ	θ	θ	θ	θ
h. Does the agency undertake outreach activities on a regular basis?……………………………………………………………….	θ	θ	θ	θ	θ
i. Is assistance given to clients to help them formulate or clarify their complaint or representation?	θ	θ	θ	θ	θ
j. Does the agency meet the special needs of particular groups in the community, e.g. in relation to culture, language, disability, impairment, etc.	θ	θ	θ	θ	θ

ja. If No or Sometimes, please give details.........	....				
k. Do you consider there are limitations on who may make a complaint or representation to the agency?	θ	θ	θ	θ	θ
ka. If Yes or Sometimes, please tell us what they are, and whether they affect the ability of a client, or potential client, to have their complaint, representation or concern properly addressed	....				

Agency Performance	**Extremely Satisfied**				**Not at all satisfied**	**Not applicable**
Q13. How satisfied are you.................. ***Circle one number only for each part of the question below***	**1**	**2**	**3**	**4**	**5**	**6**
a. ....with the promptness with which complaints or representations are dealt with..	**1**	**2**	**3**	**4**	**5**	**6**

b. ….with how regularly parties are kept informed of the progress of complaints or representations being handled……………	**1**	**2**	**3**	**4**	**5**	**6**
c. ….with how clearly staff explained things to you…..	**1**	**2**	**3**	**4**	**5**	**6**
d. ….with the help and courtesy of staff……………………………………………………..	**1**	**2**	**3**	**4**	**5**	**6**
e. ….with the knowledge and experience of staff………	**1**	**2**	**3**	**4**	**5**	**6**
f. ….that useful information and advice is provided by the agency ……………………………………	**1**	**2**	**3**	**4**	**5**	**6**
g. ….that the critical issues in complaints or representations are understood by staff………………………	**1**	**2**	**3**	**4**	**5**	**6**
h. ….that those making complaints or representations, or organisations complained about, are given clear reasons for decisions, recommendations, or conclusions…………………………………………………….	**1**	**2**	**3**	**4**	**5**	**6**
j. ….generally speaking, with the agency's final findings or decisions…………………...	**1**	**2**	**3**	**4**	**5**	**6**
k. ….with the overall performance of the agency…	**1**	**2**	**3**	**4**	**5**	**6**

Q14. Do you think that the operation of the Agency………….. ***Tick one box only***	…..tends to favour the complainant? θ	…..tends to favour the organisation complained about? θ	…..is impartial? θ

Q15. Overall, how satisfied are you that the operation of the agency is in accordance with **its stated functions**? ***Tick one box only***	Completely θ	Partially θ	Not at all θ	Don't know θ
Q15a. If you are only **Partially** satisfied or **Not at all**, please give your reasons……..	……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ………………			

Q16. If there are there reasons why you would not use the services of the agency, please indicate them…………………………..	……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… …………………………..
Q17. If you have any other comments please write them here, or attach to the questionnaire. ……………………………………………..	……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… ……………………………………………………………………………… …………………………..

The following questions are more open ended questions on aspects of the overall system of statutory complaint handling and community advocacy. You may wish to add separate sheets:

18. What is your general view of the operation of the current system of:
    - complaint handling agencies:
    - community advocacy;

    in terms of strengths and weaknesses?
19. Is it easy to find out to whom a complaint or representation should be taken?
20. Do you find clients being referred from agency to agency too frequently?
21. Do you think there are adequate mechanisms for appeal against, or review of, findings or decisions made by 'watchdog'/advocacy agencies?
22. Can you give examples where overlap has affected you, or someone on whose behalf you act, adversely?
23. Can you identify any gaps in the current system that have, or have had the potential to, let people down in terms of exercising their right to complain, or have a representation addressed?
24. Have you experienced conflicting advice or outcomes from different 'watchdog' or advocacy agencies?
25. Do you have a view on the functions of the existing agencies that might be best accommodated together to ensure better processes and outcomes for consumers, their representatives, and other stakeholders?
26. Are you aware of any areas of importance (in the eyes of consumers) that are not within the scope of the agency, and that you consider should be? (an example might be that certain persons or organisations are not subject to scrutiny by the agency – for instance, the actions of Ministers are not subject to investigation by the Ombudsman)
27. Should the function of Guardian remain with, or be separate from, the Community Advocate?
28. To ensure maximum effectiveness, where should the Management Assessment Panel and the Care Coordination Office be located?

29. Should there be limits on the time taken by government agencies or non-government bodies to implement recommendations or decisions of complaint agencies?

30. Are there circumstances which would justify giving a complaint agency which has recommendatory or conciliation powers only, a decision making power?

31. Does the agency have an internal mechanism for handling complaints about itself?

APPENDIX C - CONSULTATIONS

Meetings (in a number of cases more than one) were held with the following (* indicates that written input was also supplied):

Community and Health Services Complaints Commissioner and staff*

Community and Health Rights Advisory Council - former Chair and a former member

Discrimination Commissioner*

Community Advocate*

Management Assessment Panel - Chair *

Care Coordination Office - Manger

ACT Ombudsman and Deputy*

Official Visitors (mental health, disability, child protection and youth justice)

Legislative Assembly -two Members

Department of Disability, Housing and Community Services - Chief Executive and other senior officers

Department of Health - Chief Executive and other senior officers

Department of Justice and Community Safety - Chief Executive and other senior officers

Department of Education Youth and Family Services - Chief Executive and other senior officers

