
**Officers of Parliament—
Transforming the role**
by Oonagh Gay and Barry K Winetrobe

April 2003



The **Constitution** Unit

ISBN: 1 903903 18 1

First Published April 2003

Copyright © The Constitution Unit

Published by The Constitution Unit
School of Public Policy, UCL
29–30 Tavistock Square
London
WC1H 9QU

Phone: 020 7679 4977

Fax: 020 7679 4978

constitution@ucl.ac.uk

www.ucl.ac.uk/constitution-unit/

This report is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, hired out or otherwise circulated without the publisher's prior consent in any form of binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

Contents

Preface	5
Executive Summary	7
Part I Introduction and definitions	9
A What makes an Officer?	10
B The origins of the Officer of Parliament concept	11
C The constitutional Officers of Parliament	12
D Almost Officers of Parliament: The Electoral Commission	21
E Statutory constitutional watchdogs	23
F The non-statutory Nolan watchdogs	29
G Other non-statutory constitutional watchdogs	33
Part II Key Characteristics for an Officer of Parliament	39
A Themes of this research	39
B Defining characteristics for Officers	39
Part III The Scottish experience	49
A Introduction	49
B Key characteristics of a 'parliamentary officer'	51
C Conclusions and prospects	61
Part IV Conclusions	67
A Officers of Parliament Committee—a model	68
B Effective dialogue with Parliament	69
Appendix 1 Acronyms and abbreviations used in this study	73
Appendix 2 Characteristics of Officers and Almost Officers in the UK Parliament	74
Legislation	74
Appendix 3 Characteristics of Officers of Parliament in Australia	74
Legislation	74
Appendix 4 Characteristics of Officers of Parliament in Canada	77
Federal Legislation	77
Appendix 5 Characteristics of Officers of Parliament in New Zealand	77
Legislation	77



Preface

This project was devised and led by Oonagh Gay, who was primarily responsible for the research and report on the position at Westminster and in the selected overseas jurisdictions, and for the conclusions in Part IV. Part III, on the Scottish experience, was written by Barry Winetrobe, who also collaborated on the overall preparation of this report. We are currently Senior Research Fellows at The Constitution Unit, UCL, for whom we have written other reports, separately and together. Our collaboration on matters parliamentary and constitutional began when we were senior researchers in the House of Commons Research Service through the 1990s, and that background has given us a distinctive perspective on the matters examined in this report.

We are grateful to the Nuffield Foundation for funding this research and for their patience as it evolved. Colleagues at the Constitution Unit, especially its Director, Professor Robert Hazell, provided invaluable assistance throughout the project. We must also thank all those in the Westminster and Scottish Parliaments and other parliamentary officials abroad who generously provided us with information and advice on this constantly-evolving topic over the last six months. A series of constitutional watchdogs were also kind enough to be interviewed as part of the process. Particular thanks are due to Professor Gavin Drewry and the National Audit Office for access to earlier research on this topic. Any errors that remain, and all views expressed here, are our own. As far as possible, the study relates to the position as it was at the end of March 2003.



Executive Summary

Three constitutional watchdogs at Westminster are known as Officers of Parliament. These are:

- Comptroller and Auditor General
- Parliamentary Ombudsman
- Parliamentary Commissioner for Standards

The term is often misunderstood, but is used as a device to denote a special relationship with Parliament, which is designed to emphasise independence of the executive. Formal mechanisms, such as restrictions on dismissal of Officers and direct appointment of staff as non civil servants assist in upholding this distance. Often by accident rather than design, other constitutional watchdogs do not possess the same type of institutional safeguards and do not have a special involvement with Westminster. This research project examines the development of the concept of Officers, offers the first 'mapping' of these watchdogs and their interaction with Parliament, and considers which body should be recognised as an Officer. Using overseas examples from other Commonwealth states familiar with the concept, it is clear that there are 'core' Officers as follows:

- State Auditors
- Ombudsmen
- Electoral Officers/Commissions
- Parliamentary ethics commissioners

Auditors and Ombudsmen relate to historic functions of Parliament—authorising expenditure and redressing grievances—and electoral commissioners perform the central role of overseeing the election of a parliament's own members. The UK Electoral Commission already possesses the essential characteristics of an Officer, without formal categorisation as such. The positioning of ethics commissioners is particularly difficult, as their categorisation as Officers is less to do with necessary independence from the executive, and more related to the traditional concept of Officer as senior staff member or servant of Parliament. It is particularly important to establish mechanisms which make ethics commissioners institutionally independent of Parliament.

Other types of watchdogs are sometimes categorised as Officers. These are:

- Privacy Commissioners
- Information Commissioners
- Human Rights Commissioners
- Equality Rights Commissioners
- Civil/public service Commissioners
- Public appointments Commissioners

Whether these bodies are categorised as Officers depends to a large extent on their political and constitutional importance. Being recognised as having a special relationship with Parliament helps to denote the importance of institutional independence from the executive. But particularly where the body carries out judicial or regulatory functions, it is essential to ensure that there is no interference from Parliament in place of the executive.

The Scottish Parliament does not formally have, or recognise, a category of public official, or member of its staff, as an 'Officer of the Parliament'. The clear conclusion of this research is that a distinct, identifiable class has evolved with common characteristics and institutional template, which appear to be similar to what may be regarded as 'parliamentary officers'. A major influence in these developments was the Parliament itself, through its statutory legal basis and its unique culture, ethos and practice, and its evolving relationship with the new Scottish Executive.

There is a clear trend for such 'parliamentary officers' to be

- established in a generally standard way by an Act of the Scottish Parliament;
- appointed by the Sovereign on the nomination of the Parliament,
- reporting annually to the Parliament,
- resourced by and through the Parliament itself (primarily through the medium of the Scottish Parliamentary Corporate Body), and
- subject to standard auditing and accounting arrangements.

The advent of devolution in Scotland has offered a unique opportunity to construct appropriate constitutional architecture for new watchdogs there. By default, a template has emerged, available for future use, which may be of value to Westminster, particularly as the Scottish

Parliament, rather than the Executive, played a key role in determining the characteristics of that template. An essential element is a budget-setting mechanism institutionally independent of the executive. This already exists at Westminster for the Comptroller and Auditor General and for the Electoral Commission, in the form of committees of MPs—the Public Accounts Commission, and the Speaker’s Committee respectively.

The numbers of new parliamentary officers established as part of the devolved governance in Scotland may however lead to a strain on resources for that Parliament. It is unrealistic to enact a separate parliamentary committee to protect the independence of each Officer, particularly in small parliaments. Here, the model used in the New Zealand Parliament has much to offer. Their Officers of Parliament Committee undertakes independent scrutiny of the budget, resources and role of each Officer. This model could be developed to undertake a further role—ensuring that Parliament took the work of its Officers seriously. At present, Westminster treats constitutional watchdogs in a haphazard way—annual reports are not scrutinised on a regular basis, and dialogue is spasmodic. Yet these watchdogs have information and resources which the UK Parliament should be harnessing to achieve better scrutiny. It is possible that the Scottish Parliament will herald the way here, once its own parliamentary officers have begun work.

The Officers of Parliament Committee should have the following characteristics:

- its basis should be set out in statute
- it should be a backbench committee, to denote independence from the Government and Official Opposition, who might have partisan considerations uppermost
- there should be no Government majority on the Committee,
- involvement of the Speaker, perhaps as chair, as in New Zealand would be valuable.
- it should include Members from the Lords, not necessarily as a joint committee of both Houses.

- It should have a close relationship with the Liaison Committee in the Commons (which is composed of chairs of select committees) using the device of overlapping membership

Parliament’s role in the appointment of Officers should not be confined to the largely symbolic resolutions approving individual candidates. The Officers Committee would be the more appropriate body to play a role here than select committees, who might be caught up in policy agendas. It could contract out the recruitment process, following Nolan principles of public appointment, but retain the final decision over a shortlist of candidates. Special rules, such as outside involvement, should apply to the appointment of the Parliamentary Commissioner for Standards to buttress independence from Parliament itself.

The establishment of an Officer of Parliament Committee on its own is not enough to achieve the special relationship which constitutional watchdogs should have with Parliament. Each watchdog should have a select committee with which there is regular dialogue on the work-plan and outputs of the watchdog. This will build on the core tasks given to select committees in the first report of the Modernisation Committee in 2002.¹ There need not be a dedicated committee for each watchdog. A new joint committee of both Houses could be responsible for examining the public service. More staff are needed to assist committees with these tasks. The success of the Public Accounts Committee owes much to the dedicated resources of the National Audit Office. This is an achievable goal, given the recent strengthening of resources to select committees as part of the modernisation initiative led by Robin Cook as Leader of the House.

Constitutional watchdogs in the UK value regular interaction with select committees since at the minimum they gain a publicity platform. But the quality of their work and advice can also be improved by input from interested parliamentarians. The quality of enquiries undertaken by individual committees could be enhanced by the insights and resources of watchdogs. This is a two way process which will enhance the scrutiny role of Westminster.

¹ HC 224 Session 2001-2

Part I Introduction and definitions

This study sets out to explore the nature and status of 'Officer of Parliament', and how it could be enhanced. The aim would be to develop the roles both of such Officers and of Parliament in achieving the key constitutional functions of Parliament such as scrutiny of the executive and protection of the interests of citizens.

This requires a model which best balances accountability and independence. There are formal mechanisms which assist in this, such as restrictions on dismissal, and direct appointment of staff who are constitutionally separate from the civil service, but ultimately the key determinant of such Officers is their connection with Parliament, rather than the executive. Parliament has the potential to act as more than simply the arena for party government. Therefore, it is the nature and scope of that relationship between Officers and Parliament which is central to the constitutional uniqueness and importance of being an Officer. Parliament has to develop a separate

With the exception of the Comptroller and Auditor General (C&AG), most Officers of Parliament have developed in the last 30 years or so, partly as traditional notions of ministerial responsibility have declined and partly as the process of government became more widespread, complex and impenetrable to the ordinary citizen. This is an international trend. Canada is engaging in a national debate about the importance of the Officer role in assisting parliament to undertake a more proactive scrutiny role. The Irish Ombudsman has commented on the importance of his office in upholding the rights of the citizen.

But the excessive involvement of unelected officials in supervising elected politicians can damage democracy, if independence alone is the dominant characteristic. Some form of accountability is desirable, even if this amounts only to transparency—the public can see what is being done in their name. Direct accountability to parliament, by-passing ministers, is an avenue which can enhance that transparency, by establishing a formal channel of communication with elected representatives of the people.

The creation of the Parliamentary Commissioner for Administration (the Parliamentary Ombudsman) in the 1960s was accompanied by some soul searching as to the constitutional propriety of transferring to an independent officer the grievances of constituents, a traditional function of MPs. But the Ombudsman has demonstrably more powers and expertise available to investigate cases of maladministration than do individual MPs, and so assists rather than replaces them in holding the executive to account. A host of other regulators now exist to scrutinise executive activities, and their growth can be explained partly in terms of the loss of trust in the political process.

Independent 'experts' (and more formal rules) became necessary when concepts of honour proved insufficient to maintain public faith in the political system and politicians, especially in areas such as ethics and standards and patronage. A notable example in the UK is the creation in 1994 of the Committee on Standards in Public Life under the chairmanship of an eminent judge to investigate the causes of 'sleaze' and find remedies. Watchdogs also have an important positive message to publicise, as well as naming and shaming agencies of the executive. Therefore they need to establish an effective relationship with the executive and also with the wider public, who needs to be kept informed of their work. Many Officers have their origin in mismanagement by government, necessitating the creation of independent officials. This is true not only of bodies, created following the First Report of the Committee on Standards in Public Life, but also of the more established models, the C and AG and the Ombudsman.

The formal architecture may not be the most important characteristic in determining how important accountability and independence are to the culture of an individual watchdog. But there are key criteria which are essential in establishing the appropriate formal and informal framework. These are:

- Independence from government and institutional support for officers within parliament

- Recruitment, appointment and dismissal of officers and their staff
- Funding arrangements
- Reporting responsibilities to parliament and its committees
- Investigative and enforcement powers on behalf of parliament
- Mechanisms of accountability beyond parliament

A What makes an Officer?

Auditors and Ombudsmen can be regarded as core parliamentary officers, as can officers of parliamentary ethics, where they exist. But the latter may tend to fit the older definition of an Officer as a senior member of staff rather than an independent office-holder. Electoral Commissions or Commissioners also appear to have a central relationship with an elected house of parliament, although their main role is not the investigation of the executive. Instead, the office protects fairness in elections on behalf of parliament and its electors.

Information, data protection, human rights, and minority rights or children's commissions or commissioners may also be also Officers, mainly because of the value of the information which they bring to parliament in their reports. Many of these bodies tend to be advisory, rather than regulatory, although some can combine both functions.

In the countries surveyed in this research, only New Zealand has developed a set of criteria designed to identify Officers of Parliament. An influential report from the Finance and Expenditure Committee in 1989 found that Officers had been created on an ad hoc basis to date and recommended the creation of the specific parliamentary committee for officers. It also drew up some guiding principles for the creation of new Officers:

1. An Officer of Parliament must only be created to provide a check on the arbitrary use of power by the Executive
2. An Officer of Parliament must only be discharging functions which the House of Representatives itself, if it so wished, might carry out
3. Parliament should consider creating an Officer of Parliament only rarely

The reasoning behind principle 2 was that watchdogs who had judicial powers would not

be appropriate, since the House did not have judicial powers itself. The Parliament has held to these principles most recently in a private member's bill which attempted to upgrade the existing Children's Commissioner to an Officer.² The Bill was referred back by the Social Services Committee in favour of a government bill which did not make the Commissioner an Officer.³

Other states have not developed a consistent set of principles. In Australia, only the Comptroller and Auditor General is designated as an Officer in statute, although the Ombudsman appears to have equivalent status. Canada has a more numerous set, but there is no official classification, and some studies describe the Human Rights Commission as an Officer, while others do not. There has been no systematic attempt to define what an Officer of Parliament should be in Canada amongst parliamentarians, although academics have begun to discuss the criteria. There appears to be confusion among reports from parliamentary committees about the differences between internal servants of the House, such as the Clerk and the Librarian and constitutional bodies such as the Chief Electoral Officer. Professor Paul Thomas makes a distinction between the Auditor who reviews government spending and others who have the 'fairness task of protecting and adjudicating the rights of individuals in relation to government'⁴

Ireland has a number of Commissions and Commissioners which resemble the Officer model used in the Commonwealth, but formal connections with the parliament are undeveloped. The written constitution protects the role of judges, and one possibility for the Ombudsman, for example would be to become a constitutional rather than a parliamentary officer. Chapter 9 of the South African constitution gives specific constitutional protection to a number of Officer type bodies. These are:

1. The Public Protector (Ombudsman).
2. The Human Rights Commission.
3. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
4. The Commission for Gender Equality.
5. The Auditor-General.
6. The Electoral Commission

Who then, should be an Officer, if there are no agreed definitions? If constitutional watchdogs are to be explicitly connected to the UK Parliament and characterised as Officers, they should be contributing to Parliament's core functions, namely being on the side of parliamentarians in improving their scrutiny role. They can be characterised also as watchdogs for the citizen in dealing with the executive.

