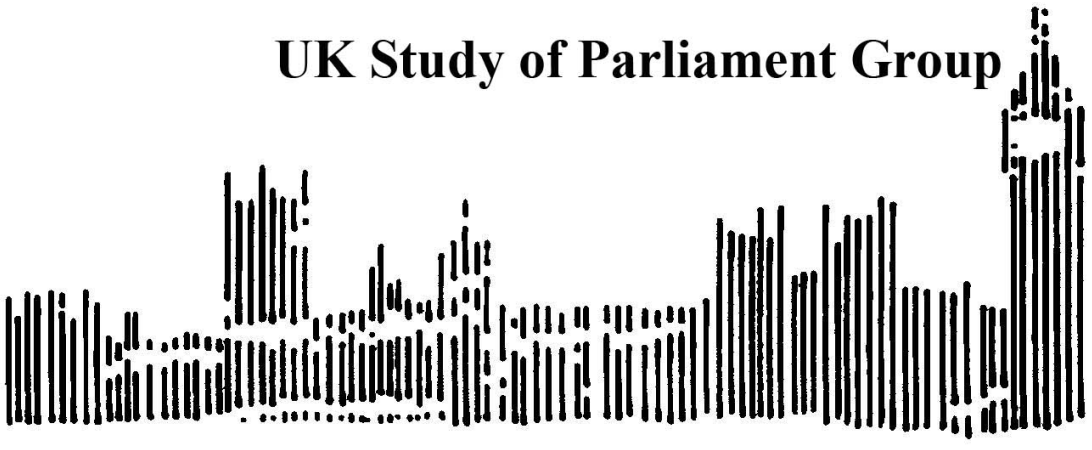
# Parliament's Watchdogs:
# At The Crossroads

edited by
**Oonagh Gay & Barry K Winetrobe**

**UK Study of Parliament Group**



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# Foreword

## Dr Tony Wright MP

I welcome the publication of this important and timely report. Important, in that it deals with the organisation and conduct of key institutions for Government and Parliament, for example, the Comptroller and Auditor General and the Electoral Commission. Timely, in that we at Westminster, and elsewhere in the UK, are currently grappling with just these issues. The decisions we take about them will have profound consequences for their governance and accountability.

The House of Commons Public Administration Select Committee, which I chair, has been examining these issues over recent years, both in the context of specific constitutional reforms – to public appointments, ombudsmen, ministerial conduct and so on – and directly in a recent inquiry and report, *Ethics and Standards: the Regulation of Conduct in Public Life*. That inquiry, which had the two editors of this Report and Professor Robert Hazell of the Constitution Unit as its special advisers, looked at many of the questions that this Report examines, and, like it, did so in a comparative and principled way.

While we made a number of concrete proposals, we also set out basic principles and issues for further research which are essential to the construction of an effective and accountable system of ethical regulation of democratic government, in place of the ad hocery we have at present. I am pleased that this new Report takes our Committee's work forward, and I hope that academics, parliaments and governments will maintain this momentum.

This report is especially useful as it is the synthesis of the work of both senior parliamentary officials and of expert academics. Both the Study of Parliament Group and the Constitution Unit have long and enviable track records in bringing forward sensible and practical constitutional and parliamentary reforms. This Report is a fine example of that tradition.

Contrary to what is sometimes suggested, these are not just dry, technical 'process' issues for political anoraks and insiders. How we regulate effectively and ethically the way we are governed is not a second-order matter. And the extent to which this regulation is anchored firmly in the representative institution of a parliament will be a measure of its democratic accountability.

## Contributors

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**Oonagh Gay** is Head of the Parliament and Constitution Centre in the House of Commons Library and has written widely on constitutional matters, including *Conduct Unbecoming: The Regulation of Parliamentary Behaviour*, the product of research by the Study of Parliament Group in 2004.

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**Tony Wright** has been a Labour MP since 1992, and, since 1999, has chaired the House of Commons Public Administration Select Committee. Dr Wright was Parliamentary Private Secretary to the Lord Chancellor 1997-98. He lectured in politics at Birmingham University, where he is now an Honorary Professor; writes widely on political and constitutional issues in academic books and journals, and is co-editor of *The Political Quarterly*.

# Preface

## Oonagh Gay & Barry K Winetrobe

This Report has its origins in the research we published with the Constitution Unit in 2003, *Officers of Parliament: Transforming the Role*. This was the first detailed attempt to map out which offices could be described as constitutional watchdogs, in particular those which are, or could be regarded as, 'Officers of Parliament'. The report considered the accountability and independence arrangements for each such office, explained how the term 'Officer of Parliament' had developed from the designation given to senior parliamentary officers, such as the Speaker and the Clerk, and examined the interaction of each watchdog with Parliament, and the value or otherwise of the Officer of Parliament designation.

As this topic gradually became ever more salient in British constitutional and political governance, our interest in this subject was maintained through the establishment and operation of a study group of the UK Study of Parliament Group (SPG). The SPG comprises academics with a particular interest in Parliament, and serving parliamentary officials. The aim is to improve understanding of the problems faced in operating an effective parliamentary democracy.

This particular study group, on which we acted as co-conveners, contained a broad range of senior officials from the UK's various parliaments and assemblies, and academics with expertise in political science, public law and public administration. Over the past few years, the study group operated mainly by regular monitoring of developments both within the various territories and at the Centre, and by reference to particular types of watchdog (ombudsmen, auditors etc); private seminars with current and previous watchdogs, parliamentarians and others, and by participation in relevant parliamentary committee inquiries in Westminster and Holyrood.

The degree of interest both within the study group and from those with whom we interacted convinced us that there was a need to publish the fruits of this work as a contribution to current debates, and that it would be most effectively presented largely as an update to our 2003 Report. This Report is therefore designed both to present the findings of our group's work and to put them into a comparative context within the UK and in the wider Commonwealth scene. Generally, our contributors have taken account of the situation as at late summer 2008, but some chapters include more recent material where there have been significant and relevant developments

We are extremely grateful to all those who have agreed to contribute to this Report, including those active members of the group who provided regular monitoring and participated in seminars and related events. The authors of the various chapters are writing in a personal capacity and are due grateful thanks for their input. Even those who are not named authors of chapters in this Report contributed greatly to it by way of their research and helpful comments and suggestions throughout. We are especially grateful to those from beyond these shores whose advice and participation have been essential and welcome. Professor Robert Hazell, Director of the Constitution Unit and the two editors of this Report were involved in parliamentary committee inquiries on this subject at Westminster and Holyrood.

Special thanks should go to the SPG, its Executive and its Chairs - Professor David Miers and, before him, Paul Evans – for vital support and encouragement throughout this project. Similarly, we would not have been able to do this work without the continuing assistance and support of the Constitution Unit at University College London, and especially Robert Hazell. His continued interest in constitutional watchdogs, in this study and Report and elsewhere, has been invaluable. We would like to thank him for allowing us to publish our findings as a Unit publication, and we are confident that the Unit will be at the forefront of future research on this vital topic.

# Chapter 1: Introduction - Watchdogs In Need Of Support

## Oonagh Gay

## The scope of the debate

The subject of this Report is both central and peripheral to public governance. Central, in that what is being examined by constitutional watchdogs is nothing less than the proper conduct of public business,[1] by ministers, officials, elected representatives and others, in areas such as public appointments, elections and freedom of information (FoI). Peripheral, in that what this Report concentrates on is not the propriety of that conduct, but the relationship of the various constitutional watchdogs to Parliament.

In other words, we are examining the parliamentary linkages of those who oversee governmental propriety, and asking to what extent such institutional and operational links affect Parliament, the effectiveness of the 'constitutional watchdog system', and through these institutions, the accountability of government. Is it both constitutionally appropriate and practically effective for some constitutional watchdogs to have close parliamentary ties; to be, in the jargon, 'officers of Parliament'? Does such a relationship enhance or not the work of the watchdogs, and of Parliament? Can we derive principles for the scope and extent of such links, and which types of watchdogs are suitable for this sort of relationship?

We are not starting with a blank sheet of paper, but with different arrangements in various 'Westminster Model' parliaments across the globe. As we shall see, some Commonwealth countries have sought to institutionalise, in a coherent, systematic way, an 'officers of Parliament' model, whereas the arrangements at Westminster and elsewhere in the UK have grown up in a haphazard, and often illogical, way. Yet the core questions relate not just to the need for coherence in such arrangements, but, more fundamentally, whether the very existence of such arrangements is beneficial. There is little point in devising formal processes for something that may well be inherently unhelpful to the better governance of a polity.

This Report does not pretend to answer such huge questions. In light of both significant developments within the UK and beyond, and the ever-growing salience of issues of trust in, and propriety of, government, it simply attempts to continue the debate, in the hope that continued focus on these complex but vital issues enhances the possibility that future changes to existing arrangements are based not on ad hoc expediency, but on principled and considered thought.

We set out various themes for consideration in our report for the Constitution Unit in 2003 (Gay and Winetrobe 2003). We found that the decline of public trust in traditional political institutions since the 1990s had led to the creation of a host of new public officials, designed to be independent of Government, who would oversee a new ethical regulatory landscape. In the UK context, statute was seen as unnecessary to establish these new watchdogs. Each was set up in response to specific events or scandals, with

[1] This was the title of a major House of Commons Public Accounts Committee report of 1993-94 (PAC 1994), but it neatly encapsulates a more general core concept here, that is, the function of the 'constitutional watchdogs' under discussion.

little thought as to the wider landscape of watchdoggery. They tended to be sponsored by the Cabinet Office, which provided funding and staff.

The new ethical watchdogs were created in addition to the two traditional parliamentary offices - that of Comptroller and Auditor General and the Parliamentary Ombudsman - and also alongside older survivors, such as the Civil Service Commissioners and the Political Honours Scrutiny Committee. Only one watchdog, established by statute, had been given the same type of formal accountability to Parliament through parliamentary appointment, independent budget and staff separate from the Civil Service. This was the Electoral Commission, set up in 2001 to oversee a new regulatory regime for party funding and electoral administration. The non-statutory Parliamentary Commissioner for Standards had achieved semi-independent status as investigator of breaches of parliamentary codes and registers of interest.

Some of these bodies can be characterised as 'officers of Parliament', familiar terminology in the Commonwealth parliamentary family. For these bodies, parliamentary accountability normally takes the shape of a dedicated parliamentary committee which examines the office's strategic plans and finance. This is bolstered by appearances before select committees and some parliamentary involvement in senior appointments. The model emphasises independence from the executive, rather than sustained scrutiny and accountability. The gold standard for this model is the Comptroller and Auditor General.

The 2003 publication struggled to define what a constitutional watchdog actually was. It considered that the definition covered bodies from the Audit Commission to the Political Honours Scrutiny Committee (since subsumed into the House of Lords Appointments Commission). There is a clear overlap with financial auditing and the advocacy roles played by human rights and equality bodies, but the precise boundaries are impossible to set. Briefly, the constitution in the UK and in its various territories can be considered to cover elections, MPs, Government ministers, the senior Civil Service and aspects of the wider public sector (especially in the realm of appointments and freedom of information) and the redress of grievances – one of the core functions of the UK Parliament. Whether posts such as the Older Person's Commissioner for Wales, or the Parades Commission for Northern Ireland fall within this definition depends on an individual's perception of what a constitution is designed to protect. This is all the more difficult in the UK, which remains without a codified constitution.

Recent developments relating to watchdogs have not been in isolation, but are part of the wider drive towards rules-based governance, open to judicial attention. Patronage, informality and legal immunities are being replaced by extensive soft-law systems. They also represent part of the trend towards depoliticisation, discussed in a recent paper for the Hansard Society (Hay et al 2008). Elected representatives are no longer trusted to make all decisions. Instead, experts are needed to operate impartial codes of conduct. But MPs and other elected representatives do not offer full support for this depoliticisation, as it removes important areas of influence from their control. Moreover when watchdogs investigate in terrain where there is clear party political interest, politicians are quick to criticise such bodies as out of touch. A recent example of this was the fury of the political classes against both the Electoral Commission and the Metropolitan Police over the cash for honours scandal in the UK in 2006-7, when the Prime Minister, Tony Blair, was subject to months of innuendo, and his closest aides were investigated. The closed world of party funding was revealed, although no prosecutions resulted.

We noticed in 2003 that in the comparative context, similar trends were visible in other Commonwealth countries. Canada in particular had adopted a number of watchdogs for each provincial assembly. New Zealand's parliament had established an Officers of Parliament Committee to monitor its watchdogs. Within the UK, newly devolved Scotland had enthusiastically embraced the idea of Commissioners in some sense directly 'owned' by Parliament, which would assist with its scrutiny role. To emphasise its separation and independence from the Executive, these watchdogs would be appointed by and paid for by the Parliament. As Chapter 3 indicates, the new model ran into immediate problems over the perceived unaccountability of the new Commissioners, and the latest to be created, the Human Rights Commission, underwent a stormy legislative passage through the Scottish Parliament before eventual establishment.

Five years on, watchdogs continue to proliferate in the UK's ethical landscape. For example, an independent adviser on ministerial interests was established in 2006, in response to yet another political scandal – that of 'cash for honours'. Despite a wide ranging report from the Commons' Public Administration Select Committee calling for a coherent structure, there is little urgency about rationalisation (PASC 2007). The Electoral Commission was scrutinised by another watchdog, the Committee on Standards in Public Life, and criticised for lack of focus and political cowardice (CSPL 2007).

In Wales, a similar range of Commissioners has been established, especially since the recent formal separation of the Assembly into its executive and legislative parts, and more seem on the way. Northern Ireland is exceptionally rich in watchdogs with a constitutional role, due to the highly politicised environment where compromise between the two traditions can only be crafted after immense effort. The saga of the proposals for a Victims' Commissioner resulted in the appointment of four separate Commissioners, rather than the one originally provided for in legislation. Such proliferation in a governance area with a population of 1.7 million is unlikely to be sustainable, once there are serious questions about role and accountability in a more normalised society.

The watchdogs struggle to gain public visibility and understanding of their role, since they are regularly confused with Non-Departmental Public Bodies (NDPBs, or, more commonly, 'quangos'), which have in post-war years undertaken executive functions for central Government at arm's length. A statutory basis for a watchdog tends to give more independence, as we can see from the Information Commissioner's role, but public perceptions about their distinctive constitutional position remain very fuzzy. Constitutional watchdogs do not necessarily perceive themselves as belonging to a distinct species, or see the value of meeting together to debate common concerns, such as insecure funding or differing experiences of sponsorship by central government departments. It is only when under threat that they feel the need to build alliances with similar bodies.

The travails of the Electoral Commission since 2001, covered in Chapter 2, have displayed some of the weaknesses of the Comptroller and Auditor General model when applied more widely. Sustained parliamentary scrutiny and direction was lacking, and an inexperienced new body tended to be careful not to upset major political parties, despite their failure to observe the laws on party political funding. A developing conclusion would be that the officer of Parliament model needs bolstering when applied to watchdogs whose functions cover areas of direct relevance to Parliament, such as standards, elections and appointments to the Lords. It is in these areas that sensitivities

are particularly important since the decisions of these watchdogs may directly affect the composition of the Parliament. Tensions between elected representatives and an independent individual or body may be too strong to contain without intelligent but non-partisan parliamentary scrutiny.

## Bringing coherence?

The officer of Parliament model itself shows strains. The Comptroller and Auditor General came under fire in 2007 for claiming inappropriate personal expenses, and Parliament was found to have failed to maintain detailed scrutiny of the operation of the post. Following a review, the model is being rejigged to interpose a management board and will reorient oversight away from Parliament to an appointed body. But distancing MPs from the running of constitutional watchdogs is unlikely to improve their powers of scrutiny. The House of Lords has also shown a sustained interest in the design of constitutional watchdogs, applying pressure towards a more independent model in reports on new watchdogs, such as the Equalities and Human Rights Commission. But the Commons has been slow to accept Peers as equal partners in oversight. A recent attempt by Peers with a specialist interest to establish a joint committee to scrutinise UK Statistics failed due to lack of interest from MPs, who did not apply pressure to the Government.

In its 2007 report, PASC argued that it was time to accept the permanence of ethical watchdogs and underpin their existence with appropriate constitutional architecture, even though it could not agree exactly what that should be (PASC 2007). But the initial reaction of the Labour Government was to press on with an ad hoc approach – in constitutional politics it seems that there is no time for coherence. Oonagh Gay sketches out these developments in Chapter 2, noting that this approach will lead to long-term problems if the development of a consistent model is not tackled now. Putting the Civil Service Commissioners on a statutory footing as an NDPB, for example, exposes the position of the Commissioner for Public Appointments, whose office is similar in size and scope, to serious questioning as to its role and purpose.

Watchdogs act as an indicator of the health of contemporary governance. They tend to be established to deal with an unexpected scandal, and then to uncover connected issues. Once in being, they are difficult for politicians to wind up or merge, lest an impression is created of an intention to hide scandal. But proliferation tends to undermine public trust.

So, must the conclusion be that regulation and transparency leads to mistrust? This is the most pressing policy issue to address. PASC concluded that proper ethical regulation was a necessary good in itself, whether or not it increased or decreased public trust. But are there other policy alternatives, which would also build trust? Or aspects of watchdog design which would promote positive ethical values in the public sector?

This leads on the question of the positioning of the constitutional watchdogs within the axes of parliament, executive and courts. They do not fit neatly within any of these definitions. Recently, the UK parliamentary ombudsman has begun an ambitious attempt to reposition that office as an essential underpinning of the constitution. So far, there has been little response from government to this initiative, but it may be a straw in the wind. In Europe, Courts of Auditors, rather than parliamentary commissioners, examine public finances. One medium-term possibility is that certain UK watchdogs gravitate towards the semi-judicial sector, as they emphasise their independence from government and

accountability to a wider public good. Alternatively, the UK Parliament may develop more autonomy and assert its control over its own watchdogs. The desire of MPs to extend the range of offices that are subject to confirmation hearings may be yet another contrary straw in the wind. A final future trajectory may be the reassertion of the political class, determined to rein in unaccountable and out-of-touch watchdogs.

'Who guards the guardians?' is one of the key conundrums in public life. Here, we may almost be taking this a step further: 'who guards the guardians' guardians?' Can coherent arrangements be devised that enable the scrutiny and performance evaluation of those who oversee the propriety of aspects of public life, by those MPs who also directly hold government to account on behalf of the people? Does making some constitutional watchdogs institutionally reliant on a parliament (an inherent and publicly political body, with relatively low collective or corporate ethos), rather than a government, for its resourcing and governance, enhance the watchdogs' independence and ability to do their jobs properly? Or does it hamper their ability to do their jobs, and a parliament's ability to fulfil its constitutional functions? We do not yet know the answers, but the debate will inevitably continue into the next couple of decades.

## The structure of this report

The Report is divided into a number of individual chapters, which look at recent developments in the field of constitutional watchdogs.

Five chapters approach the issues territorially: Chapter 2 looks at UK-wide watchdogs, and at other bodies whose primary focus is England; Chapter 3 analyses recent changes in Scotland, where tensions have developed over the appropriate form of sponsorship of parliamentary commissioners by the Scottish Parliamentary Corporate Body. Both of these chapters offer a narrative follow-up to the Constitution Unit report of 2003. Chapters 4 and 5 sketch the watchdog landscape in Wales and Northern Ireland, and are contributed by parliamentary officials working in the respective Assemblies. Chapters 6 and 7 provide a Commonwealth comparative context, by focusing on New Zealand and Australia, and on recent developments in Canada.

A pair of chapters then examines two very different constitutional watchdogs. Chapter 8 looks at a classical watchdog - the ombudsman - from different UK territorial perspectives. Chapter 9 adopts the same approach in respect of a more modern office - the Commissioner for Public Appointments. Chapter 10 pulls together some concluding thoughts, and suggests that this important constitutional subject requires more sustained (and resourced) research by governments, parliaments and academics in the UK.

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# Chapter 2: The UK Perspective: Ad Hocery At The Centre

## Oonagh Gay

## Introduction

There have been some rapid developments since the original Constitution Unit report (Gay and Winetrobe 2003a) on UK-wide and English watchdogs. New regulators tend to undergo a period of turbulence shortly after birth, as boundaries are set to independence and accountability. This tendency applied with some force to the Electoral Commission, as it struggled to balance its policy and regulatory responsibilities. Surprisingly, the longer established Comptroller and Auditor General (C&AG) and the Parliamentary Ombudsman have also undergone structural change as debate about appropriate corporate governance arrangements for Officers has become of mainstream parliamentary interest. Another theme evident in this chapter is growing alarm from parliamentarians that independent watchdogs depoliticise issues that should be the concern of elected politicians.

The specific focus for the new interest has been the creation and merger of yet more watchdogs since 2003. Slowly but surely, parliamentarians are beginning to address their involvement in the oversight of these bodies, rather than leaving the details to the executive. But problems raised by the governance arrangements of the more established Officer-type body mean that the details of parliamentary oversight require some fine tuning if the model is to offer any added value compared to departmental oversight. Finally, a feature of the Brown premiership was the promotion of 'confirmation hearings', in the form of parliamentary pre-appointment hearings. These have been generally welcomed, but offer only a one-off involvement by Parliament in a series of constitutional watchdogs, rather than a continuing relationship. Major developments in each office are sketched below.

## Comptroller and Auditor General

The corporate governance of the National Audit Office (NAO) has undergone profound reform, following the departure in 2007 of its longstanding head, the Comptroller and Auditor General, Sir John Bourn. An FoI request from the magazine *Private Eye* resulted in his extensive expenditure on overseas visits being made public (Telegraph 2007). The Exchequer and Audit Departments Act 1866 that created the C&AG had made no provision for retirement or for dismissal, except by the nuclear option of a resolution of both Houses of Parliament, allowing Sir John to hold office well into his seventies.

The Public Accounts Commission, the statutory House of Commons body which oversees the budget of the C&AG and the NAO, was found not to have had any machinery to check the personal expenses of the C&AG at all, although it had the formal authority to do so (Public Accounts Commission 2007). It established an external review of governance. There was clearly liaison with government, as the Lord Chancellor, Jack Straw, announced that government time would be made available for any legislative changes as part of its flagship Constitutional Reform Bill.

The review was led by John Tiner, whose background was in corporate finance, having been Chief Executive of the Financial Services Authority from 2003 to 2007. He had no

specialist knowledge of the parliamentary perspective and, significantly, noted in his report that 'I am not aware of the background to the C&AG being an Officer of the House of Commons and feel it is a matter for Members of Parliament to consider whether this should continue' (Public Accounts Commission 2008a*,* para 61) He briefly reviewed comparative oversight arrangements for other constitutional watchdogs and auditing bodies in the UK, but was silent about their effectiveness. He did not comment on the role and effectiveness of the Public Accounts Commission, but his main proposals, published on 12 February 2008, (Public Accounts Commission 2008a) indicated the need for more specialist oversight.

**The Tiner review's main proposals**

- A new NAO board and Audit Committee to supervise the strategies and budget of the NAO
- C&AG statutory independence over auditing retained
- A new single eight-year single term of office for C&AG, made according to public appointment principles, and monitoring of subsequent employment for conflict of interests
- The chairman of the Public Accounts Commission to appoint NAO board chairman, by agreement with the Public Accounts Committee chairman
- No immediate merger of NAO with Audit Commission

Consistent with Tiner's background, he recommended that the NAO be governed by a corporate board, with the C&AG becoming chief executive. The chairman of the board would be part-time and the majority of the board would be independent non-executives, with one from the Audit Commission, to promote closer working between these two UK audit bodies. The Public Accounts Commission would therefore remain, but the board would be interposed between it and the C&AG. The design principle was for the board to develop a much more powerful position vis a vis the C&AG, through its professionalism and expertise, compared with part-time politicians on the Commission. Tiner made almost no comment on the role and performance of the Commission.

The review argued that a single non-renewable eight-year term was the appropriate length of time for appointment as C&AG, and proposed the retention of the current arrangements whereby the appointment is made by the Crown following approval by the Commons, with the Prime Minister moving the appropriate motion with the agreement of the Chairman of the Public Accounts Committee, by convention an Opposition Member. This retained executive control over the appointment process, compared to the Scottish model of a parliamentary-initiated appointment. Tiner appeared to have little interest in the constitutional significance of the difference, despite the report claiming that the Scottish Auditor General model had been investigated.

Tiner's intention was to produce a more open mechanism for selection, in the shape of a new Nominations Committee formed with a membership including the NAO Chairman, an appointee from the Public Accounts Commission and an Independent Assessor. He did not specify whether any MPs would also sit on the Committee, and this silence would appear to indicate lack of interest in any parliamentary buy-in to the process. In the Scottish Parliament the parliamentary procedure for nominating an Auditor General is by way of a specially constituted selection panel, which includes the Committee's convener, and perhaps other members of the Committee (Gay and Winetrobe 2003b).

Changes in remuneration were recommended, which broke the automatic link with the salary of a High Court judge, and instead the Chief Executive's remuneration would be set by the Public Accounts Commission based on advice by the non-executive members of the NAO Board, which itself would take advice from its Remuneration Committee. The Remuneration Committee would provide an evaluation of the performance of the Chief Executive. This mechanism is more in tune with current thinking on rewarding performance, but parliamentary input into the decision was minimised.

In the meantime, an interim C&AG, Tim Burr, was appointed by formal parliamentary resolution on 23 January 2008. There was no alternative but to make the appointment open ended, but a commitment was made by Burr to the chairman of the Public Accounts Committee that he would step down once the governance reforms had been made (House of Commons Debates 2008).

The brief response from the Public Accounts Commission accepted the broad thrust of the Tiner proposals, while emphasising the importance of the C&AG's Officer status as both providing independence from the executive and symbolising its role as servant of Parliament (Public Accounts Commission 2008b). Remarkably, the Commission hardly discussed its role in the new governance arrangements at all, other than to note that the new chair of the board would be in direct communication with the Commission, and to argue that the Prime Minister, not the PAC Chair, should present the formal appointment of the NAO Board chair to Parliament. The PAC favoured a longer single term of 10 years following the 1983 legislation, with the additional use of the Public Appointments Commissioner (OCPA) code. It was silent about the proposed Nominations Committee. It also recommended linking the chief executive's salary to that of a Treasury Permanent Secretary.

Confusingly, the Government had made separate proposals in the *Governance of Britain* green paper (Cabinet Office 2007) to subject the C&AG to a pre-appointment hearing by the Public Accounts Committee. This lack of communication with Parliament was displayed when the Chairman of the Public Accounts Committee protested to the Liaison Committee (composed of select committee chairs) that the proposals were in conflict with the National Audit Act 1983. The Liaison Committee recommended that a hearing take place after announcement of the proposed candidate but before the formal motion before the House (House of Commons Library 2008b).

The new corporate governance system will appear in the Constitutional Renewal Bill promised for session 2008-09 and, in August 2008, draft clauses were developed by the National Audit Office and published by the Public Accounts Commission, which gave its formal endorsement (Public Accounts Commission 2008c). The legislation is intended to delineate the role of the NAO and its new Board, and is largely silent on any formal parliamentary input – apart from a new power for the Speaker to report the incapacity of the C&AG. Overall, the reforms have increased specialist control over the C&AG by the NAO, tending to marginalise parliamentarians, on the basis that they lack the relevant expertise. MPs have not indicated any desire to deepen their involvement in the appointment or performance evaluation process of their most important Officer, and the debate so far on the changes has been confined to audit specialists. The debates on the forthcoming Bill offer an opportunity for other MPs to express their opinions.

## Ombudsman

Chapter 8 examines the main Ombudsman developments, and so are not repeated here. But it is worth noting in this overview chapter that the UK Parliament has taken little interest in structural reform since the Select Committee on the Parliamentary Ombudsman's report of 1993 (Select Committee on the Parliamentary Commissioner for Administration 1993) Instead, it was the initiatives of the English health and local government ombudsmen, combined with the UK parliamentary ombudsman, which led to new secondary legislation enabling the coordination of services. (Stationery Office, 2007) As Philip Giddings notes, the term of office has been set at a seven year non-renewable term, a length of office also given to the Local Government Ombudsmen in the Local Government and Public Involvement in Health Act 2006. This indicates how the single term has become the norm for constitutional watchdogs.

In contrast to executive and legislative inactivity, the officeholder herself has been undertaking some fundamental thinking about the future direction of the position. Deprecating the fact that the *Governance of Britain* green paper hardly mentioned her office, Ann Abraham used a series of academic articles to position the Ombudsman in relation to Parliament, the executive and the judiciary. Her main expressed fear was irrelevance: the danger that the emergence of administrative law since 1967 has led to the ombudsman being seen as a support act for judicial review, while Parliament failed to appreciate the constitutional significance of the office as its servant in the redress of grievances (Abraham, 2008b). She asked whether the Ombudsman was essentially 'an adjunct of representative democracy' or an 'agent of more direct accountability to the people.' She did not give a direct answer, but the choice has real implications for parliamentary democracy (Abraham, 2008a & b).

PASC has been uncritically supportive of the Ombudsman in her recent clashes with the Government. In this sense the Committee has been fulfilling the sponsorship role (especially in a championing sense) which PASC itself found missing for Parliamentary Officers generally in its Ethics and Standards report (PASC 2007a). Overall, therefore, the relationship with Parliament appears successful, but Ann Abraham's warning that Parliament needs to express a broader understanding of the potential of her office appears timely.