Official Visitors Advisory Group

ACT Health Consumer Feedback Project Team

Canberra Hospital consumer liaison officers

ACT Council of Social Service (ACTCOSS)*

ACT Council on the Ageing

ACT Disability, Aged and Carers Advocacy Service (ADACAS)*

Advocacy Action

AIDS Action Council

Australian Council for Rehabilitation of Disabled - ACT (ACROD ACT)

Citizens Advocacy

Coalition of Community Housing Organisations of the ACT (CCHOACT)

Disability Advocacy Network

Disability Peak Organisations

Disability Reform Group

Disability Reform Legislative Working Group
Disabled Peoples Initiative (DPI)
Health Care Consumers Association
Koomari Association
Medical Board*
Mental Health Carers Support Group
Optometrists Association
Optometrists Board
People First
Tenants Union
Youth Coalition of the ACT (YCACT)

The following consultation forums were convened:

- A forum of disability groups convened by ACROD
- A forum of community groups convened by ACTCOSS
- A group of health care consumers convened by the Health Care Consumers Association
- Two groups of mental health care consumers convened by the Mental Health Consumers' Network

A number of individuals were consulted
A number of individuals returned questionnaires or otherwise provided written input

Written input was provided by:
Veterinary Surgeons' Board
Dental Board

APPENDIX D - ISSUES RAISED AND CONCERNS EXPRESSED

D.01 As mentioned at the outset, we were in awe of the dedication and determination of most of those we spoke with to obtain good solutions for consumers in the future. By necessity there was discussion of what has gone wrong in the past and what requires fixing in the present. The emphasis, however, was in designing a system that meets consumer needs in the years to come. Whilst it is inevitable that we may have missed some important points, we have endeavoured to replicate the main points made to us below. They do not represent the views of the Review Team. Some of the matters raised with us fall outside our terms of reference.

D.02 It is important to note that this review did not involve, and was not intended to involve, a systematic survey of people using, or indeed not using, the services of the agencies which are the subject of the review. Therefore the significance in quantitative terms or validity of these issues and concerns has not been tested. Neither did we proceed to making conclusions simply on the basis of these comments or views. They are here because people took the trouble to speak to us and articulate them. They are not sourced because we told all participants that that would be the case.

D.1 General

- Complaints managers should report directly to CEOs of service providers.
- Some people are scared of both complaints processes and using advocacy. This means that a very user sensitive lead-in to processes is needed. Perhaps some kind of consumer assistance service for those who don't want an advocate is required.
- Service providers and the community need to see complaints as a positive measure. We need much higher understanding in the community at large, both on the part of consumers and providers, of the value of complaints. Providers need to redouble their efforts to tell their consumers that complaints are welcomed.
- Too many complaint organisations leads to confusion and there is currently no conduit to assist complainants.
- A requirement for complaints to be in writing deters many people.
- The worst thing is to raise hopes and not deliver. At the outset of a complaints process proper assessments need to be made and achievable outcomes identified.
- Consumers' frustration frequently comes from their feeling of powerlessness and their loss of control.

- All require giving higher priority to outreach activities.
- Critical need for training for community sector people who could come into a whole range of positions; e.g. Official visitors staff of complaint bodies, and OCA.
- There is a conflict between what people – in both the service provider and community sector - see as the primary purpose of a complaint handling or resolution scheme. Is the primary purpose to lead to service improvement and the eradication of systemic problems; or is it to resolve the individual's complaint?
- It is important to have a system that allows users to give feedback after using complaint service.

D.2 Statutory complaint agencies

D.2.1 Community and Health services Complaints Commissioner

- The C&HSCC and the health professionals boards need to be able to exchange information more readily.
- The limitation on services subject to C&HSCC jurisdiction needs review – e.g. youth services.
- C&HSCC should have a clearly specified function of reviewing internal complaint handling systems. The Commissioner needs to have confidence that complaints referred back to service providers will be dealt with satisfactorily.
- Does there need to be clarification of the C&HSCC's powers to continue to look at a matter if that matter has been referred to a Board (and vice-versa)?
- In relation to any matter where an adverse incident is known or suspected, a person's carer or guardian must be informed. This includes where a complaint is being investigated.
- Contracted services should be covered by the C&HSCC.
- The C&HSCC covers services not agencies and therefore, for example, some ACT regional services are not covered.
- Should C&HSCC jurisdiction also cover NGOs providing human services – childcare, education, housing etc.? What about non-registered providers, e.g. personal carers, occupational therapists, former professionals, etc.
- Some mechanism of process review (not merits review) of the C&HSCC is needed so that criticisms can be addressed. This would require some kind of statutory basis.
- C&HSCC requires statutory time limit for assessment with power to extend (see draft Bill).

- C&HSCC needs show cause power if suitable action hasn't occurred and to achieve compliance with recommendations.
- The conciliation process needs to be improved.
- Corrective action in relation to health professionals needs to be undertaken within 6 months of a complaint to be effective.
- There should be a public interest test where C&HSCC considers he/she needs to share information with another entity, e.g. a health professional board.
- Consideration should be given to obtaining guidance and advice at assessment stage, e.g. from a board, or retired professionals.
- The C&HSCC should be required to report cases of imminent risk to health and safety and he should have a public interest discretion where there is some concern.
- There is a concern about time limits in bringing complaints especially where a childhood diagnosis is involved.
- There is a view that the C&HSCC places too much emphasis on mediation rather than investigation.
- There is a need for the Coroner and C&HSCC to agree on their respective roles at the earliest stages in inquests/investigations. The Coroner and the Commissioner should be able to share information where there may be public interest reasons for doing so, for example where there is concern that the action of a practitioner or service provider may be connected with the death, and there is a risk to public health or safety if that practitioner or service provider continued to operate. There may be a role for the Commissioner to undertake investigations, or part thereof, for the Coroner in such circumstances.