This 'pure' Officer model would not exercise executive powers (such as those of enforcement or regulation), apart from the traditional powers to summon persons, papers and records, but would use powers of persuasion and publicity to alter actions of the executive and other public bodies. Some Officers in other jurisdictions (Canada) have judicial powers, such as those held by the Privacy Commissioner or powers to enforce decisions. There are gradations of judicial authority, ranging from advice to full decisions of a court. Bodies which have a persuasion and publicity role, rather than an enforcement role, are more likely to be categorised as Officers. But there are arguments for both types to have a direct relationship with Parliament. Even if a constitutional watchdog has judicial functions, both parliament and the watchdog would gain from a closer working relationship.

Important and connected criteria are independence and interdependence. Independence from government can be ensured and fortified by a formal parliamentary connection, but this brings with it a degree of dependence on parliament. 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. As one commentator notes, Officers of Parliament were developed as a model to 'strengthen surveillance capabilities of legislatures and thereby to enhance accountability. But to be effective, parliamentary agencies need the commitment and active support of parliamentarians'.⁵

Little will be gained for the public or the polity in general if dependence by Officers on government was simply replaced by a similar dependence on parliament. In fact, because it is government which is accountable to parliament, whereas parliament as such is not so directly or continuously accountable to anyone (other than in the electoral sense), dependence on

parliament could even be more harmful to an Officer's overall independence. There should, for example, be institutional mechanisms protecting watchdogs from arbitrary dismissal and ensuring that their budget is adequate and their staff independent of external pressures. The parliamentary connection should, in principle, enable key aspects of independence, such as appointment, financing and reporting, to be more open and transparent than if these were matters for government.

In general, it is noticeable that where new ethical watchdogs are established in other countries, these tend to take a statutory form. This contrasts with practice in the UK. Although many of the newer bodies have review and advisory powers only, such as the Public Service Commissioner and the Merit Protection Commissioner in Australia, they are established by statute. The ethics commissioners in Canadian provinces are appointed on a statutory basis. The main exception is the Ethics Counsellor in Canada, but legislation is pending here to add to his statutory role in administering the *Lobbyists Registration Act*. New Zealand has not developed this type of ethical body, but has statutory machinery to deal with public sector issues. Ireland has developed an extensive apparatus to deal with ethical issues in politics in its Standards in Public Office Commission. Where ethical watchdogs have become permanent, it should be good constitutional practice to devise a statutory structure, because this forces the examination of the independence and accountability of the body.

Part I describes the characteristics of the main constitutional watchdogs operating in the UK according to the criteria of independence and accountability (which includes measures of transparency). It groups them according to legal status and function, examining as follows:

- Established Officers of Parliament
- Almost Officers of Parliament
- Statutory constitutional watchdogs
- Non-statutory Nolan watchdogs
- Other non-statutory watchdogs

B The origins of the Officer of Parliament concept

Having set out some main themes of the research, this study examines the origin of the concept. The term Officer of Parliament is imprecise and often confused with Officer of the

House of Commons or Lords. The authoritative source, Erskine May,⁶ does not use the term Officer of Parliament, but lists the following as permanent Officers of one or other Houses (discounting the Lord Chancellor, the Speaker and their deputies as drawn from the Members of the Houses concerned).

House of Commons

- Clerk of the House
- Clerk Assistant
- Serjeant at Arms
- Speaker's Counsel
- Clerk of the Crown in Chancery

House of Lords

- The Clerk of the Parliaments
- Clerk Assistant and Reading Clerk
- Black Rod
- Serjeant at Arms

The appointment of these offices is by the Crown, under various devices such as letters patent. The exception is Speaker's Counsel, who is appointed by the Speaker. The appointment of these Officers can therefore be distinguished from the appointment of other parliamentary staff. In the Commons this is the responsibility of the House of Commons Commission under the terms of the *House of Commons (Administration) Act 1978*. Earlier editions of Erskine May listed offices such as the Librarian and shorthand writer under the term Officer of the House of Commons, but the latest edition (1997) omits these officials, preferring a description of the internal administration of the House. The Parliamentary Commissioner for Standards is listed as an Officer of the Commons.

The general practice within both Houses is to give staff on senior grades the title of Officers of the House. This categorisation brings with it various privileges such as access to, and use of, parliamentary facilities, on more or less the same basis as Members. Officers also have bestowed on them certain aspects of parliamentary privilege, and other statutory protection from interference with parliamentary duties, such as exemption from jury service. These privileges are intended to enable such senior staff to carry out their parliamentary duties more effectively, though, from the perspective of other staff, they may be seen more as benefits of belonging to the elite grades.

Erskine May then uses the term Other Statutory Officers etc, under which is classified the Comptroller and Auditor General and the Parliamentary Commissioner for Administration (Parliamentary Ombudsman). One standard textbook has attempted to classify these two as 'semi-parliamentary officials' to distinguish them from permanent staff members of the House.⁷ It is worth noting that these officers are disqualified from membership of the Commons under the *House of Commons Disqualification Act 1975*.

C The constitutional Officers of Parliament

At present only three constitutional watchdogs are formally classified as Officers of Parliament or of the Commons by the parliamentary authorities in *Erskine May*. These three are quite different in kind and a brief history of their development illustrates the ad hoc way in which a new category of watchdogs has emerged. Brief sections then set out how the office fits into the themes of this report: independence and accountability.

1. The first constitutional officer—the Comptroller and Auditor General

History

The use of the term Officer to describe officials outside the permanent staff of the House was confined to the Comptroller and Auditor General (C and AG) until the mid twentieth century. Research by Professor Gavin Drewry for the National Audit Office indicates how the term evolved with little or no statutory intervention. *The Exchequer and Audit Departments Act 1866* was an attempt to bring order to the system of parliamentary control over public money, creating the post of Comptroller and Auditor General in its modern form. Reference works from that date describe the C and AG as an Officer of the Commons, but with the proviso that he was not directly appointed by the House. It was common for the C and AG to use the term as a convenient shorthand, but its use remained ambiguous until the *National Audit Act 1983* which created the first statutory officer of the House as constitutional watchdog. Until then the C and AG was appointed on the recommendation of the head of the civil service to the Prime Minister, and there were statutory references to Treasury powers to direct the C and AG on audit matters.

Although the Public Accounts Committee (PAC) had been established in 1861, its relationship with the C and AG were unclear. Pressure for reform mounted in the 1970s, and a private member's bill sponsored by Norman St John Stevas, and based on a report from the PAC in 1980-81, was eventually enacted, following extensive redrafting by parliamentary counsel. One of the main proponents for reform was John Garrett, a member of the standing committee on the Bill, and a keen student of public administration and management.

In the run-up to the 1983 legislation the C and AG expressed some nervousness about the implications to his independence of becoming, explicitly in statutory terms, an Officer of the House. A relationship solely with the Commons was envisaged, because of the pre-eminent role of that House in granting supply to the Government. The PAC reported in 1980-81 that the C and AG had complete discretion in the manner in which he conducts his audit and the selection of the subjects on which he reports to Parliament, and that he was concerned that being subject to the direction of the House would interfere with the independence of his audit and make him vulnerable to pressure from other select committees to examine other matters.⁸ The PAC's solution was to ensure that relationship between Parliament would be between the PAC and the C and AG alone and that he would retain discretion in the discharge of his functions.⁹

The PAC therefore envisaged regularising the statutory basis for the office, rather than creating new powers of direction or duties to report. An amendment to make all staff of the NAO officers of the House was rejected during the passage of the Bill on the basis that this would confuse their status with the permanent staff of the House.¹⁰

The 1983 Act

- Created the office of C and AG as an Officer of the House of Commons, to be appointed by the Crown, but in consultation with the Chairman of the PAC Dismissal would occur only if a petition to the Crown was preceded by a resolution of both Houses
- Created an independent National Audit Office, with staff employed directly by the C and AG

- Gave the C and AG complete discretion over discharge of functions, but in determining to carry out an audit examination, he must take into account any proposals made by the PAC
- Created a statutory Public Accounts Commission to oversee the budget of the NAO and appoint its auditor. It consists of the Chairman of the PAC, the Leader of the House (a Cabinet Minister) and seven other MPs, none of whom can be ministers

In opinion of Drewry, the 1983 legislation moved the C and AG's centre of gravity away from the Treasury and towards the Commons, leaving him in an independent position between the two. There were continued complaints from John Garrett about the role of the Treasury in appointing the C and AG. In response, there was a statement by the Financial Secretary confirming his operational independence.¹¹

Being an Officer attracts parliamentary privilege and freedom from arrest or obstruction. Under the *Parliamentary Papers Act 1840* parliamentary privilege and absolute privilege from defamation actions applies to statements in Hansard and committee reports and other papers published by order of the House. But this would apply to a non-Officer as well. Any witness (Officer or not) before a select committee enjoys the protection of parliamentary privilege, reinforced by the *Witnesses (Public Inquiries) Protection Act 1892* and so Officer status confers little. A department failing to provide the C and AG with documents requested would be potentially in contempt of the House as well as in breach of the relevant statutes. An Officer of the House called to give evidence in court about parliamentary proceedings is required to seek the leave of the House. Most of these rights are peripheral and symbolic rather than real.

2. The Comptroller and Auditor General since the National Audit Act 1983

Independence

The 1983 Act excludes the House of Commons Commission from any control over the C and AG, so there are no lines of managerial accountability. But

since 1983 the C and AG has developed a closer relationship with the Commons and its Members and staff. Some of this development is

undoubtedly due to his own recognition of himself as an Officer of the Commons and his duty to serve the Commons as a whole. MPs contact the NAO on a regular basis, suggesting topics for enquiry. The C and AG will not always accept the recommendations of the PAC as to what to investigate. NAO staff have been seconded to assist select committees, and their reports have been used on occasion to supplement departmental select committee enquiries. NAO seconded staff form an integral part of the new scrutiny unit established in the Clerk's department in 2002 and further associated initiatives..

The salary of the C and AG is met directly from the Consolidated Fund and the salary is treated as Consolidated Fund standing services, thus bypassing the annual supply procedure, whereby Parliament approves government estimates.¹² This emphasises the constitutional separation from other government expenditure. The costs of the National Audit Office are met by funds voted by Parliament. The estimates for the NAO are prepared and laid before Parliament not by the Treasury, but by the Public Accounts Commission, a statutory parliamentary committee established by the 1983 Act.

The C and AG is not appointed on a fixed term basis, but holds office until he indicates a preference for retirement. This provision was introduced in 1866 to protect the office-holder's independence, and therefore avoids the question of criteria for re-appointment after a fixed term expires. So far, candidates have been suggested by the civil service, whose representatives are concerned to ensure that the office-holder is sufficiently trust-worthy to be allowed access to all types of documents and accounts. When the present incumbent, Sir John Bourn, was appointed in 1988 under the provisions of the Act, he was confirmed in Parliament after recommendation by the then Chairman of the Public Accounts Committee to the Prime Minister, with no formal recruitment procedure, no advertising, and no open competition and no formal retirement age. There are some weeks before announcement of the name and Parliamentary confirmation, and the PAC chair is, by convention, an Opposition backbencher indicating a bi-partisan nature to the process. It also gives backbenchers an important role in the actual appointment, if not the recruitment process.

In the debate on the resolution to the House on 16 December 1987¹³, the Labour Chairman of the Public Accounts Committee (Robert Sheldon) described the process by which John Bourn was selected as follows:

The Prime Minister and the Chairman of the Public Accounts Committee have acted together in bringing to the forefront a person who is to be Comptroller and Auditor General.. Mr John Bourn is a notable person in the Civil Service. I might add that he is a visiting professor of the London School of Economics...I knew that the [former] Comptroller and Auditor General would be going some months before he announced his resignation and I felt it right to ensure that I saw a large number of people and consulted widely both as to names and to the methods of my consultations.

Mr Sheldon went on to say that it was imperative that the office-holder should understand, and have experience of, government. It is expected that the next appointment of C and AG will conform more closely to the Code of Practice set out by the Public Appointments Commissioner. A number of Public Accounts Committees in Canada and Australia have a direct role in the recruitment of the equivalent office holders and do not share the concerns expressed in the UK about the need for a 'buffer' between parliamentary audit committees and auditor generals.

The C and AG holds office during good behaviour and can only be dismissed following resolutions of both Houses.¹⁴ This is clearly based on the procedure to protect judges of the High Court and above who hold office on good behaviour and may only be removed by the Crown on joint resolutions. The power has not been used since 1830.

A separate Comptroller and Auditor General for Northern Ireland operates under the *Audit (Northern Ireland Order) 1987* and 1921 legislation. He also has Officer status in the House of Commons.¹⁵ Following the devolution settlement, an Auditor General for Scotland has been established, described in Part III of this report. A draft audit bill for Wales will develop an office combining the functions of the C and AG for devolved matters with the Audit Commission for Wales.

The C and AG therefore has statutory recognition of the special relationship with Parliament, by designation as Officer. The functions of the Office is also set out in legislation, firstly, as responsible for control of the Consolidated Fund and the National Loans Fund, secondly responsible for the annual certification audit of the almost all central government expenditure and the accounts of a wide range of public bodies, and specific examinations of the economy, effectiveness and efficiency with which departments and public bodies have used their resources.

The C and AG also reports on the expenditure of the Commons administration. There is a certain amount of sensitivity to this work. The NAO investigation into Portcullis House, the major new parliamentary building on the Embankment, was the first recent occasion where the expenditure of the Commons administration attracted media attention. The NAO made some criticisms of the processes of project management, which had resulted in legal action from a disappointed contractor. The PAC then issued a report reflecting these issues. In line with responses from government departments to other investigations, the House of Commons Commission's response did not accept all the points made.¹⁶

NAO staff are no longer civil servants, but public servants. Constitutionally, they are not civil servants who are servants of the Crown, but employed directly by the C and AG, as provided for in the 1983 Act. This makes their constitutional status, as separate from the executive, more transparent.

Some academics have raised concerns about the relationship of the NAO to the executive. All facts in the reports of the C and AG—but not necessarily the conclusions—are agreed with the relevant permanent secretary before publication. This is seen as an essential process to ensure that the basic parameters are agreed before discussion of the recommendations proceed, but can lead to criticism about closeness.

The role of the Public Accounts Commission

Under the 1983 Act this Commission is responsible for examining the budget and expenditure of the National Audit Office and appoints its auditor. It acts as an independent supervisory body protecting the independence

of the C and AG and the NAO. Its membership is the Chairman of the PAC, the Leader of the House of Commons and seven other backbenchers. It is possible to ask parliamentary questions about its operation. In general, the Commission has a low public profile, and was criticised in this respect by the Sharman report into audit and accountability.¹⁷ In its latest annual report the Commission accepted the force of these criticisms and made a series of changes increasing transparency, such as the publication of the NAO corporate plan.¹⁸

There appear to be arguments in favour of conceding to the Public Accounts Commission a role in appointing the C and AG, following the precedent established in by the Scottish Commission for Public Audit, which is responsible for the appointment of the Auditor General there. This would enhance the input of Parliament itself into the appointment of its Officers. There may also be grounds for questioning inclusion of the Leader of the House of Commons as an ex-officio Commission member. He appears not to take any real role in its business anyway. As a Cabinet member, he is not necessarily perceived as an impartial spokesman for Parliament. These are just the types of issues, of both constitutional and practical importance, which this research seeks to address.