## Parliamentary Commissioner for Standards

The office of Parliamentary Commissioner for Standards appears to have survived the first few years and settled into maturity since 2003. A feature of Sir Philip Mawer's tenure was the positive relationship between him and the Standards and Privileges Committee chair. Maintaining such a relationship may prove to be critical to the role's continuing effectiveness. Sir Philip retired in 2007 to take up the new role of the Ministerial Adviser, of which more below. The recruitment was a parliamentary affair, with advertisement by the House of Commons Commission, and a selection panel including an external member and the Chairman of Standards and Privileges Committee. Formal appointment was made by resolution of the House. The Commission's choice was John Lyon, a former Ministry of Justice civil servant. Lyon took up the appointment on the basis of a four-day week at a salary of £108,000 pa and on a five-year non-renewable term. The Commission report noted that it would impose no restriction on the number of days per week that the Commissioner considered necessary (House of Commons Commission 2007).

Following Sir Philip's departure, Lyon had to deal with the eruption of allegations about abuse of allowances following the investigation into the Conservative MP Derek Conway's employment of his student son. Unlike in some earlier cases, comment did not focus on the role of the Commissioner, but rather on the substantive issue of the effectiveness of the House's auditing procedures for checking Members' expenses claims.

It is noticeable however, that the role of the Commons Commissioner in advising individual Members does allow him to develop relationships within the House. This can be contrasted with the position in Scotland and Wales where the Commissioners are prohibited from offering advice on the interpretation of their respective Codes of Conduct, and in Scotland from communicating with the media, except on the most circumscribed issues. This tends to isolate the office, creating independence, but not accountability. An example of the damage which can be done through the separation of advice from investigation may be seen in Scotland in the Wendy Alexander affair in 2008. Here, Alexander understood from the clerks that additional registration of donations with the Parliament to her Labour leadership campaign was unnecessary, given the registration with the Electoral Commission. The Commissioner's independent legal advice, however, suggested the contrary, and since an apparent offence had been committed, he referred the matter to the police and prosecuting authorities (Standards, Procedures and Public Appointments Committee 2008). Standards Commissioners have the most acute balancing act of all parliamentary watchdogs, caught between Members convinced that the media are determined to represent them in the worst possible light and yet faced with the necessity to demonstrate that they can make independent judgements in the public interest.

## Electoral Commission

In contrast, the Electoral Commission has had a turbulent half decade, not least a critical review from the Committee on Standards in Public Life (CSPL) published in January 2007 (CSPL 2007). The review argued that the Commission had been too timid in its regulatory functions and had spent too much energy on policy development. The Commission had reorganised in anticipation of criticism, but its new regulatory regime has yet to demonstrate its robustness.

There was some concern about political pressure when the Chair, Sam Younger, was offered a re-appointment term of only two years in November 2006, including a series of parliamentary questions by Andrew Tyrie (Conservative) on the re-appointment process. The Political Parties, Elections and Referendums Act 2000 (PPERA) allowed the term to be set in parliamentary motions appointing the Commissioners, and in 2000 Younger had been given a six-year term. The Speaker initiated the reappointment procedure to be used, whereas under PPERA, the statutory role of the Speaker is to agree it, and for party leaders to be consulted, before a Government minister tabled the motion for debate (House of Commons Library 2008b). The Political Parties and Elections Bill of 2007-08 will regularize the position by giving the Speaker's Committee the specific responsibility of initiating appointments.

Following Commissioner of Public Appointment (OCPA) principles on re-appointments following independent appraisal, Sir William McKay, a former Clerk of the House, appraised Younger and consulted the Speaker's Committee, resulting in a unanimous offer of a further term until 31 December 2008 (House of Commons Library 2008b).

There was no opposition from the party leaders, but the brevity of the term indicated to commentators that there was some desire for a new regime. A new chair, Jenny Watson, was appointed by the Speaker's Committee in 2008, following a selection panel chaired by the former Commissioner for Public Appointments, Baroness Fritchie (Speaker's Committee 2008). The post was advertised on a three-to-five year term, potentially renewable, but on a part time basis. The part time nature of the post reflected the CSPL recommendation that the role of the Chair should be to set the strategic direction. Unusually, the Committee decided on retaining the same level of remuneration as Younger had received for a full time position. There is provision in the Political Parties and Elections Bill introduced in October 2008 for a re-appointment to be made without a selection procedure if recommended by the Speaker's Committee (House of Commons Library 2008c). The preference for short renewable terms goes against the trend for single longer terms now evident for constitutional watchdogs.

The Speaker's Committee on the Electoral Commission came in for some criticism from CSPL as insufficiently transparent and rigorous in its oversight roles. Due to continuing concerns about the management of the Commission budget, the Committee had initiated its own review in 2004, using the House's Scrutiny Unit (Speaker's Committee 2005). This was overtaken by the CSPL review. CSPL recommended that the Commission focus its efforts on regulation of electoral administration standards and party funding, and that the Speaker's Committee should oversee the process of appointing the chair and commissioners in an open and transparent way. CSPL considered that the Speaker's Committee could operate more effectively if its deliberations were more transparent and if it had more resources to support its work. It considered that the Commission should report on its work to the Constitutional Affairs Committee (now Justice Committee) with regular debates in Parliament (CSPL 2007).

CSPL initiated a shift of thinking about the non-political status of Commissioners, in response to pressure from senior politicians of all major parties, who argued that the Commission lacked practical experience of politics, and was consequently ill-equipped to regulate party political activities. In effect, party funding issues had been depoliticised. Under PPERA, its staff and Commissioners were banned from membership of political parties. CSPL recommended that four additional Commissioners be appointed with recent experience of politics, one Labour, one Conservative, one Liberal Democrat and one drawn from the minor parties in the Commons. Their appointments would, however, be on merit, following OCPA guidelines and they should act independently, not as party delegates – a difficult balancing act. The nearest precedent would be the former politicians appointed to the CPSL itself. The PPERA would be amended to bring responsibility for the oversight of the recruitment and selection process for electoral commissioners within the ambit of the Speaker's Committee, including setting the role, specification and convening an independent selection panel. Again, bucking the trend, there is continued provision for re-appointment of Commissioners.

The Political Parties and Elections Bill, intended to pass through Parliament by March 2009, is designed to implement the changes, but the proposals are opposed by the Electoral Commission, which is concerned that political commissioners would compromise its independence (Electoral Commission 2008). There may be wider opposition on the grounds that political Commissioners may not solve the problem of depoliticisation. The Commission operates in a sensitive political arena, where the stakes could not be higher. This was highlighted by the resignation of the Labour Party General Secretary Peter Watt in November 2007 after he took responsibility for accepting

donations channeled through third parties. The new investigatory powers of the Commission staff will present its members with regulatory decisions which arguably should be free from allegations of partiality. However, the proposals have met enthusiastic support from members of all three major parties, concerned at the Commission's isolation from the more mundane aspects of election campaigns (House of Commons Library 2008c).

## Information Commissioner

Successive reports from the Justice Committee (formerly the Constitutional Affairs Committee) have called for the Information Commissioner to be given Officer of Parliament status, as MPs expressed concerns about the level of funding available to the Commissioner. In 2006 they stated: 'Since the level of funding for the ICO can have a direct impact on its capability to enforce compliance, there is a potential for conflicts of interest' (Constitutional Affairs Select Committee 2006). The ambiguous nature of the sponsorship offered by the Ministry of Justice (formerly Constitutional Affairs Department), which itself has policy responsibility for FoI and houses a monitoring unit that coordinates the response of central government to politically motivated FoI requests, also caused alarm (Constitutional Affairs Select Committee 2007).

The government did not respond favourably, arguing that the current arrangements secured the independence of the Commissioner while permitting the proper scrutiny of public resources (Constitutional Affairs Select Committee 2006). In his evidence to the Committee, Richard Thomas, the Information Commissioner, expressed interest in parliamentary sponsorship without directly calling for the Officer of Parliament model (Constitutional Affairs Select Committee 2006:Q69). The relationship between the parliamentary authorities and the Commissioner were tested through a series of cases involving parliamentary allowances. The Commissioner himself did not come under direct attack; the authorities appealed his initial decision to the Information Tribunal, whose judgement required the House authorities to release more information than the Commissioner had set out in the decision notice. Nevertheless, the direct impact of FoI on parliamentarians increased their hostility to the legislation and this begs the question whether the Commissioner might have come under greater fire, if he had been classified as an Officer of Parliament.

## The Cabinet Office watchdogs

One aspect highlighted in the 2003 Constitution Unit report was the lack of a robust framework for independence and accountability in respect of the watchdogs sponsored by the Cabinet Office. These are:

- Civil Service Commissioners
- Committee on Standards in Public Life
- Business Appointments Committee
- Public Appointments Commissioner
- House of Lords Appointments Committee

PASC examined these ethical auditors in its report *Ethics and Standards* in April 2007 (PASC 2007a). It concluded that the time had come to recognise that the machinery of ethical regulation was an integral and permanent part of the constitutional landscape. A host of new ethical bodies had been established and older ones transformed under the

impetus of CSPL. In the course of its work, the Committee discovered that there had been some tensions with the Cabinet Office over funding and re-appointments, but generally the level of attempted interference was less than might be expected. The Business Appointments Committee and the House of Lords Appointments Committee had withstood executive pressure against transparency with some success. However, the manner in which CSPL was left without a chairman for six months in 2007 indicated the need for more permanence and consistency in appointments. The former chairman, Sir Alistair Graham, revealed, in his oral evidence, that CSPL was constrained in its inquiries, with offers to look at business appointments, honours and party funding being refused by No 10.

PASC was attracted to the Officer of Parliament model, with a supporting parliamentary committee for all watchdogs, but the Committee struggled with the question of merger for ethical watchdogs, eventually deciding that a collegiate arrangement was the most suitable solution. PASC considered it inappropriate that any body fulfilling the remit of the CSPL - that of an 'ethical auditor' - should be subsumed into a body consisting of those it might have to examine. Its solution was a new Public Standards Commission, established by statute, to promote and protect ethical watchdogs. At the minimum, this would recognise that a permanent form of oversight was necessary. A Commission would reflect and encourage the collegiate character of the constitutional watchdogs, and provide a framework for coherent development of the regulatory system.

**Main PASC recommendations 2007**

- A new public standards commission should sponsor and promote watchdogs
- Parliament should play a greater role in the scrutiny of constitutional watchdogs
- The direction of travel for Cabinet Office ethical watchdogs should be towards a collegiate arrangement
- Ethical watchdogs should be accepted as permanent, but there is no evidence that their existence builds public trust

The report displayed the struggle that PASC experienced in trying to devise a generally appropriate accountability framework for the watchdogs, and parliamentary involvement with the proposed Public Standards Commission in particular. Responsibility for appointing the Commission was clearly a key consideration, but left unresolved by PASC. The Government's response was lukewarm (PASC 2007b), and the watchdogs themselves did not show much enthusiasm for more parliamentary scrutiny and control, fearing that parliamentarians would inevitably start to challenge their decisions on individual cases. But the issues raised in the PASC report are unlikely to go away. Proliferation of watchdogs causes confusion and inconsistency and piecemeal arrangements for individual bodies store up problems for the future.

Some watchdog design details were clarified as a result of the report. The principle of single long, but non-renewable, terms of office was generally accepted. The Government response announced that future appointments of the First Civil Service Commissioner, the Commissioner for Public Appointments, and the Chairs of the Advisory Committee on Business Appointments, the Committee on Standards in Public Life and the House of Lords Appointments Commission would be each made for a single non-renewable term. The appropriate length appeared to be five years. On the other hand, one of the first actions of the new Brown Government in 2007 was the creation of yet another permanent stand-alone ethical watchdog, that of Independent Adviser on Ministerial Interests (see below) – a non-statutory Cabinet Office appointment. (Cabinet Office

2007) The next was to announce that only one of the Cabinet Office watchdogs would achieve statutory recognition.

As part of the proposals to put the Civil Service on a statutory basis, the white paper of March 2008 contained plans to make the Civil Service Commission statutory, but was silent on the status of the other Cabinet Office watchdogs (Cabinet Office 2008). The executives in Scotland and Wales, as well as the leaders of the two major opposition parties at Westminster, would be consulted before the appointment of the First Commissioner and a single five-year term is proposed for both the First Commissioner and the other Commissioners. Statutory reasons for dismissal (absence, convictions, unfitness) are set out, and removal would take place without resolutions of both Houses. The Commission would employ its own non civil service staff and there is scope in the Bill for it to take on additional functions. But the Commission would report to the Minister for the Civil Service, who will set the budget for the body. Its report would be laid before Parliament, but no further parliamentary scrutiny or involvement was envisaged. PASC's own civil service Bill, published in 2003-4 to prompt Government action, envisaged a full Officer of Parliament model for the Commissioners, with independent budget and appointments by resolution of each House (PASC 2003). The PASC report on the Government's draft bill emphasised the need for 'complete financial and operational independence from Government' and for the Commissioners to have the power of initiating investigations (PASC 2008).

## New and merged watchdogs

Since the 2003 Constitution Unit report, more watchdogs have arrived on the scene, sponsored either by the Cabinet Office or the Department of Constitutional Affairs (now Ministry of Justice). The existence of new commissions confirms the current UK trend for collective watchdogs rather than individuals.

**New constitutional watchdogs since 2003**

| Name | Type of body | Reports to | Funding arrangements |
|---|---|---|---|
| Commission for Equality and Human Rights | Statutory NDPB | Annually to Secretary of State | Grant in aid |
| UK Statistics Authority | Statutory Non Ministerial Department | Annually to Parliament | Grant in aid, five years funding guaranteed |
| Judicial Appointments Commission | Statutory NDPB | Annually to Lord Chancellor | Grant in aid |
| Independent Adviser on Ministerial Interests | Non statutory, personal appointment by PM | Annual report to PM | Cabinet Office vote |

The Equality and Human Rights Commission came into being on 1 October 2007, following the Equalities Act 2005, which merged the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Board. Successive reports from the Joint Committee on Human Rights had concluded that the NDPB model

offered insufficient independence, preferring a model based on that of the C&AG and the Electoral Commission, rather than one where the Home Secretary would appoint the Chairman and Board (Joint Committee on Human Rights 2004). This point was pressed during the Lords stages; a full discussion took place on 6 July 2005 when the Liberal Democrats proposed an amendment to create an Appointments and Oversight Committee to sponsor the Commission. There were some pertinent comments to the effect that simply interposing another body would not necessarily increase independence or accountability – the dilemma posed by the Officer model. The Government argued successfully that the NDPB model was well understood and more appropriate, despite personal testimony from Lord Ouseley, former chair of the CRE, of inappropriate Government interference in appointments.

The UK Statistics Authority was established in April 2008 following the Statistics and Registration Services Act 2007 to promote and safeguard the production and publication of official statistics. The Office of National Statistics was merged into the new body, which will operate as a non-ministerial department. The board of the Statistics Authority is composed of a majority of non-executive members appointed by ministers following consultation with the chair. The governing body of the Board also includes three executive members, including the National Statistician as chief executive. The National Statistician and the Chair of the Statistics Board are Crown appointments. However, the Chairman, Michael Scholar, was the first appointee to be subjected to the new confirmation hearings introduced by the incoming Prime Minister, Gordon Brown, and was pressed by MPs on the Treasury Select Committee about his independence, given his background as a senior civil servant with a son working directly for Brown (Treasury Select Committee 2007). There followed a formal vote in the House, as agreed during the passage of the Bill (but not prescribed in the legislation).

The passage of that Bill had offered another opportunity to examine the Officer model. The official Opposition proposed a parliamentary commission for official statistics, similar to the role of the Public Accounts Commission, recalling that, when Shadow Home Secretary in 1995, Jack Straw had put forward a similar proposal during a speech to the Royal Statistical Society. The Opposition amendments proposed in the Public Bill Committee would have provided for representation from both Houses of Parliament in the oversight committee, rather than exclusively the House of Commons in the case of oversight of the NAO. The commission would also have been responsible for appointing the National Statistician. The Government's position was that the production of official statistics was an executive function and it was appropriate to locate the Board within Government rather than Parliament (Statistics and Registration Service Bill 2007). As the Bill progressed, attention moved to removing the Board from the scope of the Treasury and locating it within the Cabinet Office, who would be responsible for making the Board appointments, in consultation with the devolved administrations. Following the Bill, attempts by Peers with a specialist interest in statistics to establish a joint committee have been thwarted by lack of interest from the Commons. Since the Authority is under Cabinet Office sponsorship, it was PASC which held the first hearings on national statistics in June 2008 (PASC 2008d).

The Judicial Appointments Commission was established under the Constitutional Reform Act 2005, which made a previously non-statutory body statutory, with enhanced powers. The Commission was launched in April 2006 and initially attracted criticism for its timidity in appointments, given its remit to improve the diversity of the judiciary. The NDPB model was again chosen, with appointments made by the Lord Chancellor (at the

Ministry of Justice). The purpose of the Commission is to take responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and to make the appointments process clearer and more accountable. It was born out of the decision to end the traditional role of the Lord Chancellor, which included responsibility for judicial appointments. Under the current model the Commission selects and makes a recommendation to the Chancellor, which he/she may reject, but must provide reasons. The Commission must establish specific committees to appoint judges to the Court of Appeal and to the posts of Head of Division and Lord Chief Justice.

The House of Lords established a special select committee to debate the Bill, and the role and status of the Commission was the subject of sustained argument, as well as the choice between the selecting model enshrined in the Act, rather than the appointing model or a hybrid model whereby the Commission would be responsible for appointing some but not all judges. The Prime Minister, Gordon Brown, signalled that the debate would be re-opened, and a subsequent consultation paper from the Ministry of Justice suggested that the appointing model might offer more robust independence. This was confirmed by the white paper of 2008. However, the signs are that change will be opposed, at least until the Commission is considered to have bedded in. This was the position of both the Commission and the new Joint Select Committee on the Constitutional Renewal Bill. Political unease persists that the new Commission remains too independent and divorced from parliamentary accountability and this is likely to result in more agonising when the Bill comes before Parliament.

The C&AG, Sir John Bourn, was appointed by the Prime Minister, Tony Blair, to the new post of Independent Adviser on Ministerial Interests in March 2006, as a reaction to the political discomfort at the time of the cash for honours affair. The initiative was welcomed by CSPL, but with some concerns as to the independence of the post, given that the Prime Minister initiated any investigation, and that there was no guarantee that any reports of investigations would be published. Sir John held the post on a personal basis, rather than as an Officer of the House (PASC 2008e). A PASC report in 2006 recommended that the initiative should not involve a further regulatory office (PASC 2006). Yet in 2007, Gordon Brown appointed Philip Mawer to the post of Independent Adviser, resulting in Sir Philip stepping down from his role as Parliamentary Standards Commissioner. The Adviser would now be asked to investigate any breach of the Ministerial Code referred to him by the Prime Minister and be supported by the Propriety and Ethics Team in the Cabinet Office. The Cabinet Office response to PASC signalled that it was no longer acceptable for the Adviser to be a serving Officer of the House, contrary to the PASC recommendation (PASC 2007b). The first annual report from the Adviser is awaited. So far, neither John Bourn nor Philip Mawer has investigated any alleged breaches, so the office, and the extent of any relationship with Parliament, has been untested. PASC noted with dissatisfaction that: 'the post of Independent Adviser on Ministerial Interests meets very few of the accountability requirements – and none of those associated with independence' (PASC 2008b: para 24).

## Pre-appointment confirmation hearings

Gordon Brown came to office determined to move constitutional reform forward. His green paper of July 2007 included proposals for pre-appointment hearings by select committee, without a right of veto, for a series of posts to be defined in consultation with the Liaison Committee (the committee composed of chairs of Commons select committees). In a few sentences, the line from all previous Governments, that

confirmation hearings would break the accountability of ministers for appointments, was abandoned. These proposals received a positive response from Parliament and the media, but in subsequent dialogue, the Liaison Committee asserted its right to ownership of the list of appointees subject to such hearings. The list which has emerged is a curious mixture of posts without any obvious underlying rationale. They include chairs such as OFSTED, Audit Commission, BBC Trust, but also the three armed services chiefs, the Rural Advocate, the Chief Executives of Natural England, and the agencies of the Department for Work and Pensions (House of Commons Library 2008a). Many of these are posts where select committees in previous Parliaments have demanded the right to hearings.

PASC attempted to provide some intellectual rigour, expecting hearings to apply to major auditors, ombudsman, regulators and inspectors, as well as those responsible for the appointments system itself. The Commissioner for Public Appointments raised a number of principled objections to the hearings, arguing that nominees would be deterred by aggressive and political questioning which might even contravene the Human Rights Act, but she received a rough reception when putting these points to PASC in June 2007 (PASC 2008a). The attractions of the proposals are clear, if the intention is to increase parliamentary involvement, but the concerns about aggressive questioning are real, as well as worries about splits on party lines. It requires self denial from Members which may not always be forthcoming.

## A look into the future

This brief survey has indicated that parliamentary interest in the structure of constitutional watchdogs has intensified over the past few years. The various reasons for this development include the fact that as watchdogs use or, in the view of some, misuse their powers, their structure inevitably attracts the attention of MPs and Peers. Parliamentarians desire accountability to themselves but also demand of the watchdogs independence from executive pressure. The debates over the Equalities and Human Rights Commission and the Judicial Appointments Commission lay bare the difficulties of achieving an appropriate balance. And as new bodies are created, there is no longer unquestioning acceptance of the traditional NDPB model put forward by the executive. This augurs well for the health of parliamentary democracy, as instanced by the Liaison Committee's determination to own the confirmation hearing process. Watchdogs themselves struggle with public awareness of their roles and accountabilities. When the executive and or Parliament go on the attack, following unpopular decisions or actions, watchdogs become suddenly friendless and vulnerable, so they crave supporting structures including independent staffing and funding. Parliament is in a natural position to offer this sponsorship role, which can help them rebut criticism and defend their territory.

But parliamentarians have yet to really confront the question of how a constitutional watchdog responsible to Parliament would operate in practice. The experience of the remodelling of the NAO following the failure of the PAC to offer appropriate oversight of the C&AG indicates the difficulties in busy MPs offering the type of sustained scrutiny which is required, if Parliament is to take the place of a sponsoring department. The overt criticism of the Speaker's Committee's oversight of the Electoral Commission also confirms this point. Parliamentarians need supportive and non party political structures to operate effective oversight, as well as offering a safe haven for these core watchdogs. But this demands much of MPs whose first loyalty remains to their party,

whether in opposition or in government. As the concluding chapter examines, the Westminster system mitigates against the existence of independent minded parliamentarians. But the development of the select committee system since 1979 indicates that MPs can operate for the public good with multiple identities. The function of scrutiny remains healthy at Westminster.

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# Chapter 3: Scotland's Parliamentary Commissioners: An Unplanned Experiment

## Barry K Winetrobe

## Background

The 2003 Constitution Unit report (Gay & Winetrobe 2003) described the creation of some new public 'watchdogs' in devolved Scotland, which had a more parliament-focussed institutional and governance structure – by the Parliament itself directly, or through the Scottish Parliamentary Corporate Body (SPCB) - than the conventional executive-sponsored public body. It traced their early development, and the gradual emergence, albeit largely unplanned, of a template for what has come to be known as the 'parliamentary commissioner' model. This is devolved Scotland's version of the 'Officer of Parliament' model.

This template had the following general characteristics:

- appointment, re-appointment and removal being a matter for the Parliament, and/or its Corporate Body, not the Executive;
- funding and other resourcing by or through the Parliament, rather than the Executive;
- statutory guarantees of operational independence from both the Parliament and the Executive;
- reporting to the Parliament, rather than to the Executive.

### Devolved Scotland's Parliamentary Commissioners

- Auditor General for Scotland (AGS)
- Scottish Public Services Ombudsman (SPSO)
- Scottish Information Commissioner (SIC)
- Scottish Parliamentary Standards Commissioner (SPCS)
- Commissioner for Public Appointments in Scotland (CPAS)
- Commissioner for Children and Young People in Scotland (SCCYP)
- Scottish Commission for Human Rights (SCHR)

## Developments since 2003

### New commissioners

By early 2003, almost all constituent legislation for the current commissioners had been enacted, with most commissioners in post or being appointed. The period since 2003 has been largely one of the model in operation. New proposals for watchdogs , whether from Ministers or backbenchers, tended to follow, or at least consider, this established template, as was the case with the status of the Office of the Scottish Charities Regulator in the *Draft Charities and Trustee Investment (Scotland) Bill* (Scottish Executive, 2004:14-15).

With the twin factors of a general political consensus that these new watchdogs were a 'good thing', and an apparent belief among Members of the Scottish Parliament (MSPs)

that the commissioner model was desirable because it meant independence from the Executive, the risk of 'commissioner proliferation' became obvious. However, for those politicians and others who feared that the devolved public sector was getting too large and costly, the *parliamentary* commissioners were a particularly easy target. In the last couple of years, one Executive proposal, for the Scottish Commission for Human Rights, was passed only after a very difficult fight; two backbench Member's Bill proposals – a Commissioner for Older People, and a Keeper of the Register of Tartan - were rejected, and there is little sign of the SNP Government accepting any new Commissioners.

Scotland is now in a period where the presumption is against the creation of additional public bodies, and certainly against any being created in the parliamentary commissioner model. The early, naïve 'why not?' approach has given way to more hard-headed views.

**Operation and perception of the commissioners**

As with devolution generally, media coverage of Scotland's public bodies, including commissioners, has frequently been sensationalist and ill-informed. Despite the key feature of these Commissioners being their 'parliamentariness', too often there was a failure to distinguish between Government-sponsored and Parliament-sponsored bodies and officials. Regulatory/oversight bodies were routinely dubbed 'tsars' (rather than watchdog or champion), and there were regular, lurid stories of their costs (sometimes encouraged by the more sceptical MSPs), perhaps inevitable during the period when such Commissioners were being established, staff appointed, and offices and equipment acquired.

Take the example of the location of Commissioners' offices. Commissioners were criticised both for locating well away from the 'centre' (the Information Commissioner in St Andrews, Fife) and for being too close to Holyrood (the Children Commissioner). This became subsumed into wider questions of financial efficiency; proposals for sharing services and offices with other Commissioners or other public bodies, and the more general issue of dispersal of public sector jobs – something of obvious interest to MSPs wishing to see new investment and jobs in their own locality.

The Commissioners' actual work, often in sensitive political and constitutional areas, has also prompted comment and criticism. MSPs under investigation or under threat of investigation by their Standards Commissioner may well criticise that official's processes and decisions. The Information Commissioner may be hero or villain over decisions about the release of public information, especially if it relates to the Government or (as seen recently at Westminster) the Parliament and its Members. The Ombudsman has been a particular target of sustained parliamentary and public attention, on both substantive and procedural grounds.

As was seen during the 2006 Finance Committee inquiry and elsewhere, Commissioners may profess to welcome enhanced but appropriate parliamentary scrutiny of their organisation and work, and feel that the Parliament has not yet taken full advantage of the potential benefits their work could have in its own scrutiny of government (Finance Committee 2006a). Parliamentary comment can be as unstructured, partial and unfair as media or public reaction, with parliamentary opportunities for negative reactions (multiplied by Holyrood's 'sponsoring body' role over the Commissioners) often - unlike the work of the executive - taking place largely in public. The result has been that, like

the new Parliament itself, parliamentary-sponsored public officials live under far more direct and intensive scrutiny than their government-sponsored counterparts.

## Review and Reform

Growing discontent with the Commissioner model in recent years manifested itself through the 2006 Finance Committee inquiry, the Executive's Crerar Review, and the difficult passage of the Bill that established the Human Rights Commission. During this period in particular, the Parliament itself was also refining its own internal 'Commissioner governance' processes and procedures.

### Finance Committee Inquiry

In early 2006, the Finance Committee launched an inquiry into the accountability & governance of Scottish public bodies, including those sponsored by the Parliament. The inquiry generated much heat and a fair amount of light, with a Convener and Deputy Convener both sceptical of the growth and cost of these public bodies, subjecting many witnesses to critical questioning. The approach of the parliamentary authorities was openly cooperative, clearly regarding the inquiry as a catalyst for achieving necessary changes they felt unable or unwilling to initiate themselves.

The Committee's report of September 2006 (Finance Committee 2006a) called for 'a stronger governance framework for commissioners to ensure their greater accountability to Parliament for their spending.' Central to its analysis was a belief that statutory independence did not, and could not, preclude adequate parliamentary involvement and even, where appropriate, direction in matters of budgetary control and the like. In practice this meant, for example,

- Commissioners should be required to produce three-year rolling plans;
- Committees should take evidence more regularly from Commissioners;
- more independent assessment of Commissioner performance;
- a presumption against the creation of new public bodies;
- new Commissioners would be appropriate only where they can represent any member of society, rather than specific interest groups;
- an Executive-SPCB memorandum of understanding setting out the SPCB's pre-legislative role in new Commissioners proposals;

Reaction to the report was generally positive. The Executive regarded much of the report as an internal matter for the Parliament (Scottish Executive 2006a). The SPCB was supportive, indeed grateful, for many of the recommendations aimed at clarifying its role (SPCB 2006).