D.2.2 Human Rights Office

- The Discrimination Commissioner should be able to take matters to the Discrimination Tribunal.
- s.27 of Discrimination Act needs amending.

D.2.3 Office of the Community Advocate, MAP and CCO

- There is potential conflict between one person being CA and Guardian:
  - when a matter relating to a person for whom the CA is Guardian goes to a MAP meeting another person should be the designated advocate
- Considerations for keeping MAP in the OCA include the collegiate professional support and environment and ideas, and compatibility in getting best service delivery outcomes for the client.
- The Guardianship Tribunal appoints the Guardian as guardian in cases where there appear to be others suitable and available for appointment

and does not give reasons for such decisions.

- Should 'best interests' test for CA be in OCA Act?
- A different name for OCA, such as "Public Representative and Guardian" might better reflect the role of the office.

D.2.4 Official Visitors

- Official Visitors should be able to inspect the whole system, not just designated institutions – e.g. Youth Visitors only look at Quamby and Marlowe Cottage; mental health OVs can only look at in-patient facilities and can't pursue the matter into the community
- OVs need authority to access patient files for specific functions – e.g. Monitoring conformance to legislative requirements re medication, ECT.
- Voluntary visitors have the advantage of being able to operate beholden to nobody
- The most appropriate OVs for disability services would be people with disabilities

D.2.5 Proposed Disability Services Commissioner

- Disability services complaints investigators/mediators/conciliators need to have special experience/expertise/qualities to put themselves into shoes of persons with disabilities and fully understand their position and perspectives and those of their families and carers.
- It is necessary to deal with disability issues in a holistic not medical way
- Knowledge of, and skills derived from, the disability sector are the keys to the success of a Disability Services Commissioner.
- Complaints handling must be one of the core functions of the DSC as it aids in picking up a more systemic picture of what's happening and of where the problems originate.
- Some see a problem with the way disability is defined and believe that it should be based on function.
- The DSC needs to have monitoring, audit, quality and service improvement responsibilities, and should have broad discretion to investigate individual circumstances without artificial boundaries.

D.3 Community Advocacy agencies

- It is inappropriate for advocacy organisations to be funded by agencies which are the subject of their work.
- Commonwealth grants could, under the Commonwealth/State/Territory Disability Agreement, be channelled

through an ACT though there might be some benefit in having multiple funding sources.
- There needs to be formal recognition of the role and functions of advocacy/legal services agencies under a policy statement and a whole of government
- Establishing principles for advocacy would be very constructive.
- A problem with HACC funding is that it can only be used for advocacy in relation to HACC services therefore a sector of clients cannot be serviced
- Mentoring – can alleviate the need for advocacy
- The demand for advocacy significantly outstrips resources. For example, ADACAS annually takes on about 75 cases, but must turn away 90. In addition it is likely that there are many who do not seek advocacy assistance because they have little confidence that the necessary assistance can be provided. Agencies are confronted with the invidious choice of assisting a larger number of people with issues that might be resolvable in the shorter term or a smaller number of people with issues which will take much more time to resolve.
- There is a need for greater cross advocacy networking so that the systemic advocacy bodies speak with the individual advocacy bodies
- There are gaps in advocacy provision, especially in health care and for the aged not in receipt of HACC assistance
- There needs to be a public debate about advocacy and its value, so that there can be better understanding of the need for partisan advocacy

D.4 Other

- Good information provision is the key for self-advocacy.
- There is no systematic child death review system in the ACT; a register of child deaths should be established.
- Veterinary services need to covered by the complaints system because in the ACT there is no agriculture department which normally deals with complaints on these services in other jurisdictions
- There are problems with various aspects of the existing Tribunal system, insofar as it relates to the service areas that are encompassed by this review. It would be timely for a review of the Tribunal system to be undertaken in the near future. Consideration should be given to a model along the lines of the Civil and Administrative Tribunal in Victoria.
- The Government is of the opinion that the ACT is of insufficient size to warrant the establishment of a new statutory body. The Government

also considers that it is important for the Disability Services Commissioner to report directly to the minister responsible for disability services, rather than to another minister, to provide a direct feedback loop on the performance of services to the minister and consequently to the department.

- Perhaps there should be a requirement for membership of a dispute resolution scheme as part of funding/accreditation for community housing.
- Can there be a one-stop shop for all housing decisions?
- There should be a requirement for all relevant government agencies to respond to the Coroner's recommendations within a specified period of time.
- Health professional boards need confidence that the government will support them financially if they need to defend decisions that are made in the public interest in formal legal proceedings.