Accountability

Overall successive C and AGs have welcomed Officer status as enhancing the relationship with the Commons, given the protection to his independence offered by drafting in 1983 Act. The C and AG sees his route to accountability as through the Public Accounts Commission, as responsible for the external auditing of the NAO. Although other departmental select committees will use NAO reports in reporting on policy matters, he does not appear as a witness to them. There is concern about becoming involved in issues of policy rather than economy, efficiency and effectiveness. His staff may however be seconded to other committees to assist with particular enquiries. This may be contrasted with practice in other Commonwealth parliaments where there is a greater interrelationship between audit staff and subject committees. But the creation of a scrutiny unit in the Commons in 2002, partly staffed by seconded NAO officials illustrates the potential for change.¹⁹

There is also an accountability role to the general public. The NAO has a relatively high public profile, and enjoys a prestigious reputation for the quality of its reports. It has an informative website and an array of close international contacts.

3 The Parliamentary Ombudsman

This office is accorded the rank of Officer of the House of Commons although there is no statutory underpinning for the title.²⁰ The statutory title is Parliamentary Commissioner for Administration (PCA).

History

This new type of institution was created in the mid 1960s designed to assist the citizen to obtain redress from government departments for maladministration.²¹ There was considerable opposition to the creation of an individual who might usurp the traditional role of the MP in investigating grievances, and for this reason the Ombudsman had no power to initiate investigations on his own. He had to wait for a referral from an individual MP—a procedure which came to be known as the ‘MP filter’. Although the authors of the 1967 legislation clearly intended the Ombudsman to be an independent office-holder, some MPs did not want an independent watchdog, but a servant of MPs who would be the channel by which they could submit their constituents complaints for redress. A side effect of the MP filter is that only administrative action for which Ministers were accountable to Parliament could be included in the scheme.

The model for the new post was the C and AG, and this was explicitly stated in the relevant debates which indicated that he was not to be subject to directions from Parliament on how to direct his investigations. But the model then predated the 1983 legislation which did so much to clarify the independent status of that office. The Ombudsman was to be appointed by the Crown on letters patent and could only be dismissed by an address of both Houses. The dismissal arrangements mirror those for the C and AG. The involvement of the upper House is interesting, given that neither Officer has a formal role with the Lords. He was given statutory powers to have access to information, to require the attendance of witnesses and absolute privilege to protect his reports. His

budget came from the departmental vote (therefore decided by the Treasury) and his staff remained civil servants.

An individual select committee of the House, the Parliamentary Commissioner for Administration Committee, took over the role of monitoring the Ombudsman, but the office-holder was not required to submit his reports to them and the relationship which developed was not based on statutory requirements. Instead they are laid before both Houses. There was nothing in statute to indicate his status as an Officer of the Commons. *Erskine May* referred to him as being ‘accorded the privileges of an Officer of the House of Commons’.²² It is not clear who took the decision to award him such a status. The first Ombudsman was Sir Edmond Compton who was once C and AG and was selected some months earlier as a distinguished public servant who would establish the reputation of the new position.

The select committee was modelled on the PAC with powers to summon witnesses and decide on action to be taken following reports by the Ombudsman. But the debates in 1967 did not fully appreciate the differences with the PAC, which produces several reports annually and has a very close relationship with the C and AG. NAO reports lend themselves more readily to discussion at a committee than Ombudsman reports which tend to be about individual cases. The Committee has been influential in ensuring that the reports of the Ombudsman reach a wider audience. The prospect of an appearance before the Committee has undoubtedly assisted departments in the acceptance of Ombudsmen recommendations. But the scale of the reports did not match those of the NAO, and the committee did not attract a membership of such seniority as the PAC. The committee played an important role in establishing the parameters of the Ombudsman scheme in the late 1960s and 1970s, but was ineffective in its oversight role, as its recommendations designed to reduce the length of time that cases took to be resolved had little effect. It was not until Sir Michael Buckley’s decision to delegate responsibility for handling individual cases at the lowest appropriate level in the late 1990s that real inroads were made in backlogs and through-put time.²³

There was no consultation with the Ombudsman’s office when the PCA select committee was merged with Public Service

Select Committee after the 1997 general election. This happened by a simple standing order change placed before the House by the Government with little notice. The main motivation appeared to be the difficulty of finding sufficient Conservatives to staff the committee, at a time when Opposition numbers were low, and the overlap between Citizen's Charter issues and FoI issues in both committees. The arrangements do not really take into account the separate office of Health Service Ombudsman, whose responsibilities are more appropriate for a health select committee, particularly since the Ombudsman has been empowered since 1996 to look at clinical judgment.

The Committee and its predecessor do not have the same senior status as the PAC and nor does it handle the same volume of reports. A key role has been to lobby for the enlargement of the jurisdiction of the various ombudsmen schemes. The committee in 1994 issued a weighty report about maladministration,²⁴ but otherwise it has tended to simply approve annual reports of the Ombudsman, make periodic reviews of the scheme and highlight problems which the Commissioner experiences. The Committee does not make a formal response to strategic plans from the Ombudsman's office. It has not published a report on the annual reports of the PCA or Health Service Ombudsman since 1998-89, as its priorities have tended to lie elsewhere. However, it undertook an enquiry into the service in the 2002-03 session resulting in a report on Ombudsman issues.²⁵ But the Committee does serve a valuable function in highlighting failure by departments to rectify maladministration. It has also played a major role in buttressing the Ombudsman's role in administering complaints under the non-statutory Code of Access to Government Information. It commented on a high-profile case where Government departments had not abided by the Code of Practice. But the Government has still not released the information which the Ombudsman considered to fall within the Code.

4 Reform proposals for the Ombudsman's Office

The select committee made major proposals in 1993, recommending that its chairman and the Leader of the Opposition have a statutory role in the appointment of the Ombudsman. It also proposed that the funds for the office should be voted directly by Parliament on estimates

prepared for a Public Appointments Commission, clearly modelled on the Public Accounts Commission—that is a separate body to take responsibility for setting the budget of the office.²⁶ The then Government agreed to amending legislation making the staff public servants and an equivalent to the Public Accounts Commission to supervise a budget voted directly by the House of Commons.²⁷ No legislative time has yet been made available. The 1993 proposals would be one way of achieving parliamentary scrutiny of his budget, operations etc. safeguarding the constitutional position and enabling public debate about the appropriate level of budget.

Lack of legislative time has also prevented clarification of the status of the Ombudsman and the removal of the MP filter. The Office has gone as far it can with stretching the boundaries of the 1967 legislation, but cannot really progress without primary legislation. This means that the office still only handling 3,000 cases a year, way below overseas equivalents such as Australia which will deal with 20,000 cases annually.

Therefore the office lacks evidence to make authoritative judgments. Without pensions and social security cases there are only 100 other maladministration cases conducted by the Ombudsman per year. Departments have been developing their own adjudicator and internal review processes which is what there is really a demand for and they handle a big caseload. The Ombudsman model in the UK is therefore falling behind overseas models. Arguably, the Ombudsman's relationship with Parliament is hindering the development of the office.

Sir Michael Buckley and the Chairman of the Local Government Commission for England together lobbied the Government for a comprehensive review of the Ombudsman system in 1998-9. In response, a review by the Cabinet Office was published in April 2000. It recommended a new Commission to cover the remits of the parliamentary ombudsman, the health service commissioner and the local government ombudsman. The Commission would be chaired by one of the ombudsmen for the purposes of representing it externally and for laying an annual report before Parliament. It noted that the concept of the Ombudsman as a 'tool of Parliament' had had the effect of treating the customer as the MP and not the complainant, thus excluding the latter from the

investigative and reporting process and recommended the end of the MP filter. But it did not focus in any detail on the reporting arrangements to Parliament and the role of a select committee in monitoring the work of the new Commission.

When the report was considered by the select committee, it emerged that there was support from MPs for the abolition of the MP filter and in July 2001 the Government announced that there was broad agreement for the review's main recommendations. But, once more, no legislative time has been made available. The Public Administration Select committee has drawn attention to the uncertainties which result for the office, as well as for Health Service Commissioner and the Local Government Ombudsmen.²⁸

Independence

A judicial review case, *ex p Dyer*²⁹ rejected the argument that the Ombudsman was amenable only to control by Parliament and not subject to review by the courts. Following legislation in 1972 the Ombudsman was appointed as the Health Service Ombudsman for England, Wales and Scotland, although there is no statutory requirement to combine the posts. These posts do not carry the privileges of being an Officer and there has been no suggestion that the Health Service Commissioners should be classified as one. The Commission for Local Administration (which is responsible for the Local Government Ombudsmen service for England) established in 1974 has no parliamentary committee to report to. The Standards Board, established under the *Local Government Act 2000*, also has no direct parliamentary focus. These bodies are described in detail later in Part I.

The Ombudsman's relationship with Parliament has been insufficiently defined, and the Office would benefit from the type of discussion predating the *National Audit Act 1983*, which would result should the Colcutt recommendations be examined by Parliament. It lacks a statutory declaration of independence, formal parliamentary involvement in appointment and an independence budget setting mechanism.

The appointment of Sir Michael Buckley in 1997 was the first time the PCA had been appointed

following open advertisement. Following short-listing and interview, names were discussed with the Leader of the Opposition and the Chairman of the Select Committee.³⁰ The interview panel included the then Commissioner for Public Appointments. In the process for the appointment of his successor the Chairman of the Select Committee was involved at an earlier 'sifting' stage. The period of appointment is not fixed, but a retirement age of 65 was set. The process of recruitment was handled by the Cabinet Office.

Staff of the Ombudsman's office are technically civil servants. The possibility of according them the status of NAO staff, directly employed by an Officer should be considered.

Accountability

A further weakness is the relationship with the Select Committee, which no longer focuses solely on the Ombudsman. A more appropriate model might be to allow the Ombudsman to report to the appropriate select committee for the subject area under review. This would overcome the difficulty of local government ombudsman work being reported to the Public Administration Committee, rather than the Office of the Deputy Prime Minister (ODPM) select committee, which covers local government. A public service committee could then take a more strategic approach, such as reviewing the objectives of the office. In Part II of this report, the model of the Officers of Parliament Committee used in New Zealand is discussed as a suitable model for scrutinising the Ombudsman and other UK Officers.

The office has been subject to review by Government, for example, there was a Cabinet Office review in 1986 involving a team of technical inspectors. The resultant report was not enthusiastically received by the Ombudsman. Change came only with the appointment of a new officer holder in 1990, who was not a lawyer but a civil servant, in effect chosen by the Government.³¹ At present, the Ombudsman's Office is not subject to the quinquennial reviews or performance monitoring which would be expected of a NDPB. There is a lack of close dialogue with the sponsoring department, the Cabinet Office. In a sense the Ombudsman has escaped scrutiny because it is not seen as an important enough office.

New arrangements to reflect the advent of devolution are being developed. There was already an Assembly Ombudsman in Northern Ireland who has responsibility for devolved matters and a Commissioner for Complaints with jurisdiction on health and local government. Both offices are held by the same person.³² The Scottish Ombudsman has been merged into the Scottish Public Services Ombudsman, which is described in Part III. The *Government of Wales Act 1998* set up the Welsh Administration Ombudsman, to be responsible for the Assembly and a series of Welsh public bodies. The post is held by the current Ombudsman. There are proposals for there to be a single one-stop shop public service ombudsman for Wales, just as there is for Scotland.³³

The Ombudsman struggles with relatively low levels of public perception of his office, despite an informative website. There are a plethora of internal complaints systems operational within government.

5. The non-statutory Parliamentary Commissioner for Standards

Functions and Status

There is a third model of Officer of Parliament, in the creation of the Parliamentary Commissioner for Standards (PCS). This is the only Officer who is actually selected and appointed by the House of Commons Commission and there is no statutory authority for the post. House of Commons Standing Order no 150 provides for a Commissioner who will be an Officer of the House, and who is dismissable by resolution of the House. The PCS is responsible for advising MPs on the registration of their financial interests, and also for investigating complaints from other MPs and the public about failures to register, or otherwise abide by the Code of Conduct for MPs.

History

The first report of the Committee on Standards in Public Life recommended an officer to oversee parliamentary standards, using analogies with the C and AG and the Parliamentary Ombudsman. It decided against legislation to establish the post, but left the possibility open in the future. These analogies failed to note the role of legislation in setting out the parameters of autonomy and in establishing operational

independence. The details of the new post and its relationship with the new Standards and Privileges Committee were left for a one-off select committee to decide, with endorsement in a general debate by the House. The first PCS, Sir Gordon Downey, was appointed by the House of Commons Commission, as the body responsible for employing staff of the House. It appears that he was deliberately chosen because he was a former C and AG and therefore familiar with the House and prestigious enough to establish the importance of the post. He was sounded out about reappointment at the end of his term, but made clear that he would not be interested.

The next PCS, Elizabeth Filkin has described her poor relations with the Speaker, the head of the House of Commons Commission, and was not invited to extend when her term of office came to an end, although she was offered the opportunity to re-apply. The process was documented in detail in evidence to the enquiry into parliamentary standards of conduct by the Wicks Committee on Standards in Public Life.³⁴ Instead a competition was administered by the Commission, which was criticised by several witnesses to Wicks as amateurish. In retrospect, it seems extraordinary that the Chairman of the Standards and Privileges Committee was not consulted when the Commission decided not to offer Mrs Filkin an automatic renewal, but instead, according to his evidence, read about the decision in the press. He was invited to participate in the interview panel for the appointment of the next PCS, Sir Philip Mawer.

Independence

The PCS reports to the Standards and Privileges Select Committee. Evidence to Wicks indicated considerable ambiguity as to the status of the PCS's conclusions on individual MPs and as to whether the PCS was in effect a servant of the Committee. Witnesses to Wicks gave contrasting opinions as to whether the Commissioner was an investigator, an adjudicator, or both. Initially, Downey's recommendations were unchallenged due to the seriousness of accusations of sleaze in the mid 1990s. But by the late 1990s the Committee appeared to be reluctant to endorse all the findings of the PCS's investigations, particularly in relation to ministers and ex-ministers, such as John Reid, Keith Vaz, John Prescott, and Nigel Griffiths. Mrs Filkin had difficulty in persuading

the Committee to use its powers to enable her to interview witnesses in one or two cases, leading to inevitable friction.

The Wicks Committee on Standards in Public Life commented on the ambiguous nature of the office in terms of its operational independence. The terms and conditions for the post are currently set out in annexes to the Commission's report recommending the appointment of a Commissioner, endorsed by resolutions of the House.³⁵ This process was found by the Wicks report to be inadequate in terms of establishing the constitutional nature of the post and in giving the post-holder a proper contract. A number of factors mitigated against independence:

- no separate powers to call for witnesses and papers, apart from those of the Standards and Privileges Committee
- short three year term, and ambiguity about the possibility of renewal.
- difficulties over obtaining further resources following staff inspections
- salary from the House of Commons' Vote rather than consolidated fund
- concern expressed by the Speaker over press statements by the PCS

The Wicks committee recommended that

- the post should be clearly defined as an office-holder, appointed and paid for, but not employed by the House
- the appointment should be for five to seven years and non-renewable
- the post should have direct powers equivalent to the Standards and Privileges Committee to call for witnesses and papers
- there should be full involvement by the Commissioner and Chairman of the Committee in setting the budget for the post
- the Commissioner should produce an annual report on his own authority with a review of activity and details of the budget
- there should be an Investigatory Panel for serious or contested cases, with an independent Chair external to the House and an independent legal assessor for the Committee
- there should be external input into a regular review of the Commons Code of Conduct

- no party should have an overall majority on the Committee

These recommendations were considered by the Committee on Standards and Privileges and the House of Commons Commission. Their responses to Wicks, while promising greater transparency and clarity about the relationship between PCS and Committee, indicated differences of opinion about an Investigatory Panel and in the possibility of conferring separate powers on the Commissioner without legislation.³⁶ Parliamentary authorities argued that statute was necessary to ensure the model of an independent office-holder in the manner described by Wicks. But the prospect of legislation is slim, given other pressing demands on the legislative timetable.