### SCHR Bill

That the Executive Bill to create the Human Rights watchdog had the rockiest parliamentary ride was largely due to it being caught up in the growing criticism of Commissioners. Had the scrutiny it received been applied to some or all the earlier Commissioner Bills, many of the difficulties faced in the previous few years might have been addressed earlier. The Finance Committee's report on the Bill's Financial Memorandum was scathing:

> The Committee is concerned that in taking the significant step of preparing [the] Bill... the Executive does not appear to have fully considered the governance issues associated with the funding and financial oversight of that body. A sizeable number of commissioners and ombudsman have now been established in Scotland, and while they fulfil a very important role, it is critical that all parties – including the Commissioners themselves, the Executive, the Parliament, the SPCB, and the public - have a common understanding of the accountability mechanisms that operate with respect to such bodies. This issue goes beyond the financial aspect of the Bill and has important implications for the principles underpinning the legislation (Finance Committee 2006c).

Following the Justice 1 Committee's Stage 1 scrutiny, it exceptionally refused to endorse the Bill's general principles, because of its concerns about various governance and operational issues, and its doubts as to whether the case for creation of an SCHR had been made (Justice 1 Committee 2006). Major amendments - even to the fundamental issue of whether the watchdog should be a single Commissioner or a multi-member Commission - were proposed at the Bill's later stages, by the Executive, the Finance Committee Convener and others, and a much-changed Bill eventually limped into law in December 2006.

### Crerar Review

In June 2006, the Executive announced a review, under Professor Lorne Crerar, previously Convener of the Standards Commission for Scotland, of the scrutiny of public services, to examine 'how improvements could be made in inspection, regulation, audit and complaints handling for public services in Scotland'(Scottish Executive 2006b). It would 'take account of other work' such as the Finance Committee inquiry. It issued a final report in September 2007 (Crerar Review 2007).

It had a wide remit, ranging far beyond the Commissioners, but including them where it thought it appropriate. Of relevance here is that, where the Review and its Report looked at the Commissioners, it was not as a discrete form of public body, with distinctive accountability and governance issues, but rather as bodies which just happened to be sponsored by the Parliament. The Parliament is discussed in the Report almost exclusively in traditional scrutiny/oversight accountability terms in relation to all types of devolved public body. Crerar's focus on two Commissioners was only because of their cross-cutting potential in any reformed governance arrangements – the Auditor General for audit purposes, and the Ombudsman for complaints-handling mechanisms.

## An External View – The 2007 PASC Report

The ethics & standards inquiry by the House of Commons' Public Administration Select Committee, discussed in Chapter 2, used the Scottish commissioners as a comparator for the 'Officer of Parliament' model (PASC 2007). It recognised that the basic principles behind the Commissioner template 'reflect the strong focus in their institutional design on the independence of these posts from the Executive', but that 'too little attention had been given to their consequential "dependence" on the Parliament … and on their accountability arrangements.' It was impressed by the Commissioner system, setting out its lessons:

- only those functions which should be properly separate from government are suitable for establishment by this model;
- tension between independence and accountability is unavoidable, but not insurmountable;
- Officers of Parliament should be funded through the Parliament, but not directly from Parliamentary funds;
- the effectiveness of both regulators and Parliament would be enhanced by clear reporting lines from a regulator to a particular committee.

**Holyrood as a sponsor of commissioners**

> The corporate body is not set up as civil service departments are with a great sponsorship arm; we have a couple of people only. We were not set up to sponsor commissioners. I have done that job myself in the past so I know that it is resource intensive. *Paul Grice, Parliament Chief Executive (Finance Committee 2005: col 3097)*

The distinctive feature of the Scottish model, as compared with Westminster, is the operation of the Parliament, and especially the SPCB, as the *de facto* sponsoring body for the various commissioners. How Holyrood reacts to that role is crucial to the success or otherwise of these arrangements. In that context, two factors in particular about the Parliament are relevant.

**The legal basis of the Parliament**

The Scottish Parliament is itself a creation of UK statute, and so is a body wholly subject to the ordinary law of the land. This contrasts with Westminster's unique status as a largely self-regulating body, neither created nor controlled by the external law and courts, protected as it is by parliamentary privilege and 'exclusive cognisance'. Holyrood, therefore, always has to be, and is, acutely aware of the possibility of external legal intervention in all it does, including its institutional and administrative dealings with Commissioners.

*Senior civil service experience within the Parliamentary organisation*

The Parliament, its structures and procedures were largely devised by Scottish Office officials, some of whom initially filled a significant number of key posts in the new Parliament. In the Parliament's dealings with its Commissioners, this impact has been double-edged. It brought much-needed experience in operating the public body sponsoring role, a function almost unknown in the domestic parliamentary scene, especially in the context of the overall novelty of a totally new parliamentary institution.

However, based on observed practice in Commissioner governance since 1999, it seems likely that these new parliamentary officials sought to replicate familiar, bilateral civil servant–minister relationships. In the institutional running of the Parliament itself, this meant developing a close relationship with the SPCB, and its MSP members, by seeing that body as their 'Government' and 'ministers', distinct from their relationship with the generality of MSPs in the Parliament. As part of this, and with the overarching shadow of legal liability, there was a less proactive approach in some SPCB functions, especially if it appeared to involve 'policy', whether party political or Executive. Key officials may not

have seen it as appropriate to encourage the SPCB, as the Parliament's servant, to take an interventionist position when the Commissioner Bills were being discussed.

**SPCB attitudes to Commissioner governance**

Both these attitudes have had an impact on how the Commissioner model has developed in devolved Scotland, especially in relationships and dealings with and within the Parliament. The trilateral relationship between parliamentary officials, SPCB and MSPs, especially where the interests and wishes of the SPCB may have been different from those of MSPs generally, clearly caused difficulties, when the relevant constituent legislation was by way of a Committee or Member's Bill. In the crucial early years, the SPCB evidently did not feel it could routinely intervene proactively to make clear its views on the potential impact on the Parliament's resources of the new Commissioners, or on the proposed governance arrangements it would be required to administer.

These factors, both legal and cultural, also overshadowed the SPCB's dealings with the Commissioners over budgetary and performance matters. The emphasis given by the SPCB to the Commissioners' statutory independence was, in the view of the Finance Committee, taken too far, amounting at times almost to abdication of its responsibilities. It seemed that the SPCB's default approach was one of discussion and negotiation with Commissioners, rather than formal or informal direction or control. This can be illustrated by the office location issue, during a Finance Committee meeting in November 2005 on the SPCB's own budget:

> **Mr John Swinney:**[2] Why was a stiffer line not taken with the individual commissioners? Why were they not asked to look at more cost-effective locations? The location of an office has diddly-squat to do with the independence of an individual commissioner, but it may represent better value for money for the taxpayer.
> **Nora Radcliffe:**[3] I agree; the commissioners would probably also agree. We will have to resolve the issue through discussion and influence, because we do not have the statutory powers to direct. If anything, the Finance Committee has statutory powers that we as the corporate body do not have. Our responsibility is to act as a conduit, so to speak, to challenge the commissioners on their budgets and to ensure that what they propose is reasonable. We do not have sanctions such as the Finance Committee has (Finance Committee 2005: col 3098).

As noted, the Finance Committee report provided the SPCB with much-desired cover and authority for more robust dealings with Commissioners over their budgets etc. Its Legacy Report at the end of Session 2 in spring 2007 set out in tabular form how it had responded to these reviews (SPCB 2007: 12-20).

However, the institutional reforms prompted by the Finance Committee do not seem to have solved all the SPCB's, and the Parliament's, potential challenges as sponsor of Commissioners. Giving evidence to that Committee in January 2008 on the Crerar Report (Finance Committee 2008: col 279), the SPCB portfolio member, Tom McCabe, while stressing that SPCB consideration was then at an early stage, said that the SPCB had 'encountered a number of dilemmas'. These included what it saw as the difficulties caused by the different forms of appointment provided in the constituent legislation,

[2] Finance Committee deputy convener, and currently Finance Secretary in the Government.
[3] SPCB portfolio member for Commissioners

especially a distinction between 'office holders' (ie those it directly appointed) and 'Crown appointees' (presumably those only nominated by the Parliament). He suggested that 'Crown appointees have less need than office holders to look over their shoulders, although others may disagree.'

Regarding budgets, staff structures and the nature of appointments, McCabe argued that 'it becomes increasingly easy to cross a line that could leave the SPCB open to the charge of interfering with bodies' operational independence. In considering how the SPCB may assist the response to the Crerar report, the Parliament may need to revisit the original intentions for those bodies and how they are to be administered.' Throughout his evidence, he emphasised the 'lack of consistency in approach' which 'has given us a discrete set of issues that we need to wrestle with and try to resolve in some way', and, as SPCB representative, was characteristically cautious about the possibility of an internal parliamentary review of its Commissioners, while seeking to make a distinction between the Corporate Body and the Parliament itself:

> My feeling is that it would be inappropriate for the corporate body to go too far on its own initiative. The corporate body is a creation of the Parliament, and it is important that the fact that all the organisations that we are discussing are a creation of the will of Parliament is given proper recognition and respect (Finance Committee 2008: col 281).

This approach suggests that the SPCB's relative passivity and reactivity continues, in that it is looking to others to solve its perceived problems. There is still no overt acceptance that the 'lack of consistency' is due largely to the SPCB, and its failure to involve itself sufficiently proactively in parliamentary and executive consideration of earlier proposals for the creation of Commissioners.

## Conclusion

### Parliamentary and public accountability

As noted earlier, too little recognition had initially been given to the consequential institutional dependence on the Parliament/SPCB, of the Commissioners' independence from the executive. Failure to appreciate the multi-layered complexity of the Commissioner-Parliament relationship led to much of the later friction and difficulties. The statutory model which developed had such a strong 'independence from' focus – not just from the Executive, but also from the Parliament, in terms of directions by it, the SPCB or MSPs – that areas of what became characterised as governance or accountability were insufficiently addressed.

Developing a dynamic model which accommodates these complexities has been problematic. This was due to several reasons, including the multi-faceted nature of a parliament; the overlapping nature of the Commissioners' remits, and, most importantly, the different aspects of relevant parliamentary accountability.

Accountability is a core concept in democratic governance, and, in the context of parliaments and their commissioners, there are many accountability relationships. For example, Commissioners can be regarded as part of a parliament's mechanisms for carrying out its own scrutiny and oversight of the executive. Experience since 1999 has been that both the Commissioners and the Scottish Parliament and its Members

recognise that this relationship has not been exploited nearly as effectively as it could or should be, but that committees in particular are now making efforts to improve their relationship with 'their' appropriate Commissioners.

However, in what might be termed 'governance accountability' – the accountability of Commissioners to the Parliament for their own performance – difficulties arise. This is an area involving the SPCB, the Finance Committee and the relevant policy committees, in terms of budgetary and resource issues as well as more 'operational' issues, with which they are inevitably bound up. There can be a fine line between governance activity by the Parliament - setting or approving budgets, staffing resources and future activity plans; appointing or removing commissioners etc – and involving itself actively in what commissioners do, and whether and how they do it. As Robert Pyper describes in Chapter 9, the UK Commissioner for Public Appointments has some reservations about the potential impact on the efficiency and effectiveness of her office if it was subject to close and tight parliamentary governance regime, such as she saw in Scotland.

In the context of the nature of Holyrood's own founding principles, we can examine the extent to which the Commissioners are accountable not just to the Parliament, but also, like the Parliament itself, to the public. Some commissioners have tried to justify their independence from the Parliament by claiming that they are ultimately responsible instead to the people, or to the 'constituency' they were established to oversee or champion. This thesis was played out during the Finance Committee inquiry, where the committee were clearly of the view that Parliament was entitled to exercise whatever statutory rights of direction over Commissioners it may have, and that Commissioners owed their accountability to the Parliament, not directly to the public.

> Consultative Steering Group 1999 Report Key Principles: Accountability: the Scottish Executive should be accountable to the Scottish Parliament and the Parliament and Executive should be accountable to the people of Scotland
>
> Children's Commissioner, evidence to Finance Committee, 2006: I would say that I am accountable to children and young people in Scotland. That is what Parliament expects. …. I am accountable to the Parliament for being accountable to children and young people—that is the way I see it.
>
> Finance Committee 2006 Report: The Committee notes the distinction made by several witnesses between wider public responsibility and the formal parliamentary accountability of Parliamentary Commissioners and Ombudsmen. There is a need to protect Commissioners from any undue interference in their work but the Committee's view is that it needs to be clearly stated the route of accountability for any parliamentary Commissioner is to Parliament.

**The potential impact of the Crerar Review**

The Crerar Report, and its aftermath, allied to the public sector policies of the SNP Government which took office in 2007, has changed the landscape in which Parliamentary Commissioners operate. It is likely that the coming years will see a closer alignment, especially in governance policy, between the public bodies sponsored by the Parliament and those by the Government. Whether or not this can be described as sensible partnership, such alignment further blurs any distinctions between the two types of body; makes the Commissioners appear little more than a peripheral area of the

overall Government public bodies sector, albeit outsourced to the Parliament/SPCB, and potentially undermines, perhaps fatally, whatever rationale there was initially for creating this model.

This may seem an overly negative conclusion. However, the indications that this may be the direction of travel can already be detected in recent developments. For example, in overall post-Crerar public sector reform there is a growing focus on substantive operational processes (especially complaints and scrutiny) rather than institutional aspects of the bodies themselves. This could have an impact on the structure and remit of Commissioners. The most obvious example is the Ombudsman, who, as evidenced by the work and reports of the post-Crerar 'Scrutiny Improvement' action groups and the Government's proposed Public Services Reform (Scotland) Bill, seems to be being prepared for some sort of overall 'umbrella' role in relation to complaints-handling bodies (Scottish Government 2008).

There may be intrinsic merit in these developments, but it does remind us that, while overall policy developments which may affect Commissioners, directly or indirectly, may be at the initiative of the Government, it will be the Parliament and SPCB which has to cope with any financial and resource consequences, and the inevitable political and media reaction. MSPs are already unhappy that they and the Parliament bear the brunt of the media flak over Commissioner costs and activities, without having any scope for influencing them. If Government-driven initiatives add to Commissioner costs (especially through extra functions or ones transferred from its own public bodies), MSPs will find themselves even more in the role of paying the piper but not calling the tune. This, in turn, could lead to demands for even greater parliamentary control over 'their' Commissioners, further undermining the initial virtue of 'independence' built into the model.

The impression that the Crerar Review did not fully appreciate the distinctiveness of the Parliamentary Commissioner model has been reinforced by the post-Crerar work within the Government, especially its five Action Groups, even though most of them have a Parliament staff representative. This process, at least thus far, seems to regard the Commissioners as just part of the overall mix of devolved public bodies, and, as such, suitable for inclusion in any efficiency reforms, whether changes in remit or sharing of services and offices.

This *de facto* alignment of the Commissioners with traditional NDPBs will have consequences for parliamentary accountability. A post-Crerar government drive towards the Parliament focussing on 'traditional' scrutiny of public bodies and their reform does not sit well with more internalised scrutiny and overview of the Parliament's 'own' Commissioners, and will provide tacit support for those Members who see the subject committees as the best and most appropriate mechanism for oversight of all aspects of Commissioners, including their governance (eg resourcing, appointments, strategic planning). If such views gain ground, where policy-oriented, party political committees examine not only Commissioners' substantive operational activity, but also their internal organisation, staffing, spending, policies and so on, the scope for inefficient, confused lines of accountability and direction both within the Parliament, and between the Parliament and the Commissioners, may be increased.

The 2006 Finance Committee report rejected the idea, floated by the editors of this Report in their discussions with the Committee, of a statutory dedicated arm's length

parliamentary body to deal with most or all aspects of governance work on behalf of the Parliament and SPCB, on the line of Commonwealth Officers of Parliament Committees. Such a body could have been created, for example, by expansion of the existing Scottish Commission for Public Audit (SPCA),[4] which has governance functions over Audit Scotland and the AGS, or as a new, dedicated statutory body. The Committee was worried that a new body would further blur lines of accountability and communication on parliamentary Commissioner work; fearful of adverse criticism of the creation of a 'super-tsar', and preferred retaining the SPCB as the main governance mechanism. Perhaps it also thought that it could retain stronger influence over the SPCB, through its existing budget scrutiny process and otherwise, than over a new, dedicated and potentially powerful statutory body.

**Prospects**

From the perspective both of Holyrood as a convenient laboratory for experimenting with a variant of an 'Officers of Parliament Committee' in the UK - one distinct from a parliament's 'corporate body' or its normal scrutiny committees, yet still ultimately linked with the parliament - and of a modern model of parliamentary self-regulation via 'arms length' bodies, this not unexpected rejection is still an opportunity missed. Hopes that the Finance Committee inquiry was the catalyst for a necessary and complete, if belated, reform of the Commissioner system, are already waning. Developments since 2006 suggest that any attempt to revisit the Officers of Parliament Committee option is even less likely.

After a decade of devolved Scotland's Parliamentary Commissioners, the jury is still out on many of the central questions about the nature, purpose and perceived advantages of the Commissioner model for the carrying out of certain core public functions. There are probably many within and outwith the Parliament who wish they had never established most or all of the posts, at least not as Parliamentary Commissioners. While outright abolition is probably not an option in the near future, a scaling-back of the system is likely, both in terms of merging of posts and/or remits, and *de facto* integration by stealth of the single-function Commissioner into the more general family of devolved public bodies.

Subject to these pessimistic overtones, the implementation of various internal governance reforms, deriving from the Finance Committee inquiry and elsewhere, may improve the Parliament's day-to-day governance of its Commissioners. The Procedures Committee's suggestion, in its March 2006 Report, of tidying up some existing inconsistencies and lacunae in the Commissioner governance arrangements by way of a Committee Bill, was a helpful one (Procedures Committee 2006: paras 45-46), and it could also be the vehicle for implementing any wider reforms which may emerge from current reviews and inquiries. If the Parliament itself has the will to undertake such an exercise, and the Government is willing for this to be done via a non-Executive legislative vehicle, this could produce a comprehensive Act providing the basic framework and template for the 'parliamentary commissioner' model, in conjunction with the existing schemes. Papers and Minutes of SPCB meetings in late 2008 indicate, however, that the Parliament may be happy instead to piggyback on the Government's forthcoming public service reform bill due in early 2009. As well as being unfortunate in

[4] The SCPA has been reviewing the parliamentary governing arrangements for the AGS and Audit Scotland (e.g. SCPA 2008).

principle, this would necessitate some loss by the Parliament of legislative initiative and control over any governance reforms.

The Crerar Review, and subsequent developments within Government and the Parliament, may be radically changing the basic environment within which the Commissioners operate, making them less like *sui generis* parliament-focussed public bodies. For the Parliament, this could provide the worst of both worlds - all the continuing problems and burdens of 'sponsorship' with few of the potential 'scrutiny' benefits. This 'decommissionerisation' trend may be assisted by the recently announced departures of two of the original Commissioners from spring 2009 – Alice Brown as Ombudsman and Kathleen Marshall as Children Commissioner – making it easier for new office-holders to be chosen by the Parliament, perhaps based in part on their willingness to go along with the emerging trends described in this chapter.

At a time when issues of the independence and accountability of public bodies, especially those in core constitutional areas, are to the fore in the UK, we may be seeing the beginning of the end, at least in its original form, of devolved Scotland's bold, if unplanned, Parliamentary Commissioner experiment.

**Stop Press**

Just as this Report was going to the publishers, there were two developments in early November which may well demonstrate whether the above analysis will be vindicated or disproved. The Finance Secretary, John Swinney, made a parliamentary statement on 6 November on the Scrutiny Improvement programme, including the reports of the Action Groups (Scottish Parliament, 2008). The Parliament itself is preparing to establish an ad hoc Committee to examine the governance of its parliamentary commissioners, taking account of the 2006 Finance Committee Inquiry; the Crerar Review and the SCPA Report on the Governance of Audit Scotland.

If, as appears to be the plan, the parliamentary committee's report and recommendations would be fed into legislative action, possibly through the Government's forthcoming Public Service Reform Bill, then its inquiry may be a rather speedy and potentially superficial exercise over the next few months or so, not in keeping with the best principles and practice of Holyrood committee activity. It should take the opportunity to consider, among others, all the issues raised in this present report, and take full account of existing experience and expertise in parliaments elsewhere in the UK and in the Commonwealth, especially the highly relevant comparator of New Zealand.

It looks as if Scotland, before the UK itself, has reached its 'crossroads' and its 'time for decision' on parliamentary constitutional watchdogs. What it decides over the next year will not just determine the future of its own Commissioners, but could influence the direction of travel of their counterparts in the rest of the UK.

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# Chapter 4: 'Parliamentary Officers' in Wales: Evolving Roles

## Alys Thomas

## Introduction

The story of the core parliamentary officers in the National Assembly for Wales, since its creation in 1999 by the *Government of Wales Act 1998*, is one of evolution. The new institution had an Auditor General for Wales (AGW) from the outset, but the role has changed with the creation of the Wales Audit Office (WAO) in 2005. A Public Services Ombudsman for Wales (PSOW) was created in 2005 by combining the roles of several ombudsmen (including that of the Welsh Administration Ombudsman created in the 1998 Act) in one post and the Standards Commissioner began life as a mere Adviser.

Prior to May 2007, the National Assembly for Wales had no power to make primary legislation but Welsh Ministers succeeded in persuading UK Ministers to legislate at Westminster for a Children's Commissioner for Wales (the first in the UK) and a Commissioner for Older People (the only such post in the UK). They, however, do not fit the model of a 'core parliamentary officer' as they are appointed by Welsh Ministers, although they report to the Assembly and Assembly Members have a role in their appointment, so they are therefore something of a hybrid.

The separation of the National Assembly for Wales from the Welsh Assembly Government (Welsh Ministers) in 2007 has brought a further step change as the architecture of the devolution settlement in Wales now more closely resembles other UK parliaments, and the interface with the parliamentary officers has changed as a consequence.

This chapter will discuss the evolution of the core parliamentary offices from 1999 to 2007; the changes resulting from separation between the Assembly and the Assembly Government in 2007 and provide some background to the 'hybrid' Commissioners for Children and Older People.

## Core Parliamentary Officers

### Auditor General for Wales

The Office of the Auditor General for Wales (AGW) was created by the *Government of Wales Act 1998*. For the first six years the post was occupied by Sir John Bourn in addition to his role as UK Comptroller and Auditor General.

However, the *Public Audit (Wales) Act 2004* created a single public audit body for Wales, the Wales Audit Office (WAO), to be headed by the AGW. Jeremy Coleman was appointed as the first full time AGW. Previously the role of the National Audit Office in Wales was to audit, on behalf of the AGW, the National Assembly and its sponsored and related public bodies. The Audit Commission in Wales was responsible for auditing and inspecting local Welsh public services. These functions were now combined in a single body.

The role of the AGW combines those of auditor, regulator and inspector. He audits bodies such as the Welsh Ministers, Assembly Commission (the equivalent of the House of Commons Commission), Assembly Government Sponsored Public Bodies (AGSBs), PSOW and the Children's and Older People's Commissioners. The AGW appoints the auditors of local government bodies and has direct responsibility for performance audit including inspection functions under the Wales Programme for Improvement (WPI).

One of the most high profile acts in the early days of the new office occurred in 2006 when, following some inadvertent political drama[5], the Assembly, using powers under the *Government of Wales Act 1998* and the *Public Audit (Wales) Act 2004*, invited the AGW to conduct an inquiry into the Welsh Ambulance Service, the performance of which had been the subject of widespread public concern. In his introduction to the Report, the AGW addressed the circumstances in which he had been invited to carry out the inquiry:

> I have undertaken this study of ambulance services in Wales under my normal audit powers. The report is therefore, in that sense, a conventional audit report. The circumstances under which I was invited to conduct the study were not conventional, however, and I have been conscious throughout that it was intended to be a substitute for a public inquiry under the Inquiries Act. For that reason, I took the unprecedented step for an Auditor General's report of holding eight public hearings throughout Wales, and in presenting the results of the study I have deliberately set out the evidence much more fully than is usual in my audit reports (WAO, 2006).

**The Public Services Ombudsman for Wales**

The Welsh Administration Ombudsman was created by the *Government of Wales Act 1998* (GOWA, 1998: s111 and Schedule 9). It was originally intended that the UK Parliamentary Commissioner for Administration (PCA) would have jurisdiction over the National Assembly for Wales. However, during the parliamentary passage of the 1998 Bill, the UK Government agreed to the creation of a separate office. The defining framework of the Office followed that of the PCA but with some significant twists. First, the 'MP filter', whereby complaints had to be made through the Member, was dispensed with, so that the public can submit complaints directly to the ombudsman. Secondly, the 1998 Act contained special provisions relating to the ombudsman's use of further reports to deal with non-compliance. A requirement that the First Minister propose a motion in a plenary sitting accepting the ombudsman's recommendations meant that 'publicity – and potential embarrassment – effectively substituted for the Ombudsman's lack of enforcement powers' (Rawlings, 2003: 378). Since 2007, the requirement now falls on the First Minister is respect of complaints about the Assembly Government and a member of the Assembly Commission in respect of the Assembly itself (PSOW Act, 2005: s.25).

The *Public Services Ombudsman (Wales) Act 2005* (PSOW Act, 2005) merged four ombudsman services into a single Public Services Ombudsman for Wales. These were the Welsh Administration Ombudsman, the Local Government Ombudsman for Wales, the Health Service Ombudsman for Wales and the Social Housing Ombudsman. The

[5] In the vote in June 2006 on a Plaid Cymru-led debate, it was thought that the motion to establish an inquiry would be defeated because the expected tied vote would be broken by the casting vote of the Presiding Officer against the motion, in line with convention. However, the Minister for Health and Social Services, Brian Gibbons, pressed the wrong voting button, so supporting the motion, which was therefore carried by 28 votes to 26. The Assembly subsequently resolved to invite the AGW to conduct the inquiry.

objective was, according to the First Minister, to 'establish a modern, flexible and accessible ombudsman service, on a one-stop shop basis, for the citizens of Wales.' (NAfW RoP, 17 March 2004: 41) The PCA retains responsibility for investigating non-devolved functions such as social security, income tax and immigration.

The PSOW is concerned with complaints that injustice has been caused by 'maladministration' and 'service failure' in a range of public bodies including local authorities, health bodies, the Welsh Assembly Government and the Assembly itself. The Ombudsman also enforces the Code of Conduct for Councillors in Wales.

The post formally came into being in April 2006. In the 2007-08 Annual Report the outgoing PSOW, Adam Peat, noted:

> I was able to report last year that the inaugural year of the office of the Public Services Ombudsman for Wales had gone smoothly and that more people than ever before had used the Ombudsman service in Wales. The past year saw a further significant increase in the number of complaints my office has received – 10% up on last year. However the number of complaints I upheld during the year is little changed on the previous year, which suggests that the upward trend in complaints received is due to increased awareness of the existenc eof the Ombudsman among members of the public rather than any deterioration in public services (PSOW, 2008:8).

Peter Tyndall was appointed as the second PSOW from April 2008. Philip Giddings provides a further discussion of the development of the ombudsman role in Chapter 8.

**National Assembly Commissioner for Standards**

Initially, the Assembly had an Independent Adviser on Standards who was appointed by, and accountable to, the Assembly as a whole to advise and assist the Presiding Officer on request in respect of any matter relating to conduct of Members. The Adviser's role in relation to the Standards Committee was by invitation and mainly limited to the investigation of factual matters. Any complaint to be investigated by the Committee had to be addressed in the first instance to the Presiding Officer in his role of overseeing the general standards of conduct within the Assembly (NAfW, 2000).

The Adviser was not a member of Assembly staff nor a civil servant, and was contracted by the Assembly for a period of three years initially on the basis of an average 2-3 days per month.

The constitution of the first Assembly as a corporate body, combining both the parliamentary and executive branches, led to some early tensions about who was responsible for standards. When one Assembly Member publicly criticised the Counsel General[6] in his local newspaper, the Permanent Secretary issued a rebuke in the form of a letter:

> As I think you know I take complaints against Assembly Members very seriously, and I take great exception to Assembly Members criticising named Assembly officials in the press without good reason and without first raising the matter with me (IWA, 2000: 22).

[6] In the First Assembly the Counsel General was a Civil Service position, not the political post it has been since May 2007 when the *Government of Wales Act 2006* came into force.

The Presiding Officer replied:

> I am not content with this. Your third paragraph suggests that complaints against Assembly Members are a matter for you. I am wholly responsible, as Presiding Officer of the National Assembly for Wales, for complaints against Members and refer these to the Standards Adviser appointed by the Assembly for this purpose. Where appropriate complaints are referred to the Standards Committee in accordance with the procedures agreed by the Standards Committee. There is no role for the Permanent Secretary in the complaints process and it would be improper and inappropriate for the Permanent Secretary to seek to become involved in such complaints. Members are accountable to their constituents and not to officials.
>
> I am also concerned that you have breached a fundamental principle of parliamentary democracy in seeking to rebuke an Assembly Member. As Presiding Officer, I am responsible for protecting the rights of Members and a complaint made against a Member should be addressed at the political level either by the appropriate Assembly Secretary or by reference to me as Presiding Officer. It is not a matter for an unelected official of the Executive to rebuke a Member or to address him or her in discourteous or intimidatory terms (IWA, 2000: 23).