D.5

The following summarises in broad terms what we understand those we consulted see as the requirements for our oversight and advocacy system to meet into the future:

- Everyone in the oversight and advocacy system should have a sound appreciation of the complex circumstances, and needs of the disability community;
- The system should be structured to minimise confusion as to where to go with a complaint;
- There should be no gaps in coverage for individual advocacy – e.g. for those with a major health issue and the aged who are not in receipt of support - and complaint handling – e.g. with complaints about community housing;
- Complaints need to be taken to finality in the minimum time possible given constraints due to complexities and the need to involve multiple agencies;
- Clients need to be kept informed of progress in the handling of matters;
- Easily accessible/interpretable information about complaint and advocacy bodies needs to be widely available, particularly at point of service;
- Complainants need to be clearly and realistically informed about what outcomes may be achievable through a complaint recognising that this needs to be done so as not to prejudice the process;

- Advocacy services should be available for those in need of them in all sectors (the general shortfall is estimated at 50%).
- Official Visitors should be able to monitor/inspect all disability, mental health and relevant youth services, whether provided through institutions or in a community context and whether or not they are funded by government;
- All oversight agencies should be able to undertake outreach work sufficient to keep themselves well informed of the needs of the sectors they serve;
- The system should be structured and agencies should be managed so that the highest level of co-operation between complaint bodies can minimise confusion and achieve the best possible outcomes for consumers;
- The mechanisms by which community advocacy agencies are funded, and the quantum available, needs to be such that all who need advocacy assistance are eligible.
- Legal advice services should be available to those with particular needs in the sectors relevant to the Review, e.g. children and young people, indigenous citizens, and persons with a disability.
- Advocates should try to work as cooperatively as possible with the statutory oversight and complaints agencies and encourage and assist their clients to make use of the services of these agencies.
- Service providers should have effective systems to advise consumers of external complaints mechanisms and encourage their use should their own internal mechanisms not resolve matters.

APPENDIX E: FUNCTIONS OF STATUTORY AGENCIES

E.1 Community and Health Services Complaints Commissioner

Functions[29]

In addition to the other functions given to the commissioner by this Act, the commissioner has the following functions:

(a) to encourage and assist users and providers to resolve complaints;

(b) to collect information about the operation of this Act and to publish the information from time to time;

(c) to identify, inquire into and review issues relating to—

  (i) the provision, in the ACT, of health services, services for aged people or services for people with a disability; and

  (ii) the causes of complaints received by the commissioner;

and report to, or advise, the Minister or other appropriate persons on them;

(d) to inquire into and report to the Minister on any matter that the Minister has, under this Act, directed the commissioner to inquire into and report on;

(e) to inquire into and report to the council on any matter that the council has referred to the commissioner;

(f) to encourage and assist providers to develop and improve procedures for responding to users complaints;

(g) to compile and publish statistical records relating to complaints and responses to complaints;

(h) to provide the information and advice to the council, a board or a purchaser of a service that may lawfully be provided;

(i) to disseminate information about—

  (i) this Act; and

  (ii) the code; and

  (iii) the Health Records Act; and

  (iv) the operation of the unit; and

  (v) the procedures for making complaints;

(j) to discharge other functions given to the commissioner by any other law;

(k) to exercise the functions and powers given to the commissioner by the Health Records Act;

[29] See *Community and Health Services Complaints Act* 1993 (ACT)

(l) to do whatever is reasonably necessary to ensure that persons who wish to make a complaint under this Act, or a complaint or request to review under the Health Records Act, section 18, are able to do so.

E.2 Community and Health Rights Advisory Council

Functions[30]

The functions of the council are—

(a) to advise the Minister and the commissioner in relation to the redress of grievances relating to community services and health services or their provision; and

(b) to advise the Minister on—

(i) the means of educating and informing users, providers and the public on the availability of means for making community service and health service complaints or expressing grievances in relation to community services and health services or their provision; and

(ii) the operation of this Act; and

(iii) any other matter on which the Minister requests the advice of the council; and

(c) to refer to the commissioner any matter that may properly be dealt with by the commissioner under this Act and that, in the view of the council, should be so referred.

E.3 Discrimination Commissioner

Functions[31]

(1) In addition to the other functions conferred on the commissioner by or under this Act, the commissioner has the following functions:

(a) to promote an understanding and acceptance of, and compliance with, this Act;

(b) to undertake research, and develop educational and other programs, for the purpose of promoting the objects of this Act;

(c) to review the laws of the Territory for the purpose of ascertaining whether any of those laws is inconsistent with this Act, and to report to the Minister on the results of the review;

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[30] See s62 *Community and Health Services Complaints Act* 1993 (ACT)

[31] see s111 *Discrimination Act* 1991 (ACT)

(d) when requested to do so by the Minister, to examine any proposed law for the purpose of ascertaining whether the proposed law, if enacted, would be inconsistent with this Act, and to report to the Minister on the results of the examination;

(e) to advise the Minister on any matter relevant to the operation of this Act;

(f) such functions (if any) as are conferred on the commissioner by or under any other law of the Territory;

(g) such functions (if any) of the Commonwealth commission as are conferred on the commissioner by virtue of an arrangement made under the Human Rights and Equal Opportunity Commission Act 1986 (Cwlth);

(h) to do anything incidental or conducive to any of the commissioner's functions.