The Wicks Committee refrained from recommending that the Commission should no longer be involved in recruitment, with the proviso that the Code of Best Practice produced by the Commissioner for Public Appointments was adhered to, and that the Chairman of Standards and Privileges was fully involved in the recruitment process.

The case for greater involvement in the House of Commons Commission in the appointment of constitutional Officers has been weakened by the Filkin affair. The processes of the Commission lack transparency, despite recent efforts to explain its role via the Commons website. The application of FoI legislation to the House in 2005 may assist in improving its accountability but a safer solution might be to contract out the recruitment process, while retaining responsibility for establishing the constitutional nature of the position. This might only be necessary for the extremely sensitive position of the PCS and less appropriate for other constitutional watchdogs whose role does not affect internal House of Commons administration. This suggestion is developed in the conclusion to this report.

Accountability

The Commissioner is accountable to Parliament through the employer, the House of Commons Commission, and to the Standards and Privileges Committee for the overall conduct of investigations, although he undertakes individual investigations without specific direction from the Committee. The Scottish Parliament has enacted legislation to make

define the relationship between Commissioner and Committee more exactly, although this does not necessarily confer complete operational independence.³⁷ Mrs Filkin clearly saw a wider accountability role to the public, but this remains undefined. The new Commissioner, Sir Philip Mawer, has welcomed the prospect of extra-Parliamentary consultation in the formulation of the Code of Conduct for MPs, as proposed by the Wicks Committee. This Committee saw this as an opportunity to facilitate the exchange of best practice ideas from e.g. the Bar Council.

D Almost Officers of Parliament: The Electoral Commission

This category comprises external bodies which have key characteristics of the Officer model, without having been accorded the title in legislation or by convention. The only body which qualifies is the Electoral Commission, whose role in supervising elections is usually expected to have constitutional guarantees of independence. There was a precedent in the creation of the Chief Electoral Officer for Northern Ireland in 1973, whose salary is met from the Consolidated Fund in the same way as the C and AG and the Parliamentary Ombudsman.

Functions and status

The Commission has an overall responsibility for the conduct of elections in the UK.

Its creation in the Political Parties, Elections and Referendum Act 2000 (PPERA) is an interesting example of a new body which was created with the analogy of the C and AG, but without Officer status. The Act created a Speaker's Committee explicitly modelled on the Public Accounts Commission which would provide oversight of the budget and strategic plans of the new Commission.³⁸ The Commission has important regulatory roles in checking expenditure returns from political parties. Since politicians exercise a supervisory role, there are particular sensitivities for the Commission to be aware of.

Independence

The Commissioners are appointed by royal warrant, but on an address from the Commons only, presumably because it is the only elected House. Agreement must be sought from the Speaker, and the registered leader of each

registered party with two or more MPs must be consulted (excluding Sinn Fein, whose members do not take the parliamentary oath).³⁹ Each Commissioner is appointed for a maximum of ten years.

The statute is silent on reappointments and on the procedure for subsequent appointments. Presumably this is a role for the Chairman, and the Commission would itself undertake recruitment. The provisions for appointing or re-appointing the Chairman do not appear to exist formally and presumably the Lord Chancellor's Department, as current lead department, would be involved. The first Commission members were appointed in January 2001 for periods of 4 to 5 years, and 6 years for the Chairman. They may be dismissed on very limited grounds including absence, bankruptcy and only by an address from the Commons.

The Home Office ran the initial recruitments exercise, which was carried out by outside consultants. The pay and pensions arrangements are approved by the Commons, and the payments come from the consolidated fund.

The Speaker's Committee consists of the Home Secretary, the Minister for Local Government, the Chair of the Lord Chancellor's Department (LCD) Select Committee and five backbenchers. Co-incidentally, the senior backbencher, Alan Beith, who has been answering questions on behalf of the Committee has been selected as chair to the LCD select committee. The Speaker chairs the Committee and selects the members for the duration of the Parliament.⁴⁰ The former Speaker indicated that she intended to appoint one government backbencher, three members from the main opposition party and one member from another opposition party, although there was no requirement on her to ensure that the membership of the Committee reflected the balance of parties in the House.⁴¹ There is no requirement for a separate address to the House to appoint this Committee.

There is nothing in the statute to guarantee independence of the Commission from Parliament or from the Executive, but the absence of reserve powers to direct the Commission is significant. PERPA provides for a separate Parliamentary Parties Panel, which is designed to be a link between registered political

parties and the Commission. In practice, it has had a fairly minor role to play.

The Committee supervises the budget of the Commission, but does not otherwise play a role in examining its policy objectives. It does have to approve the five-year corporate plan of the Commission. The Treasury has a statutory entitlement to comment on the draft budget. The Secretary of State has a statutory role in approving the allocation of policy development grants for political parties, and the Chief Secretary has to approve spending on public awareness under section 13 of the Act..

Staff are not civil servants but enjoy similar employment benefits. The Commission is funded from the parliamentary vote, in the same way as the National Audit Office and the funding of the Commons itself. The salaries of the Commissioners are met from the consolidated fund standing services, in the same way as the C and AG, and the Chief Electoral Officer for Northern Ireland.⁴²

Accountability

The Commission produces an annual report which is presented directly to Parliament under Schedule 1 of PPERA. Its chair and chief executive appeared before the Department of Transport, Local Government and the Regions (DTLR) select committee in July 2002, and was examined about its policy objectives. Since the transfer of elections from the DTLR to the Lord Chancellor's Department in the summer of 2002, the Commission have lacked one dedicated select committee responsible for scrutinising election policy. The DTLR, now renamed the Office of the Deputy Prime Minister (ODPM) has retained some responsibilities for local elections and local referendums. There would be considerable advantages in an annual session for the Commission, so that they could build a relationship with a dedicated set of MPs. This may evolve naturally when the LCD select committee becomes established.

The accounts are audited by the NAO, but there is no requirement to appear before the Public Accounts Committee, given the existence of the Speaker's Committee. Following some criticism in Parliament about the lack of transparency in the budget setting process, the Committee published its first annual report in 2002, which included the minutes of its meetings.

The strict requirements of PPERA has meant that MPs are required to submit details of donations received to the Electoral Commission. This has caused some friction, given that MPs also have to register interests with the Parliamentary Commissioner for Standards who administers the register of members' interests. The Electoral Commission have interpreted the law to require the registration of BAA passes, for example, when as a benefit available to all MPs, it is considered by the Commissioner as exempt from registration. The Speaker has corresponded with the Chairman of the Commission over BAA passes, and clearly there would be issues about independence, should the relevant select committee, the Standards and Privileges Committee, summon the Commission to explain its position. There is a tension in the regulatory role which result in friction relatively soon. The awarding of Officer status to the Commission would not in itself make any difference to the issue, since in theory anybody can be summoned to give evidence to a select committee and it is a contempt of the House to refuse.

The Commission appears to have relatively good relationship with the Government. The main problem it faces is ensuring acceptance of the need for a bill to reform electoral law, when two separate departments are involved in the next session of Parliament. It has adopted a relatively high public profile, in an attempt to encourage higher turnouts in elections, and establish its independent nature. The website needs further work to build on this role.

The Electoral Commission appears to operate as an Officer of the House in its constitutional make-up, but its Chairman or members have not been designated as such. There are sound, but mainly symbolic reasons for its designation. It would indicate the constitutional importance of elections to the Commons. The independence of the Commission could be underpinned by legislation similar to section 1(3) of the National Audit Act 1983, which guarantees the independence of the C and AG.

The Commission reports directly to the Commons, but if an elected element in the Lords is brought into being, then it would be appropriate to rejig the oversight mechanisms. The relationship with the devolved parliaments/assemblies is also unclear. There is no duty to report to them on the operation of elections to

these bodies. This is a reserved matters, but it would be proper to offer some route for dialogue between the Commission and other elected bodies in the UK.

E Statutory constitutional watchdogs

This category encompasses those bodies which have been established in statute with some constitutional safeguards, such as restrictions on dismissal, or the right to report to Parliament, but do not have enough characteristics to be described as Officers. Some of the bodies in this category has a reporting relationship to Parliament, but others have none at all. Their functions and status are briefly described, before the commentary examines areas of independence and accountability, and suggests improved models.

1. The Information Commissioner

Functions and status

This post was established by the *Data Protection Act 1998*, but its predecessor was the Data Protection Registrar, created under the *Data Protection Act 1984*. It took on new responsibilities with the *Freedom of Information Act 2000*, where it adopted once more the duties of guidance and enforcement of the legislation. There was some policy discussion about whether the Registrar or the Ombudsman should take responsibility for FoI, since the PCA administers the non-statutory Code of Practice on Access to Official Information. But the ombudsman model appeared old-fashioned and suffered from the disadvantage of the MP filter. Also, the new Commissioner's decisions are open to challenge before the Information Tribunal, in contrast to the Ombudsman, whose decisions are subject to judicial review only. Its sponsoring department is now the LCD, which undertook the recruitment process for the new Commissioner appointed in 2002, and sets the budget for the work of the Information Commissioner.

Independence

The salary of the Information Commissioner itself is funded from the standing services of the consolidated fund, suggesting some attempt to ensure that there was similar constitutional status with the Parliamentary Ombudsman.

The Information Commissioner is appointed by letters patent, and a resolution of both Houses is also required under Schedule 5 of the 1998 Act to remove the Commissioner from office. No grounds are specified for removal. Originally under the *Data Protection Act 1984* there had to be a parliamentary resolution every time the salary was increased—this was changed with the 1998 Act. The Commissioner holds office for a term of 5 years or until he reaches the age of 65. There is statutory provision for up to two re-appointments. The Commissioner appoints staff directly, who are not civil servants. The accounts are audited by the C and AG.

The Information Commissioner has some of the features of an Officer of Parliament. But the absence of statutory recognition of a select committee inhibits the dialogue with Parliament, and the financial arrangements need some buttressing to achieve more independence. The Information and in effect Privacy Commissioner for the UK is a central constitutional watchdog, because of its role in scrutinising the executive facilitating the release of official information, and protecting the privacy of citizens. There is a judicial element to the role, which would mean that some statutory protection might be needed to guard against parliamentary interference. But, with that proviso, the Commissioner should be recognised as an Officer of Parliament.

Accountability

The Commissioner is required to lay an annual report before Parliament but 2002 was the first year where the Commissioner was formally questioned by Parliament, by the Public Administration Committee. The formation of the new LCD select committee is likely to increase the level of parliamentary scrutiny. The Commissioner has a right to lay a special report when a policy issue arises, but there is no guarantee in the Act that Parliament will respond to it, unlike the C and AG and the Ombudsman where the relevant select committee would be expected to take up the issues contained in the report. The power has never been used in practice. The accounts of the office are audited by the C and AG, and it is subject to the jurisdiction of the Parliamentary Ombudsman.

The Office has attempted to develop a relationship with the wider public but again its website needs some more attention to make the

dual functions of the Office more comprehensible.

2. *The Audit Commission*

Function and status

The Commission was established under legislation in *the Local Government Finance Act 1982*. It carries out a number of different functions relating to the inspection and audit of local authority and health services in England and Wales. It encompasses the District Audit service, which audits local authority accounts. The legislation is now consolidated into the *Audit Commission Act 1998*. Its most recent initiative has been the Comprehensive Performance Assessment process. The concept was developed by ministers, but the Commission has developed the necessary detailed arrangements for implementation, using powers conferred on it as part of the Best Value initiative in 2000. This illustrates the Commission's usual role in devising workable machinery for a broad policy proposal put forward by the Government, but also maintaining a rigorous independent judgement in the inspection process which results.

Schedule 1 of the 1998 Act gives ministers broad powers to direct the discharge of functions of the Commission. These powers have not been used to direct the Commission in any detailed way. Section 8 of the 1998 Act gives auditors discretion to issue reports in the public interest, as that term is defined by the auditor. Section 33 allows the Commission general powers to undertake studies designed to improve 'efficiency, economy and effectiveness', and section 34 enables study of areas where statutory provisions or ministerial directions have affected the 'three Es' of local authorities. There is provision for such a study to be presented to the Comptroller and Auditor General, who has discretion to draw the House's attention to the study. This provision resulted from an amendment in the Lords to the 1982 legislation and represents the only legislative attempt to link the role of the NAO with the Audit Commission.

The relationship between the two bodies is not close. In Scotland devolved National Audit Office functions and of the Audit Commission's equivalent body, the Accounts Commission, are combined in a single body, Audit Scotland. The

Welsh Assembly Government plans similar arrangements for Wales, and an Audit (Wales) bill is expected shortly. Merger between the Audit Commission and the NAO is sometimes discussed, but is not high on the policy agenda at present.

The Commission has seconded staff to the new Commission for Healthcare Audit Improvement (CHAI) and has given advice about planned legislation establishing the body. It expects to have a close relationship with, and will retain its VFM work locally on, health bodies.

Independence

Legislation allows powers of direction by ministers, but the Commission has attempted to establish its independence from Government despite the legislative framework. In particular, its first Chair, Sir John Banham, took care to establish his distance from Government. The Chairman is appointed by three Secretaries of State (ODPM, Health and Wales), though there are statutory requirements for consultation with local government interests.

Section 1 and the Schedule of the 1998 Act allows the appointment of between 15 and 20 Commissioners by the Secretary of State for three terms, which may be renewable. The lead is normally taken by ODPM. These appointments are paid, and are staggered to provide corporate continuity. There has been tension about appointments of the Audit Commission chair, most recently in the failure to offer Dame Helena Shovelton reappointment after her tenure came to an end in November 2001, and the refusal by the Local Government Association to accept Lord Warner as a replacement.⁴³ He was seen as too closely connected with Government. There is no formal role for Parliament to be consulted or to express opinions on the suitability of either the Chair or the Commissioners.

There are 17 Commissioners at present, whose appointments are designed to represent the types of interests in the Commission's work—often senior ex-local government and health officials. No norms have developed about re-appointments. ODPM carries out the role of advertising for Commissioners, but under the guidance of the Commission. There are statutory reasons for dismissal of a Commissioner, including bankruptcy, absence,

and failure to fulfil functions, which are set out in the schedule.

The Commission's staff are not civil servants, but appointed directly by the Commission. The head is described in the schedule to the 1998 Act as the Controller and is appointed by the Secretary of State for a three-year renewable term.

The Commission's revenues are mainly derived from fee income from local authorities and health authorities who pay District Audit to audit their accounts.⁴⁴ However a growing source of income are pump priming grants from Government for Best Value and CPA work. The Audit Commission budget comes from a departmental vote. The Commission accounts are laid before Parliament, but not debated in any forum. Schedule 1 requires the annual report to be presented to the Secretary of State who then presents it to Parliament and the National Assembly for Wales. There is a statutory duty for the Commission to ensure that its fee income balances its expenditure plans, with specified exceptions for certain inspection and audit functions. The fact that the Commission was designed to be self-financing contributes to the culture of independence.