In 2001 the Standards of Conduct Committee commissioned Professor Diana Woodhouse of Oxford Brookes University to conduct a review of the Standards Regime in the National Assembly for Wales (NafW, 2003). On the respective roles of the Presiding Officer (PO) and the Independent Adviser in the complaints process, her Report noted that the responsibility for maintaining the Register of Members' Interests and advising on registration lay with the PO. However, the process was flawed because he also received complaints about infringements of the Code of Conduct, including registration, and although, in practice, these were automatically referred to the Independent Adviser, the opportunity existed, in theory, for the PO to exercise some discretion. This raised concern about a possible conflict of interest.

The Report concluded that the options before the Committee were maintaining the office of Independent Adviser, with a few adjustments; appointing a Commissioner for Standards who has increased responsibilities and a higher profile but no more power; or seeking primary legislation for a statutory Commissioner for Standards with increased responsibilities and the power to go with them.

In 2005, the Committee accepted the second option, as an interim measure. The National Assembly Commissioner for Standards, therefore, is not at present a statutory post but the role was enhanced in response to recommendations from the Woodhouse Review. The Commissioner's post is funded through the Assembly Parliamentary Service (APS) budget. The current Commissioner does not receive a salary but is paid an annual retainer and receives fees on a *per diem* basis. The post is supported by Assembly Parliamentary staff but they are not exclusive to the Commissioner. The Committee on Standards of Conduct, as described in the following section, is currently considering the introduction of what could be the Assembly's first Committee-proposed Measure to create a statutory Standards Commissioner.

## Changes arising from the *Government of Wales Act 2006*

**Government of Wales Act 2006**

- Constituted the National Assembly for Wales and the Welsh Assembly Government (Welsh Ministers) separately.
- Gave powers to the Assembly to pass Measures in areas where it has legislative competence. This is acquired by means of Legislative Competence Orders which must be approved by both Houses of Parliament and the Assembly or by a Westminster Act. In practice this involves the amendment Schedule 5 of the Act by adding 'matters' to the listed 'Fields' where the Assembly may legislate.

As indicated above, the *Government of Wales Act 2006* brought about some key changes in the relationship between the parliamentary officers, the Assembly and the Welsh Assembly Government. Many of those relate to the fact that the Assembly is no longer constituted as a corporate body akin to a local authority. Following 'separation' there is a clear legal distinction between the government and the legislature so the relationships with the 'watchdogs'needed some adjustment.

The AGW and PSOW are now both appointed by the Crown following nomination by the Assembly (for five years and seven years respectively). The term of a PSOW is non-renewable and future AGWs will be appointed on a non-renewable basis. (NafW, 2008b) Previously the nomination was made by the Secretary of State for Wales, although when the current AGW was appointed an *ad hoc* protocol with the Wales Office was used so that the Assembly, in fact, made the selection. In respect of the AGW, no nomination is to be made until the Assembly is satisfied that reasonable consultation has been undertaken with bodies that represent the interests of local government in Wales (GOWA, 2006: Schedule 8, para.1). Both posts are subject to dismissal by the Monarch on the grounds of misbehaviour, although the Assembly can only recommend dismissal following a resolution passed by at least two thirds of all Assembly Members.

Previously, funding for the salary costs of the AGW and PSOW was subject to annual approval by the Assembly as part of the overall budget tabled by the Welsh Ministers. Both are now funded directly from the Welsh Consolidated Fund. The general expenditure for the running costs of the two offices is authorised by Assembly Budget Motion.[7] The Assembly's Audit Committee can make modifications to the AGW's and the PSOW's estimates but must consult the AGW or PSOW before laying an estimate containing such modifications before the Assembly (GOWA, 2006: Schedule 8, para.12).

As regards the officers' relationships with Assembly Committees, the Audit Committee is the only committee that the Assembly is required by statute to have (GOWA, 2006: s.30). It examines reports prepared by the AGW on the audit of accounts and value for money investigations of the Welsh Assembly Government and other public bodies. The AGW may attend private meetings of the Committee, with the permission of or at the request of the chair, and the Committee determines its programme of work in consultation with the AGW (NafW, 2007a: SO13.9, SO13.10). At the Audit Committee's first meeting in the Third Assembly in July 2007, the AGW, Jeremy Coleman, outlined the relationship between the AGW and the Committee.

[7] A budget motion serves the same purpose and has the same statutory effect as the annual Appropriation Act.

> The Committee operates along non-party political lines, and traditionally in unanimity, to give an impartial view on the implementation of policy. Its ability to do so is greatly enhanced by its right to consider comprehensive evidence and analysis in reports from the Auditor General and to base its questioning of witnesses on them.
>
> The Committee's ability to draw on the Auditor General's work whether in reports intended to provide a basis for an evidence session or in considering issues raised in correspondence, such as the responses of the Assembly Government to its recommendations, is a major strength. It adds to the Committee's effectiveness, and incidentally increases the authority of the Auditor General's reports (NAfW, 2007b: 1).

The Finance Committee is new to the Third Assembly. Standing Orders require it to consider and report on the estimates of income and expenses prepared by the PSOW. Welcoming Adam Peat, the outgoing PSOW, to the committee in October 2007, the then Chair, Alun Cairns, expressed a hope 'that the relationship between the committee and the ombudsman will develop, as with the Auditor General for Wales [with the Audit Committee]' (NAfW, 2007c: para.6).

The Committee on Standards of Conduct is introducing an Assembly Measure that would create a statutory Standards Commissioner, and embarked upon a public consultation in the summer of 2008. Unlike the PSOW and the 'Hybrid Officers' (see below), creation of this Commissioner does not require Westminster legislation (or even a Legislative Competence Order (LCO)), as the *Government of Wales Act 2006* empowers the Assembly to make a Measure (i.e. the equivalent of an Act of Parliament) for the:

> Creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about the conduct of Assembly members and reporting on the outcome of such investigations to the Assembly (GOWA, 2006: Schedule 5 Matter 13.1).

The AGW and PSOW have both submitted evidence to the initial consultation and share the view that the position of the Standards Commissioner should be developed along the lines of their posts in terms of tenure, independence and resourcing (NafW 2008b, 2008c). Standards Commissioners in other legislatures were consulted. The Scottish Commissioner submitted evidence but the Parliamentary Commissioner for Standards in Westminster did not feel it appropriate to provide evidence, but offered assistance with factual material should it be required (NafW, 2008d). The Standards Commissioner himself also submitted evidence which detailed how current Assembly staff assisted him in his work but noted that the Measure is 'the opportunity to create a properly resourced independent Office for the Commissioner for Standards in line with the revised role and enhanced profile of the Commissioner' (NafW, 2008e).

In his evidence, the Commissioner explained his current remit to advise the Standards Committee on matters of general principle relating to 'standards of conduct' or the 'registration of Members' Interests'. Assembly staff assist the Commissioner in providing this advice by identifying areas where there could be some concerns; undertaking research on his behalf; liaising with similar organisations; and so forth. He cited a recent example of this: several complaints regarding the misuse of blogs by Assembly Members

had flagged up a potential problem in relation to the general conduct of Members. Staff supporting the Commissioner undertook research on the background, what the situation was elsewhere, and developed a paper on behalf of the Commissioner for consideration by Standards Committee. He concluded: 'In taking matters such as this forward I have given my Office responsibility for researching, liaising with other legislatures and Commissioners.'

## 'Hybrid' Commissioners

The Children's Commissioner for Wales and Commissioner for Older People were both created by UK legislation. The two offices were created to safeguard and promote the rights and welfare of children and the interests of older people respectively.

The post of Children's Commissioner for Wales was originally established by the *Care Standards Act 2000* and the *Children's Commissioner for Wales Act 2001*. The Commissioner has the power of review and the power to require information to be provided, and is therefore empowered to examine cases of particular children by means of a public inquiry if it involves an issue that has a more general application to the lives of children in Wales. For such an examination the Commissioner has the same power as the High Court in respect of the attendance and examination of witnesses, including the administration of oaths and examination of witnesses abroad; the provision of information, and the payment of expenses. However, the Commissioner's powers are primarily of recommendation, followed by publication of non-compliance. The post has no power of enforcement through the courts, unlike similar posts such as the Disability Rights Commissioner for Wales.

In 2002 the Children's Commissioner set up the Clywch inquiry, which reported in 2004. This had been prompted by the case of a former teacher charged with sexual offences against children (but who had killed himself before the case came to trial). The nature of the inquiry raised some interesting questions about its role and status, which the Commissioner addressed in his rather defensive introduction to the Report.

> Some may also wonder how I have been able to reconcile my role as an advocate for children and that of presiding over this Inquiry. The answer is reasonably simple. Only a fair Inquiry would have served the interests of children. That is what I sought to undertake. Whenever there might be a perceived conflict between the rights of children and fairness to those directly affected by my Inquiry the reality is that it is fairness which has to and which I ensured did prevail (Clywch Report, 2004: para.1.21).

The Commissioner's remit is limited by the devolution settlement. This means that areas such as youth justice, policing issues and the benefits system are excluded from his remit. However, he does have the power to make representations to the National Assembly about any matter that affects a child in Wales.

The Commissioner is appointed by the First Minister. Its sponsor department is the Department of Children, Education Life Long Learning and Skills (DCELLS), and the post is funded from the Welsh Assembly Government (as is the Commissioner for Older People). He or she is appointed for a non-renewable seven-year period. The first Commissioner, Peter Clarke, died in January 2007 and his successor, Keith Towler, eventually took up his post in January 2008. Regulations require that children and young

people are consulted on the appointment, and candidates for the position were interviewed by a panel of young people aged between 14 and 19, drawn from Funky Dragon[8], the Young Carers Network and the Children's Commissioner's Advisory Group. The formal selection panel was chaired by the Children's Minister, Jane Hutt, with cross party representation of Assembly Members and two members of the young people's panel.

In his evidence to the Assembly Committee on the UK Government's White Paper, *Better Governance for Wales*, Peter Clarke argued that his appointment should be brought into line with that of the AGW and PSOW:

> If the Children's Commissioner for Wales were to follow this model it would give me a similar capacity to "assist the Assembly in holding the Welsh Assembly Ministers to account." If the same model is not adopted, I can envisage no arrangements that would give the same level of assurance that appointments to these offices should be seen to be entirely independent of executive authority in Wales" (NafW, 2005).

*The Proposed National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order* 2008, if passed, will give the Assembly the legislative competence to makes changes to the way in which the Children's Commissioner is appointed and to whom he is accountable. The Children's Commissioner's office stated in its evidence to the Assembly committee scrutinising the LCO that: 'we are of the opinion the Children's Commissioner for Wales should report to the National Assembly and not the Welsh Assembly Government'. It went on:

> Any office or body concerned with safeguarding and promoting the well-being of children or young persons would be able to carry out this role more effectively and independently if their budget is controlled by the National Assembly rather than a Government Department as it is now by the Department for Children, Education, Lifelong Learning and Skills (NafW, 2007e).

The Commissioner's evidence also recommended that there should be an express power to work jointly with the Children's Commissioner for England.

The Commissioner makes an annual report to the Assembly through the First Minister and cannot be instructed by any Minister to carry out an investigation. The first Commissioner considered this to be absolutely fundamental to the independence of the post (HC WAC: 29 July 2004).

The *Commissioner for Older People Act 2006* sets out a framework under which the National Assembly for Wales is able to introduce secondary legislation making detailed provision as to the appointment, staffing, financing and functions of the Commissioner. These are similar to the procedures for the Children's Commissioner except that in making the appointment the First Minister must take into account the views of selected older people resident in Wales, rather than young people, and the Commissioner is appointed for a four year term, renewable once. The first Commissioner for Older People, Ruth Marks, took up her post in April 2008.

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[8] Funky Dragon is the Children and Young People's Assembly for Wales. It is funded by the Welsh Assembly Government.

## Conclusion

Since the National Assembly for Wales came into being in 1999, the Welsh devolution settlement has evolved, and since 2007 has taken a step change with the separation of government and legislature. The role of the core parliamentary officers has similarly evolved. The Auditor General for Wales is now based in Wales and heads up a separate Welsh office; the Public Services Ombudsman for Wales is a one stop shop for Welsh public concerns about maladministration, and the Standards Commissioner's role has been clarified and strengthened from that of an 'adviser'. Early evidence from the consultation on the Assembly Measure making the Standards Commissioner a statutory post seems to indicate that the post is likely to be established along similar lines to the other two posts and the incumbents appear to see a congruence between the positions.

Wales led the way in the UK with the creation of Children's and Older People's Commissioners, the former post having now been created in the other three countries. However, the unorthodox position of being funded and appointed by the Welsh Assembly Government continues to raise questions about independence and the office of the Children's Commissioner made its position very clear in evidence on the Proposed Social Welfare LCO that it wished to be accountable to the Assembly. If the LCO is passed the Assembly will have the powers to change the status of the 'hybrid commissioners' but this is likely to depend on whether the Welsh Assembly Government of the day favours such a change.

Finally, further Commissioners are on the way. The *One Wales* document – the basis of the governing coalition Government of the Labour Party and Plaid Cymru – commits it to seek the legislative competence to pass a Measure for 'the establishment of the post of Language Commissioner'(*One Wales* Document, 2007: Ch.9). A Legislative Competence Order is expected which will enable the Assembly to acquire the power to legislate to create the post.

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# Chapter 5: An Overview Of Northern Ireland's Constitutional Watchdogs

**Ruth Barry & Zoe Robinson**

## Introduction

Any assessment of the governance of Northern Ireland cannot ignore what is often euphemistically termed 'the legacy of the past'. The longest period of direct rule lasted from 1974 until 1999, and the road to devolved government has been peppered with suspensions of the Northern Ireland Assembly. As a result, the Assembly, as a parliamentary institution, is still in its relative infancy, and the development of the term 'officers of the Assembly' has been rather limited. However, the journey from direct rule to devolution, and what the Good Friday Agreement termed 'the particular circumstances of Northern Ireland', has resulted in a greater level of 'watchdoggery' and accountability than in other constituent parts of the UK.

The primary locus of constitutional power is the Northern Ireland Act 1998. Legislative powers on certain matters are transferred to the Assembly, while some will always remain at Westminster. Reserved matters are those areas of responsibility that may be devolved - the most notable being policing and justice. With responsibility being shared between Parliament and the Assembly, some watchdogs will always report to Westminster, or, on occasion, to both legislatures.

The introduction of this Report stated that watchdogs tend to be created to 'deal with an unexpected scandal'. This statement is perhaps less true of Northern Ireland than other areas, as several high-profile watchdog bodies were proactively created as part of the political settlement. While most have met with controversy at their inception, several have operated smoothly throughout the often turbulent political climate of the last decade and are now firmly embedded in the governance of Northern Ireland. The following is an analysis of most, but by no means all, watchdog bodies that operate in Northern Ireland. The bodies covered in this chapter are:

- Comptroller and Auditor General
- Northern Ireland Ombudsman and Commissioner for Complaints
- Chief Electoral Officer
- Equality Commission for Northern Ireland
- Northern Ireland Human Rights Commission
- Police Ombudsman for Northern Ireland
- Parades Commission
- Commission for Victims and Survivors
- Commissioner for Public Appointments in Northern Ireland
- Northern Ireland Commissioner for Children and Young People
- Civil Service Commissioners for Northern Ireland

## Officers of the Assembly

While the signing of the Good Friday Agreement in 1998 may have been the most notable landmark of the peace process, the devolved future it heralded has been noted for its intermittence, with frequent suspensions - the longest lasting for over four and a half years - hampering the evolution of the Assembly as a legislature. Although largely based on the Westminster model, the term 'officer of the Assembly' technically applies to only three posts: the Assembly Ombudsman, the Comptroller and Auditor General and the Examiner of Statutory Rules, the last of which is not dealt with here.[9]

### Comptroller and Auditor General for Northern Ireland

Northern Ireland has had a separate audit office since 1987, when the Audit (Northern Ireland) Order 1987 established the Northern Ireland Audit Office (NIAO). The Comptroller and Auditor General for Northern Ireland, however, existed from Stormont times, being established in 1921. The 1987 Order can be seen as a catch-up exercise in Northern Ireland, following the modernisation of the UK office in the National Audit Act 1983. The C&AG holds the unique accolade of being both an officer of the UK Parliament and of the Assembly, with reporting responsibilities to Westminster or Stormont during direct rule or devolution as appropriate. Whereas the UK Comptroller and Auditor General is named in statute as an officer (National Audit Act 1983), there is no similar designation for the Northern Ireland post-holder, nor is the role mentioned in Assembly Standing Orders.[10] The restoration of devolution has had a major impact on the work of the C&AG and the NIAO, with the C&AG regularly appearing before the Assembly Audit and Public Accounts Committees. One significant change has been an Assembly motion to publish NIAO reports 'by order' of the Assembly, thus affording them some protection of privilege, in line with procedure at Westminster.

### Northern Ireland Ombudsman and Commissioner for Complaints

The purpose of the Ombudsman is 'to ensure that every citizen in Northern Ireland is served by a fair and efficient public administration that is committed to accountability; openness; and quality of service.' The Ombudsman office incorporates both the Northern Ireland Ombudsman and the Northern Ireland Commissioner for Complaints, which are governed by different legislation. The responsibilities of the Office were extended by the Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997, giving the Office the power to investigate complaints about the exercise of clinical judgement by health care professionals.[11] The post of Commissioner for Complaints is unique to Northern Ireland, and arose as a result of civil rights agitation in the 1960s. There are two separate pieces of secondary legislation establishing the posts, which are traditionally held by the same person. These are the Ombudsman (Northern Ireland) Order 1996 and the Commissioner for Complaints (Northern Ireland) Order 1996.[12] For further information on the history of the two offices, see Chapter 8 of this report.

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[9] The term 'officer of the Assembly' is also applied to senior members of the Assembly secretariat.

[10] His status as an officer of the Assembly was confirmed orally with the first Speaker of the Assembly, Lord Alderdice. .

[11] For further discussion about the different roles of the Northern Ireland, Ombudsman: see the website http://www.ni-ombudsman.org.uk

[12] These are UK secondary legislation

The role of the Northern Ireland Ombudsman is to promote accountability within government departments and certain other areas of the public sector, and to represent the interests of the public by investigating and addressing complaints reported by individuals. The Ombudsman is primarily concerned with investigating complaints of injustice as a result of maladministration. It is important to note that, according to the legislation that governs the Ombudsman, there is no requirement for public authorities to comply with its recommendations. When a public authority ignores the recommendations, an individual can seek damages in a County Court. However, this provision does not apply in respect of General Health Service Providers (including GPs) therefore some complainants have not had the redress recommended by the Ombudsman.

In the annual report for 2006 to 2007, the Ombudsman included a complaint surrounding two GPs, which emphasised the ineffective financial sanctions that are available to citizens. As a result of this complaint, the Ombudsman highlighted this grievance, by suggesting that legislation should be altered to make compliance with recommendations mandatory, including the possibility of financial redress.[13] The Ombudsman commented further:

> I regard this deficiency as a most serious matter which I believe undermines the statutory purpose for which my Office was created and effectively leaves the citizen unprotected in these areas of public administration.

Since May 2007, the current Ombudsman, Dr Tom Frawley, has also fulfilled the role of interim Assembly Commissioner for Standards, following an invitation to act in that position from the Assembly Standards Committee, who considered that the ombudsman's professional skills would make an effective standards investigator.[14]

## Peace Process Watchdogs

There are other offices which report to Westminster and Whitehall, because they cover areas which will remain a UK responsibility, whether or not devolution is in operation. However, the Office of the First Minister and Deputy First Minister (OFMDFM) also exercises some oversight. Most, but not all, have their origins in the Good Friday (Belfast) Agreement of 1998. These are as follows:

### Chief Electoral Officer

Electoral administration in Northern Ireland emanates from the post of Chief Electoral Officer, an independent role created by the Electoral Law (Northern Ireland) Order 1972. As parliamentary and Assembly elections are excepted matters under the Northern Ireland Act 1998, powers relating to elections will always rest centrally with Westminster, with the Secretary of State responsible to Parliament for policy and law in this area, and annual reports laid at Westminster, not Stormont.

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[13] While there had been further written communication and meetings with the Department, to date there has not been any progress to address this significant deficit in the legislation: http://www.ni-ombudsman.org.uk/pubs/NI%20Ombudsman%202007.pdf

[14] Dr Frawley's remit as interim Commissioner is completely separate from his role as Ombudsman; as interim Commissioner he acts solely under the authority of the Assembly Committee on Standards and Privileges.

The duties and functions of the Chief Electoral Officer are exercised by the staff of the Electoral Office of Northern Ireland (EONI), yet this body does not have discrete status or responsibilities. Its staff are independent and do not have the status of civil servants. A move towards securing civil service status for Electoral Office staff was suggested in 2007, but was unsuccessful (Chief Electoral Officer for Northern Ireland, 2007).

The status of the relationship between EONI and the Electoral Commission came under the spotlight with the publication of the Committee on Standards in Public Life's report into the Electoral Commission (CSPL 2007). Evidence from the Electoral Commission and the Chief Electoral Officer uncovered a difference of opinion as to whether there was any overlap in responsibilities of the two organisations.

### Equality Commission for Northern Ireland

The Equality Commission is a creation of the Northern Ireland Act 1998, and subsumed the functions of several equality bodies — the Fair Employment Commission, the Equal Opportunities Commission, the Commission for Racial Equality in Northern Ireland, and the Northern Ireland Disability Council — into one generic office. Equality and human rights issues are the responsibility of one body in England and Wales,[15] but in Northern Ireland the Equality Commission and the Human Rights Commission operate as discrete bodies with separate responsibilities. Both organisations guard their independence closely, but have a memorandum of understanding outlining their respective roles in areas of overlap and are committed to working together where necessary.

Although the Equality Commission is an independent public body, OFMDFM retains several oversight functions, including approval of corporate plans. Annual reports are submitted initially to it, which in turn sends a copy to the Secretary of State, and reports are laid before the Assembly and each House of Parliament. In addition to its advisory role, the Equality Commission is responsible for the monitoring and enforcement of section 75 of the Northern Ireland Act 1998, which places a duty on public authorities to have due regard to promote equality of opportunity between various groups in society. This duty extends to government departments, including the Commission's sponsoring department, OFMDFM.

The Northern Ireland Act 1998 provides for a minimum of 14 and maximum of 20 Commissioners, appointed by the Secretary of State. As required by the Act,[16] the current complement of 16 reflects the various community and social groups that make up Northern Ireland's ever-changing social demographic.

### Northern Ireland Human Rights Commission

The Northern Ireland Human Rights Commission (NIHRC) also emanated from the Good Friday Agreement and is a statutory Non Departmental Public Body under the Northern Ireland Act 1998. It reports to the Secretary of State, who lays its annual report before the UK Parliament. Its funding is through the Northern Ireland Office. Commissioners are appointed by the Secretary of State, and the Chief Commissioner since 2005 has been Monica McWilliam, a former Assembly Member. The principal role of the Commission, which replaced the Standing Advisory Committee on Human Rights,

[15] There is now a separate Scottish Commission for Human Rights (see chapter 3).
[16] Section 73(4).

is as a human rights enforcement body. Additionally, the Commission is charged with presenting proposals to the UK Parliament on the content of a bespoke Bill of Rights for Northern Ireland.

A Bill of Rights for Northern Ireland has been on the agenda since before the Good Friday Agreement. However, a decade on, the Bill has yet to materialise. The Bill will aim to offer human rights additional to those contained in the European Convention on Human Rights, taking into account the 'particular circumstances of Northern Ireland'. This phrase, which was taken from the 1998 Agreement, has been the subject of very different interpretations by many in Northern Ireland society, and also, on a more formal basis, by the bodies that comprised Bill of Rights Forum.

The Forum, which was established in the wake of the St Andrews' Agreement in December 2006, was tasked with the express purpose of devising proposals to inform the Commission's final advice to the Secretary of State. It also represented the first formal engagement by unionist parties on working towards a Bill of Rights. The Forum's composition[17] reflected all shades of political opinion, and wider Northern Ireland society. As such, it is perhaps no surprise that the Forum's report, which was published in March 2008, was notable for the myriad areas of disagreement within it.

**Office of the Police Ombudsman of Northern Ireland**

Policing has always been a controversial and politicised issue in Northern Ireland, and policing and justice continue to be among the most contentious issues faced by the Executive, with the devolution of powers seen by many as the final step in the peace process. The Office of the Police Ombudsman was established as an independent oversight body under the Police (Northern Ireland) Act 1998. It reports to the Secretary of State and is funded by grant in aid via the Northern Ireland Office. The first Police Ombudsman, Nuala O'Loan, was appointed Police Ombudsman designate in 1999, serving until 6 November 2007, when former Oversight Commissioner,[18] Al Hutchinson, succeeded her. There is a single seven year term of office.

The Ombudsman has operated during an unstable period in Northern Ireland politics, and while several reports may not have been well received in some quarters, surveys have shown that confidence in the impartiality of the police complaints system has consistently risen. Section 51 of the 1998 Act provides that the Ombudsman shall exercise his powers in order to secure 'the confidence of the public and members of the police force'. Confidence in the impartiality of the police complaints system has risen, with 81% of Catholics and 74% of Protestants expressing their confidence in the system in 2005. Compared to figures for 2002, this represented an increase of 3% among Catholics and a significant 23% increase among Protestants (Bennett, 2005).

In February 2005, the Northern Ireland Affairs Committee (Northern Ireland Affairs Committee, 2005) noted that the Ombudsman had operated for the first six months of its existence without formal guidance from government. This highlights government's

[17] The Forum comprised the main political parties in Northern Ireland and other groups including the Churches, trades unions and the voluntary and business sectors.

[18] The Oversight Commissioner (OOC) was established pursuant to the Report of the Independent Commission on Policing in Northern Ireland, chaired by Chris Patten, to oversee the implementation of the report's recommendations. The OOC operated between February 2000 and May 2007.

role with new bodies that, while independent, have a remit involving such a contentious and highly politicised issue.

**The Parades Commission**

The Commission was established in March 1997 in order to address community tensions around public processions, and given statutory existence in the Public Processions (Northern Ireland) Act 1998. Significantly, the establishment of the Commission meant that the police no longer have a decision-making role in respect of parades. Appointments to the Commission are made by the Secretary of State - there are seven Commissioners, including the Chairman - and the secretariat is provided by the Northern Ireland Office.

In addition to making determinations on whether parades can take place, and often what route they can take, the Commission also has statutory functions to promote understanding and facilitate dialogue. As such, the independence and autonomy of Commission is crucial to its work.

As with many other watchdog bodies in Northern Ireland, the Commission's membership aims, as far as is reasonably practicable, to be representative of the community in Northern Ireland. However, recruitment to the Commission has been as contested an issue as that of parading itself. The decision by the then Secretary of State Peter Hain to appoint two members of the Orange Order to the Commission was met with outrage in some quarters. This resulted in a long legal challenge that went on judicial review all the way to the House of Lords. On 30 January 2008, the Law Lords ruled that there was a conflict of interest in the appointment of David Burrows and Don MacKay, rendering their appointment unlawful (House of Lords 2008).

Don MacKay had already resigned on 16 May 2006 after criticisms surrounding his failure to receive permission from his referees prior to submitting his application form surfaced throughout the media (BBC News 2006a). David Burrows resigned on 30 January 2008 as a result of the House of Lords ruling (Parades Commission 2008).

This particular legal challenge emphasises that not only is the independence of watchdog bodies a particularly crucial issue in Northern Ireland compared to elsewhere in the UK, but that transparency is also of significant importance. As with the development of the Commission for Victims and Survivors, and the appointment of Bertha McDougall as interim Victims Commissioner, there have been accusations that certain appointments to the Parades Commission were politically motivated. The resultant successful legal challenges may give more grist to Felicity Huston's mill in relation to strengthening and widening the remit of the Commissioner for Public Appointments, on which see below.

**Commission for Victims and Survivors**

Dealing with the legacy of the past in Northern Ireland has been, and continues to be, a particularly sensitive issue. The establishment of a mechanism to address the needs of, and oversee policy in relation to, victims and survivors has been the subject of intense political debate.

The evolution of the Commission has been dogged by controversy and legal challenge. The appointment of the interim Commissioner Bertha McDougall, the widow of an

RUC reservist, was at the direction of the then Secretary of State, Peter Hain, and media speculation at the time centred on the question of whether her appointment was politically motivated (BBC News 2006b). Following a judicial review, the post was deemed a contractual appointment that ended on 5 December 2006. Consequently, the interim Commissioner's final report was published in a personal capacity.

An appointment process for a new, permanent Commissioner was initiated in January 2007, when direct rule was still in operation, and several candidates were deemed to have been successful. In October of that year, the then First Minister and deputy First Minister decided to re-advertise the post 'against the background of a fully functioning Executive.' Instead of a single Commissioner, as had been advertised, four Commissioners were appointed, of whom Bertha McDougall is one.