E.4 Community Advocate

Functions[32]

(1) The community advocate has the following functions:

(a) to foster the provision of services and facilities for persons who have a disability;

(b) to support the establishment of organisations which support such persons;

(c) to encourage the development of programs that benefit such persons (including advocacy programs, educational programs and programs to encourage persons to act as guardians and managers);

(d) to promote the protection of such persons from abuse and exploitation;

(e) to protect the rights of such persons;

(f) to monitor the provision of services for the protection of children;

(g) to act as advocate for the rights of children;

(h) to represent such persons at inquiries before the guardianship tribunal;

(i) to deal, on behalf of such persons, with persons or bodies providing services;

(j) to investigate, report and make recommendations to the Minister on any matter relating to the operation of this Act referred to the community advocate by the Minister;

(k) to act as a guardian or manager when so appointed by the guardianship tribunal;

[32] See s13 *Community Advocate Act* 1991 (ACT), The Community Advocate also has certain functions when appointed as Guardian under the *Guardianship and Management of Property Act* 1991 (ACT)

(l) to disseminate information concerning—

(i) the functions of the community advocate; and

(ii) the operation of this Act; and

(iii) the functions of the guardianship tribunal;

(m) to represent forensic patients before the guardianship tribunal or any court;

(n) the functions given to the community advocate by the Children and Young People Act 1999, Guardianship and Management of Property Act 1991 and Mental Health (Treatment and Care) Act 1994;

(o) any other function assigned to the community advocate by a law of the Territory.

(2) The community advocate has power to do all things necessary or convenient to be done in connection with the performance of his or her functions.

Management Assessment Panel and Care Coordination Office

E.5 ACT Ombudsman

Functions[33]

(1) Subject to this Act, the ombudsman—

(a) shall investigate action that relates to a matter of administration, being action—

(i) taken after the commencement of this Act by an agency and in respect of which a complaint has been made to the ombudsman; or

(ii) in respect of which a complaint is transferred to the ombudsman under the A.C.T. Self-Government (Consequential Provisions) Act 1988 (Cwlth), section 28; or

(iii) taken before the commencement of this Act and in respect of which a complaint is made to the ombudsman after that commencement in a case where, if that complaint had been made to the Commonwealth ombudsman before that commencement, that complaint would have been transferred to the ombudsman under the A.C.T. Self-Government (Consequential Provisions) Act 1988 (Cwlth), section 28; and

(b) may, of his or her own motion, investigate action of that kind.

(2) The ombudsman is not authorised to investigate—

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[33] See s5 *Ombudsman Act* 1989 (ACT)

(a) action taken by a Minister; or

(b) action taken by—

  (i) a judge or the master of the Supreme Court; or

  (ii) the registrar or a deputy registrar of the Supreme Court or of the Magistrates Court when performing a function of a judicial nature; or

(c) action taken by a magistrate or coroner for the Territory; or

(d) action taken by a royal commission under the Royal Commissions Act 1991; or

(e) action taken by a board of inquiry under the Inquiries Act 1991; or

(f) action taken by the commissioner for the environment; or

(g) action taken by the Territory or a Territory authority for the management of the environment; or

(h) action taken by—

  (i) the commissioner for health complaints; or

  (ii) a delegate of the commissioner for health complaints; or

  (iii) a member of the community and health services complaints unit, being the office established by the Community and Health Services Complaints Act 1993, section 6; or

  (iv) a conciliator appointed under section 32 of that Act; or

  (v) a mentor appointed under section 38 of that Act; or

(i) action taken by a judicial commission under the Judicial Commissions Act 1994; or

(j) action taken by any body or person with respect to persons employed in the public service or the service of a prescribed authority, being action taken in relation to the employment of those persons, including action taken with respect to the promotion, termination of appointment or discipline of, or the payment of remuneration to, those persons; or

(k) action taken by an agency with respect to the appointment of a person to an office established by or under an enactment, not being an office in the public service or an office in the service of a prescribed authority; or

(l) action taken, or not taken, under the Legislation Act 2001, part 5.2 (Requirements for regulatory impact statements); or

(m) action taken by an agency—

  (i) for the purpose or in the course of providing, or purporting to provide, a community service or health service; or

  (ii) in refusing to provide a community service or health service; or

(n) action taken by the essential services consumer council.

(3) The reference in subsection (2) (a) to action taken by a Minister does not include a reference to action taken by a delegate of a Minister.

(4) For subsection (3), action shall be deemed to have been taken by a delegate of a Minister notwithstanding that the action is taken under a power that is deemed by a provision of an enactment, when exercised by the delegate, to have been exercised by the Minister.

(5) For the application of this Act in relation to the ombudsman, action taken by an agency shall not be regarded as having been taken by a Minister only because the action was taken by the agency in relation to action taken or to be taken by a Minister personally.

(6) In this section:

community service—see the Community and Health Services Complaints Act 1993.

health service—see the Community and Health Services Complaints Act 1993.

E.6 Official Visitors

E.6.1 Child protection and youth justice

Functions[34]

(1) The official visitor must—

(a) visit and inspect shelters and institutions; and

(b) visit children and young people receiving therapeutic protection, if practicable, at least once each week; and

(c) hear a complaint, or referral of a complaint, made by a child or young person in a shelter or institution or who is receiving therapeutic protection at a place, or by anyone else, about—

(i) the child's or young person's care, detention or treatment; or

(ii) how the shelter, institution or place providing therapeutic protection is conducted; and

(d) except as provided by section 44 (No requirement to investigate complaint) investigate each complaint and prepare a report about it (which may contain recommendations); and

(e) provide a copy of the report to the chief executive and the community advocate.

(2) The official visitor may also provide a copy of the report, or part of it, to—

(a) the Minister; and

[34] See s42 *Children and Young People Act* 1999 (ACT)

(b) the complainant.

(3) Before providing a copy of the report or part to the complainant, the official visitor may make minor alterations that the official visitor considers appropriate to protect the privacy and confidentiality of a person mentioned in the report.