Accountability

The Commission describes itself on its website as an independent body, but gives little information about its constitutional position, part from noting that it is a NDPB. It is subject to quinquennial reviews which are conducted by the ODPM. Its annual report is not addressed to ministers or to Parliament, but to the public in general. Partly for constitutional reasons, as the Commission deals primarily with local government, it has no structural links with Parliament, although it is frequently called to give evidence on particular enquiries to select committees. There is no role for Parliament to indicate where the priorities of the Audit Commission might lie. The Commission will receive correspondence from individual MPs on matters which ought to be investigated. There is no equivalent to the formal relationship between NAO and PAC, and so no opportunity for Parliament to comment on the size of the budget, or policy priorities.

The Commission meets every two months, but does not appear to issue minutes which are publicly available. Though its constitutional

structure appears to be designed to ensure independence, it is difficult to check whether this is being achieved when the Commissioners' activities lack transparency. The Commission has undertaken a number of projects to build a stronger focus on citizens, and to factor service users needs into Commission work, but has had difficulties in demonstrating strong links with the consumers of local government and health services. The C and AG audits the Accounts of the Commission, which are then presented to Parliament. It is not subject to the Parliamentary Ombudsman.

The framework for the Audit Commission is not satisfactory if it is to be, and to be seen as, a genuinely independent body. It could benefit from greater scrutiny from Parliament, as a forum for representing the Commission's customers, who currently take little interest in its work. Overall, the monopoly the Audit Commission has in regulation of the public sector appears to be fragmenting. Tony Travers of the LSE, and a former Audit Commissioner, has commented that the various inspectorates being introduced by the government, such as the Commission for Health Improvement, housing and social care inspectorates, 'may be independent of the services which they are inspecting, but they will be much less independent of departments and ministers'.⁴⁵

3. The Health Service Commissioner (Ombudsman)

Functions and status

The office was created in the *NHS Reorganisation Act 1973* following pressure for an effective resolution of grievances, given the exclusion of the NHS from the 1967 *Parliamentary Commissioner Act*, as outside the direct responsibility of the then Minister for Health. It was subsequently modified by the *Parliamentary and Health Service Commissioners Act 1987*, the *Health Service Commissioners Act 1993* and the *Health Service Commissioner (Amendment) Act 1996*. This last Act considerably broadened the scope of the investigations by enabling the HSC to investigate all aspects of NHS care and treatment, wherever provided. It was designed to place the the Ombudsman at the top of the new unified NHS complaints procedure. The PCA select committee had a major role in pressing the Government to bring forward changes to the role of the HSC.

There were originally separate commissioners for Scotland and Wales, but the new Scottish Public Services Ombudsman has assumed responsibility for health matters. The HSC for Wales remains a separate post.

Independence

The office has always been held by the Parliamentary Ombudsman. The linkage has enabled the HSC to benefit from the prestige of the Ombudsman.⁴⁶ But the Commissioner is appointed by the Prime Minister, who by convention consults the Chairman of the select committee and the Leader of the Opposition. The appointment and budget setting process should include a formal role for Parliament. Legislative change consequent on the implementation of the Colcutt report would enable the creation of more formal mechanisms of independence.

The HSC recruits his own staff, who are civil servants, but he shares offices and common services with the PCA. The budget is negotiated with the Treasury, and there is no equivalent to the Public Accounts Commission for the NAO.

Accountability

The legislation did not provide for an MP filter, and assumed that no separate accountability arrangements were necessary, beyond a separate annual report to Parliament and regular summaries of cases. The HSC gives evidence to the Public Administration Select Committee, but there is no regular contact with the Health Select Committee. This appears anomalous, particularly as the Commissioner now has power to investigate complaints about clinical judgement and this has proved to be the bulk of the work now undertaken by the office. There are about 4,500 complaints and 600 investigations annually. There have been similar concerns about the relatively small number of complaints investigated and long through-put times.

The HSC is prepared to use publicity to highlight cases of bad publicity, and since the late 1990s has been engaged in a major drive to raise public awareness of the office. Its accounts are audited by the C and AG.

4. The Commission for Local Administration and the Local Government Ombudsman

Functions and status

The Commission was set up under Part III of the *Local Government Act 1974* and is responsible for the Local Government Ombudsman service for England. There is a separate CLA for Wales. The Local Government Ombudsmen investigate complaints of injustice arising from maladministration by local authorities and certain other bodies. There are three Local Government Ombudsmen in England and they each deal with complaints from different parts of the country.

The members of the Commission are the three Ombudsmen for England together with the Parliamentary Commissioner for Administration on an ex officio basis. The functions of the Commission include: defining the Ombudsmen's geographical areas; providing the Ombudsmen with the staff, accommodation, IT and other support they need to enable them to conduct their investigations; producing annual financial estimates, the annual accounts and the annual Business Plan and managing the finances and assets of the Ombudsman service; conducting a triennial review of the the legislation and giving advice on good administrative practice.

The jurisdiction of the Ombudsman is not changed by the *Local Government Act 2000*. However, one of the duties of an Ombudsman will be removed by the Act's provisions. That is the duty, if finding maladministration because of a breach of the previous National Code of Local Government Conduct, to name the member concerned in his or her report, unless satisfied that it would be unjust to do so.

Following the acceptance of the Colcutt report into the Ombudsman service, legislation is expected to merge the work of the Local Government Ombudsman with other Ombudsman services, perhaps in a similar way to the Scottish Public Services Ombudsman. There is no indication however of early legislation. Complaints are beginning to show some decline after reaching a peak of over 19,000 in 2000/2001.

Independence

The Ombudsman service is financed by an annual grant (currently c£11.5m), top-sliced from the Revenue Support Grant for local government, out of which is paid the salaries for members of the Commission. The 1974 Act provides for the appointment of the Ombudsmen by the Queen, on the advice of the Secretary of State, after consultation with the Local Government Association. Commissioners may be appointed to serve full-time or part-time, and the Secretary of State designates one as Chairman and another as Vice Chairman of the Commission. The Act specifies that the Ombudsmen shall hold office on good behaviour until the completion of the year of service in which they are 65. Ombudsman staff are recruited directly and are not civil servants or local government officials.

Accountability

There are no formal mechanisms linking the Commission to Parliament or to local authority associations or consumers, though the Local Government Ombudsmen has given evidence on ombudsman issues to the Public Administration Committee. The Commissioners have some statutory protection from removal. The service is under review following Colcutt and an arrangement giving Local Government Ombudsmen the same constitutional position as the PCA would be welcome. There might be benefits in links with the ODPM select committee which could pick up some systemic issues about local government services. As with the other Ombudsman services analysed, a common parliamentary body to oversee the budget and financial planning should be an essential part of the reforms following Colcutt.

The Commission meets about once a month in private. In addition to discharging their statutory responsibilities, the Ombudsmen use Commission meetings, for example, to try to achieve consistency in the way they conduct investigations, the way they decide whether there has or has not been maladministration and in the way they recommend remedies for injustice. The minutes of these meetings are not publicly available, and its annual report is not formally presented to Parliament. It is not audited by the C and AG, but by a body agreed with by the ODPM. The Commission was the subject of an efficiency review by KPMG in

2001-2, which recommended a more proactive role and higher profile.

5. The Standards Board for England

Functions and status

The Standards Board was set up under the *Local Government Act 2000* to investigate complaints of breaches of their authority's code of conduct by members and co-opted members. This followed the third report of the Committee on Standards in Public Life which recommended consistent standards of conduct throughout local government.

Investigations are the responsibility of Ethical Standards Officers (ESOs), who are employees of the Board, but are independent in their investigating role. Sanctions apply, including up to a five year disqualification from office, for members who are found to have breached a local authority's code of conduct. However, neither the Standards Board nor the Adjudication Panel can provide or recommend a remedy for a complainant.

Independence

The Board came into formal existence in March 2001. There are nine members, appointed by the Secretary of State. The term of appointment is three years. There are statutory restrictions on dismissal in Schedule 4, but the Secretary of State may remove members without reference to Parliament where these conditions are fulfilled. Formally, it is an NDPB sponsored by ODPM, which funds it through a grant in aid, which includes sums for the remuneration of the Chair and for the part time Board members. The staff are appointed directly by the Standards Board.

Accountability

The Board meets monthly and minutes are not publicly available, but its annual report states that it is accountable to Parliament. The annual report is presented to the Secretary of State who has a statutory duty to lay it before both Houses of Parliament. The Board has not yet given evidence to a select committee. Standards Board members are disqualified from being MPs under the *House of Commons Disqualification Act 1975*.

The Standards Board has very limited accountability to Parliament for its work., despite its independent nature. It is an example of a body which has been established with little thought as to its proper constitutional role, or relationship to Parliament or the executive. Its constitutional position is probably not significant enough to justify full Officer status, but this need not prevent a closer relationship with Parliament. The ODPM select committee would be a suitable vehicle for developing this.

6. Equalities and Human Rights Commissions

Functions and status

In the UK there are three separate equality bodies with similar constitutional architecture. They are NDPBs, with Commissioners appointed by the Secretary of State without parliamentary involvement, but some statutory protection for Commissioners exist. Annual reports are made to the relevant minister who will present the report to Parliament. They are no dedicated parliamentary select committees. Funding is generally by grant in aid and auditing by the C and AG. The role is mainly advisory and educational, but there are some enforcement powers.

- Equal Opportunities Commission—created following the Sex Discrimination Act 1975
- The Commission for Racial Equality—created in the Race Relations Act 1976
- The Disability Rights Commission—created in the Disability Rights Commission Act 1999

Independence

There is no Human Rights Commission for the UK, but separate Commissions/Commissioners exist or are planned for Northern Ireland and Scotland. The parliamentary Joint Committee on Human Rights monitors the operation of the Human Rights Act 1998 and has recommended the creation of a Commission to cover UK wide aspects of Human Rights. It envisages a statutory obligation to consult Parliament about the appointment of the Commissioners and direct involvement by Parliament in the setting of the budget. It noted that the standard model of NDPB accountability was not satisfactory in respect of the equalities commissions, as it did not offer a 'sufficiently outward and visible guarantee of independence from the

Government.¹⁴⁷ It promised to examine models of accountability in more depth, having highlighted the debate in Scotland about forms of institutional independence, explored in Part III below.

The Government has raised the possibility of creating a single equality commission in the longer term. The question of creating a single body taking in the work of a Human Rights Commission is also an option, but not as yet on the official agenda. A number of overseas states have created a single body, as documented in a study by Colm O'Conneide at University College London. The Australian, Canadian and New Zealand commissions at both state and provincial level in Australia and Canada combine human rights and equality functions in a single commission, seeing both areas as inseparable. In contrast, the Northern Ireland Equality Commission and the Irish Equality Authority do not have human rights functions, as separate bodies exist.⁴⁸

Accountability

The O'Conneide study suggested that if the UK moved to the model of a single commission, then its relevant parliamentary committee should be the Joint Human Rights Committee. The Government consultation exercise has concluded, and a Government response is awaited. Lord Lester has introduced the *Equality Bill* into Parliament, creating an single equality commission for Great Britain, as part of a drive to achieve integrated equality legislation. Although it has attracted widespread support, it stands little chance of success as a private member's bill.⁴⁹

The issue of parliamentary accountability for human rights and equality commissions has been raised in Canada and South Africa, where direct lines of accountability to Parliament has been seen as a mechanism to protect the funding of such commissions.

All are subject to the jurisdiction of the Parliamentary Ombudsman and are audited by the C and AG. But equality and human rights commissions in the UK have only limited accountability mechanisms to Parliament. The creation of the Joint Committee on Human Rights offers possibilities for a developing relationship. Their designation as Officers is a

possibility, but might dilute the constitutional importance of the office.

F The non-statutory Nolan watchdogs

This category have no statutory basis and consequently, their constitutional architecture has not been examined in depth. They form a series of bodies set up following concerns about the standards of conduct in public life in the early 1990s. As mainly advisory NDPBs they do not come within the jurisdiction of the Parliamentary Ombudsman or the C and AG.

1 The Committee on Standards in Public Life

Functions and status

The creation of the Nolan Committee was announced by the Prime Minister John Major on 27 October 1994 during his statement on the conduct of public life which was prompted by allegations of impropriety made by Mohammed Al Fayed . Its terms of reference were:

To examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations as to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life.

On 12 November 1997 the new Prime Minister, Tony Blair, announced additional terms of reference relating to the funding of political parties. This prompted an enquiry into the funding of political parties, which led to major legislation in 2000—the *Political Parties, Elections and Referendums Act*.

John Major decided to establish standing machinery to examine the conduct of public life and to make recommendations on how best to ensure standards of propriety are upheld. Initially, the creation of the Committee was seen as an exercise in damage limitation, but some commentators considered that the Committee could become a valuable constitutional innovation, which would help to create more checks and balances in a political system which operates without formal separation of powers.⁵⁰ However, the standing of the Committee rose

considerably when it took evidence in public, and produced a report which was seen as authoritative in many areas. In a speech shortly after the establishment of the Committee, John Major said that it was designed ‘to act as a running authority of reference—almost, you might say, an ethical workshop called into do running repairs.’⁵¹

The nearest precedent to the Committee is probably the Salmon Royal Commission on Standards of Conduct in Public Life,⁵² set up following the Poulson scandal to ‘form a judgement of the nature of conflicts of interest and risks of corruption in public life, and the best means of ensuring that high standards of probity are maintained.’ It did not act as an investigative body for individual cases, but made a series of recommendations; many of the key recommendations remain unimplemented as they involved legislation to reform the law on corruption. The Commission was wound up after reporting.

One of its most important achievements is the widespread adoption of the Seven Principles of Public Life. The Committee’s recommendations have led to the creation of some new offices and the adaptation of others, using either legislation or Orders in Council. These included the non-statutory Parliamentary Commissioner for Standards and the Public Appointments Commissioner, and the statutory Standards Board for England and the Electoral Commission. Recently, its recommendations have received less public attention. It is responsible for deciding its programme of work.

Independence

The Committee is a standing advisory committee and has always been officially classified as an advisory NDPB with the Cabinet Office as the sponsoring body. Appointments are made by the Prime Minister, for renewable periods of up to three years, but normally include a senior member from each of the three major parties. The first two chairmen were judges, but the current chair is a former senior civil servant, Sir Nigel Wicks. Members are appointed following open competition run by the Cabinet Office under the Nolan public appointment rules. A former member of the Committee, Ann Abraham, resigned when appointed the new Parliamentary Commissioner for Administration and another member, Professor Alice Brown, also resigned when she took up the position of

Scottish Public Services Ombudsman. One member of the Committee, Peter Shore, was reappointed to two three year terms, before his death in September 2001. Committee members receive a daily remuneration where not already paid from public funds.

The Committee has been subject to a quinquennial review, carried out by the Cabinet Office and published in January 2001.⁵³ This concluded that the Committee that there would be periods in the future where the Committee would not be engaged in a particular study, but would monitor the ethical environment. This would affect the activity rate of the Committee.⁵⁴

It receives its budget through the Cabinet Office, but day-to-day responsibility for financial controls and budgetary mechanisms are delegated to the Secretary of the Committee. Expenditure runs at about £0.5m annually. The Secretary and the rest of the team which make up the Secretariat (currently 7 staff) are permanent civil servants employed by the Cabinet Office.

Given the importance that the Committee has achieved in UK public life, it is surprising that its constitutional architecture has not been given much attention. If it is designed as permanent standing machinery, then it should have a statutory basis, and an independent budget.