Subsequently, this move resulted in further intense scrutiny from the Assembly, the media, and further legal challenge. The fact that the statutory arrangements were predicated on a single post-holder necessitated a change in legislation, as the original Order in Council passed at Westminster[19] created 'an officer known as the Commissioner for Victims and Survivors for Northern Ireland'. The hiatus between appointments to the Commission and enacting amending legislation threw up a further problem, in that confusion arose as to the legal status of the fledgling Commission. This was further compounded by delays in tabling the amending legislation. While the process of change from a Commissioner to a Commission may have been the cause of consternation, the legislation enabling the creation of a Commission did not significantly alter the remit, responsibilities or powers envisaged in the original Order.

Debate on the past in Northern Ireland is understandably fraught, and the formalisation of a mechanism to deal with such issues through the Commission depends, as with any watchdog body, on public confidence. The process that led to the creation of the Commission for Victims and Survivors is matched by the enormity of the extremely sensitive task upon which it has embarked.

## Devolved watchdogs

Finally, some watchdog bodies report formally to the Executive and/or the Assembly, described below:

### Commissioner for Public Appointments in Northern Ireland

The appointment of Felicity Huston to the Office of the Commissioner for Public Appointments in Northern Ireland (OCPANI) in 2005 represented a change in the public appointments process in Northern Ireland, in that she is the first incumbent born and based in Northern Ireland. Until that date, public appointments in Northern Ireland fell within the remit of the UK Commissioner for Public Appointments. Chapter 9 provides more detail about the decision to establish a separate Northern Ireland Commissioner in 2005, through an Order in Council at Westminster.

Currently, the Commissioner oversees fewer than half of the public appointments in Northern Ireland. High-profile bodies such as the Parades Commission and the Northern Ireland Human Rights Commission, in addition to many quasi-judicial posts,

[19] Victims and Survivors (Northern Ireland) Order 2006 (NI 17).

are outwith her remit. Instead, OCPANI's remit is limited to overseeing and regulating appointments made to Executive non-departmental public bodies and health and social services bodies.[20] These restrictions have been recognised by central government, with the then Secretary of State, Peter Hain, announcing as far back as March 2006 that all public appointments in Northern Ireland should be regulated by OCPANI. New legislation has, however, yet to materialise.

Although sharing a broadly similar remit with counterpart bodies in the rest of the UK, OCPANI does not enjoy the same legislative framework. The current appointment process is through a prerogative Order,[21] as opposed to a primary legislative instrument. Chapter 8 on public appointments commissioners gives more detail on arrangements in other parts of the UK, The absence of a more traditional statutory framework — legislation moved on the floor of the Assembly, open to the usual parliamentary scrutiny — is but one issue raised by Felicity Huston in relation to the independence of her office (Commissioner for Public Appointments in Northern Ireland 2007).

Huston has outlined her concern at her inability to issue effective sanctions or overturn appointments and has highlighted a range of issues, from budgetary control to staffing and resource limitations, which hamper her work. These frustrations are typified by the fact that OCPANI is currently staffed and financed by, and located in the same building as, the government Department responsible for her appointment and which also falls within her remit:

> sitting in the midst of the Civil Servants whom I both regulate and audit, does nothing to enforce the status of OCPANI as independent of Government and the Civil Service (Northern Ireland Assembly Public Accounts Committee 2008).

**Northern Ireland Commissioner for Children and Young People**

The Northern Ireland Commissioner for Children and Young People (NICCY)'s principal aim is 'to safeguard and promote the rights and best interests of children and young persons' (The Commissioner for Children and Young People (Northern Ireland) Order 2003). The Commissioner's role is defined in the 2003 Order as promoting children's rights, dealing with complaints and legal action, and research and inquiries. It is a Non Departmental Public Body in legal form, sponsored by the OFMDFM, despite the founding legislation being enacted at Westminster. The Commissioner is tasked with reviewing the effectiveness of law and practice relating to the welfare of children and young people.

NICCY scrutinises government action and upholds the rights of children and young people. There is a co-operative relationship between the four UK Children's Commissioners, which allows for further transparency of both central government and devolved government, enabling their actions to be held to account.

The independence of the Commissioner may be affected by the role of OFMDFM, both in appointing the Commissioner and the department's role in the Commission's policy-

[20] Some appointments remain within the remit of UK Commissioner for Public Appointments, such as those made by the Northern Ireland Office and the Northern Ireland Court Service.

[21] The legislative framework for the Northern Ireland Commissioner for Public Appointments is found in the Commissioner for Public Appointments (Northern Ireland) Order 1995, as amended by the Commissioner for Public Appointments (Amendment) Order (Northern Ireland) 2001.

making functions. In a statutory review of the office in 2006, required by the 2003 Order, the Commissioner highlighted various aspects that affect his/her independence, arguing that it could be compromised as a result of OFMDFM's involvement. Concern was expressed that the Commissioner's autonomy and independence cannot be guaranteed if a government department is the sponsoring body, and that 'it would be desirable if the Commissioner, as a 'constitutional watchdog', was made answerable to a Committee of the Assembly as opposed to a Government Department.' (Northern Ireland Commissioner for Children and Young People 2006). There has been no legislative response to this suggestion.

### Civil Service Commissioners for Northern Ireland

The six Civil Service Commissioners for Northern Ireland (CSCNI) were first established in 1923 to uphold the principle of appointment on merit in recruitment to the Northern Ireland Civil Service (NICS). The appointments to the Commission are made by Her Majesty (in practice the Secretary of State), and the Northern Ireland Office provides the secretariat. The creation of the Stormont Parliament and a separate Northern Ireland Cabinet had established a separate civil service in Northern Ireland, in contrast to the position under devolution in Scotland and Wales, where the principle of a unitary civil service was retained. CSCNI broadly adopt the same role as their counterparts in the UK, with an additional responsibility conferred upon them under section 75 of the Northern Ireland Act 1998 to ensure that all appointments to the NICS are made with regard to the promotion of equality of opportunity.

The Commissioners are afforded some independence by the Civil Service Commissioners (Northern Ireland) Order 1999, which assigned to CSCNI the role of an independent appeals mechanism to civil servants. This allows staff grievances to be aired and guarantees NICS accountability. It is important that the Commissioners ensure that all applicants are judged on the merit principle, which provides for fair and open competition. Their annual report is addressed to Her Majesty. The forthcoming legislation designed to establish the British civil service on a statutory basis, described in Chapter 2, will not extend to Northern Ireland. But although there are no formal reporting lines to the OFMDFM, in practice, the Commissioners must liaise closely with the Executive departments.

## A troubled history

Devolution in Northern Ireland was turbulent due to societal polarisation and the 'particular circumstances' which developed as a consequence of the Troubles. The legacy of the past has placed a burden on Northern Ireland leading to the suspension of devolution on various occasions, rendering the devolution process extremely fragile. For devolution to become sustainable there must be a network of support insulating governance arrangements from past divisions.

Generally, watchdogs promote accountability and help prevent partisanship within government and the wider public arena. In Northern Ireland, however, certain watchdogs are entrusted with a further role in addressing the legacy of the past and aiding the transition to a peaceful society. This additional aspect perhaps accounts for the fact that Northern Ireland — a region similar in size to Yorkshire — has a relatively higher number of watchdogs than the rest of the UK.

## Independence

Equality, justice and the human rights for all must be at the heart of governance to guarantee these ideals are enshrined. Consequently, the independence of watchdogs is vital given that devolution is susceptible to certain fragilities or unforeseen issues due to its relative infancy.

Throughout this chapter, there have been issues where the independence of particular watchdogs has been questioned. For example, concerns have been voiced by the Northern Ireland Human Rights Chief Commissioner Monica McWilliams over the inability of the Human Rights Commission to provide a meaningful role. A particular emphasis was placed on their incapacity to adequately address past human rights abuses, which is at the heart of addressing the legacy of the past.

The importance of independence was emphasised by former Prisoner Ombudsman Brian Coulter, whose resignation in June 2008 was prompted by an 'irreconcilable difference' (Prisoner Ombudsman for Northern Ireland, 2008) with the Northern Ireland Office over the need to secure the position through discrete statutory powers.

## Accountability

Devolution emerged from a 30-year conflict where any attempt at stable government was subject to suspensions and intermittent periods of direct rule. Hence, the Assembly lacks practical experience of the substantive issues of self-government due to its difficult beginnings. Protection of the ideals of independence, accountability and transparency in government should allow the people and the Executive to fully engage in devolution. However, as 90% of the 108 Assembly Members belong to parties that form the mandatory coalition that forms the Executive, the development of effective opposition and thus opportunities for the expression of alternative views may be limited.

Several watchdogs were created in the wake of the new peace settlement with the intention of addressing controversial aspects of life in Northern Ireland that were often at the nucleus of the Troubles. The peace process placed a duty on the Assembly to tackle the issues of controversy and the legacy of the past in a way compatible with the ideals of equality and justice. The accountability of government to the people lies at the core of Northern Ireland's transition to peace to ensure that no questions remain unanswered.

## Public confidence

Independence and transparency are essential for any body with a watchdog function. However, it could be argued that public confidence is more of an issue for the people of Northern Ireland than elsewhere, as a society emerging from a sustained period of conflict into a largely peaceful, if at times slightly unsteady, political settlement. With the new Executive operating for over a year with little real threat to its existence, the focus has been very much on accentuating the positive: devolution is alive and well in Northern Ireland. Although pockets of doubt remain, the four-party mandatory coalition has negotiated many of the obstacles that it has met along the way to ever-increasing stability.

Public confidence in watchdog bodies is crucial in that they all form part of the jigsaw of devolution and are a tangible representation of the commitments made by the political parties along the arduous and hard-fought road to the Assembly. Many in Northern Ireland remain to be convinced of the bona fides of 'the other side', and these bodies, while providing a greater degree of governance than elsewhere, are crucial in showing that equality, fairness and openness are truly at the heart of the 'new dispensation'.

## Conclusion

As government and governance gain in confidence and stability, and Northern Ireland as a society moves not only towards a shared future but to addressing hitherto unresolved issues, this begs the question of whether certain watchdogs can carry on in perpetuity. The initial murmurings of whether there is a better way to address past issues - a discrete issue for society and government in Northern Ireland to address - have been coupled with robust calls from other ombudsmen to underpin particular bodies through primary legislation.

With the legacy of the Troubles remaining a live issue in Northern Ireland, it is difficult to envisage a situation where bodies dealing with contentious issues, such as parading and policing, would be considered redundant. Furthermore, many watchdogs, such as the Equality Commission and the Northern Ireland Human Rights Commission, appear determined to maintain their separate functions and responsibilities.

With the Executive responsible for its own Budget, and the Assembly growing in terms of confidence and stability, consideration might in the future be given to streamlining or merging certain oversight bodies. While former Police Ombudsman Nuala O'Loan has advocated creating a single body to deal with past investigations (BBC News 2008), for example, there appears to be a desire in other quarters for retaining distinct roles for the foreseeable future.

Openness, accountability, independence and transparency are crucial elements in order for the oversight bodies outlined to survive. The calls for and from ombudsmen to have these bodies placed on a statutory footing may provide food for thought for an Executive that has been criticised for a dearth of primary legislation during its first year of operation. Moreover, one criticism often levelled during direct rule was that accountability was not as robust as it could, or should, have been. This is perhaps evidenced by the numerous legal challenges made to appointments to several of the bodies outlined in this chapter. However, devolved government is too young, and the memories of the past too fresh, to predict with any degree of certainty how long certain watchdogs will continue operating in their current form.

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# Chapter 6: Commonwealth Experience I – Federal Accountability and Beyond in Canada

**Elise Hurtubise-Loranger**

## Summary

This chapter starts by listing the various officers of Parliament in Canada within federal jurisdiction and identifies the common characteristics between them. It then briefly examines the various offices that were established from 1878 to 1983, paying particular attention to the political context in which they were created. The second half of the chapter deals with the more recent developments and, specifically, with the three new officer of Parliament positions that have been established by the *Federal Accountability Act* adopted in 2006. The chapter concludes by examining issues such as funding mechanisms for officers of Parliament and their compliance with government policies.

## Introduction

There is no statutory definition of what constitutes an officer of Parliament in Canada. As a result, there is some confusion as to how to describe them and who is included in this category. For example, the Privy Council Office, the central body of the federal government, makes a distinction by referring to the officers of Parliament discussed in this document as 'agents of Parliament' and to other individuals such as the Clerk of either Chamber of Parliament, the Sergeant-at-Arms, the Law Clerk and Parliamentary Counsel or the Parliamentary Librarian (officials who assist Parliament in procedural and administrative matters) as 'officers of Parliament.'

There are, however, a few criteria that have been consistently used to identify officers of Parliament:

- Appointment by the Governor in Council by commission under the Great Seal.
- Appointment approved by one or both Houses of Parliament through a resolution.
- Term of appointment guaranteed by statute.
- Removal from office by a resolution of one or both Houses.
- Reports submitted to the Speakers of one or both Chambers.

Following these criteria, there are currently eight officers of Parliament in Canada and they are:

- Auditor General
- Chief Electoral Officer
- Commissioner of Official Languages
- Information Commissioner
- Privacy Commissioner
- Conflict of Interest and Ethics Commissioner
- Commissioner of Lobbying
- Public Sector Integrity Commissioner

All, except the Auditor General and the Chief Electoral Officer, have seven-year mandates. The Auditor General holds office for a ten-year term, but not beyond age 65. The Chief Electoral Officer does not have a fixed term but must retire at age 65.

**Reappointment**

The officers of Parliament who have a seven year mandate can be reappointed for a subsequent seven year term. The Conflict of Interest and Ethics Commissioner may even have his or her seven year term renewed more than once. The Auditor General's ten-year term is not renewable.

The creation of officer of Parliament positions has been done on an *ad hoc* basis in Canada and usually in response to political pressures. The following sections will examine the role of each of these officers of Parliament and explain the particular context in which these offices were created. The first section of the document deals with officers of Parliament positions created from 1878 to 1983. The following section will focus on more recent developments in this area.

## Officers of Parliament - From 1878 to 1983

### Auditor General

The Auditor General (AG) was the first officer of Parliament in Canada.[22] This office was created in 1878 following the Pacific Scandal, where Prime Minister John A. MacDonald had accepted illicit funds from a businessman in return for the lucrative contract to construct the transcontinental Canadian Pacific Railway. The office of the AG was established by the subsequent government following a political crisis in which the need for independent review became apparent.

Today, the AG plays an important role in the process of government accountability by conducting independent audits of federal government operations and reporting her findings to the Senate and the House of Commons by tabling both annual and special reports. The AG verifies the accounting methods and accuracy of the financial statements of the government, and determines whether public funds were used efficiently and for the purposes intended by Parliament. The AG appears regularly before parliamentary committees, particularly the House of Commons Standing Committee on Public Accounts.

The AG's investigatory powers have recently been extended to allow inquiry into the use of funds that individuals, non-government institutions and private entities receive under a funding agreement with any federal institutions such as government departments or Crown corporations.[23] However, this power has yet to be exercised by the current AG.

[22] The current Auditor General is Sheila Fraser. She took office in 2001. On the office of the AG, see the *Auditor General Act*.
[23] *Federal Accountability Act* 2006, s. 304

## Chief Electoral Officer

In 1920, a Chief Electoral Officer (CEO) was appointed for the first time under the *Dominion Elections Act* of 1920. The Act, and, consequently, the CEO position, was adopted following allegations that some women had been allowed to vote during World War I for unlawful political reasons, and the perceived for a non-partisan, non-government electoral structure (Bell, 2006: 16).

Today, under the *Canada Elections Act* (2000), the CEO administers federal elections and referendums in Canada. His or her office is also responsible for the registration of political parties, the Register of Electors, and in general, the enforcement of the Act.

## Commissioner of Official Languages

In 1963, triggered by an intense period of change in the province of Québec known as the Quiet Revolution[24], and the ripple effect it had in the rest of Canada, the Royal Commission on Bilingualism and Biculturalism was launched by the federal government.[25] The Commission's mandate was primarily to examine the extent of bilingualism in the federal public service, the role of public and private organizations in promoting better cultural relations, and the opportunities for all Canadians to become bilingual in both English and French.[26] The Commission's findings were published in six volumes from 1967 to 1970, and one of its main conclusions was that 'Canada is now in the greatest crisis of its history'.[27]

Following the findings of the Commission, Parliament adopted the *Official Languages Act*[28] (OLA). This quasi-constitutional legislation established the Office of the Commissioner of Official Languages, whose mandate is to ensure that federal institutions comply with the Act. The OLA provides, among other things, that French and English are the official languages of Canada, and that both languages are to be used as languages of work and languages of service in federal institutions. The Commissioner may investigate complaints, conduct audits and studies to evaluate the performance of federal institutions, and make recommendations to them.

## Privacy Commissioner and Information Commissioner

The positions of the Privacy Commissioner and the Information Commissioner constitute an exception in that they were not created in the midst of a political crisis but rather following many years of discussion and a debate on the report of a Department of Justice Task Force published in 1972.

The Privacy Commissioner monitors compliance with the *Privacy Act* (1983) and investigates complaints that the federal government has not responded adequately to an individual's request to see his or her personal information or complaint that a federal agency is collecting information in a manner that does not comply with the *Privacy Act*. The Privacy Commissioner is also responsible for complaints relating to the collection,

[24] On the Quiet Revolution, see Durocher (n.d.)
[25] On the Royal Commission, see Canadian Broadcasting Corporation Archives (n.d.)
[26] Laing (n.d.)
[27] Canadian Broadcasting Corporation Archives (n.d.)
[28] The OLA was originally adopted in 1969 but was substantially modified in 1988.

disclosure, use and protection of personal information in the private sector under the *Personal Information Protection and Electronic Documents Act* (2000).

The Information Commissioner investigates complaints from people who believe they have been denied access to government documents in a manner that contravenes the provisions of the *Access to Information Act*. The Commissioner may also make recommendations to government institutions.

### Recent Developments – Officers of Parliament Created by the *Federal Accountability Act*

More recently, the trend of creating officers of Parliament in the midst of political tensions has resurfaced. In 1995, in the aftermath of the Québec sovereignty referendum, the federal government established a fund to help promote Canada in the province of Québec by sponsoring various types of events such as cultural and sporting events. The management of this fund came under strong scrutiny and was the object of an extensive report by the Auditor General in 2003 (Auditor General 2004) followed by a public inquiry headed by Justice Gomery that ended with the publication of his final report in February 2006 (Gomery 2005).

These reports on what has become known as the 'sponsorship scandal'[29] revealed that millions of dollars had been paid in commissions to communication firms in Québec, but that very little work resulted from these expenditures. The Gomery Commission further revealed that there was evidence of political involvement in the administration of the program.

This sponsorship scandal arguably cost the Liberal Party the following federal general election. In January 2006, the Conservative Party, which had campaigned on values of integrity and accountability, won the highest number of seats in the House of Commons and formed a minority government.

The Party's top commitment of the campaign was to 'clean up government' by adopting a new piece of legislation that would make extensive changes to the oversight mechanisms in place. In April 2006, the government introduced Bill C-2, the *Federal Accountability Act* (2006) (FAA). The FAA was an omnibus piece of legislation that amended 45 federal statutes and enacted two new pieces of legislation. Its provisions related to various topics linked to political accountability such as ethics; political financing; access to information; lobbying and whistleblower protection to name a few. The FAA also elevated three existing administrative functions to the status of officers of Parliament. These three new officers are: the Conflict of Interest and Ethics Commissioner, the Commissioner of Lobbying and the Public Sector Integrity Commissioner.

The FAA also instituted a uniform approach to appointing officers of Parliament. All officers of Parliament, except the Chief Electoral Officer,[30] are appointed by the Governor in Council by commission under the Great Seal, after consultation with the leader of every recognized party in the Senate and the House of Commons and after

[29] Canadian Broadcasting Corporation Archives (2006)

[30] The CEO's appointment does not involve the appointed Senate Chamber. Since the CEO's role has a direct impact on the Members of the House of Commons, they have a unique role in reviewing his appointment.

approval of the appointment by resolution of the Senate and the House of Commons. The goal behind this new approach was to ensure a more meaningful role for Parliament in the appointment process.

**Appearance before Parliamentary Committees:**

Section 111.1 of the *House of Commons Standing Orders* further provides that where the government intends to appoint an officer of Parliament, the name of the proposed appointee is referred to the appropriate House of Commons standing committee which may consider the appointment by inviting the candidate to appear before the committee. For example, when the government appointed a new Commissioner of Official Languages in the Fall of 2006, the proposed appointee appeared before the House of Commons Standing Committee on Official Languages. The Senate takes a similar approach by adopting a motion inviting the candidate to appear before the Committee of the Whole in the Senate Chamber. This appearance takes place prior to the adoption of the Senate and House of Commons resolutions.

### Conflict of Interest and Ethics Commissioner

The position of Conflict of Interest and Ethics Commissioner was created in 2007 when the pertinent provisions of the FAA amending the *Parliament of Canada Act* [31] (PCA) came into force. The PCA, along with the *Conflict of Interest Act* (2006) (CIA), enacted by the FAA identifies the Commissioner's roles and responsibilities.

Under the PCA, the Commissioner performs the duties and functions assigned by the House of Commons for governing the conduct of its members when carrying out the duties and functions of their office as members of that House, under the general direction of any committee of the House of Commons designated for that purpose.

Under the CIA, the Commissioner provides confidential advice to the Prime Minister and to public office holders (mostly Governor in Council appointments) on all matters pertaining to the implementation of the Act. In addition, he or she may, at the request of a Member of Parliament or on his or her own initiative, investigate any breach of the Act by a public office holder.

This position replaced that of the Ethics Commissioner established in 2004. The former office of the Ethics Commissioner administered two sets of conflict of interest codes (one for Members of Parliament and the other for public office holders). The current Conflict of Interest and Ethics Commissioner now applies the *Conflict of Interest Act* and the Members' Code.

### Commissioner of Lobbying

The office of the Commissioner of Lobbying was created when the relevant provisions of the FAA came into force on 2 July 2008. The Commissioner is responsible for promoting an understanding of and compliance with the *Lobbying Act*[32]. To this end, he or she has a public education mandate, particularly with respect to lobbyists, their clients and public office holders. The Commissioner must also conduct investigations where he or she has reason to believe that this is necessary to ensure compliance with the Act. The

[31] This Act was originally adopted in 1868 but has been substantially modified since then.
[32] This Act was originally adopted in 1988 but substantially modified in 2006 by the FAA.

Act also stipulates that the Commissioner must report to Parliament on his or her findings and conclusions after the completion of an investigation.

Some infractions under the *Lobbying Act* are in fact criminal offences. The Commissioner will not have the authority to impose administrative or monetary penalties for these particular offences. In fact, when the Commissioner believes that a person has committed a criminal offence under the *Lobbying Act* or any other statute, he or she must cease the investigation and advise the appropriate authorities.[33] Therefore, the Commissioner's investigation powers are somewhat restricted and it 'remains to be seen how effective the proposed new investigatory powers will be, given that the ultimate enforcement of the law will still rely on the use of criminal sanctions by a body outside of the lobbyists system' (Holmes 2007).

The Commissioner of Lobbying replaces the former Office of the Registrar of Lobbyists that had been established in 1989 and was under the control and supervision of the President of the Treasury Board. The Office of the Commissioner of Lobbying is now an independent office with increased investigatory and reporting powers, enforcement measures and a public education mandate.

### Public Sector Integrity Commissioner

The Public Sector Integrity Commissioner position was also created in 2007. The Commissioner's mandate under the *Public Servants Disclosure Protection Act* (2005) is to receive and investigate disclosures of wrongdoing and make recommendations based on his or her findings. The Commissioner is also responsible for hearing the complaints of public servants who have experienced a reprisal as a result of reporting a wrongdoing. The Commissioner may conduct investigations and attempt to conciliate a settlement between the parties, but does not have the power to enforce a settlement. If there is no settlement, the Commissioner may decide to refer the matter to a new, independent Public Servants Disclosure Protection Tribunal. The Commissioner must report to Parliament on his or her findings and conclusions when an allegation of wrongdoing or reprisal is well-founded.

The Public Sector Integrity Commissioner replaced the former Public Service Integrity Officer appointed in 2001 as an officer of Treasury Board following the adoption of a government policy on disclosure of wrongdoings. In his first annual report, the Officer concluded that he needed to be independent from the government in order to perform his duties. The policy was eventually turned into legislation in 2005, thereby establishing the Public Sector Integrity Commissioner's position. However, this legislation only came into force in 2007 following amendments to the *Public Servants Disclosure Protection Act* under the FAA.

## Funding of Officers of Parliament

In order to allow officers of Parliament to fully fulfill their mandates, their funding must be sufficient and appropriate. Funding of officers of Parliament has raised some concerns and was the subject of a report by the House of Commons' Standing Committee on Ethics and Access to Information in 2005.[34] The Committee's report came to the conclusion that the process by which officers of Parliament secured their

[33] See subsection 10.4(7) of the *Lobbying Act*.
[34] House of Commons Standing Committee on Access to Information, Privacy and Ethics (2005)

funding every year (through submissions to the Treasury Board) was incompatible with their government scrutiny mandate. Following this report, an ad hoc, all party advisory panel made up of Members of Parliament and chaired by the Speaker of the House of Commons was established. The panel's role is to consider funding requests from officers of Parliament and proceed to make recommendations to the Treasury Board. This panel was maintained by the current Conservative government when they took office in 2006 and seems to be giving satisfactory results:

> This innovative mechanism has addressed the apparent compromise of independence that arises when the government of the day decides on the level of funding available to officers of Parliament - whose role it is to investigate government and government officials. As well, the ad hoc advisory panel serves, along with the substantive standing committees to which the officers of Parliament report, as a mechanism of accountability for the officers of Parliament (Information Commissioner, 2007).

It will be interesting to see whether this ad hoc panel becomes a permanent fixture on Parliament Hill or whether it will be replaced by another system.

## Compliance with Treasury Board Policies

Officers of Parliament have raised other issues, besides funding, that threaten to compromise their independence. Officers of Parliament must generally comply with Treasury Board policies on various administrative matters such as human resources, reporting, compensation, etc.[35] To ensure that federal institutions comply with these rules, Treasury Board officials may conduct audits and examinations of the federal institution's records. This could mean for example that government officials could potentially access investigation records held by an officer of Parliament. Such scrutiny may give rise to an appearance of government interference with the independence of officers of Parliament. An Officers of Parliament Working Group has been established to work with Treasury Board to review its policies and directives with this independence concern in mind.

The Working Group is formed by the officers of Parliament listed in this chapter. For the purpose of this on-going discussion with Treasury Board, the officers of Parliament have developed a set of principles to guide the review of the policies. These principles are: the need to respect the spirit and intent of government policies, to protect the independence of officers of Parliament, to ensure accountability and transparency, and to ensure that appropriate reporting mechanisms are in place (Information Commissioner, 2007). The objective is to find a balance between the need for central agencies to ensure accountability and the importance of protecting the independence of officers of Parliament.

However, the officers of Parliament have recently complained that new Treasury Board policies are being adopted without their input and knowledge. For example, in the spring of 2008, the government issued a draft policy that would require all communications strategies from federal departments and agencies under schedule 1.1 of the *Financial*

[35] Institutions within the legislative branch of government such as the Senate, the House of Commons and the Library of Parliament, are not bound by Treasury Board policies. They each adopt their own policies that generally respect the intent and spirit of Treasury Board policies.

*Administration Act* (which includes officers of Parliament[36]) to be vetted by the Privy Council Office for approval. Such a practice would clearly be incompatible with the independent role of an officer of Parliament. The government House Leader declared in the House of Commons that the government 'has no intention of requiring those independent agents of Parliament to vet their communications through the government in any way'[37]. However, officers of Parliament remain concerned because the wording of many Treasury Board policies does not reflect the government's intention.

## Conclusion

The role of officers of Parliament has evolved significantly over the last decade. As mentioned earlier, the Auditor General, through one of her reports, unveiled a sponsorship scandal that has had a major impact on the Canadian political landscape. Since then, the way officers of Parliament are perceived by Parliamentarians and by the public has somewhat changed. Their appearances before parliamentary committees are frequent and in some cases receive considerable media coverage. Substantial credibility is being attached to their work; so much so that they can truly have an impact on public opinion and are often able to put the government on the defensive.

For example, the Chief Electoral Officer has recently alleged that the Conservative Party of Canada violated the *Canada Elections Act* during the federal elections of 2006 by spending above their limit on media advertising. Fearing that this would become the political scandal of the day, the Conservative Party denied these allegations and voted against a motion introduced by the opposition to the effect 'that the House express its full and complete confidence in Elections Canada and the Commissioner of Canada Elections'[38]. The government chose to take a strong stand to try to minimize the impact of the Chief Electoral Officer's allegations.

It will be interesting to see if this trend continues and if it will extend evenly to all officers of Parliament. It will also be interesting to note in the next few years how the three new officers of Parliament settle into their new functions and what impact they might have in their respective areas of expertise. Will they bring more accountability to government? These three new officer of Parliament positions were established with that very goal in mind. These recent developments stemmed from the government's intention to restore the public's trust in government and significantly increase accountability mechanisms. The reality seems to be however, that these independent bodies do not ensure that government is held to account since their power is often limited to influence.

Officers of Parliament do play a crucial role in providing the knowledge necessary to ask the right questions but ultimately, only parliamentarians and the Canadian public have the power to truly hold the government to account.