(4) In addition to a report under subsection (1), the official visitor may, on his or her own initiative, provide a report (that may include a recommendation) to the Minister or chief executive, or both.

E.6.2 Mental health

Functions[35]

(1) An official visitor—

(a) shall visit and inspect mental health facilities; and

(b) shall inquire into—

(i) the adequacy of services for the assessment and treatment of persons with mental dysfunction or a mental illness; and

(ii) the appropriateness and standard of facilities for the recreation, occupation, education, training and rehabilitation of persons receiving treatment or care for mental dysfunction or a mental illness; and

(iii) the extent to which people receiving treatment or care for mental dysfunction or a mental illness are being provided the best possible treatment or care appropriate to their needs in the least possible restrictive environment and least possible intrusive manner consistent with the effective giving of that treatment or care; and

(iv) any contravention of this Act; and

(v) any other matter that an official visitor considers appropriate having regard to the objectives in sections 7 and 8; and

(vi) any complaint made to an official visitor by a person receiving treatment or care for mental dysfunction or a mental illness; and

(c) has such other functions as are conferred on the official visitor by this or another Act.

(2) An official visitor—

[35] See s122A *Mental Health Act* 1994 (ACT)

(a) may, with or without prior notice given to a responsible person for a mental health facility (within the meaning of part 6), visit the mental health facility at such times and for such periods as the visitor thinks fit; and

(b) shall visit a mental health facility at least once every 3 months.

(3) The Minister may, in writing, direct an official visitor to visit a mental health facility at such times as the Minister directs.

APPENDIX F HOW DO CONSUMERS EXPECT TO BE DEALT WITH BY A COMPLAINT HANDLING SYSTEM?

F.1 Properly

F.1.1 Dealing with people properly means dealing with them:

- promptly, and without undue delay;
- correctly, in accordance with the law and other rules governing their rights;
- sensitively, by having regard to their capacity to understand often complex procedures or policies;
- with dignity, having regard to their feelings, privacy and convenience;
- helpfully, by simplifying procedures, forms and information on services that may be available;
- by providing co-ordinated assistance for individuals' needs and advice, and assistance as to possible options; and
- by providing clear and precise details on time limits or conditions that might apply to their issue of concern.

F.2 Fairly

F.2.1 Dealing with people fairly means:

- treating people in similar circumstances in a like manner;
- accepting that rules and regulations, while important in ensuring fairness, should not be applied so rigidly or inflexibly as to create inequity;
- being responsible, by not adopting an adversarial approach as a matter of course where there may be a fear of litigation;
- being prepared to review rules and procedures and change them if necessary; and
- giving adequate notice before changing rules in a way that adversely affects a person's entitlement.

F.3 Impartially

F.3.1 Dealing impartially with people means:

- making decisions based on what is relevant in the rules, codes, and law, and ignoring what is irrelevant; and
- being careful that one's prejudices are not factors in a decision.

F.4 Openly and responsively

F.4.1 Dealing with people openly and responsively means:

- communicating in a manner and language which is clear to the client and courteous;
- giving adequate reasons as to how and why a decision is made;

- giving adequate information so that the decisions or conclusions can be understood and evaluated;
- ensuring that the scheme is open and transparent;
- informing people how they can seek a review of the decision; and
- having an adequate review system so that adverse decisions can be looked at again by someone not involved in the first decision, and informing people of available external review bodies.

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APPENDIX G: CRITERIA FOR THE USE OF THE TERM 'OMBUDSMAN'

Following

1. the formation of the UK Ombudsman Association and the publication on 17 March 1993 of the Association's criteria for the use of the term 'Ombudsman' in the UK;
2. legislation in New Zealand outlawing the use of the name 'Ombudsman' without either legislative authority or consent of the Chief Ombudsman and the subsequent publication by the Chief Ombudsman on 2 April 1992, of the criteria for guidance in the granting of that consent;
3. an increase in the growth of the use of the position of Ombudsman in Australia in a variety of statutory and non-statutory contexts;
4. recommendation of the Access to Justice Advisory Committee in October 1993 as to the need to protect the term 'Ombudsman';
5. agreement between the Commonwealth Ombudsman and the Australian Banking Industry Ombudsman in April 1994;
6. consideration by the meeting of Australian Parliamentary Ombudsmen in July 1994 and by the 14th Australasian & Pacific Ombudsman Conference in New Zealand in October 1994,

it was agreed that in order to protect the credibility of the name 'Ombudsman' in the public interest, the following criteria should be adhered to when deciding whether or not a position should be filled by a person being called 'Ombudsman'.

These are regarded as minimum criteria to ensure the independence accountability and effectiveness of the Ombudsman's office itself.

1. Independence

- The Ombudsman should be independent of those being investigated and the complainant.
- The Ombudsman should be appointed for a set term (such a term would be capable of being renewed), with removal only on the basis of incapacity/proven misconduct or bankruptcy.
- The majority of those selecting the person to be appointed as in Industry Ombudsman must not be from the industry which it is proposed the Ombudsman will investigate.
- Any determination of whether a matter falls within the jurisdiction of the Ombudsman must be made by the Ombudsman or as set out in jurisdictional rules or criteria.
- The Ombudsman should be provided with sufficient funding to enable complaints/disputes to be properly investigated.