Accountability

The Committee reports officially to the Prime Minister, but some Parliamentary involvement would be desirable. The most appropriate channel would be a general parliamentary committee with responsibility for the public service. It has always aimed its work at the wider public, taking evidence in public sessions in different locations in the UK. In the last two years it has begun a research programme designed to test public understanding of the Seven Principles. The Committee now publishes its agendas and summaries of its monthly meetings.

2. Commissioner for Public Appointments

Functions and status

This non-statutory office was established following the first report from the Committee on Standards in Public Life in 1995. This report did

not recommend the creation of an independent Commission to make appointments in public life, since the Committee wished to uphold the principle of ministerial accountability. Instead, the Commissioner was envisaged as auditing appointments and overseeing a new code regulating appointments. The Commissioner is appointed for three years under a Order in Council and is currently Commissioner for England, Wales and Scotland. A separate Order in Council makes her Commissioner for Northern Ireland.⁵⁵ These arrangements will change under devolution. Separate legislation is being designed for Scotland.⁵⁶

The non-statutory NHS Appointments Commission was established in April 2001, following a scrutiny of the NHS system carried out by the Commissioner in 2000. It is a Special Health Authority, with a chair, a chief executive and 8 regional commissioners. It has 45 staff based in London and Leeds. The chair, Sir William Wells, has given evidence to the Public Administration Select Committee in relation to its enquiry into patronage. Ministerial involvement in the selection of non-executive appointments to NHS bodies has now ended. It is not clear why such an approach has been confined solely to health appointments. The new structure followed criticism by the Commissioner about the personal involvement of ministers, but seems to cut across traditional notions of the role of ministerial responsibility in public appointments. Officially, the Secretary of State for Health has delegated his responsibility for ministerial appointments to the new Commission.

Independence

The appointment of the Public Appointments Commissioner is made by the Cabinet Office, using public appointment code principles and the result of the Board is sent to the Prime Minister. The appointment is made by the Crown. There is no opportunity for formal consultation with the Opposition or with Parliament, whether the Speaker or the appropriate select committee. The Commissioner is eligible for re-appointment for a further three years and was re-appointed in March 2003. The appraisal process to check suitability for re-appointment was undertaken by the Cabinet Office. The first Commissioner was Sir Leonard Peach. The current post-holder is Dame Rennie Fritchie.

The Commissioner is responsible for setting her own terms of reference. There is no formal oversight from the Committee on Standards in Public Life, despite its role in establishing the post and formally reviewing the implementation of its recommendations.

The Commissioner is supported by 8 civil servants—two from the Cabinet Office and 6 from other government departments. Short term secondees have also carried out short term research projects. There are some issues of perception related to the use of civil servants as supporting staff. The Commissioner considers the office as totally independent in a particularly sensitive area of public life, but her staff are career civil servants. There is a tendency in Whitehall for OCPA's role to be seen as advising ministers, which confuses the accountability lines. The Commissioner is responsible to the Crown and to the public. But the fact that the office is serviced from Whitehall can create the appearance that she works for and reports to ministers.

The office is financed entirely from the Cabinet Office departmental vote. This also causes problems of perception. There is a strong case for a ring-fenced budget, and the most appropriate vehicle appears to be the consolidated fund, as with the National Audit Office and the Electoral Commission. Her budget ought to be set by another body, and following the precedent of the Electoral Commission, Parliament should have a role. It is possible that she has too few staff for a permanent separation from the civil service, but there should be clearer boundaries about the independent nature of the work, in case there are concerns about offending their home departments.

Overall, because no legislation was necessary to create the post, there has not been much sustained scrutiny of the appropriate constitutional architecture for the office. As the Public Administration Committee is due to report on patronage, these issues may once again come to the fore. The question of ministerial responsibility for appointments may need a re-examination, given the precedent of non-involvement set in appointments to health bodies.

If the Public Appointments Commissioner is to have a continuing role in monitoring and

advising on public appointments, then the office should have a statutory basis.

Accountability

The annual report is not directed at either the Government or Parliament, but is published for the general public. The parliamentary committee most relevant to the Commissioner's work is the Public Administration Select Committee. The Commissioner makes regular appearances before this committee but this is in the context of individual enquiries, such as the current one on patronage. There should be a regular dialogue with a parliamentary committee responsible for monitoring the public sector.

Ministers and not Parliament continue to be responsible for the appointment of public officials. The Commissioner needs to preserve some distance from individual pressures from Members on particular appointments, and she has given evidence to the Scottish Parliament advising against confirmation hearings conducted by the Parliament, under the terms of the private member's bill introduced by Alex Neil.⁵⁷ Therefore a closer relationship with Parliament would need mechanisms to ensure that she was not drawn into controversy about individual appointments. Parliamentary accountability has however made the Commissioner consider the need to make her annual report transparent. She was questioned on this by the select committee and following their queries, the names of departments are now released where she has found evidence of failure to follow the Commissioner's Code of Practice.

There is a separate website for the Commission, which explains the functions of the office. Clearly, the work of the Commissioner has a significant impact on Whitehall, but overall public knowledge of the role is not high.

3. The Civil Service Commissioners

Functions and status

These are included as a Nolan type body, despite their historic origins, as they took on an important role in administering complaints under the Civil Service Code in the mid 1990s. This Code was not developed directly from Nolan, but from recommendations of the Commons Treasury and Civil Service Select Committee.

Nevertheless the wording of the Code fits into the general ethical concern of the mid 1990s, despite the fact that it does not incorporate the Seven Principles of Public Life.

The Commissioners are appointed by Order in Council under the royal prerogative and derive their responsibilities and powers from the Civil Service Order in Council 1995 and the Diplomatic Service Order in Council 1991 as amended. They were originally established in 1855, as part of the Northcote-Trevelyan reforms designed to create a non-partisan civil service recruited by merit and not patronage.

Their two main responsibilities are:

- To maintain the fundamental principle of selection on merit on the basis of fair and open competition in recruitment to the civil service. They have direct involvement in competitions for recruitment to the Senior Civil Service
- To hear and determine appeals under the Civil Service Code, established in 1996 and appeals from civil servants arising from the Special Adviser's Code established in July 2001

The Commissioners have developed a Recruitment Code under the 1995 Order in Council. The main stakeholders are human resource directors of departments, Cabinet Office and the public. The current First Commissioner, Baroness Prashar, comes from a non-civil service background, as did her predecessor, and Baroness Prashar has a relatively high public profile.

Independence

The Commissioners come from a range of backgrounds such as business, voluntary sector and local and central government. There are currently 12. The Commissioners are supported by civil servants seconded mainly from the Cabinet Office. The staff group would be too small to become completely independent, and previous knowledge of the service is a bonus. The Commissioners' Office is funded from the Cabinet Office departmental vote, which leaves the Office open to the possibility of across the board reductions in expenditure. An independent source of finance would be preferable.

Baroness Prashar applied through open competition, and the chairman of the interview board was the Cabinet Secretary. The Prime Minister, Scottish Executive and the National Assembly for Wales were also consulted about the appointment. Appointments for individual Commissioners were made through open competition for the first time in 2000-2001, with an interview panel chaired by the First Commissioner. One of the Commissioners, Dame Rennie Fritchie, is also the Commissioner for Public Appointments

The involvement of the Cabinet Office in the recruitment exercise means in effect, that the supervisors of the civil service are recruited by civil servants. But the personal involvement of the First Commissioner in the process ensures independence. They are appointed for three year terms with the possibility of extension for another two years. They are not protected from dismissal. The annual report states that the Commissioners are 'independent of Ministers and the Civil Service'.

The Commissioners demonstrated their independence recently in an appeal which found that the production of a particular report risked breaching paragraph 5 of the Civil Servants Code—which states that civil servants should not deceive or knowingly mislead Ministers, Parliament or the public.⁵⁸ But the Commissioners have a reactive rather than proactive role, and have no powers to launch independent enquiries into matters of concern. For example, they played no role in the tensions in the former DTLR between the press office and a ministerial special adviser, as they were not asked to adjudicate.⁵⁹

In a speech to the House of Lords on 1 May 2002, Baroness Prashar drew attention to the problem of relying on prerogative powers to set out the role of the civil service. She said:

By enshrining in statute the core values of appointment on merit after fair and open competition; by incorporating in statute the responsibilities and powers of the Civil Service Commissioners including the obligation to report on their work; we will have placed the constitutional position of the Civil Service more directly under the oversight of Parliament

A civil service act is very likely to include sections putting the appointment and dismissal

of Commissioners on a statutory basis, and ensuring some line of parliamentary accountability, while preserving independence. The April 2003 report from the Wicks Committee recommends legislation, arguing that ‘ The government of the day should be accountable to Parliament for the health of the [civil] service. The civil service should not be subject simply to the virtually unaccountable control of the Executive.’⁶⁰ Wicks considered that the Commissioners should be put on a statutory basis to

- Ensure that its role in ensuring the principle of selection on merit is properly applied
- Investigate issues on its own initiative and report on the operation of civil service recruitment

It also recommended that the First Commissioner should continue to be appointed on the initiative of the Prime Minister, but only after consultation with Opposition leaders. It did not consider other measures to bolster the Commissioners’ financial and structural independence, such as a separate budget.

Accountability

The annual report is presented to the crown, and not Parliament. It anonymises complainants to protect them, which means that departments at fault are not identified. Minutes of the Commissioners’ meetings are not publicly available.

The Public Administration Select Committee has recently taken an interest in the work of the Commissioners, but does not have a formal arrangement to inspect their activities. This might change should there be legislation to set out the constitutional principles of the civil service, but the immediate prospects for this appear limited. A Joint Committee of both Houses would seem most suitable as a monitoring committee, covering not only the work of the Commissioners, but also developments in the civil service. Beyond recommending that Parliament approve the Civil Service Code and the numbers and role of special advisers as separate statutory instruments, the Wicks Committee did not set out any standing scrutiny machinery for parliamentary investigation of the civil service.

Baroness Prashar has given evidence to the Public Administration Committee in favour of a civil service act which would ‘place the role and character of the Civil Service more directly under the oversight of Parliament and would thereby provide assurance of its continued impartiality and core values at a time of reform and change’.⁶¹ However, she stressed that she did not want to be accountable to Parliament, since it was important to remain independent.⁶² There is no formal line of responsibility to the Wicks Committee, although there is dialogue. The Commissioners have a separate website, but public knowledge of their role is not high.

G Other non-statutory constitutional watchdogs

These bodies also have a non-statutory nature, which tends to be indicative of action by the executive without much thought as to appropriate constitutional architecture. They are not subject to the jurisdiction of the Parliamentary Ombudsman or the C and AG, apart from the Statistics Commission.

1 The National Statistics Commission

Functions and status

This body was set up in 2000 following white papers in 1998 and 1999 which sought to fulfil a manifesto pledge to provide independent national statistics.⁶³ The Commission acts as a guardian of statistical integrity and is a NDPB under the Treasury. It advises ministers and the Office of National Statistics (a permanent government department) headed by the new post of National Statistician. It is described as ‘independent’ in its framework document of 2000, but this document appears to consider the Commission’s main role as advising ministers. Yet if its role is to sustain public confidence in statistics, then it should also be advising Parliament and the citizen. It has regular contacts with users groups and with producers of statistics and sees its role as ‘holding the ring’.

There has been some debate as to the necessity for legislation to establish the Commission and as to whether the most appropriate model is that of the National Audit Office, completely independent of government. But in general statistics production in other states remains an integral part of the government service. The Commission has begun consultations on the

case for a Statistics Act, to bring the UK into line with other developed nations and to ensure that the National Statistician is statutorily independent of ministerial direction and that he or she has security of tenure. The National Statistician, Len Cook, is also Registrar General with statutory responsibility for the census.

Independence

The Commission members are appointed by the Chancellor of the Exchequer, as Minister for National Statistics. There are eight, including the chair. Since the initial appointments were not staggered, there will be some issues about their replacement after the three year terms come to an end. There is a possibility of re-appointment, following appraisal. The chairman was appointed following a board chaired by a minister and he then took a major responsibility for appointing the other Commissioners. They receive salaries for a number of days work per year. There are nine staff, the majority seconded from the Treasury. Such a small number raises issues about career development. The Commission is funded by grant in aid, rather than by departmental vote, preserving a measure of independence.

The case for a statutory basis for the National Statistician and a Statistics Commission is strong. The Commission should report to Parliament rather than to ministers about the adequacy of national statistics. It should also have more institutional protection for its funding.

Accountability

The Commission's annual report is presented to the Minister for Statistics who lays it before Parliament. There is no formal relationship with Parliament, but the convention is developing that the Commission will give evidence to the Treasury sub-committee on its annual report. It has also given evidence to the Public Administration Select Committee in its targets enquiry. It has developed relationships with assemblies/parliaments in Scotland, Wales and Northern Ireland, as elements of the statistical service are devolved.

There has been some tension in the relationship with the National Statistician over the classification of Network Rail liabilities as not part of the National Debt. Len Cook was reporting as commenting that the Statistics

Commission could not influence his decision on the matter.⁶⁴

The Commission has a website and lays emphasis on its openness and transparency. Its papers and minutes are publicly available. It has nevertheless had difficulty in establishing a public profile.

2 The Commission for Judicial Appointments

Functions and status

This was established following an independent scrutiny report by Sir Leonard Peach, former Commissioner for Public Appointments, in December 1999.⁶⁵ This found that there was no independent oversight of the system of judicial appointments in England, Wales and Northern Ireland and recommended a new Commission with two main roles:

- Investigation of complaints about individual appointments
- Audit and review of the appointments process

He recommended that the Commission be modelled on the Commissioner for Public Appointments. The recommendation was accepted by the Lord Chancellor's Department, but with the restriction that the Commissioners would have no role in making or recommending individual appointments, but would be confined solely to review and complaints investigation.

More generally, the Lord Chancellor's role in judicial appointments is coming under sustained scrutiny, particularly following the *Human Rights Act 1998*. The Bar Council published a critical report in March 2003 recommending that the office no longer hold responsibility for the appointment of High Court judges and QCs and that an independent body undertake the process, modelled on the Judicial Appointments Board of Scotland, which has taken over responsibility from the Lord Advocate.⁶⁶ The Lord Chancellor has announced plans to consult on his judicial appointment functions, and change in the longer term looks possible.⁶⁷

Independence

In March 2001, Professor Sir Colin Campbell, Vice-Chancellor of Nottingham University, was appointed First Commissioner for Judicial Appointments. Seven Deputy Commissioners

were appointed in December 2001 to support Sir Colin in his role.

One of the Deputy Commissioners is also Commissioner for Judicial Appointments for Northern Ireland. All their appointments were for a term of five years, which is renewable for a further five years. The panel for the appointment of the First Commissioner was chaired by the LCD's Permanent Secretary, with a senior judge and an independent assessor. The panel for the other Commissioners was chaired by the First Commissioner, with a senior LCD official and an independent assessor.

The appointments were made by Order in Council in exercise of the Royal Prerogative, on the recommendation of the Lord Chancellor. The Commissioners were selected through an open competition conducted by the Lord Chancellor's Department under the usual OCPA rules.

The Commission has a staff of 3, selected through interdepartmental competitions and not previously in the Lord Chancellor's Department. It is funded through the LCD with an annual expenditure of £100,000. The Commissioner's functions were set out in *the Judicial Appointments Order in Council 2001*. The Commission's role is to conduct an ongoing audit of the procedures for the appointment of judges and Queen's Counsel (QCs—also known as Silks). It handles comments or complaints from individuals and organisations about the way the procedures are applied and recommends improvements to the Lord Chancellor.