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# Chapter 7: Commonwealth Experience II – Officers of Parliament in Australia and New Zealand: Building a Working Model

**Robert Buchanan**

The primary focus of this chapter is on the status of officer of parliament in New Zealand. It briefly examines the situation in Australia, and concludes with a discussion of the emerging approach, in both jurisdictions, of watchdogs and their parliaments working together to achieve common accountability goals.

New Zealand is worth focusing on in this study because of its unusual approach of having defined the characteristics of an officer of parliament and formalised the status of its officers in legal and functional terms. This has produced a firm understanding of the types of functions deserving of the status. Unusually for Commonwealth jurisdictions, the intended effect has been to limit the number of watchdog offices with parliamentary officer status.

Another significant effect in New Zealand has been to systematise the relationship between the officers and the parliament. Although not always without tension and difficulty, and some ongoing ambiguity, the relationship in recent years has been positive and characterised by a mutual respect. To some extent this may have been a product of the small, unicameral, and largely consensus-based nature of New Zealand's parliamentary democracy. But, to return to one of the questions posed in the introduction to this report, there is little doubt that, in New Zealand at least, the relationship has enhanced the work both of the officers and of the parliament itself.

Similar observations can be made about Australia, about which this chapter contains less detail. There has been a range of developments at both Commonwealth and state level in Australia, with varying degrees of systematisation but, ultimately, a similar approach to co-operation between the officers and their parliaments.

## Development of the officer of parliament status in New Zealand

The officer of parliament concept in New Zealand has evolved, over the course of half a century, from a bare statement of the status in 1962 to the formalised structures of today. It is helpful to describe some of the history because it shows that the comparatively well-defined framework did not emerge in a single move, and that the relationships built on that framework have taken a lot of time and effort to develop.

Three significant milestones can be identified:

- Statutory designation of the Ombudsman as an officer of parliament, in the original legislation establishing that office in 1962.
- The 1989 *Report on the Inquiry into Officers of Parliament*[39], which defined the characteristics of an officer of parliament and led to the establishment of an

[39] *Report of the Finance and Expenditure Committee on the Inquiry into Officers of Parliament*, 1987-90, AJHR (New Zealand), I.4B.

Officers of Parliament Committee (OPC) and a system for parliamentary appointment, funding, and oversight.
- A series of legislative reforms from 2001 to 2004, which have laid the foundation for an interactive relationship between officers and the parliament.

**Early developments**

The 1962 Ombudsman legislation provided for the Ombudsman (who was, significantly, also known as the Parliamentary Commissioner for Investigations) to be appointed on the recommendation of the House of Representatives (House), but did not otherwise explain what was meant by the status of officer of parliament. It was nevertheless understood that the office would perform functions of a parliamentary nature. The Ombudsman's complaints jurisdiction was, in effect, an enhancement of the representative function of Members of Parliament (although without the need for complaints to be forwarded through MPs) and the citizen's right to petition parliament.

In practical terms, the first Ombudsman (Sir Guy Powles) called himself 'parliament's man' – a description still used by his successors today although without the gender connotations.[40] Given the constitutional linkages, it is a powerful description which acknowledges the source of the officer's authority, the nature of his or her work, a sense of accountability and – although perhaps less overtly – a sense of the independence which lies at the heart of the officer of parliament concept.

Other development of the officer of parliament status was *ad hoc* until 1989. The Ombudsman legislation was reformed in 1975, providing for appointments of multiple Ombudsmen, each of whom was an officer of parliament. Two other officers of parliament (an early manifestation of the Privacy Commissioner, and a Parliamentary Commissioner for the Environment) were established with provision, in each case, for appointment on the recommendation of the House. By contrast, the Police Complaints Authority was not designated an officer of parliament when established in 1988, despite being appointed in the same manner – the rationale, apparently, being that the Authority was to be a judge and would discharge the function judicially. The Controller and Auditor-General was also loosely referred to throughout this period as an officer of parliament – although the House had no part to play in appointments to the office.

**The 1989 report and its effects**

In 1989 the Finance and Expenditure Committee of the House (FEC) undertook an inquiry into the constitutional status of the officers of parliament. The inquiry was prompted by Opposition moves to formalise the status of the Controller and Auditor-General, following political attacks on that office by Ministers after the incumbent had criticised the government over its expenditure on government advertising.

The FEC's report duly recommended that the Controller and Auditor-General be made an officer of parliament. But it also took a wider focus. With the assistance of the Clerk of the House, it sketched a framework for the status of officer of parliament which came to provide a practical basis for their operations.

[40] New Zealand recently appointed its first female Chief Ombudsman.

The 1989 framework has never been enshrined in legislation but appears now to be the basis of a strong series of conventions. It provides that:

- An officer of parliament should only be created to provide a check on the arbitrary use of power by the executive.
- An officer of parliament should only discharge functions which the House itself, if it so wished, might carry out.
- Parliament should consider creating an officer of parliament only rarely and in separate legislation principally devoted to the office, and should from time to time review the appropriateness of each officer's status as an officer of parliament.

The framework has been influential in subsequent officer of parliament legislation. As a result of various reforms since 1989, there are now three classes of Officer of Parliament in New Zealand: the Ombudsmen (of whom the number of appointees ranges between two and three); the Controller and Auditor-General and Deputy Controller and Auditor-General; and the Parliamentary Commissioner for the Environment. But it is also significant, in comparative terms, that there are only three. As in other jurisdictions, New Zealand has established a large number of other accountability organisations in the past twenty years – including, for example, a new Privacy Commissioner, a Children's Commissioner, and a Health and Disability Commissioner. But none of them has been given officer of parliament status – a point that will be returned to shortly.

The 1989 report also resulted in a new system of funding and accountability, which took account of the framework and recognised the officers' constitutional status. Based on a mixture of legislation and convention, it placed the control largely in the hands of the parliament. The formal funding mechanism (which is written into the Public Finance Act 1989) involves the House recommending to the Governor-General, by way of an address, the estimates to be included for each office of parliament[41] in the Appropriation Bill containing the government's annual budget. This is, in effect, a pre-budget approval by the parliament of each office's appropriation.

The preliminary work is done by the OPC, which examines the draft annual estimates of each office and reports to the House on the proposed level of funding. The House is not bound to follow the OPC's recommendations, but invariably does so, and there is an established convention that the Crown will include the recommended amounts in the Appropriation Bill (since Ministers have been party to the address from the House).

The OPC is a permanent committee of the House, is chaired by the Speaker *ex officio*, and works in a non-partisan manner. The size of the OPC is determined by the House's Business Committee. In practice, all parties represented in the House are offered membership – which is a different situation to that for other select committees. Most parties choose to be represented on the OPC, if they have enough members to participate. Besides considering the funding for each office of parliament, the committee has the task of recommending appointment of officers of parliament, and the appointment of their independent auditors for each office. It does so in both cases after following a process which involves applications being invited and assessed with the assistance of recruitment consultants or other external experts.

[41] The legislation uses the term 'office of parliament' to refer to the institution in receipt of funding, as opposed to the 'officer of parliament' who heads it. The distinction is used accordingly in this chapter.

The annual reports of the officers of parliament, and their reports to the parliament on their actual operations, are considered on the same basis as those of government departments and other public organisations. This involves the FEC allocating to a subject select committee (or retaining for itself) the task of conducting a financial review of the entity's performance and current operations. The current practice in respect of the offices of parliament is to allocate the task of financial review to a select committee based on the nature of the officer's functions.[42] This practice has not always been welcomed by the officers of parliament, some of whom consider it inappropriate for the same select committee that receives and reviews its reports on particular matters also to be responsible for reviewing its performance. There is nothing to prevent a member who is also a member of the OPC from sitting on a subject select committee for the financial review.

Despite the ground-breaking characteristics of the OPC model, the relationship between officers of parliament and the House through the 1990s was not without its tensions and difficulties. Reappointments became a particular point of tension, highlighting the risks of having officers of parliament appointed on a multi-term basis. On one occasion the House did not reappoint an Ombudsman after the Government declined to nominate her, apparently because of disagreement with some of her recommendations. On another occasion, the reappointment of the Parliamentary Commissioner for the Environment was debated on the floor of the House on the basis that one political party disagreed that the office should continue to exist.

The issue of funding also became a major source of concern for the officers of parliament in the 1990s, particularly the Ombudsmen and the Parliamentary Commissioner for the Environment. In a tight fiscal environment, the OPC showed no inclination to meet their requests for additional funding for their core work – nor even for such activities as the then Chief Ombudsman's leadership of the International Ombudsman Institute. This was a matter of great disappointment and frustration to the then officers, and prompted a retiring Chief Ombudsman to comment, on leaving office in 2003, that the consequent pressure on his office had been 'unreasonable':

> An effective Ombudsman's office requires adequate funding in order to fulfil its legislative mandate. … An under-resourced office is unable to carry out [its] mandate effectively. It risks becoming part of a problem – namely an unsatisfactory interaction between a citizen and the agencies of government – rather than a means by which that relationship can be improved and injustice avoided when disputes or misunderstandings arise.[43]

**Further reforms**

In 2001, the parliament finally passed legislation establishing the office of Controller and Auditor-General as an officer of parliament. The Act introduced an innovative procedure[44] under which the Controller and Auditor-General must provide a draft work plan annually to the House, consult the House about any discretionary work programme

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[42] For example, the FEC considers the Auditor-General's reports, including annual reports, and the select committee responsible for environmental matters considers those of the Parliamentary Commissioner for the Environment.

[43] Sir Brian Elwood, *Report on Leaving Office*, 2000-03, AJHR (New Zealand), A. 3A, 3.3, 3.4.

[44] Public Audit Act 2001, section 36.

priorities in the draft plan, and then indicate in the completed work plan any comments by the House that have not been taken up. This was a compromise on the initial position advocated by the Treasury – which considered that a parliamentary power to direct an officer of parliament on the ordering of its business was a logical consequence both of the FEC's framework and of the new approach to public sector accountability. In an approach similar to that later taken by the Scottish Parliament's Finance Committee, it argued that excusing officers of parliament from any form of direction was unacceptable and was akin to allowing them to escape accountability; and that if they were not to be open to direction by the executive then Parliament itself should have that power.

Interestingly, the FEC unanimously accepted the strong objections mounted by the Auditor-General of the day against that approach, when it considered the public audit legislation. The consultative procedure emerged as an acceptable compromise.

The public audit reform was followed in 2004 by a major revamp of the Public Finance Act, which introduced new reporting requirements for government departments and extended those, with appropriate modifications, to all the officers of parliament. Among the reforms was a requirement that all government departments, and officers of parliament, must prepare annually a 'statement of intent' which guides operations over a three-year period. The statement forms the basis for the entity's annual report, which is open to scrutiny by the parliament. This reform extended the consultative procedure involving the Auditor-General's work plans to all the officers of parliament.

These reforms have considerably affected the funding and accountability process for the offices. The OPC now closely scrutinises each office's draft statement of intent and work programme, and there is correspondingly close scrutiny of the annual report (by other select committees) through the financial review process (discussed earlier). But the reforms have also coincided with some other significant developments which have, arguably, produced benefits for the officers:

- The advent of improved business planning, which has been a side-effect of the new requirements for statements of intent. Robust planning of resource requirements, and correspondingly robust analysis of the cost of producing the necessary outputs, now provides the basis for an informed and realistic dialogue between the OPC and each officer of parliament about required funding levels.

- The nature of the Treasury's involvement in the process. The OPC calls for Treasury advice, and seeks evidence of consensus between Treasury and each office on the fundamentals of its output costing models. Treasury's involvement also creates an incentive for each officer to act responsibly in his or her funding demands, by bringing forward plans that can withstand Treasury scrutiny. The OPC has, however, made it clear that, once the fundamentals of the business plan have been discussed, the decision on the level of service and outputs to be produced by each office is a matter for the parliament to determine. The OPC has been prepared to disregard Treasury advice on such matters.

The thinking about independence and accountability has also matured considerably over this period. The ongoing public finance reforms have themselves had a part in this. The enhanced scrutiny of the offices' operational proposals and their actual performance undoubtedly creates risks for them. It requires a clear understanding, on both sides, of the nature of the officers' independence and the importance of holding their offices (and

themselves as 'chief executives') accountable for their actions and performance only in governance terms. To date, that understanding appears reasonably strong. The officers now appear to accept that a dialogue about business planning need not undermine their operational independence; the parliamentarians largely accept that strongly independent and well funded officers of parliament are ultimately – despite occasional political inconvenience – in the legislature's interests.

However, there remains considerable room for improvement. It can be observed that much of the success of the OPC model is attributable to the strong personal influence and leadership shown by successive Speakers, committed to running the OPC model on a non-partisan basis. Indeed it is open to question whether the model would function effectively without it. The officers of parliament themselves tend to approach their relationships with the House according to the individual circumstances of their offices, and there is no formal system of co-operation or collegiality to support the system.

The system of appointments is also comparatively weak. Despite the practice of inviting applications, the process involving endorsement by party caucuses (as a prelude to a unanimous resolution of the House recommending appointment) lacks transparency and brings an element of political acceptability, rather than merit, to the appointment. The emergence of multi-party parliaments, following New Zealand's adoption of proportional representation in 1996, tends to amplify tensions of this type and points to the need for a more open process. As discussed elsewhere in this Report, the adoption of single, non-renewable terms of office can reduce the risks surrounding officer of parliament appointments.[45]

**Other watchdogs**

The Crown entity sector in New Zealand was significantly reformed in 2004, in tandem with the public finance reforms just described. That reform seems to have largely settled the question of which watchdogs should have the status of officer of parliament. This had been a significant issue in the 1990s, when at least two attempts were made to have Crown-appointed watchdogs (the Human Rights Commission and the Children's Commissioner) given parliamentary status. Both proposals were driven by a perception that, as independent officers with functions that required them to advocate for interests of citizens against those of the state, neither should be dependent on the Crown for appointment (or, more importantly, reappointment) and funding; and that giving them the status of parliamentary officers would achieve a greater degree of separation from the Crown and more safety in terms of their independence. Both moves failed, despite a recognition that equivalent bodies in other jurisdictions had parliamentary status at least to some extent.

The FEC's 1989 framework was clearly influential in those debates, prompting the question of what factors should prompt the parliament to assume direct oversight of an accountability function. One answer was to say that one of the central roles of a parliament is to scrutinise and control the executive, and any instrument of the executive that performs a similar role should be capable of coming under the parliamentary umbrella. But the outcome recognised that that argument can be taken too far. The 1989 framework recognises a core set of accountability functions, based on the parliament's traditional mechanisms for achieving accountability through financial oversight and

[45] The Controller and Auditor-General in New Zealand is now appointed for a single, fixed term. This is also the case in Australia.

mechanisms for citizen redress, across the whole of society rather than specific parts of it. From that flows the proposition that only in respect of those functions, and the extension of them through the work of appointed officers, should there be direct oversight and determination by the parliament, as opposed to the executive, of what those officers should do and how much funding they should be given. Different, and well-established, conventions and precedents exist for other types of independent office holders and institutions to exist independently within the executive branch, even though their functions may on occasions be exercised against the Crown or its interests.

The Crown entities reform of 2004[46] has significantly enhanced the statutory protections of those independent offices. Its major achievement was to systematise the law relating to the appointment, governance and accountability of Crown entities. Importantly for this discussion, this included categorising a large number of Crown entities into groups – including that of 'independent Crown entity'. This group consists of those relatively few entities that, by virtue of their functions, require special protection from government direction and arbitrary removal from office. The Act establishes a level of security of tenure for those entities' office holders that are comparable with those for officers of parliament. It also established a framework for the governance of Crown entities, with particular emphasis on how the relationship between entities and their responsible Ministers is to be conducted.

The Children's Commissioner, Human Rights Commission, and Privacy Commissioner, together with bodies like the Independent Police Conduct Authority, the Electoral Commission, and the Law Commission, are all now 'independent' Crown entities. Besides reinforcing their office holders' security of tenure, this has given the offices the benefit of a concise and visible framework for their dealings with the Crown over matters of funding and the development of work priorities. Given this development, it would be surprising if there were fresh attempts to achieve officer of parliament status.

## Officers of Parliament in Australia

In Australia, the Auditor-General is the only Commonwealth officer designated by legislation as an officer of parliament. However, other officers share some of the characteristics. They include the Ombudsman, the Electoral Commissioner, the Human Rights Commissioner, and the Privacy Commissioner. Officers of parliament also exist at state level.

Parliamentary oversight of the Auditor-General is through the Joint Statutory Committee on Public Accounts and Audit, a joint committee of the House of Representatives and the Senate. The committee's functions include considering nominations for appointment as Auditor-General (and making recommendations to the parliament) and for the position of auditor of the Australian National Audit Office; considering the draft estimates of the Office and its work priorities; reviewing its operations (including the resources allocated to it) and receiving audit reports on the Office; and reporting to the parliament on its performance.

Unlike the OPC in New Zealand, the committee also examines all reports to the parliament made by the Auditor-General. There is no equivalent committee for the Ombudsman or any of the other bodies with some form of parliamentary status.

[46] Embodied in the Crown Entities Act 2004.

The relationship between state legislatures and their officers of parliament has not always been an easy one. For example, in the mid to late 1990s the relationship between the Victorian government and the Auditor-General became a matter of public stand-off and deteriorated to the point where the very future of the Audit Office became an election issue. The Victorian parliament has had a particular interest in the issues of independence and accountability since that time. The matter was the subject of a very useful report by the Public Accounts and Estimates Committee in 2006, which recommended a framework and a set of criteria similar to those used in New Zealand.[47] However, the report has yet to be implemented.

## Independence – a brief assessment

There are various measures for assessing the independence of an officer of parliament. Thomas identifies five structural features:

- the nature of the agency's mandate;
- the provisions regarding appointment, tenure, and removal;
- the processes for deciding budgets and staffing;
- whether the agency is free to identify issues for study and whether it can compel production of information; and
- reporting requirements and whether its performance is monitored.[48]

The 2003 report used similar measures but also focused on institutional architecture (including statutory status and protections), independence from parliament, and accountability (or, more specifically, means of assessing performance) outside the parliamentary sphere.[49] A recent charter of independence adopted by the international body of government auditing institutions is along similar lines.[50]

Both New Zealand and Australia tend to score well on these indices of independence. As well-established offices operating in mature and stable democracies, their challenges are of a less fundamental nature. The remainder of this chapter explores some of the recent developments and issues.

## The future in Australia and New Zealand – towards interdependence

The idea that a parliament and its officers can work together to hold the executive to account, and are dependent on each other in doing so effectively, has increasing traction in both Australia and New Zealand.

The basis of the idea is that, for its part, a parliament is dependent on officers of parliament to perform some of its functions for it and to 'be on the side of parliamentarians', and that, in turn, it has a responsibility to appoint suitably qualified persons for the roles, provide adequate resources, and listen to and where necessary act

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47 Parliament of Victoria: Public Accounts and Estimates Committee: *Report on a Legislative Framework for Independent officers of Parliament*, February 2006, 85.

48 Thomas, *The past, present and future of officers of Parliament,* Canadian Public Administration, Vol 46 No 3 (2003), page 287 at 297.

49 2003 report, 39ff.

50 International Organisation of Supreme Audit Institutions (INTOSAI), Mexico Declaration on the Independence of Supreme Audit Institutions, 2007.

on its reports – while recognising the necessity that the officers are, and must also be seen to be, independent in the discharge of their roles.

An officer of parliament, in turn, is dependent on the parliament for resources. While the funding procedure must recognise its operational independence and minimise (and, ideally, eliminate) the potential for political interference in the selection of work priorities and the exercise of discretion and judgment, an officer does not have an unfettered right to resources and should be prepared to listen to any views that the parliament may express about how its resources should best be applied in the interests of the public. Having done so, the officer must be prepared to give a reasonable account of the office's overall performance applying the funding it has been given.

Both the parliament and the officers of parliament are thus dependent on each other's behaviour to promote the public policy objectives of the officer of parliament concept. Moreover, the parliament furthers its integrity, both in the constitutional sense and ultimately with the public, by being seen to support the roles and functions of the officers and their independence. In turn the officers can further their credibility with the public, and provide reassurance to the parliament, by being seen to be 'in touch'. The parliament may also expect that, to the extent that an officer's independence allows, it can legitimately express a view about the overall direction and intentions of an officer's business, and hold an officer to account for its performance.

The concept of interdependence is not without constitutional risk. The contrary argument is that any form of interaction by an officer of parliament with the legislature, other than through the mechanism of formal reporting, is a threat to independence. While not shared in New Zealand or most of Australia, that viewpoint needs to be acknowledged; indeed it is likely to be more widely held in jurisdictions where the practical threats to an officer's independence are greater for political or social reasons.

**Understanding 'interdependence'**

Interdependence as described above is fundamentally about communication and consultation which stops short of direction. As the Constitution Unit's 2003 report stated:

> The aim of a robust and effective Officer system should be to achieve the best balance, or degree of interdependence, in the relationship between Officers and parliament. … But to be effective, parliamentary agencies need the commitment and active support of parliamentarians.[51]

Interdependence can be understood in another sense by shifting the focus from the constitutional to the managerial. In Australia, the incumbent Commonwealth Auditor-General in the early 2000s developed his relationship with the joint committee by seeking a sense of partnership based on a mutual understanding of the values of independence, mutual respect, 'no surprises' in terms of reports, and responsiveness in terms of financial and other support.

[51] 2003 report, page 11.

In practice, this type of approach requires a blend of professionalism and efficiency, with a willingness to be fearless in reporting but also to show a good understanding and insight of the political context.

A similar approach has emerged in New Zealand, and can be seen as a visible maturing of the concept that an officer of parliament performs functions of a parliamentary nature, for parliament's benefit. An approach based on communication also makes sense for the officers when dealing with the new statutory consultative requirements for their work programmes. Those requirements have not, to date, appeared to raise any real concerns about the officers' independence from the political process, either in theory or in practice. Parliament should, some officers have said, be free to suggest new areas of work, or points of emphasis, and they in turn should recognise MPs as a valuable source of opinion and wisdom – why not consult them? What is important is the officer's power to say 'no', which does sometimes happen – especially if the officer considers a request is too politically motivated.

## Current challenges

While strong in both New Zealand and Australia, the officer of parliament status remains problematic in some respects.

Protection of independence is always the overriding concern. Although they exercise vital parliamentary functions and are independent of the executive, it is central to the concept that officers of parliament also act independently of the parliament itself. There is a constant risk that politics will intrude into the relationship – as discussed above and as acknowledged by the introduction to this Report.

The role of officers of parliament in relation to the functions of executive government is another point of concern. Tensions can arise when officers of parliament stray, or are seen to stray, into the area of executive decision making or to take the role of opinion leaders. This can happen through reports on major issues of public concern or propriety, or through more routine activities such as the production of good practice guides (which are sometimes criticised on the basis that they place the officer of parliament in the position of both setting the rules and judging performance against them). Of course, tension with the executive is not, in itself, a bad thing. But officers of parliament can sometimes become victims of their own success. When a report on an issue of public propriety is well received by a sceptical public and the news media, it may get the opposite reaction from the politicians. It is not unusual for a Minister to seek to impugn a report by questioning the officer's mandate to express the opinions it contains. The officer can then very easily be drawn into the political process and the attendant publicity – with the risk of being seen undesirably to be advocating for his or her own opinions.

Officers themselves often point out that the need to express strong opinions from time to time is not only a consequence of the offices they hold but may also arise out of practical necessity. Advocacy for one's opinions is another thing altogether, and is discouraged. But the issue raises a useful question about whether officers of parliament have a legitimate role as opinion leaders, either in public administration or in society at large, and how they should interact with the public. Possible flow-on effects into any re-appointment process need also to be considered – making it essential to have transparent appointment processes (as discussed earlier).

Implementation of the officers' reports is another current issue in New Zealand and Australia, as it is elsewhere. Officers of parliament depend significantly on the parliament (as the recipient of their reports) for support in achieving the improvements that their reports so often urge. But the relationship has to be at arms' length to preserve their independence, and a failure to achieve action on their reports can not only stunt their effectiveness as public institutions but also lead the officers themselves into the dangerous territory of advocating for their own opinions. The Joint Committee in Australia considers the reports of the Auditor-General. But, in New Zealand, scrutiny of officers' reports has been infrequent, and it is rare (if not unheard of) for the House itself to take a report up against the executive. This has prompted a recent amendment to the Standing Orders of the House, by which officers' reports will stand referred to the relevant subject select committee for examination.

## Conclusions

The experience in Australia and New Zealand shows a consistent understanding of what defines an officer of parliament, without the proliferation that is evident elsewhere. Combinations of partially legal frameworks (particularly in respect of funding and accountability) and convention (for example, concerning the establishment of new offices and the appointment of office holders) have emerged over time, enabling relatively strong working relationships to develop between the officers and their respective parliaments. Those relationships have tended to enhance the officers' legitimacy and effectiveness – and, arguably, the effectiveness of the parliaments themselves. More recently, the notion of an interdependent relationship between officers and their parliaments has emerged on both sides of the Tasman.

There are many strengths in this type of approach. The New Zealand funding model, which is written into legislation and based firmly on the role of the OPC, is also particularly attractive to other jurisdictions. But there remains plenty for the 'down under' nations to learn from the way things are done elsewhere.

# Chapter 8: The Parliamentary Ombudsman: A Classical Watchdog

**Philip Giddings**

## Origins

Serious discussion within government of introducing an Ombudsman system in the United Kingdom began with the Labour Party's general election victory in October 1964. The Prime Minister, Harold Wilson, much influenced by his experience on the Public Accounts Committee, planned to adapt the Scandinavian Ombudsman concept to the perceived requirements of the UK's constitutional system, creating a specifically *parliamentary* institution like the Comptroller and Auditor General (Gregory & Giddings 2002:61-3; Stacey 1971:38-43; Wilson 1964:87). Although that adaptation was not straight-forward (Stacey, 1971; Gregory & Giddings:66-122) the UK Ombudsman finally made it onto the statute book in the *Parliamentary Commissioner Act 1967*. That firm statutory base created an Ombudsman Office deliberately embedded in the parliamentary system: independent of Whitehall, but strongly linked to Westminster. The Office's current Governance statement carefully says:

> The Ombudsman is appointed by the Queen on the recommendation of the Prime Minister. She is independent of government and has statutory responsibilities and powers to report directly to Parliament. She may only be removed following a resolution of both Houses of Parliament PHSO web-site (1).

## Legal base

The 1967 Act gives statutory authority for the Ombudsman's investigations, requires compliance with his requests for information, access to persons and papers and protection from dismissal similar to that given to the senior judiciary. The Ombudsman is formally appointed by letters patent from HM the Queen but the choice of person is made by the Prime Minister who customarily consults the Leader of the Opposition and the chairman of the relevant Select Committee of the House of Commons, currently the Public Administration Select Committee (PASC). Ann Abraham's appointment as Parliamentary Ombudsman was simply announced in a press release from 10 Downing Street (Prime Minister, 2002). In recent years the post has been advertised and a shortlist of applicants interviewed, with the Select Committee chair on the panel, before the final selection was made. But the PHSO's web-site clearly makes the point that the Ombudsman is a *Crown* appointment and, by implication, this suggests independence from parliament as well as from government.

The Parliamentary Ombudsman is one of the offices for which PASC, with the support of the Liaison Committee, has been advocating pre-appointment hearings for some years. Following publication of the Green Paper *The Governance of Britain* (Ministry of Justice, 2007) Gordon Brown accepted the principle of the House of Commons having 'a key role in the selection of key public officials' (Prime Minister, 2007). From the ensuing discussions with the Liaison Committee it is clear that the Parliamentary Ombudsman is one such official (Liaison Committee, 2008).

Although the original legislation provided that the Ombudsman would hold office until (s)he reached the age of 65, in 2006, as part of the UK's response to the European Directive on age discrimination, this was changed. The new provision is that the appointment is for a maximum of seven years and non-renewable (Employment Equality (Age) Regulations, 2006, Schedule 8, Part 1). Interestingly, although the regulations as a whole were debated in the Commons Standing Committee on Delegated Legislation on 28 March 2006, the provisions for the Parliamentary and Health Service Commissioners attracted almost no public comment, either from the PHSO or from parliamentarians.

Dismissal of the Ombudsman, as in the case of a High Court judge, is only possible by joint address of the two Houses of Parliament. In this way, the Ombudsman has security of tenure for the period of the appointment, and in that respect can be considered independent of the Government even though prime-ministerial choice of office-holder might suggest some dependence on the government whose administrative practices the Ombudsman will investigate. Parliamentary ownership of the post could be strengthened if the choice of person had to be endorsed by resolution of both Houses of Parliament before submission to the Queen. Alternatively, as in many other states, and in Scotland, the Ombudsman could be directly nominated by the House of Commons, as the National Audit Act 1983 requires for the C&AG. The current C&AG was appointed in that way in January 2008, on a motion from the Prime Minister. In the debate a number of MPs drew attention to the importance of the House being directly involved in the appointment of such constitutional watchdogs in this way, as well as the question of the length of tenure for such offices (Prime Minister, 2008). Direct nomination would fit well with pre-appointment hearings, as well as following the original pattern of basing the Ombudsman arrangements on the model of the C&AG.