2. Jurisdictional Criteria

- While it may be a usual practice that a complainant should first exhaust any internal complaint procedures set in place by the body being investigated, the Ombudsman should have the right to investigate any complaint without the need for any prior consent of any person or body against whom the complaint is made.
- Comprehensive information setting out jurisdiction should be publicly available.
- There should be some independent procedure to review the extent of the jurisdiction from time to time and a public review of operations and effectiveness of the Ombudsman's operations.
- Desirably, the jurisdiction should give 100% industry coverage but at the very least, a majority of industry members should be subject to the Ombudsman's jurisdiction.
- In industry schemes, those investigated should be bound by the Ombudsman's decision, whereas the complainant should not be bound.
- In those cases where the Ombudsman's decisions or recommendations are not complied with, the Ombudsman should have the power to publicise, or require the publication of, such non-compliance at the expense of those investigated.

3. Powers

- The Ombudsman should be required to give decisions with reasons to the parties.
- The Ombudsman's procedures should accord with principles of natural justice.
- The criteria against which cases should be decided should include a reference to 'fairness in all the circumstances'.
- The Ombudsman should have the right to require all relevant information, documents and other materials from those who are being investigated or from other parties capable of providing information relevant to an investigation.

Note: The Parliamentary Ombudsman has the statutory power to access information from a third party and the power to summons a witness on oath. The Parliamentary Ombudsman can also provide protection for privileged information so gained. The Industry Ombudsman does not have such powers or the capacity to provide such protection. As a consequence, there may be some limitations on the information capable of being obtained by the Industry Ombudsman.

4. Accountability

- Parliamentary Ombudsmen should be responsible to Parliament.
- Industry Ombudsmen should be responsible to a body made up of both industry and client groups, with an independent Chair, and with the proviso that the numbers of industry members of such a group do not predominate.
- The Ombudsman should publish an annual report to the public about the activities of the office and should have the right to name industry members or agencies and give anonymous case notes.
- The Ombudsman should have the ability to make statements in the public interest on matters within the jurisdiction of the Ombudsman.
- The Ombudsman and staff should either be protected from, or indemnified against any civil litigation, which may arise as a result of the exercise of the Ombudsman's powers. Complaints should be protected from or indemnified against any civil actions, which arise as a result of the content of a complaint.

5. Accessibility

- The office of the Ombudsman should be directly accessible to complainants.
- Parliamentary Ombudsmen provide their services free of charge.
- The Industry Ombudsmen should be free of costs to persons acting in a non-business capacity and to small businesses.
- The Ombudsmen should be enabled to ensure the Scheme is made known to potential users.

APPENDIX H: STRUCTURAL OPTIONS

H.1 ACT Rights and Complaints Commission and separate ACT Ombudsman

ACT Ombudsman (under contract arrangements) and **Commonwealth Ombudsman**;

- Continue existing arrangements for ACT Police Complaints Unit

and:

ACT Rights and Complaints Commission:

Discrimination

Health Services

Disability and Community Services

and:

Entry and assistance unit – preferably co-located with the Commonwealth Ombudsman

Conciliation unit

Assistance, education and outreach unit

Major reviews unit

Policy and legal advice unit

Administrative support, including for:

- The Management Assessment Panel and Care Co-ordination Office
- The Office of the Community Visitors
- Housing Review Committee

Possible future Human Rights Commissioner

Possible future Children's and Young Persons' Commissioner

Possible future Aged Persons' Commissioner

H.2 Part Amalgamation

ACT Human Rights Office:

Discrimination Commissioner

Possible future Human Rights Commissioner

Possible future Children's and Young Persons' Commissioner

Possible future Aged Persons' Commissioner

and:

ACT Ombudsman

Ombudsman

- ACT Police Complaints Unit on delegation

Deputy Ombudsman, Health Services

Deputy Ombudsman, Disability and Community Services:

- Disability Services;
- Community Services

and:

Monitoring & Audit Unit

Conciliation Unit

Assistance, Education and Outreach Unit

Major reviews unit

Office of the Community Visitors

Management Assessment Panel and Care Co-ordination Office

Housing Review Committee

Entry and Assistance Unit – common with Human Rights Office

Common administrative support

H.3 Full Amalgamation

Human Rights and Ombudsman Commission

Discrimination Commissioner

Possible future Human Rights Commissioner

Possible future Children's and Young Persons' Commissioner

Possible future Aged Persons' Commissioner

Ombudsman:

- ACT Ombudsman functions
  - ACT Police Complaints Unit on delegation
  - Conciliation Unit
  - Information, Education and Outreach Unit
  - Office of the Community Visitors
- Deputy Ombudsman, Health Services
  - Health complaints
- Deputy Ombudsman, Disability and Community Services,
  - Disability and Community Services complaints;
  - Monitoring & Audit Unit

Management Assessment Panel and Care Co-ordination Office

Housing Review Committee

Common:

Major reviews unit

Entry and Assistance Unit

Administrative Support

H.4 Co-location Model

Bodies to be co-located with a **Common Entry and Assistance Unit:**

ACT Ombudsman (under contract arrangements) and **Commonwealth Ombudsman**

- Continue existing arrangements for ACT Police Complaints Unit

and:

Health Complaints (or Services) Commissioner

Disability and Community Services Commissioner

ACT Human Rights Office:

Discrimination Commissioner

Possible future Human Rights Commissioner

Possible future Children's and Young Persons' Commissioner

Possible future Aged Persons' Commissioner

General Manager, Operations:

- Support for the Management Assessment Panel and Care Co-ordination Office
- Support for the Housing Review Committee
- Support for the Office of the Community Visitors
- Information, Education and Outreach Unit
- Conciliation Unit
- Administrative support
- Co-ordination of Entry and Assistance Unit
- Major reviews and monitoring unit_
- Policy and legal advice unit

APPENDIX I: NSW HEALTH CARE COMPLAINTS COMMISSION PATIENT SUPPORT OFFICE

Services offered

- Assist consumers to understand and uphold their health rights.
- Resolve concerns by:
  - providing information and facilitating self advocacy
  - assisting consumers negotiate and discuss

- Provide information on avenues to resolve concerns
- Provide information on health, welfare & support groups
- Facilitate fair, simple, timely & efficient resolution of concerns
- Provide information on health services & consumer rights & responsibilities
- Assist resolution through:
  - clarifying issues
  - identifying options for resolution
  - direct assistance

- Network with community groups to provide information and understanding of:
  - the health system
  - health consumer rights
  - resolution of concerns with health services
  - the Patient Support Office

APPENDIX J: NZ HEALTH ADVOCACY

Advocates need not be viewed as intrusive

Advocates managed 4011 complaints in the 2002/03 year and 6.4% of these were about general practitioners – the third highest percentage of total complaints, following group providers at 65%, and health or disability workers without a professional body or formal qualification at 9.2%.

Consumers often talk about the difficulty they have in making complaints. Advocates assist consumers to:

- clarify their issues and identify their desired outcome in relation to their complaint
- record and submit their complaint
- meet with or communicate with the doctor
- assert their concerns
- increase their confidence
- achieve low-level resolution of their complaint.

Issues most commonly complained about in relation to doctors involve standards of care. Advocates often find that the quality of the relationship between the doctor and the patient underlies the complaint. Patients seek to be treated with respect, to be communicated with effectively and to be given appropriate information on all matters pertaining to their diagnosis, prognosis and treatment. When patients choose to use an advocate to assist with resolution of their complaint, usually they want the matter sorted at an informal level, with the aim of improving their ongoing relationship with the doctor concerned.

Many doctors receiving a complaint from a patient may be angry at the assertion that they have not done their best. There may appear to be little acknowledgement from patients and their families that medicine is not an exact art. The diagnosis is not always clear. Opinions may differ, treatments do not always work, and there may be side effects.

In addition, systemic issues may contribute to the concerns raised by patients, such as inadequate funding and clinical decisions made outside the doctor's control. Doctors are not always available and cannot always give up free or family time to deal with patients' problems. Given the pressures on doctors' time, including the paperwork to be done in their own time without cost, the last person a doctor may want to see is a patient or advocate with a complaint.

The good news is that over 70% of complaints are resolved at low level with the assistance of an advocate. Low-level resolution can be very positive for both providers and consumers. The advocacy process can help deal with matters quickly and avoid the need for a formal investigation. Doctors who

feel they are unable to sort out a complaint directly with a patient can refer the matter to an advocate.

Advocates do not view doctors as 'the enemy', to be brought down a notch or two or taught a lesson. This approach would likely result in doctors acting defensively and protectively, and lead to a reduction in trust, respect and understanding – ultimately, to a breakdown in communication and reduced ability to reach a satisfactory resolution of the patient's concerns.

Advocates view doctors as professionals dedicated to patient welfare, who may from time to time make a mistake. Doctors want to do well by their patients. They do not knowingly do things wrong. With this approach, advocacy can lead to a climate of openness and a focus on achieving a resolution.

Low-level resolution with the assistance of an advocate is achieved through the advocate understanding the processes and systems under which doctors operate, in particular, how to work with the system to achieve a successful outcome. This often means understanding the constraints doctors are working within. Advocates make it their business to understand these constraints, so they can manage their clients' expectations effectively. Advocates are well aware of the emotional impact complaints may have on the doctors and staff involved.

Doctors who find themselves working with a patient and an advocate can expect the advocate to:

- explain the advocacy process, the role of the advocate, the patient's issues and what the patient wants
- allow adequate time for the doctor to prepare a response to the concerns raised
- make every effort to inform the doctor about who will be attending the meeting
- encourage complainants to be respectful in their dealings with doctors
- conclude the meeting at any time upon request from the patient, doctor or advocate.

Doctors are able to bring a support person to advocacy meetings with patients, but should advise the advocate so that the patient can be kept informed. Legal representation is discouraged, as this is not seen as being in the spirit of low-level resolution.

If a complaint has been referred to a doctor by the Health and Disability Commissioner, the advocate is required to report back to the Commissioner the results of the steps taken to resolve the complaint. The report must contain the terms of any agreement reached between the parties and identify any outstanding issues. If either party wishes to obtain a copy of the

advocate's report it must be requested from the Commissioner's Office.

Should resolution not be achieved at the meeting, the patient has the option of referring the complaint to the Health and Disability Commissioner. The provider will be advised in writing if the patient chooses this option.

Advocates do not investigate complaints, and do not make decisions on whether there has been a breach of the Code. Nor are they mediators. Advocates act on the instructions of the consumer.

If you have any questions, contact your local advocate. Although advocates do not discuss a complaint without the complainant being present, they are able to discuss the advocacy process.

Three Advocacy Services provide nationwide cover. Advocates are available to give presentations on the Code of Rights and to conduct training on best practice for complaints management. Contact details are:

- Upper North Island 0800 555 050
- Central and Lower North Island 0800 423 638
- South Island 0800 377 766