The Judicial Appointments Commission is designed to be an independent body to advise on the process of appointments. However, it lacks any formal structure of accountability and reports solely to the Lord Chancellor, who is responsible for the appointments.

Accountability

The First Commissioner published an annual report alongside the Lord Chancellor's Annual Report on Judicial Appointments. It is addressed to the Lord Chancellor.

There is no parliamentary involvement in the appointment process or any specified reasons for dismissal. This may be an area which will come within the purview of the new LCD select committee. Public knowledge of the Commission

appears to be very low and the Commission does not yet have its own website, but is reached via the LCD site.

It would seem appropriate for the Commission to have a formal association with the Commissioner for Public Appointments who would then have a reporting relationship with Parliament. Since the Commission carries out a watchdog role over judicial appointments there would be benefits in closer links with Parliament, most likely with the LCD select committee.

3 The House of Lords Appointments Commission

Functions and status

This body is included because it is designed to have a key role in appointments to the upper house and to offer an auditing role in respect of appointments made by political parties. The Appointments Commission—chaired by Lord Stevenson—is a non-statutory NDPB which began work in May 2000.

The Commission first invited applications from people wishing to become non-party political members of the House of Lords in September 2000. The announcement in 25 April 2001 of 15 new peers received largely hostile press coverage. The thrust of the criticism was that those nominated were exactly the kind of establishment figures who might well have been nominated under the old system and that there were no "ordinary people" (the so-called 'people's peers') amongst them. One of the new peers was Sir Herman Ouseley who had taken part in the selection panel appointing the Commissioners themselves. Although there was no suggestion of impropriety, the choice seemed to indicate that the Commission had not reached out beyond the usual suspects.

Independence

The Commission consists of representatives of the three main political parties and four independent figures, one of whom—Lord Stevenson—chairs the Commission. The posts are part time and the Commissioners receive a small remuneration. They were appointed for three-year terms. It was established following a white paper published at the same time as the *House of Lords Act 1999* was introduced. The white paper promised to establish an

independent Appointments Commission to recommend non-political appointments to the transitional House.

A selection panel prepared the final shortlist for the chairman and independent members.⁶⁸ Formally, its status is an advisory NDPB sponsored by the Cabinet Office. Its staff are civil servants, who are either members of the Cabinet Office or on loan to it from other Government departments or agencies. It does not produce an annual report.

The Appointment Commission's website describes its role as follows:

- to recommend people for appointment as non-party political life peers
- to vet all nominations for membership of the House to ensure the highest standards of propriety.

In fact, the Prime Minister makes an exception in the case of individuals he appoints as ministers, who are not vetted by the Appointments Commission. This has caused some controversy. The Prime Minister has also bypassed the Commissioner in recommending certain non party political life peerages, such as that offered to Lord Wilson, formerly Sir Richard Wilson and Cabinet Secretary).

It is the Queen, as the sole fount of honour, who awards peerages, but she only exercises this prerogative on the advice of her ministers. The Prime Minister must make all recommendations for appointment. Under the system which existed before the Appointments Commission was established, the Prime Minister decided on nominations from his or her own party, sometimes creating peerages to enable individuals to serve as ministers. He or she also invited recommendations from other party leaders to fill vacancies on their own benches. Non-party appointments to the independent Cross Benches were in the control of the Prime Minister. The Political Honours Scrutiny Committee vetted all nominations for life peerages.

Much of this system remains the same. The Prime Minister retains the power to decide the overall number of new peers created and the balance between the parties. The appointment of party political peers is also still a matter for the Prime Minister, in consultation with other party

leaders. However, responsibility for the recommendation of non-party peerages has passed to the Appointments Commission. It is still the Prime Minister who passes on these recommendations to the Queen, just as he passes on nominations from other parties.

Following the *House of Lords Act 1999*, the next stage of Lords reform came with the publication of the Wakeham Commission in January 2000. It recommended a new statutory Appointments Commission to be responsible for all appointments to a second chamber:

Recommendation 70: An Appointments Commission, independent of the Prime Minister, Government and the political parties, should be responsible for all appointments to the second chamber.

Therefore the Wakeham-model Appointments Commission represents a considerable extension of the present Commission's role as exercised for the interim House. The key points were:

- It would nominate all appointed peers—not just Cross Benchers.
- It would also ensure that overall balance between the political parties in the House reflected the share of votes cast at the most recent General Election. This would be implemented by appointing party-affiliated individuals to the appropriate party group. It would ensure that at least 20 per cent of the House were Cross Benchers.
- The Prime Minister's role in patronage for the Lords would disappear. Political parties would submit names to the Commission, but there would be no guarantee that the Commission would decide to accept these nominations. In addition, the Commission would vet all political nominations for propriety. Appointees would serve for 15 years and would not be eligible to stand for the Commons until 10 years after retiring from the Lords.
- The Commission would be set up under legislation and Commission members would have statutory protection from interference, in a similar way to the Electoral Commission under the *Political Parties, Elections and Referendums Act 2000*.

The Government accepted the principle of a statutory Commission as part of permanent arrangements for the Second Chamber, but its precise role was never made clear. Any developments would depend on the composition of any reformed second chamber, especially a split between membership and honours.

There is no timetable for the second stage of Lords reform, following the failure of both Houses of Parliament to come to a majority view on the composition of the Lords in February 2003. If the transitional House created as a result of the 1999 legislation is to remain, attention will return to the method of appointment to the House. The non-statutory Commission is unsatisfactory as a model.

Accountability

Even with its limited responsibilities there is no formal mechanism of accountability, apart from recommending peerages to the Queen via the Prime Minister. The Committee ought to be scrutinised by some parliamentary body, perhaps a Joint Committee of both Houses. No thought has yet been given to the question of accountability to Parliament and to the wider public. The Commission ought not to be grouped with other constitutional Officers of Parliament, but some mechanisms ought to be available to scrutinise its work. At present, it does not set any type of performance indicators for the peers it has appointed, so it has no measures of 'success'. But the quality of its Members ought to be a consideration for Parliament.

² *The Parliamentary Commissioner for Children Bill*

³ There was a proposal for a Energy Complaints Commissioner to become an Officer in a bill dealing with energy supply reform scrutinised by the Commerce Committee, but the arguments were made against by the Clerk of the House. See *Commerce Amendment Bill*, as reported by Commerce Committee on 2 February 2001 296-2

⁴ Professor Paul G Thomas 'Accountability and Independent Parliamentary Agencies' speech to Canadian Ombudsmen October 2002 p 24

⁵ Professor Paul G Thomas 'Accountability and Independent Parliamentary Agencies' speech to Canadian Ombudsmen October 2002

⁶ *Parliamentary Practice* 22nd edition Butterworths 1997

⁷ *How Parliament Works* (4th ed) 1998 Paul Silk and Rhodri Walters p34

⁸ *The Role of the C and AG* HC 115 1980-81 para 7.16

⁹ PAC 8th report HC 105 1983-84 para 4

¹⁰ HC Deb, Standing Committee C, 9 March 1983

¹¹ HC Deb 16 Dec 1987 c1201-4

¹² This position predates the 1983 Act and is set out in the *Exchequer and Audit Departments Act 1957* For a clear explanation, see *Stair Memorial Encyclopaedia*, Public Expenditure 2002, para 519

¹³ HC Deb 16 December 1987 c 1185

¹⁴ *Exchequer and Audits Department Act 1866*

¹⁵ PAC, Second Report HC 116 1986-87 and *Erskine May* p209

¹⁶ Response by the House of Commons Commission to the Sixty-Third Report from the Committee of Public Accounts, House of Commons Paper 861 of Session 2001-02, and to the Report by the Comptroller and Auditor General, House of Commons Paper 750 of Session 2001-02

¹⁷ *The Review of Audit and Accountability for Central Government* Report by Lord Sharman of Redlynch February 2001

¹⁸ Eleventh Report 2002 <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmpacomm/1251/125104.htm>

¹⁹ For further details see O. Gay and B. K. Winetrobe *The Parliamentary Audit Function* Constitution Unit May 2003

²⁰ *Parliamentary Practice* 22nd ed 1997 Butterworths p210

²¹ See *The Ombudsman, the Citizen and Parliament* by Roy Gregory and Philip Giddings Politico's 2002 for an authoritative history of the office

²² 22nd ed 1997, p 210

²³ For a complete history of the office, see *The Ombudsman, the Citizen and Parliament* by Roy Gregory and Philip Giddings 2002

²⁴ HC 112 1994-95

²⁵ Third report HC 448, session 2002-3

²⁶ PCA Select Committee First Report HC 1993-94. See also R. Gregory, P. Giddings and V. Moore 'Auditing the Auditors: The select committee review of the powers, work and jurisdiction of the ombudsman 1993' *Public Law* Summer 1994

- ²⁷ Government reply to the First Report from the Select Committee on the Parliamentary Commissioner for Administration HC 619 session 1993-94
- ²⁸ *Ombudsman issues* HC 448 Session 2002-03
- ²⁹ *R v Parliamentary Commission for Administration ex p Dyer* (1994) All ER 375
- ³⁰ Oral evidence to the Committee on Standards in Public Life May 2002
- ³¹ Gregory and Giddings, 269-271
- ³² The office of the Ombudsman was established in 1969 under two separate pieces of legislation to firstly handle complaints about government departments and secondly as a Commissioner for Complaints to deal with the wider public sector . The current legislation is The Ombudsman (Northern Ireland) Order 1996 SI no 1298 and the Commissioner for Complaints (Northern Ireland) Order 1996
- ³³ http://www.publications.parliament.uk/pa/cm200203/cmhansrd/cm030311/wmstext/30311m02.htm#30311m02.html_sbhd3
- ³⁴ *Standards of Conduct in the House of Commons*, Eighth Report Cm 5663 November 2002
- ³⁵ See <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcomm/598/59802.htm#a1> for the most recent report *Parliamentary Commissioner for Standards: Nomination of Candidates 2001-2*
- ³⁶ HC 403 Session 2002-3
- ³⁷ See O.Gay *The Regulation of Parliamentary Standards: A Comparative Perspective*, Committee on Standards in Public Life 2002 for further details about the Scottish legislation
- ³⁸ The Committee was a development from a predecessor Committee established under the *Registration of Political Parties Act 1998*, with limited functions
- ³⁹ Section 3 Political Parties Elections and Referendums Act 2000
- ⁴⁰ At Lords Committee stage on 11 May Lord Bassam of Brighton, for the Government, said: 'The Government's view is that the appointment of members of the committee, other than those who are members by virtue of their office, should be a matter entirely for the Speaker to determine'. HL Deb vol 612 c780
- ⁴¹ HC Deb 13 March 2000 c92
- ⁴² *Electoral Law Act 1962 (Northern Ireland)* as amended in 1973
- ⁴³ for background see *Financial Times* 25 March 2002 'Political points dressed up as public interest
- ⁴⁴ District Audit has now been integrated with the Inspections Service of the Commission
- ⁴⁵ *Financial Times* 18 July 2002 'Audit of public services weakened, MPs told' which reported evidence to the Treasury select committee
- ⁴⁶ See *The Ombudsman, the Citizen and Parliament* p690-691 for a discussion of this point
- ⁴⁷ Joint Committee on Human Rights *the Case for a Human Rights Committee* HL Paper 67/ HC 489 Session 2002-3
- ⁴⁸ An independent study undertaken by Colm O'Cinneide at University College London *A Single Equality body: Lessons from Abroad* 2002 for the Equal Opportunities Commission
- ⁴⁹ HL 19 of Session 2002-3
- ⁵⁰ *Times* 27 October 2000 'Nolan's team must breach convention
- ⁵¹ 10 Downing St Press Notice 14 November 1994 'Speech by the Prime Minister at the Lord Mayor's Banquet
- ⁵² Cd 6524 1975
- ⁵³ HL Deb 31 January 2001
- ⁵⁴ *Report of the Quinquennial Review of the Committee on Standards in Public Life* Cabinet Office 2000
- ⁵⁵ *Public Appointments Order in Council 1995*
- ⁵⁶ Public Appointments and Public Bodies (Scotland) Bill
- ⁵⁷ Evidence to Local Government Committee in respect of *Public Appointments (Parliamentary Approval) (Scotland) Bill*
- ⁵⁸ Annual report 2000-2001
- ⁵⁹ Q637 HC 686 of Session 2001-2 (Evidence to Public Administration Select Committee)
- ⁶⁰ *Defining the Boundaries within the Executive: Ministers, Special Advisers and the permanent Civil Service* Cm 5775 April 2003, para 10.13
- ⁶¹ Q549 HC 686 of Session 2001-2
- ⁶² Q552 HC 686 of Session 2001-2
- ⁶³ *Statistics: a matter of trust* Cm 3882 1998 and *Building Trust in Statistics* Cm 4412 1999
- ⁶⁴ *Financial Times* 18 July 2002 'Watchdog challenges statistics service chief
- ⁶⁵ *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England & Wales*
- ⁶⁶ *Consultation Paper from the Bar Council Working Party on Judicial Appointments and Silk* 12 March 2003
- ⁶⁷ Evidence by Lord Chancellor to LCD select committee 2 April 2003
- ⁶⁸ 10 Downing Street Press Notice 'Prime Minister Announces Members of the House of Lords Appointments Commission' 4 May 2000

Part II Key Characteristics for an Officer of Parliament

A Themes of this research

The initial mapping exercise of UK constitutional watchdogs has indicated how they have been given various forms of institutional architecture, without any systematic thought by their creators as to the appropriate criteria characterising such officers or commissions. As these posts were created, there was little attempt to formulate common principles for their relationship with Parliament or even to find a generic term for them. 'Constitutional officers' and 'independent parliamentary agencies' are other terms used to describe Officers of Parliament in Canadian literature on the subject. This part attempts to list the characteristics which an Officer of Parliament ought to possess in order to establish an appropriate relationship with Parliament and the public. It draws on Commonwealth and Irish experience to broaden the debate.

B Defining characteristics for Officers

The most important themes in characterising an Officer are set out below:

1. Formal parliamentary involvement in the institutional architecture

Statute gives constitutional watchdogs a formal architecture. But only two UK constitutional watchdogs have a fully worked out parliamentary structure which offers the body statutory protection from interference by Parliament or Government. These are:

- Comptroller and Auditor General
- Electoral Commission

The Electoral Commission is closely modelled on the C and AG in structure. Both have statutory parliamentary committees which are responsible for the budget and for approving forward planning, the Speaker's Committee for the Electoral Commission and the Public Accounts Commission for the C and AG. Neither are directly involved in appointing the watchdogs. It is worth noting that, though the Scottish Parliament follows the UK model, in Canada and Australia the Public Accounts

Committees of the parliaments are often directly involved in the selection and supervision of the equivalent to the C and AG, and no intermediate body such as the Public Accounts Commission is seen as necessary.

The Parliamentary Commissioner for Administration has some of the characteristics of an Officer but lacks the statutory basis given the C and AG. Although he reports to a Parliamentary Committee, he does not have a separate statutory body, akin to the Public Accounts Commission and the Speaker's Committee to ensure financial independence.

This definition also does not include the Parliamentary Standards Commissioner. This is because, as currently constituted, the PSC cannot be considered an independent Officer of Parliament. Instead, he is subject to the body which he is investigating, and therefore independence is compromised. He is appointed by the House of Commons Commission on a three year contract and may be dismissed by resolution of the House.⁶⁹ The procedures used by the Commission have been criticised by the Committee on Standards in Public Life as insufficiently robust. In response, the Commission stated that the type of independent officer envisaged by the Wicks Committee could only be established by statute.