## Independence and Impartiality

Impartiality is fundamental to the concept of an Ombudsman; independence is the institutional feature which underpins it. Appointment and dismissal procedures are key features of 'independence' but they do not tell the whole story. One also needs to look at other 'connections' which may influence the decisions made by an office-holder. The Office itself now provides a governance and accountability statement on its web-site and includes within it a statement of its relationships with government which has been agreed with the Head of the Home Civil Service, and the Permanent Secretaries of the Treasury and the Department of Health (PHSO website (2)).

Independence is not an end in itself. Its purpose is to secure impartiality in such a way as to re-assure those who might wish to use the services of the Ombudsman office that they will receive a genuinely fair assessment of their case. It applies not just to appointment and dismissal but also to three other aspects of the way in which the Ombudsman's office is set up: finance; staffing; and background.

First, finance. Funding is often seen as a means of controlling organisations, particularly governmental ones, because it generates an expectation of accountability. Funding for the UK Parliamentary Ombudsman's office comes from the Consolidated Fund. The Office has in practice tended to impose upon itself an expenditure discipline similar to that operating in the rest of Whitehall. In recent years this evolved into an explicit three-year agreement with the Treasury. Thus in July 2007 the Office's *Three Year Strategic Plan 2007-10* was published. As well as announcing a further 3-year settlement with the Treasury on the Office's budget (£24m p.a.), it set out new organisational priorities, an

improved performance measurement system and public service standards (PHSO, 2007a).

Second, staffing: the Office was originally staffed by civil servants on secondment from other departments, selected by the Ombudsman via the conventional civil service trawl. Anxieties that this would mean too narrow a mind-set and a potential bias towards 'home' or future departments led the Office to go outside, particularly as the Ombudsman's remit expanded. So the Office has recruited from outside, including the consumer advice and health sectors. A crucial balance has to be struck here between manifest independence and expertise: staff who are familiar with the culture and practices of the organisations (government departments, agencies, health authorities and hospital trusts) which are subject to investigation have a great deal of expertise to offer. But an office entirely composed of former officials from those bodies would not encourage the perception of independence and impartiality. Thus a well-balanced mixture of backgrounds and skills is required. To attract *and retain* suitable personnel can be challenging for small organisations who are not able themselves to offer a careers structure to current or potential staff.

**Holders of the Office of Ombudsman, and previous post held, 1967-2007**

| | | |
|---|---|---|
| 1967 – 1971 | Sir Edmund Compton | Comptroller & Auditor-General |
| 1971 – 1976 | Sir Alan Marre | Second Permanent Secretary, DHSS |
| 1976 – 1978 | Sir Idwal Pugh | Second Permanent Secretary, Dept of the Environment |
| 1979 - 1984 | Sir Cecil Clothier | Barrister |
| 1985 - 1989 | Sir Anthony Barrowclough | Barrister |
| 1990 - 1996 | Sir William Reid | Secretary, Scottish Home and Health Department |
| 1997 - 2002 | Sir Michael Buckley | Chairman of an NHS Trust and retired civil servant |
| 2002 - | Ann Abraham | Legal Services Ombudsman; previously Chief Executive of NACABx |

The third aspect of perceived independence concerns the background of the person appointed. The first Ombudsman, Sir Edmund Compton, was a former Comptroller and Auditor General, probably unknown to most of the public, but well-known to MPs and civil servants. He was followed by two former permanent secretaries of government departments who knew how Whitehall (and its outstations) worked. For the initial 'confidence-building' phase of the life of the Office this made a great deal of sense. The first non-civil-servant, Sir Cecil Clothier, was appointed in 1979, and followed in 1985 by Sir Anthony Barrowclough, a barrister. The lawyers' style was different (Gregory & Giddings, 2002:231, 240-249; 269-273) and Barrowclough's term of office included the very complex and controversial Barlow Clowes affair. (ibid, 273-285) The next two – William Reid and Michael Buckley - were former civil servants but the pattern was broken again in 2002 with appointment of Ann Abraham, the first woman to hold the post but also the first person from the consumer advice sector to be appointed. Interestingly, her period of office has also included a particularly complex and long investigation of a financial services-related case which resulted in the huge and highly critical report on *Equitable Life* published in July 2008 (PHSO, 2008). As we shall see below, other controversial cases with which she has been involved have brought claims

that a constitutional crisis was in prospect because of the Ombudsman's disagreements with the Government, but that has proved to be an over-statement.

## The Ombudsman's Work

The term 'Ombudsman' is more widely used now than it was when the 1967 Act was passed, especially in the private sector. However, the Ombudsman's remit is still not widely understood. The Parliamentary Ombudsman is statutorily empowered to conduct investigations and make reports on complaints of maladministration referred to the Office by MPs. This 'MP filter' is a unique feature of the UK Parliamentary Ombudsman scheme. Coupled with the fact the Ombudsman's reports on such cases are to the relevant Member of Parliament, this is a significant indicator of 'ownership'. It is one of the most important reasons why the Ombudsman is regarded as an Officer of Parliament. Whether the MP filter should be abolished has been a long-running controversy. Currently, both the Select Committee and a majority of MPs surveyed remain in favour of abolishing the filter (eg PASC, 2000), but the Government remains unconvinced. Along with a number of other reforms canvassed in the late 1990s, it remains in limbo 'awaiting parliamentary time'.

In addition to the bread-and-butter work on cases, the Ombudsman produces two other kinds of report to the House of Commons collectively. First, there is the Annual Report setting out the work done, and accompanied by annual resource accounts. This is an important feature of accountability and a clear indicator of parliamentary ownership. Almost every year the Ombudsman is examined upon it by the Select Committee, of which more below.

Second, the Ombudsman is empowered to make special reports to Parliament of two kinds, either on issues raising matters of general importance (e.g tax credits [PHSO, 2005a] and continuing care funding and redress [PHSO, 2007b]) or cases in which there remains significant unremedied injustice (e.g. ex gratia payments to former civilian internees of the Japanese (PHSO, 2005b) and occupational pensions (PHSO, 2006)). This is the point at which the Ombudsman has concluded that his advocacy of a remedy in discussion with the Government Department or Agency concerned can get no further. By making a special report he hands over the case to Parliament so that MPs can use the procedures of the House of Commons and other political processes to achieve the remedies required. Ann Abraham has made this explicit in her most recent report on *Equitable Life*, on which PASC will be holding hearings. (PHSO, 2008) Other recent significant reports are listed below.

**Some Recent Significant Special Reports from the Parliamentary Ombudsman**

| Subject | Commissioner | Reference | Date |
|---|---|---|---|
| Compensation to farmers for slaughtered poultry | Reid | HC519, 1992-93 | March 1993 |
| Channel Tunnel Rail Link | Reid | HC193, 1994-95 | February 1995 |
| State-Earnings-Related Scheme | Buckley | HC305, 1999-2000 | March 2000 |
| Tax Credits | Abraham | HC455, 2005-06 | June 2005 |
| The Balchin Case | Abraham | HC475, 2005-06 | October 2005 |

| | | | |
|---|---|---|---|
| A Debt of Honour | Abraham | HC735, 2005-06 | January 2006 |
| Occupational Pensions | Abraham | HC984, 2005-06 | March 2006 |
| Equitable Life | Abraham | HC815, 2007-08 | July 2008 |

Investigating complaints and securing remedies for injustice are the heart of the Ombudsman's work. Through them the PHSO makes a significant contribution to improving the quality of public services, and particularly complaint-handling. In recent years, as other Ombudsman schemes and complaint-handling bodies have been set up, this quality of administration work has become of increasing significance for the PHSO. The Office cites 'to share learning to promote improvement in public services' on its web-site as the fourth point in its current 'vision statement'. This aspect of the work was evident in the special reports cited above. Sir William Reid made particular use of it in the early 1990s with the two reports cited in Table 2 and three reports relating to the NHS – two on long-term care, and one a systemic report on complaint-handling by a particular trust (Giddings & Gregory 2002:639-44). Ann Abraham has issued by far the largest number of special reports and has taken the concept further with her publication of *Principles of Good Administration* and *Principles for Remedy* in 2007.

## Support and Accountability

In recent years the PHSO has stressed its own accountability as well as its independence from government. There are four modes of support and accountability for the Ombudsman Office, two external and independent and two internal.

### Sources of Support and Accountability

| | |
|---|---|
| Select Committee | external |
| Judicial Review | external |
| Audit Committee | internal |
| Advisory Board | internal |

### The Select Committee

Although not in the legislation, the select committee is a key part of the Ombudsman scheme set up in 1967, drawing directly on the model of the Public Accounts Committee and the Comptroller and Auditor General. The Select Committee on the PCA played a significant role in the evolution of the Office, enabling the Ombudsman to obtain parliamentary endorsement for developments in his work, such as his definition of 'maladministration'. It was equally important that the Select Committee should steer clear of 're-hearing' individual cases – i.e. did not seek to act as a court of appeal against the Ombudsman's findings or recommendations.

On the other hand, as the 'special report' procedure indicated, it was also important that the Select Committee could – like the Public Accounts Committee – call in and examine permanent secretaries or health authority chief executives to ask why they were failing or refusing to act on the Ombudsman's recommendations, or unusually tardy in responding to his requests for comments on complaints or responses to his findings and recommendations, especially if the Ombudsman drew attention to them in his annual report.

Although modelled on the Public Accounts Committee, the PCA Select Committee has never commanded anywhere near the PAC's prestige. Indeed, there have been times when it has struggled to attract and retain active members. The Committee survived the reorganisation of Commons Committees in 1979 (when departmentally-related select committees were introduced), remaining as a committee wholly focussed on the Ombudsman's work. However, in 1995 it was replaced by the Public Service Committee, with a remit covering the Office of Public Service, and that Committee was in turn replaced in 1997 by the current Select Committee on Public Administration (PASC) which interprets its 'public administration' remit very widely. In consequence of these extensions of committee remit, the work of the Ombudsman receives less frequent, and less extended, attention than it did when it had 'its own' select committee.

Nevertheless, PASC remains as a significant player, with its chairman playing a key role in the selection of a new Ombudsman, and its ability both to produce supportive reports and to make robust criticisms. The former would include those on particular cases (see above) or general issues (e.g. the 'bad rule' (Gregory & Giddings 2002:143-46); reform of public sector ombudsman schemes (PASC, 2000); government attitude to Ombudsman (PASC, 2006)). Criticisms are made usually when the Committee examines the Ombudsman 'operationally', either on the public record or in private session, as it has done on issues such as the Office's throughput times, joined-up work with other public sector complaint-handlers, making the Office known and access to it easier. This is one of the ways in which the Office is held accountable without invalidating its independence of government and parliament.

**Judicial Review**

The Ombudsman has to comply with the law as the courts declare it. The 1967 and 1993 Acts give the Ombudsman very wide discretion whether to accept complaints for investigation, how to investigate, and any proposed remedy. Challenges to the Ombudsman in the courts are therefore rare – but not unknown, particularly with the new procedures for judicial review.

The most important case to date is *R (Bradley and Others) v Work and Pensions Secretary*, an action brought by the Pensions Action Group on the Ombudsman's Report *Trusting in the Pensions Promise*. In it the Appeal Court ruled on the scope of the Government's power to reject an Ombudsman's finding or recommendation:

> the Secretary of State, acting rationally, was entitled to reject a finding of maladministration and prefer his own view. But, it was not enough that he had reached his own view on rational grounds; it was necessary that his decision to reject the ombudsman's findings in favour of his own view was, itself, not irrational having regard to the legislative intention which underlay the 1967 Act.
>
> To put the point another way, it was not enough for a minister who decided to reject the ombudsman's finding of maladministration simply to assert that he had a choice; he should have a reason for rejecting a finding which the ombudsman had made after an investigation under the powers conferred by the 1967 Act (*Times*, 25 April 2008).

### Audit Committee and Advisory Board

The Office of Ombudsman is a personal one. The powers granted by Parliament are vested in the Ombudsman as an individual. That is why, when designing Ombudsman schemes, so much attention is paid to the processes by which the office-holder is chosen and appointed, re-appointed or dismissed. These processes are crucial to the independence of the Office and whether it will be perceived by the public at large as genuinely impartial in its handling of complaints and remedies.

But too much insulation of the Office to secure independence can have a significant cost in terms of accountability and responsiveness. An Ombudsman Office uses public funds and provides a public service. The Officer holder is a public servant as well as 'chief executive'. It is important, therefore, that the obligation of good stewardship of such responsibilities is both understood and made transparent. Cost-effectiveness, value for money, good practice in terms of access to information, data protection, personnel policies and (especially) good administration and complaint-handling all need to be secure and transparent.

In the last decade the Office has increasingly emphasized its accountability to stake-holders. This has been exemplified by two developments within the Office of the Parliamentary Ombudsman: the establishment of an Audit Committee and the Advisory Board. The Audit Committee (PHSO, 2005c), which meets at least four times a year to coincide with key points in the delivery of work of PHSO's Internal Audit and the NAO, comprises three external members, and the Ombudsman who is Accounting Officer. Internal Audit and the NAO will have free and confidential access to the Chair of the Audit Committee, who is one of the external members.

The Advisory Board, first set up in 2004, is intended to act as the Ombudsman's 'critical friend' and provide support and advice, a role originally envisaged for the Select Committee when monitoring the work of the Office was its sole remit. Initially the Board comprised the Ombudsman (as Chair and Chief Executive in line with her statutory accountability), two non-executive members, and four senior executive officials. In 2007 the Ombudsman added two more external members to bring in expert knowledge of organisational development and communications/marketing and the executive officials became advisers to, rather than members of, the Board (PHSO 2007c:69).

## Other Ombudsmen

The PHSO remains the 'market leader' amongst British Ombudsmen but is no longer the sole public sector office nor the only complaint-handling body available to assist those dissatisfied with the decisions of government departments and agencies. Health Service and Local Government Ombudsman schemes were introduced in 1973 and 1974 respectively. Although the Government has declined to take forward the Collcutt recommendation to set up public service ombudsman schemes in England (PASC 2000), it did eventually make statutory provision for co-operation between the Parliamentary, Health Service and Local Government Ombudsmen in an Order under the Regulatory Reform Act which came into operation in August 2007.

Westminster's Parliamentary Ombudsman has also been the model for Northern Ireland, Wales and Scotland, but with some interesting variations. In Northern Ireland a PCA's Office, explicitly based on Westminster's 1967 Act, was established in 1969 by the then

Northern Ireland Parliament. In the same year a Commissioner for Complaints was also established to cover local and other public bodies. Although legally separate since 1973, the two Northern Ireland offices have been held in plurality by the same person, an arrangement which has continued through the period of direct rule and continues the new power-sharing arrangements (Gregory & Giddings, 2000, 284-295). Thus the Office is generally known as 'the Northern Ireland Ombudsman Office', albeit that one part of it is based on the parliament/assembly and the other not. One consequence of this is that, in Assembly Ombudsman mode, the Northern Ireland Ombudsman like his Westminster counter-part can only make recommendations, whereas in his other role dealing with local councils, public boards and agencies, if a public authority ignores the Ombudsman's recommendations the aggrieved citizen can seek damages in a County Court. This has led the Assembly Ombudsman to recommend that his statute should be amended to ensure that he too is able to ensure compliance with recommendations. He has also campaigned vigorously for an 'own initiative' power.[52]

The mixed nature of the Ombudsman's remit, and the long wait for the restoration of the Assembly, clearly make it difficult to determine the exact nature of the Office's relationship to the Assembly. Until 2007 the Ombudsman presented his reports to the Westminster Parliament; now they are presented to the Northern Ireland Assembly and in principle the Assembly's committees can scrutinise them and the work of the Office. However, introducing enforcement or 'own initiative' powers could have the effect of distancing the Assembly Ombudsman from the Assembly – the Office's last two Annual Reports actually state that the Ombudsman is 'independent of the Assembly'. Does this mean abandoning the notion that the Ombudsman is an 'Officer of Parliament' or the Assembly equivalent which is integral to the model inherited from Westminster? Creating significant distance from the Assembly might be considered a price worth paying for greater effectiveness for aggrieved citizens as well as to some extent de-politicising the office – a delicate matter in the context of power-sharing. It remains to be seen how the Assembly will in practice address the task of scrutinizing the Office's work and the response made by government departments and public authorities to it. In reality it will be the dynamics of the relationship between the Assembly's Committees and the Ombudsman Office which will determine whether, and if so in what sense, the Office can be called a *parliamentary Office* and its holder an 'Officer of Parliament'.

Somewhat similar issues are arising with the public service ombudsman schemes (PSOs) that have been established by the Scottish Parliament and the National Assembly for Wales since devolution. These PSOs bring together the remits of the former UK Parliamentary Ombudsman over matters now devolved, with the local and health services Ombudsman schemes. In the case of Wales, the Assembly Act which brought together the four ombudsman services only became fully operational in 2005-06 and in the current year (2008) a new Ombudsman – Peter Tyndall – has taken up office. It was already apparent from his predecessor's reports that the local government work would be the major feature of the PSOW. See Chapter 4 for more details. As with Northern Ireland the dynamics of the relationship between the Assembly's Committees and the PSOW will determine how the new Office should be characterized and who 'owns' it.

In Scotland the evolution of a PSO is further advanced. The SPSO was established in 2002 as a merger of final stage complaints handlers and with the intention of embedding a 'one-stop-shop' approach. Its evolution has become entangled with the wider issue of

[52] See Chapter 5 for more details.

cost and co-ordination of regulatory and supervisory bodies and their relationships with the Scottish Parliament, its corporate body and its committees, as Barry Winetrobe explains in Chapter 3. In September 2007 the Crerar Review recommended a standardized complaints handling system across public services in Scotland, to be overseen by the SPSO. Its recommendations were taken forward by the 'Fit-for-purpose Complaint System Action Group' which reported in July 2008. The First Minister's legislative programme announced in September 2008 included a Public Service Reform Bill to 'enact proposals from Professor Crerar to reform the scrutiny landscape in Scotland' (First Minister, 2008).

Once the sole Ombudsman in the United Kingdom and soon joined by the Commissioners for Local Administration in 1974, the PHSO now stands alongside not only the Ombudsman offices in Scotland, Wales and Northern Ireland, but also a number of bodies carrying out Ombudsman-type functions in specific fields of the public service as well as a plethora of regulators.

## Conclusion

The Parliamentary Ombudsman is a classical Ombudsman office. It also exemplifies the classical Officer of Parliament. The Office was designed to be an instrument of Parliament, for MPs to use in their role of redressing citizens' grievances. It was underpinned by a select committee as its 'management instrument', designed both to monitor the work of the Office and to protect it from the Executive. Its work is initiated by Parliament and reported back to it. Although initially derided as an 'Ombudsmouse' and 'a toothless tiger' (Gregory & Giddings 2002:125) the Office gradually succeeded in overcoming the hostility of Whitehall and some parliamentarians and became an established part of the UK's constitutional arrangements. Its success was evidenced in the extension of the Ombudsman model to other parts of the public sector (local government, NHS and, later, housing associations) and to the private sector. Ombudsman offices were also being established overseas, particularly in Commonwealth countries and some followed the UK's parliamentary model – though not the MP filter. Many have been impressed by the role of the select committee and sought to emulate it.

As more internal complaints reviewers were established, and then public sector ombudsman schemes were established in Scotland and Wales following devolution, it became clear that the PHSO had to change with the times. Is it to look primarily to Parliament – or to the public, the users of public services whose problems and complaints are its bread-and-butter? In recent years the Office has engaged with a much wider range of 'stake-holders' and recognized that it has to demonstrate that operating as 'parliamentary ombudsman' adds value. Does this imply that 'Officer of Parliament' status is no longer so significant? How does it connect with the MP filter? The experience of the Ombudsman offices in Wales, Northern Ireland and particularly Scotland post the Crerar Review are relevant here, but do not yet give a clear answer. At Westminster attempts to remove the MP filter were initially resisted by some MPs as a threat to their own constituency grievance role, but as the scale and complexity of that aspect of their work-load increased, support for removing the filter grew. Only the Government's reluctance to provide legislative time seems to stand in the way now. With the Select Committee no longer exclusively focused on the Ombudsman, what would be the effect of removing the MP filter on MPs' perception of the Office? Would it be seen as just another complaint-handling mechanism in an increasingly complex, mixed-mode public sector? If so, why does the office-holder need to be an Officer of Parliament?

With legislation to remove the filter on the back-burner, if not abandoned, Ann Abraham has developed ways of co-operating with other public sector complaint-handlers, particularly the local government ombudsman service, and focussed her office's work on the more serious complaints, where PHSO's powers and expertise can significantly add value, and on promoting ways of improving the quality of administration. In both spheres the link with Parliament is critical, as PASC demonstrated with its high-profile report *The Ombudsman in Question* (PASC 2006b). For, as regards the effective status of the Ombudsman, attitudes in Whitehall (both officials and ministers) are at least as significant as the perceptions of parliamentarians, especially if the Ombudsman increases the pressure on standards of administrative behaviour. Ann Abraham's battles over tax credits, 'A Debt of Honour', the regulation of occupational pensions, and the Equitable Life saga have shown how vital parliamentary support is to her Office's effectiveness. Being an officer of Parliament is crucial to that support.

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# Chapter 9: New Watchdogs: Public Appointments Commissioners

**Robert Pyper**

## Introduction

The Office of the Commissioner for Public Appointments (OCPA) was described in the original Constitution Unit report (Gay and Winetrobe, 2003: 30-31) as one of the 'non-statutory Nolan watchdogs' and is listed in Oonagh Gay's chapter in this Report as one of the 'Cabinet Office watchdogs'. These labels tell us only part of the story, however. While the office of the original, founding Commissioner remains non-statutory and part of the 'Cabinet Office family', the development of the OCPA system in the period since the 2003 report has produced two new Commissioners, neither of whom is directly linked to the Cabinet Office, and one of which has a statutory basis. Over the past five years, this watchdog's evolution has been significantly affected by the emergence of the devolved polity in the UK, with resultant complexities and differences in internal governance and management arrangements, as well as in relationships with the respective executives and parliaments. The guiding theme of this chapter is, therefore, the diversity to be found within the regime of this new type of watchdog.

## Evolution of the OCPA System

Why are we describing this as a 'new' watchdog? For two reasons: due to its relatively recent introduction in 1995, and because the distinct Scottish and Northern Irish arms of the Office emerged as recently as 2004 and 2006 respectively.

The origins of the OCPA system lay in growing concerns about 'sleaze' in the early 1990s, and possible political bias in public appointments stemming from the arrangements whereby the Public Appointments Unit of the Cabinet Office loosely coordinated (without exercising any power over) the role of ministers in making thousands of appointments across the UK public sector (McTavish and Pyper, 2007: 147). Although this system was similar to those found in most other states at that time, the particular nature of the UK controversies led to proposals for the establishment of an independent Public Appointments Commission (Commission of Standards in Public Life, 1995; Stott, 1995; Wright, 1995).

The Office of the Commissioner for Public Appointments was created by an Order in Council in November 1995 (the legal basis for the Office was further developed in subsequent Orders, in 1998 and 2002) following a recommendation from the Nolan Committee on Standards in Public Life. The new Commissioner's role was

> to regulate monitor, report and advise on the way in which Ministers make appointments to the boards of public bodies… (the) aim is to ensure that all Government departments have in place systems for making appointments which are visible, fair and open, and that all appointments to the boards of public bodies are made on merit.

The remit of the Office eventually covered around 11,000 appointments made to the boards of around 1,200 national and regional public bodies (Committee on Standards in Public Life, 2004).

Under the terms of the 1995 Order in Council, the Commissioner is appointed by the Queen and Privy Council for terms of three years. The Public Administration Select Committee (2003a) later recommended that the Commissioner's appointment should be approved by Parliament, but the Government would only agree to 'consult main Opposition Party Leaders on the appointment' (Cabinet Office, 2003: paragraph 18).

The Office of the Commissioner for Public Appointments in Scotland was created by statute (the Public Appointments and Public Bodies etc (Scotland) Act 2003), with Karen Carlton taking up the post from June 2004. This Commissioner is appointed by the Queen on the nomination of the Scottish Parliament for terms of five years. The legislation makes it clear that the Commissioner is not a Crown servant, and neither is she subject to 'the direction or control' of MSPs, the Scottish Executive (now Government), nor the Scottish Parliamentary Corporate Body.

Under a separate Order in Council (1995, amended in 2001), the Commissioner for Public Appointments also covered Northern Ireland. The stop-start nature of devolution in Northern Ireland created some uncertainty regarding this post. Eight months after she became Commissioner for Public Appointments, Dame Rennie Fritchie was appointed Commissioner for Public Appointments for Northern Ireland, in December 1999, but this appointment was initially seen as a temporary measure, pending a decision by the Northern Ireland Assembly on the future of the post. However, the interruptions to the devolution process resulted in the Commissioner's appointment being extended on three occasions, until, finally, with Dame Rennie due to step down, the opportunity was taken by the UK Government to make a separate appointment and Felicity Huston became Commissioner for Public Appointments for Northern Ireland in August 2005.[53]

There is no separate Commissioner for Public Appointments for Wales – the London Office continues to deal with the Welsh jurisdiction. During a brief telephone interview with the author in 2004, the Head of the Public Appointments Unit in the National Assembly for Wales commented that 'There has been some discussion within the Assembly, but nothing has come of it'. No consultation papers were issued. The lack of primary legislative power was cited then as one major reason for the Assembly's apparent reluctance to go forward on this issue ('we would have problems establishing an independent Commissioner'). In any case, the Head of the Public Appointments Unit argued at that time that 'we are very happy with the "gold standard" of service currently being received from Dame Rennie'. In evidence to the Public Administration Select Committee (2003b, paragraph 1349), Dame Rennie Fritchie noted that the National Assembly had agreed in principle to a preparatory office being established in readiness for the appointment of a separate Commissioner, although the timing of this was not agreed, and in the end no further steps were taken. Issues relating to Wales are monitored within OCPA, and the Commissioner's Annual Reports contain an Appendix dealing with public appointments in Wales.

The table below sets out the key dates for the jurisdictional changes across the developing OCPA system.

[53] See Chapter 5 for more details

**Commissioners for Public Appointments: Jurisdictions and Dates**

| | | |
|---|---|---|
| Sir Len Peach | United Kingdom | 1995-1999 |
| Dame Rennie Fritchie | United Kingdom | 1999-2004 |
| Dame Rennie Fritchie | England, Wales & N. Ireland | 2004-05 |
| Janet Gaymer | England and Wales | 2006- |
| Karen Carlton | Scotland | 2004- |
| Felicity Huston | Northern Ireland | 2005- |

## Executive Relations and Internal Governance Issues

During Dame Rennie Fritchie's tenure there were occasional signs of tension between the OCPA and the executive (in the form of the Cabinet Office), as the Commissioner adopted a robust approach to matters relating to her independence, particularly over the principles and practice of office financing and staffing. Tension has been less obvious since Dame Rennie was succeeded by Janet Gaymer, and there has been little evidence of strain in the relationship between the Scottish Commissioner and her 'executive' (due in part perhaps to the different funding and governance circumstances of the Scottish office). Indeed, at times it looks like Janet Gaymer and Karen Carlton appear more concerned about possible encroachments upon their 'independence' from Parliaments rather than from the executive (see below). On taking up her post in Belfast, Felicity Huston indicated that she would be taking a firm line on matters of resourcing. Noting the importance of 'independence', she intimated that she was 'in discussions' with the head of the Northern Ireland Civil Service regarding the location and support for her office – 'it is essential that my team has a more neutral location in the Stormont Estate …' (OCPANI, 2007: 25).

From the outset, OCPA was funded through the Cabinet Office budget, with allowance made for a Commissioner's salary (Rennie Fritchie was ultimately paid £126,000 for four days per week, but this fell to £84,000 on Janet Gaymer's appointment) and a budget of £680,000 for the office and staffing costs (OCPA, 2007). In 2003, the Public Administration Select Committee (2003a, paragraph 101) recommended that OCPA should be funded 'through the Parliamentary Vote, with the Commissioner approved by Parliament and reporting to it, and that the Office should be housed and staffed separately from the executive.' This reflected the view of Dame Rennie Fritchie. In her evidence to the Committee, she noted that she had argued consistently for greater independence since her appointment:

> … if I were coming with my Christmas shopping list, then being in a separate building that was not part of the Cabinet Office, having our money to come through a parliamentary vote rather than out of a Cabinet Office spend … and being able to appoint staff permanently, I would very much like to be able to do that (Public Administration Select Committee, 2003b, paragraph 1368).

The Commissioner went further when giving evidence to the Committee on Standards in Public Life (2004a):

> …people say to me, "How can you say you are independent when you get your money from the Cabinet Office?" Normally, I have said in the past, "Well I get

> my money from the Cabinet Office, but it is pay and rations. It works beautifully." About two years ago, I came up with a bit of a shock, when I suddenly … had a little note to say (the budget) was going to be cut by 47%. I was rather shocked by this and it was pointed out to me that Cabinet Office was going to have less money, therefore everybody had to lose money. I pointed out that my role, which is that of independent (sic) …would be cut in half, because I would no longer be able to undertake my role. I stood ground for some months and they agreed that they would talk to the Treasury about ring-fencing the money and I did finally get the money… I was not alone in independent office (sic), I have to say, though the same question came up again the following year. So a great deal of energy is put in to being as independent as I can be. Sometimes it is not easy.

Fritchie also made it clear that she believed the link to the Cabinet Office could adversely affect the operational effectiveness of her office, citing the need to go through a lengthy process to get executive approval for a public opinion survey designed to gauge perceptions of public appointments (Committee on Standards in Public Life, 2004a).

Also giving evidence to the Committee on Standards in Public Life, Tony Wright, PASC Chair, reiterated his view that the Commissioner (and, indeed, all watchdogs) should be 'directly set up by Parliament, with a Parliamentary vote, not an order in council, funded through Parliamentary approval, reporting to Parliament, and anchored into a Parliamentary committee.' (Committee on Standards in Public Life, 2004b).

In its response to the Public Administration Select Committee's report, the government stated its belief that 'the present arrangements work well, and allow the Commissioner to carry out her role independently of Ministers and their departments … as the Commissioner regulates and reports on appointments that are the responsibility of Ministers, it is only right that the Government should provide the funding for this role.'(Cabinet Office, 2003, paragraph 18)

PASC recommended (2003a, paragraph 102) that the staffing requirements of OCPA should be reviewed 'in the light of the Office's current and future responsibilities …' This recommendation was accepted by the government (Cabinet Office, 2003, paragraph 19): 'the Cabinet Office and the Commissioner meet regularly to discuss the work and resource requirements of her Office.' As with funding, it was clear that Dame Rennie Fritchie was not entirely satisfied with the arrangements for staffing. In 2001 she requested more staff from Sir Richard Wilson (then Cabinet Secretary), and was offered two posts: she compromised and accepted one post (PASC, 2003b, paragraph 1364-67). In her evidence to the Graham Committee (Committee on Standards in Public Life, 2004a), the Commissioner argued that she needed more support, and expressed her frustration at the requirements of the civil service staff appointments procedure: 'It is madness.'

The salaries of the Commissioner for Public Appointments in Scotland and her staff are paid by the Scottish Parliamentary Corporate Body, and this arrangement was clearly seen as preferable by Rennie Fritchie, who noted her 'disappointment' that the UK Government had rejected PASC's recommendations on a range of matters, including funding OCPA through the Parliamentary Vote (Public Administration Select Committee, 2003a). In a memorandum submitted to the PASC during the latter's inquiry into 'Ethics and Standards' (Public Administration Select Committee, 2006), Fritchie's

successor, Janet Gaymer, reiterated the concerns raised by her predecessor regarding the office's dependence on the Cabinet Office for staffing and expressed a wish to lose the connection to the Cabinet Office e-mail address. However, she was apparently less concerned about the effect of the budgetary link: '…the Commissioner for Public Appointments in Scotland derives her financial support from a parliamentary vote. Assuming that was done, I would be concerned if that stopped the Commissioner from being fleet of foot…in relation either to maintaining the code or amending the basic operation of the office'.

Annual Reports of the Commissioner for Public Appointments now contain a special section on public appointments in Wales, in which it is noted that the Commissioner works closely with the National Assembly for Wales's Public Appointments Unit and has regular meetings with the NAW Permanent Secretary.

## Relationships with Parliament

At the inception of the OCPA system it was clear that there was no obligation on the Commissioner to report to the UK Parliament or its committees (the Order in Council simply required publication of an Annual Report) although a convention developed whereby the Commissioner would appear before the Public Administration Select Committee to discuss the Annual Report and any other matters of concern. Until the emergence of the devolved OCPA arrangements in Scotland and Northern Ireland, the Commissioner would make appearances before PASC, the Equality of Opportunity Committee in Cardiff, the Committee of the Centre in Belfast and the Local Government Committee in Edinburgh.

Although it was occasionally critical of OCPA's lack of impact (Public Administration Select Committee, 1998), PASC generally acted as a supporting mechanism for OCPA, by arguing for increased powers, independent status and enhancing staffing for the Commissioner (see, for example, Public Administration Select Committee, 2003a). As noted above, Tony Wright argued strongly that this system of mutual support would work best if the Commissioner formally reported to Parliament, through a committee (Committee on Standards in Public Life, 2004b).

The tenor of the relationship between the Commissioner and the PASC appeared to alter following Rennie Fritchie's departure. Janet Gaymer appeared before the PASC to give evidence during its Ethics and Standards Inquiry (Public Administration Select Committee, 2006). Most of the discussion focused on the regulatory role of the Commissioner, but some of the questions raised issues relating to the relationships between OCPA, Parliament and the executive. While recognising the importance of 'parliamentary scrutiny' of her work, she had reservations about following the Scottish model in relation to a specific issue, where the chain of accountability might 'slow her down': '…my colleague in Scotland has to go to Parliament in order to change her code. I could imagine a situation in which I might want to change my code quite rapidly to deal with an immediate situation.'

A distinctly fractious note was sounded during the exchanges which took place in the course of the Committee's consideration of the Government's proposals for 'streamlining public appointments' in its Green Paper, *The Governance of Britain*. Janet Gaymer gave oral evidence to the Committee in June and December 2007 and submitted a memorandum at the Committee's request (Public Administration Select Committee,

2007a; Public Administration Select Committee, 2008). There were sharp exchanges between the Commissioner and members of the Committee as she sought to defend her concerns about the possible involvement of select committees in the public appointments process. The Committee's report, published in January 2008, explicitly rejected the Commissioner's position (describing it as 'arbitrary') that pre-appointment hearings should not apply to posts within her remit.

**Primary Parliamentary Committee Links, 2008**

**Office of the Commissioner for Public Appointments:**
Public Administration Select Committee, House of Commons
Equality of Opportunity Committee, National Assembly for Wales

**Office of the Commissioner for Public Appointments in Scotland:**
Standards, Procedures and Public Appointments Committee, Scottish Parliament

**Office of the Commissioner for Public Appointments in Northern Ireland:**
Committee of the Office of the First Minister and Deputy First Minister, Northern Ireland Assembly

In Edinburgh, it took some time for the Parliament to decide which Committee should be the primary point of reference for the new Commissioner for Public Appointments in Scotland. Eventually, following the submission of evidence to, and an appearance before the Procedures Committee (Scottish Parliament Procedures Committee, 2004a; 2004b), the name and remit of the Standards Committee were changed, with the effect that the new Standards and Public Appointments Committee (now, since September 2007, the Standards, Procedures and Public Appointments Committee) became the focus for receipt of consultations and reports from this Commissioner (Scottish Parliament Procedures Committee, 2005).

In an interview (Carlton, 2005), Karen Carlton made it clear that she was keen to preserve her independence (not a Crown Servant, not subject to 'direction or control' by MSPs, Scottish Executive or the Scottish Parliament's Corporate Body from which her budget comes) and did not see her relationship with the Scottish Parliament in accountability terms. She spoke of her appearance before the Procedures Committee as 'information sharing'. While she has a duty to report cases where ministers have failed to comply with the Code of Practice, she preferred to see this as formally reporting to the Parliament's Corporate Body (although, in practice, as noted above, it was to be the then Standards and Public Appointments Committee which would receive these reports, and take them forward within the Parliament). During the interview, there was no sense that the Commissioner saw the Parliament or its committees as potential 'allies' – her wish to be seen to be above the political fray was evident. Her comments about the relationship between her Office and the (then) Scottish Executive were very positive. She was apparently able to appoint staff without encountering the sort of obstacles described above by Dame Rennie Fritchie. Overall, 'I don't have the same strength of feeling as Dame Rennie on this – it is perfectly acceptable that I should be asked to account.'

Karen Carlton's evidence to the Scottish Parliament's Finance Committee during its inquiry into Accountability and Governance (two brief memoranda submitted in April

and June 2006 in response to a series of questions[54]) confirmed her wariness regarding the parliamentary dimension of her activities. While noting her budgetary relationship with the Parliament's Corporate Body, her duty to consult with the Parliament, and, in certain circumstances, work through its committees, she stressed her 'independence':

> The Act states that the Commissioner is not subject to the direction of Parliament or the Scottish Executive … There has been some question over whether the Committee or Parliament as a whole has the right to direct our (i.e. the various Commissioners') offices. My legislation clearly prohibits such direction.

Nonetheless, in its report (Scottish Parliament Finance Committee, 2006) the Committee took issue with the argument that the various 'watchdogs' were completely 'independent', and concluded that '…it needs to be clearly stated that the route of accountability for any parliamentary Commissioner or Ombudsman is to Parliament.' See Chapter 3 for more details.

It is difficult to be precise about the reasons behind the wariness with which these Commissioners approach dealings with the Parliaments. There is an undoubted caution, however, perhaps caused in part by the emphasis the Commissioners place upon their 'independent' status, coupled with their fear of being tainted by too close an association with the politicians whose actions they are meant to be monitoring.

## Links with Other Officers and Wider Accountability and Transparency Issues

According to information supplied by OCPA in July 2004, interaction with other officers (ie watchdogs beyond the realm of Public Appointments Commissioners) takes place in a limited fashion and on a purely informal basis.

Within the context of the Commissioners for Public Appointments, closer, though still informal, links have been developed. For example, in advance of Karen Carlton taking up her post, she met with Dame Rennie Fritchie in Edinburgh in June 2004 to receive advice on the establishment of the new office. Once in post, Carlton became involved in informal meetings with the various Scottish commissioners and officers. Discussions took place about the idea of an 'Audit Board' within which all of the commissioner/ officers could share practices and experiences and offer each other 'wise counsel' (Carlton, 2005) but little obvious progress was made on that front. Once the system had developed to the point where there were three UK Commissioners for Public Appointments (Janet Gaymer, Karen Carlton and Felicity Huston), the establishment of the informal links was signified when the post holders met in Northern Ireland in April 2006.

Viewing the concept of accountability broadly, to encompass the requirement that office-holders should provide information to external bodies ('informatory' or 'explanatory' accountability), it is clear that each of the Commissioners accounts to a reasonably wide range of extra-parliamentary bodies and groups. Most obviously, there is a link to the Committee on Standards in Public Life, but beyond this, the Annual Reports of each branch of the OCPA system set out examples of engagement with the wider public

[54] See www.scottish.parliament.uk/business/committees/finance/inquiries

through participation in academic seminars, 'consumer' programmes on the radio, and appearances at events organised by pressure and interest groups with concerns about public appointments issues. Additionally, each branch of the system has its own website. In 2005 a major internal review of the role and development of the OCPA since 1995 was published (Commissioner for Public Appointments, 2005). A further example of wider accountability and transparency came when a MORI research project was carried out on behalf of OCPA, OCPAS and OCPANI (MORI, 2005). This revealed a low level of public awareness about the operation of the public appointments system, a lack of public confidence in the system, and a belief that the processes were weakened by ministerial involvement at the final selection stage.

## Conclusion: Future Development

This chapter's main theme has been the growing diversity in the development of this 'watchdog', both in terms of the spawning of new offices and Commissioners and in the apparent differences in approach taken by the Commissioners towards some key issues, including relationships with parliaments. The future development of the various strands of the OCPA system is likely to hinge at least to some extent upon the approaches to the governance of watchdogs adopted in the different parts of the devolved polity. As Barry Winetrobe notes in Chapter 3, debates about these matters have been fairly wide-ranging in Scotland.

At Westminster, PASC opened up some potentially radical future options during its investigation into Ethics and Standards. Key sections of the final report (Public Administration Select Committee, 2007b) commented on the links between the work of OCPA and that of the First Civil Service Commissioner, and, more broadly, on the scope for a more 'collegiate' approach to the work of all of the ethical regulators. The Committee noted that the evidence taken from both the First Civil Service Commissioner and the Commissioner for Public Appointments defended the separate nature of these roles. However, while recognising that 'policing entrance into the civil service differs from advising ministers on public appointments to NDPBs' and understanding that 'there is a real difference between appointment to a part-time role and to a full-time post at the top of a particular organisation … we are not convinced that the argument that the variety of posts involved prevents consolidation and will hold good for all time.' (paragraph 86). The Committee refrained from making 'firm recommendations about rearrangement of Cabinet Office regulators at this point' but felt there is 'at least a *prima facie* case for revising the arrangements for the civil service and wider public service recruitment' (paragraphs 86 and 88). The Committee saw this in the broader context of its recommendation that there is 'scope for a more collegiate model' (paragraph 88) of ethical regulation. This would involve a college of regulators being overseen by a Public Standards Commission, created by statute, 'to undertake sponsoring role of appointing, funding, staffing and auditing the college' (paragraph 111).

Interestingly, the 2008 Draft Governance of Britain – Constitutional Renewal Bill (Cm 7342), although fairly wide-ranging and ostensibly designed to 'tidy-up' a range of governance and constitutional matters, made no mention of the OCPA system, while proposing that the Civil Service Commission should be placed on a statutory footing. Were this to be followed through, the asymmetries of the OCPA system would become even more pronounced, with a statutory Commissioner for Public Appointments in Scotland (not dependent upon the Government in Edinburgh for budgetary resources), a statutory First Civil Service Commissioner (as PASC noted in its 2007 report, covering a

similar area of work to that of the OCPA), and non-statutory Commissioners for England and Wales, and for Northern Ireland. The diversity to which we alluded at the start of this chapter would be intensified, and the PASC questions about the need for 'consolidation' of the work of the First Civil Service Commissioner and the Commissioner for Public Appointments might become more acute.

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# Chapter 10: Conclusion - Parliamentary Watchdogs: Time For Decision

**Barry K Winetrobe**

## Watchdogs & parliamentary watchdogs?

The earlier chapters demonstrate how different jurisdictions seek to organise their various core constitutional watchdogs. The picture which emerges is of a lack of uniformity and an inconsistency of approach. Why? Is it simply due to ad hoc development, unique to each jurisdiction's political and constitutional circumstances? Or is it because any attempt to corral very different watchdogs together in similar governance arrangements is inherently flawed?

More specifically, for the purposes of this Report, it still begs the questions that underlie our study – why have parliamentary watchdogs at all? What benefits does this model provide for modern, democratic, effective public administration, which could not be achieved through other, more conventional models? Is there an 'added value' to the 'parliamentary officer' model in some or all cases? If so, does it, and need it, benefit all actors in the sector – parliaments, governments, watchdogs, those being 'watchdogged', and, ultimately, the public – or are there acceptable tradeoffs in costs and benefits as between these actors, when choosing the parliamentary officer model for a particular watchdog function?

At present there is no consensus as to which offices or officials can be regarded as constitutional watchdogs, nor is there agreement as to which constitutional watchdogs should be closely linked to a parliament, in the senses discussed in this Report, as officers of parliament or parliamentary commissioners.

While some of the classical posts are actually or potentially parliamentary officers – ombudsmen, auditors-general, and (perhaps) parliamentary standards commissioners – others are not so obvious. Inclusion or exclusion may be due to the unique political or constitutional situation of a territory, as with the Victims Commissioner in Northern Ireland, or ad hoc political circumstances and priorities, prime examples being the Environment Commissioner in New Zealand, or the Official Languages Commissioner in Canada.

Any defined set of criteria – whether formal, as in legislation, or otherwise – for parliamentary watchdogs, should identify which offices or posts should or should not be so constituted. In reality, such criteria tend to be established for negative reasons, especially to set limits on the potential expansion of such posts, as in New Zealand or Scotland. Inevitably any such consideration must also encompass more fundamental issues of the independence, accountability and governance of the watchdogs in question, especially their relationships with the other two most directly involved organs of government (three, if one counts, in this modern age, the people themselves) the legislature and the executive.

As Robert Buchanan shows in Chapter 7, these aspects have probably been examined most closely in New Zealand. Its approach, based on conventions (which he argues are strong) rather than legislation, is one which may well be transferable to other

Westminster Model parliaments, such as those in the UK. For example, its assertion that parliamentary officers should only be created to provide a check on the use of arbitrary *executive* power, may suggest that parliamentary standards commissioners should be placed outside the 'Officers' category, or, at the very least, be given a unique framework if within it. This might provide a solution to the conundrum, in Britain and Canada for example, of watchdogs over the ethical conduct of parliamentarians themselves being accountable to, and dependent on, these very parliamentarians.

Again, the New Zealand emphasis on having parliamentary officers, where they 'only discharge functions which the House itself, if it so wished, might carry out', provides a solid and practicable rationale, which is also potentially transferable to other jurisdictions. It demonstrates to everyone the parliamentary underpinning of the role, vital for basing it within the representative parts of the governance landscape. It fits in with contemporary notions of parliamentary government, where parliaments do not pretend to be the executive or the alternative executive, but do hold the executive to account publicly and effectively, whether directly (by questions, debates, inquiries etc) or indirectly through its watchdogs, including their governance, through devices such as (pre-)appointment-related hearings. The Brown initiative on confirmation hearings for a whole range of bodies recognises this new Westminster assertion.

## Why have *Parliamentary* Officers at all?

Any direct parliamentary location for the governance of Officers needs to be justified. For example, any cost benefit analysis needs to take account of more amorphous aspects such as perception, especially public perception. In Scotland, as Chapter 3 describes, one major driver for the creation of parliamentary commissioners was the desire that certain watchdogs need to be clearly seen as independent of the Government. Though it became clear that this motivation itself led to flaws in the governance arrangements for the Commissioners, that realisation does not negate the validity of the earlier perception. In principle, any watchdog should be, and be seen to be, independent of those they oversee or regulate. In some jurisdictions, this may require such administrative details as ensuring that their websites and emails should not have an identifiably government address.

An intangible benefit may be prestige – should parliaments take on more expansive 'parliamentary officer governance' roles for reasons of prestige, empire-building, or, more mundanely described, to give them something useful to do? Should watchdogs wish to be linked to parliaments because they perceive that institutional status as superior to conventional executive-sponsored public bodies? In the UK there has been discussion of this gold standard issue, and whether and to what extent, for example, its existence might be to the detriment of those without this status.

Even in these examples, it can be seen that we rapidly enter wider, more fundamental constitutional questions, such as the proper role(s) of a parliament in a modern democracy, especially their relationships with their executives and, increasingly, with their ever-more demanding and proactive publics. How these questions are addressed is central to the institutional design of the core constitutional watchdog sector.

In other words, is it a largely practical question of parliaments needing to co-opt these watchdogs into its fold so as to be better able to do its traditional functions, especially of holding the government to account for its policies, actions and spending, or is there a

more theoretical question of constitutional propriety for the location of these watchdogs, which happens to be of some practical benefit to parliaments simply as a by-product?

## Interdependence

Robert Buchanan's discussion in Chapter 7 of 'interdependence' may hold the key to bringing some coherence to the 'parliamentary officer' phenomenon, and to its apparent paradoxes. Interdependence may be necessary to guarantee both independence (which, he claims, is 'always the overriding concern') and accountability. He examines the notion in terms of an interdependence between 'officers' and 'parliament'. The relationship is fundamentally about 'communication and consultation which stops short of direction'. This reinforces the collaborative nature of the parliamentary–officer relationship, especially vis-à-vis the executive.

In theory, this is a simple, even self-evident, concept. In practice, providing a system of governance that effectively incorporates 'interdependence' may be more problematic. Like similar constitutional notions, it may be more a vague aspiration or goal, rather than a blueprint for institutional design. Does it mean some sort of zero-sum trade-off between 'independence' and 'control' or 'direction', such that *X* amount of an officer's independence is worth sacrificing, to ensure *Y* amount of parliamentary accountability through specific powers of control or direction? Interdependence, more positively, could mean that there can be forms of effective parliamentary oversight which do not have the consequence of diluting an officer's independence, properly so defined. As we have seen in Chapter 9, watchdogs may worry about the detrimental impact on their operational effectiveness of an inappropriate form of parliamentary governance regime.

These were the dilemmas which hampered the commissioner governance work of the Scottish Parliamentary Corporate Body (SCPB). At times it seemed to fear that almost anything it did with or to with 'its' parliamentary commissioners, however non-coercive, could be regarded as an unlawful invasion of the commissioners' statutorily-protected independence. The SPCB's dilemma was tackled (even if not entirely resolved) through Holyrood's Finance Committee's inquiry, where the committee rejected the notion that independence required a hands-off form of governance and cajoled the SPCB into taking a more robust and proactive view of what constituted acceptable governance oversight of, and involvement with, the commissioners and their operational and institutional performance, which would not compromise their necessary independence.

Interdependence, in the New Zealand sense, is a useful, overarching approach to parliamentary officer governance, and may generate some general principles and criteria. Translating it into detailed and practical institutional design will certainly mean different arrangements for different officers (and perhaps even for the same officer, but in different sets of circumstances), taking account of their particular roles and functions. A one-size-fits-all approach cannot work in such as disparate area. Indeed, as with the earlier discussion of which watchdogs should be classified as parliamentary officers, it is probably not an exercise that can be undertaken in isolation, but only as part and parcel of the overall institutional design of a particular watchdog role, function and structure.

## Interdependence plus?

Perhaps we can consider taking the interdependence approach one step further. As described, it is a bilateral relationship, between officer and parliament, which necessarily

excludes the executive, because it is the executive which is the focus of the officer's and the parliament's scrutiny and oversight.

However, just as interdependence is a concept which seeks to reconcile officers' necessary independence and their democratic accountability to their parliament, perhaps we need to consider also whether a strict and total separation of powers model is the most effective model for the relationship between parliamentary officer and executive. This may seem a strange question to ask in contemporary Britain, where the strong trend in constitutional law and public administration is towards stricter separation when adjudicatory, or investigatory functions are exercised over the use of executive power.

In the UK, the idea of a parliament acting in an autonomous way – in this case, being the sponsoring body for a bloc of highly sensitive and increasingly costly public officials and bodies, most of whom oversee the exercise of executive power – is a novel one. It is not one to which our domestic Westminster model - where the executive sits within that parliament (normally with a working majority of some form), and relies on its continued confidence for its very existence – can easily adapt. Our parliaments find it hard enough to operate in a corporate, institutional mode, independent of government, even when running their own internal administration.[55] How much more difficult may it be for such parliaments to operate as effective governance sponsors of a significant group of public bodies?

Above all, parliaments are forums for the operation of party politics by party politicians seeking re-election and advancement, and so all parliamentary activities, including any Officer oversight and governance, are political and politicised to some degree or other. It is hardly surprising that, while watchdogs often look to parliaments for protection against executive interference, they are wary of moving too close to them for similar reasons.

This sponsoring role perhaps requires some further explanation. Watchdogs need to ensure that their basic independence and accountability arrangements can be defended when they come under political or media attack for a specific decision or recommendation which they have made. At such moments, they require an affirmation of their independence and role within the constitution. More prosaically, the sponsoring role will also include the supervision of the budget and the corporate strategy. At Westminster, the Public Administration Select Committee (PASC) recognised that an appropriate governance partnership between parliament and executive could be an acceptable and effective option when discharging the sponsorship role for core constitutional watchdogs.

Any design must necessarily envisage appropriate roles for parliament and government in a satisfactory system of ethical regulation. This dual focus can have advantages, if utilised positively in an appropriate partnership. It can not only be operationally efficient and effective, but also constitutionally proper, by sharing the role of sponsor of the ethical auditors and so minimising dangers of dependence on one or the other and maximising appropriate democratic accountability.

Such cooperation, PASC suggested, could operate, not via parliamentary officers of parliament committee as seen in the Commonwealth, but through some sort of free-

[55] This is evident when considering the difficulties faced by the UK Parliament in setting parliamentarians' pay and allowances in 2007.

standing, statutory commission at arm's length from both parliament and government (PASC 2007: para 112):

> We favour the 'statutory commission' model to undertake, on behalf of both Parliament and government, the sponsoring body functions we have described, thereby leaving Parliament to fulfil its proper constitutional scrutiny and oversight role, and the watchdogs themselves the appropriate balance of independence and accountability to enable them to carry out their work properly.

PASC did not go into further detail about the design of a Commission. But given its consistent interest in retaining an expert element in a reformed House of Lords, the Committee might have looked for representatives from the executive and parliament to be nominated by the respective bodies.

Of course, construction of a practical governance model along these lines would be far from straightforward. '*Who guards the guardians?*' is a logically insoluble problem where, at some point, a top-level tier of accountability has to be relied upon by parliaments, executives, watchdogs and public alike. In Britain, with no written, supreme constitution, we do not have the option of establishing bodies which are legally above and beyond the ordinary law of the land as enacted by parliaments and governments of the day. We could not therefore establish, as a constitutionally untouchable body, what could amount to a fourth arm of government, alongside the legislative, executive and judicial arms. In Britain, we have traditionally tended to rely on constitutional convention, rather than law (never mind 'supreme law') to provide certain core bodies, procedures or whatever with a *de facto* exalted status within our system of governance. However, recent practice has been to entrench much of our core constitution in statute, even if that is not formally a higher form of constitutional statute.

Another alternative would be to seek to locate a watchdog governance body somewhere within the judicial sphere. In our chapter for the recent collection speculating on the shape of the British Constitution by 2020 (Gay and Winetrobe, 2008), we suggested that one scenario could see the core watchdog sector as part of the judicial/quasi-judicial area of the constitution, distinct from, and above the parliamentary and governmental arms of government which they watchdog. Speculating even further, and probably beyond 2020, the core watchdog sector machinery could ultimately emerge as some form of fourth branch of government, perhaps in the form of a Supreme Standards Tribunal or Council of State alongside a true Supreme Court. Bruce Ackerman has argued along similar lines in the US context (Ackerman 2000).

By adopting such judicial models, priority would be given to attributes of independence and impartiality over those of democratic accountability in the traditional representative, sense. However, one option might be the public election of some appropriate watchdogs, just as some countries elect some of their judges.

## Elections and ethics

Regulation of elections and ethics raises particularly sensitive issues in the relationship between parliament and officer; activities in both areas directly affect the composition of Parliament and the activities of its individual members. The sensitivity of the subject matter will also inevitably involve the political parties. The unease a decade ago about handing over regulation of standards in the House of Commons to a depoliticised

standards commissioner has died away to some extent, but a similar concern is building in relation to the Electoral Commission, whose regulatory powers are being strengthened in the Political Parties and Elections Bill. The intensely political questions of donations to party leaders, and the appropriate use of parliamentary allowances, mean that the decisions of watchdogs are likely to face hostility from politicians on the grounds that such bodies cannot understand political reality. The proposal to add representatives of political parties to the Electoral Commission is symptomatic of this unease. But politicising a watchdog is unlikely to solve the underlying tension between politicians and their regulators. Therefore, some form of sponsoring arrangement which offers electoral and ethical watchdogs some protection when under attack is particularly necessary.

## Last word – for now?

Study of the operation and governance of core constitutional watchdogs associated with parliaments is both a highly rewarding and hugely frustrating exercise. Rewarding, in the sense that it raises many of the fundamental issues of contemporary political and constitutional governance, including public trust and engagement in their governance, and the nature of representative, parliamentary democracy in the modern age. Frustrating, in that the very centrality of these issues makes it seem an impossible topic to examine in isolation. Its mercurial qualities make it so much easier to raise interesting questions than to devise ways of seeking their answer, as many academics, parliamentary committees and others have discovered.

The time is right for some body to grasp this nettle in the UK, and undertake a comprehensive search for robust answers for the institutional design, operation and interrelationships of core constitutional watchdogs and their parliaments, executives, 'clients' and publics. So much of present-day constitutional change – whether by design or otherwise – affects these watchdogs and the governmental areas they oversee, but these effects are too often consequential or collateral, with little sense of an overall coherence or of any operative underlying principles entering this silo thinking. As the pace of constitutional change has quickened in the last decade, so has the need to develop an appropriate framework to accommodate these new watchdogs.

This Report suggests that this is not the only option; that the problem is potentially soluble, and that many political systems and others around the world have already thought about it in their own particular contexts. As noted, the editors of this report have recently speculated on a variety of possible trajectories for the development of constitutional watchdogs in the UK (Gay and Winetrobe 2008). The New Zealand situation, and the recent parliamentary committee inquiries in Holyrood and Westminster, suggest that the foundations of a thorough study are now possible and available. To ignore this opportunity should not be an option. This challenge should be taken up by a large-scale academic research project or by a royal commission or the like, operating in a modern fashion – with a premium on openness, transparency and public engagement, as much as is consistent with the inherent sensitivity of some of this core constitutional terrain.

Constitutional watchdogs may seem technical, obscure and even unimportant to the vast majority of the general public – and even, sadly, to some charged with examining them in some way, such as the Crerar Review in Scotland and the Tiner Review of the NAO/C&AG - and therefore a low-priority policy issue for parliaments and governments. But recent studies have consistently demonstrated that issues of public

trust are increasingly salient. After all, all government in a democracy is in the name of the public, and the modern interactive, 'more 'direct democracy' era means that the public is an active and essential factor in any form of governance design, especially ones so central and sensitive as those where watchdogs roam. And so many of the areas where the trust problem manifests itself are those where core constitutional watchdogs operate, as the case of Northern Ireland demonstrates. In other words, with appropriate information and engagement, the public could come to realise that some of what concerns them about the current political system relates, to the operation, effectiveness and governance of these watchdogs.

This study would not come up with all the answers. But it might raise the profile for watchdoggery and address the question of interdependence in a novel and coherent way. Such a review could be the catalyst for a productive exercise which would engage the public and add to its trust and faith in government. It is a route worth taking.

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