The other main UK constitutional watchdogs established by statute are:

- Health Service Commissioner
- Commission for Local Administration and Local Government Ombudsmen
- Information Commissioner
- Audit Commission
- Standards Board for England
- Equal Opportunities Commission
- Commission for Racial Equality
- Disability Rights Commission

The founding legislation typically contains some provision inhibiting dismissal of Commissioners and other criteria characterising a body which is constitutionally distinct from Parliament and the executive: these include a reporting relationship, separate staff and funding arrangements. But they do not have the explicit safeguards given

the Electoral Commission and the Comptroller and Auditor General.

These other constitutional bodies do not have statutory institutional safeguards:

- Committee on Standards in Public Life
- Commissioner for Public Appointments
- Civil Service Commissioners
- National Statistics Commission
- Commission for Judicial Appointments
- House of Lords Appointments Commission

This list is not exhaustive, and does not include the Security Commissioner, Commission for Healthcare Audit and Improvement or the Political Honours Scrutiny Committee. Nor does it take in the territorial counterparts, such as the Chief Electoral Officer or the Human Rights Commission in Northern Ireland. Nor does it include parliamentary committees, such as the Joint Committee on Human Rights, established as an alternative to an independent Commission. But they are key examples of the types of bodies which are candidates for Officer status.

Most of these non-statutory constitutional watchdogs are constituted as Non Departmental Public Bodies (NDPBs) with a sponsoring government department. The level of independence accorded to NDPBs varies widely across the sector and is not necessarily related to the formal structure. Instead, the culture is a more important factor. Some Nolan bodies (Civil Service Commissioners, Public Appointment Commissioner) are Crown appointments which gives a nebulous accountability to the public interest distinct from the government of the day.

International comparisons

The New Zealand Parliament offers the most useful guidance in constitutional architecture. An Officers of Parliament Committee is chaired by the Speaker and has other senior members. The Committee has four functions as set out in the current Standing Order 191:

191 Officers of Parliament Committee

(1) The House establishes an Officers of Parliament Committee at the commencement of each Parliament. The committee consists of

the Speaker and seven other members. The Speaker is the chairperson of the committee.

(2) The committee—

(a) recommends to the House in respect of each Officer of Parliament an estimate of appropriations for inclusion as a Vote in an Appropriation Bill, and also recommends to the House any alteration to such a Vote:

(b) recommends to the House an auditor to be appointed by the House to audit the financial statements of each Officer of Parliament:

(c) considers any proposal referred to it by a Minister for the creation of an Officer of Parliament:

(d) may develop a code of practice applicable to all Officers of Parliament.

The Committee takes its responsibilities seriously and is mindful of the importance of fixing funding levels for Officers at a level which maintains their independence. Officers are funded by individual Annual Vote, which is recommended by the Officers Committee for adoption in an appropriation bill. It has considerable similarities with the Public Accounts Commission and the Speaker's Committee.

2. Safeguards for recruitment, appointment and dismissal of Officers

Primary legislation governs the procedure for the following watchdogs:

- Comptroller and Auditor General
- Parliamentary Commissioner for Administration
- Electoral Commission
- Health Services Ombudsman
- Commission for Local Administration (Local Government Ombudsman)
- Audit Commission
- Standards Board for England
- Equal Opportunities Commission
- Commission for Racial Equality
- Disability Rights Commission

The various statutes offer varying degrees of consultation before appointment and protection against dismissal. Only the first three have any parliamentary involvement in appointment and

dismissal. Others are appointed by the relevant Secretary of State, sometimes after formally consulting interest groups (Audit Commission, Local Government Ombudsman). All have some protection against dismissal, but the form of words vary in statute. Most are modelled on the protection given against dismissal of judges, traditionally seen as the touchstone of independent tenure.

The other watchdogs do not have a statutory basis. Some are Crown appointments made under Order in Council (Civil Service Commissioners, Public Appointments Commissioner, First Commissioner for Judicial Appointments), others are simply made by the Secretary of State or Prime Minister using the Commissioner for Public Appointment principles (Statistics Commission, , House of Lords Appointments Commission, Committee on Standards in Public Life). There appears to be no clear rationale for the division, apart from the novelty of these bodies. The Office of the Commissioner for Public Appointments Code of Practice appears to be in general use, but it is important that the appointments process is transparent as possible. The Standards Commissioner is a special case—here the Standing Order which provides for dismissal by resolution of the House undermines rather than buttresses independence. If a statutory Commissioner were created, a different mechanism would be required to inhibit summary dismissal.

When or if the Statistics Commission or the House of Lords Appointments Commission are made statutory bodies, some parliamentary involvement should be incorporated in the legislation. The question of confirmatory hearings by select committees arises. This would allow Parliament to examine appointees, but not offer Parliament the opportunity to make the appointments themselves. Where the main function of the Officer is to act on Parliament's behalf, then that institution ought to have some 'ownership' of the appointments process. At the minimum this should mean a parliamentary representative on the selection panel, and at the maximum the an UK equivalent of an Officers of Parliament Committee should make the appointment as the Scottish Parliamentary Corporate Body does in Scotland. The concern is that partisan pressures overwhelm the impartial public appointments procedures.⁷⁰ The involvement of senior permanent parliamentary

staff, rather than individual Members might be one safeguard. The experience of Elizabeth Filkin has set back the argument for direct parliamentary involvement. But this is an unusual Officer type and should not be used to dismiss its use for more conventional models. This argument is developed further in Part IV.

Commonwealth comparisons

In Canada, except for the Auditor General, Officers are appointed or approved by Parliament. The Governor General is responsible for appointing the Auditor General for a ten year term. Other appointments are made by resolution of one or both Houses. The Privacy Commissioner is appointed by the Governor General after resolutions by both Houses for a seven year term, whereas the chief Electoral Officer is appointed by the Commons only for no set term apart from retirement age. Only the Information Commissioner was subject to hearings before committees of both Houses before his appointment was finalised and the first time this occurred was in 1998 following opposition to an earlier nominee.

The Procedure Committee of the Canadian Parliament has recommended that all government nominees for parliamentary officers should appear before a parliamentary committee prior to a vote on their appointment. The nomination would be put forward after consultation with the opposition parties. The committee would have 30 days to consider and report on a nomination. After no more than 30 days, a non-debatable motion would be passed in both Houses to confirm or reject the appointment⁷¹ In Manitoba, an all-party committee hired and appointed an ombudsman, and a similar process is undertaken in Saskatchewan for the Provincial Auditor. Committee involvement in appointments of these parliamentary officers is common in Canadian provincial legislatures. Unlike the UK, there appears to be little interest in having a separate parliamentary body to oversee the budget of the Auditor or to monitor relations with the auditor. This is seen as the role of the Public Accounts Commission. There have been tussles over pre-appointment hearings, for example over the appointment of the Privacy Commissioner in 1990.

In general, seven year terms are the norm, with the possibility of re-appointment, but the C and

AG and Public Service Commissioners are appointed for a ten year term. The Government makes the initial selection for the positions of Information, Official Languages and Privacy Commissioners.⁷²

In Australia the Auditor General is appointed for a ten year term, with no re-appointment, and the Ombudsman seven, with a possibility of re-appointment. Following the 1997 legislation, the Joint Committee of Public Accounts and Audit (JCPPA) took on an active role in the appointment of the Auditor General. In New Zealand, the terms are five years with the possibility of re-appointment for the Ombudsman and the Environment Commissioner and seven years with no re-appointment for the Comptroller and Auditor General. In Ireland, no consistent rule applies. One individual, Kevin Murphy, has been appointed Ombudsman, Information Commissioner, a member of the Standards in Public Office Commission and of the Referendum Commission. These appointments are made under separate legislation and he is appointed by the President on the address of both Houses.

3. Remuneration and expenses for watchdogs

The salaries of UK Officers who are constitutionally independent of the Executive are met out of the consolidated fund and are not subject to the annual supply procedure, whereby each department's vote is set by the Executive and approved by Parliament. They are listed in a separate part of the Fund, known as the Standing Services. This arrangement is applied to the C and AG, the Ombudsman, the Information Commissioner, the Chief Electoral Officer for Northern Ireland and the Electoral Commissioners. It is an important symbol of independence and should always be considered as part of the template for establishing a constitutional watchdog.

There are unexplained variations in practice. Some Commissioners are paid (Electoral Commissioners, Statistics Commissioners) even where the work is part-time only. Others receive expenses only. Some salaries are set by parliamentary resolutions (Electoral Commission, Parliamentary Commissioner for Standards Parliamentary Ombudsman C and AG) which may cause problems when uprating orders are needed. Non-statutory bodies may offer expenses or remuneration, and as usual in

the NDPB sector there is no consistency in approach. Practice appears to depend on the most appropriate model chosen on which to base the new body, which may depend to some extent on the normal practice of the sponsoring department. Consistency of approach would be desirable.

4. Independent funding arrangements

More importantly, the activities of the following watchdogs are funded from the consolidated fund protecting them from across the board budget cuts:

- Comptroller and Auditor General
- Electoral Commission

Others are funded either from

- a departmental vote (Parliamentary Ombudsman and Health Service Ombudsman Civil Service Commissioners, Commissioner for Public Appointments, Committee on Standards in Public Life, Commission for Judicial Appointments, House of Lords Appointments Commission) or
- by grant in aid or annual grant (Statistics Commission, Local Government Ombudsman, Standards Board, Information Commissioner, equality commissions) or are largely self-financing (Audit Commission). This offers a measure of financial independence.

The position of the Parliamentary Ombudsman seems particularly anomalous given its statutory basis. But the Nolan-type bodies funding is potentially insecure, resting directly on Cabinet Office departmental vote. Funding ought not to be based on assessments by the executive about the effectiveness of the body. One solution is a statutory duty for each Office to make public its financial requirements. This transparency is likely to inhibit routine demands for cuts. In return, the Office would need to be held to account for its budget and forward planning to a separate body, such as the Public Accounts Commission. The New Zealand model of a separate Officers of Parliament committee is particularly attractive, as it avoids the need to establish a multiplicity of separate monitoring committees.

Commonwealth comparisons

International practice varies, as in the UK. The Australian and New Zealand auditors have statutory protection for their budgets and the electoral commissions also have considerable independence in all the states surveyed. Others are more likely to suffer executive budget cuts. The action of the Queensland government in 1996 is instructive, when the budget of the Crime and Misconduct Commission was cut by 10 per cent after a series of clashes with the executive and parliamentarians. Attempts to cut the budget of the Irish Ombudsman were thwarted in 1987 when the Ombudsman used his statutory powers to issue a special report to Parliament. In Canada, Government budget cuts in the 1990s affected constitutional watchdogs, and they appear under-funded in relation to their role.⁷³ Only the Auditor General in Canada has the right to complain to Parliament about its resource levels. The current Canadian Information Commissioner, John Reid, has complained about budget cuts inflicted on his office by Treasury Board and Ministry of Justice and has called for a more independent process.⁷⁴ Similar problems are faced by the Privacy Commissioner there.⁷⁵

5. Independent staffing arrangements

Statutory bodies, such as the C and AG, Audit Commission and Electoral Commission tend to have directly appointed staff who are not classified as civil servants.⁷⁶ This is an important principle buttressing independence. Smaller non-statutory bodies are staffed by civil servants, often on secondment, which gives some measure of operating independence. These bodies cannot offer career progression, and it is unrealistic to expect all to have directly recruited permanent staff. But it is important that appropriate training is offered to explain the culture of the Office.

In the Commonwealth, it is the norm for recognised Officers of Parliament to have separate, directly appointed staff in all the states surveyed.

6. Reporting responsibilities to Parliament

Annual reports are the main form of accountability reporting, ensuring that Parliament is aware of the work of the Office. But operational reporting on particular investigations

is also an important aspect, since it enables Parliament to follow up on the work of the watchdog. The Ombudsman for example has the power to make a special report to Parliament where injustice to a complainant has not been remedied.

Only a minority of constitutional watchdogs have formal reporting responsibilities of either type, on a spectrum ranging from presentation of annual reports or special reports to Parliament to a structural (though not necessarily a statutory) relationship with a parliamentary committee. The relationship is normally confined to the House of Commons, although a number of watchdogs are separately individual members of the Lords (individual Committee members of the Committee on Standards in Public Life, Chair of the Civil Service Commissioners).

There is a case for a more formal involvement with the House of Lords. A Human Rights Commission, if established, would report to the Joint Committee on Human Rights, and there are some reasons for involvement of the upper House in public service issues, perhaps through a joint committee. There is some considerable potential for a more systematic use of joint committees on constitutional issues. At present the Constitution Committee in the Lords has a wide range of interests. The Public Administration Committee in the Commons has developed a similarly roving brief, which might be inhibited by the new Lord Chancellor's Department select committee which will cover the full range of departmental responsibilities. But the focus of Officers on engaging with the Commons should not be neglected as a result. The lower House remains the only elected body.

The following have a statutory or a well-established relationship with a select committee or statutory parliamentary committee:

- Comptroller and Auditor General
- Parliamentary Ombudsman
- Parliamentary Commissioner for Standards
- Electoral Commission
- Parliamentary Standards Commissioner

The Standards Commissioner now makes an annual report to the Standards and Privileges Committee. The others in this category are required under statute to make an annual report to a parliamentary body and the first two

additionally make regular reports on investigations

Some watchdogs are required to present reports to Parliament but have no other formal relationship:

- Health Service Ombudsman
- Information Commissioner

Some present annual reports to a Secretary of State who then lays it before Parliament:

- Standards Board for England
- Audit Commission
- Equal Opportunities Commission
- Commission for Racial Equality
- Disability Rights Commission

Bodies appointed under the royal prerogative make annual reports to the Crown (in reality the public in general):

- Civil Service Commissioners
- Public Appointments Commissioner

The remaining non-statutory bodies issue annual reports to their sponsoring departments and the wider public. The Committee on Standards in Public Life makes its report to the Prime Minister, who brought the Committee into existence. This is anomalous for reports which deal with standards of conduct in Parliament and with local government. Greater consistency of approach should be developed, with all constitutional watchdogs submitting annual reports to Parliament as a matter of good practice.

The C and AG, Standards Commissioner, and Ombudsman have formal relationships with Commons select committees, either by statute or under Standing Orders. The position of the Electoral Commission is unfortunate, since electoral responsibilities are split between the departmental committees of the ODPM and the LCD. It has no formal relationship with either select committee. Some smaller bodies have developed working relationships with a particular select committee, which may or may not involve regular appearances:

- Statistics Commission
- Civil Service Commissioners
- Commissioner for Public Appointments
- Information Commissioner

The equalities commissions will appear before a selection of departmental select committees, but do not have a natural role. They have not developed a relationship with the Human Rights Joint Committee. Others do not have any formal relationship and do not present their report directly to Parliament but to the sponsoring department. Select committees have not taken interest in these bodies so far, but the formation of the LCD committee may have some impact on the level of scrutiny for the last two at least:

- Committee on Standards in Public Life
- Commission for Judicial Appointments
- House of Lords Appointments Commission

A related issue is accountability to either or both Houses of Parliament—the Electoral Commission is solely accountable to the Commons, which is the only elected House, but should not the Lords have a role reviewing the role of the Civil Service Commissioners? The role of the Lords in relation to Officers should be a high priority for examination, especially as the prospects for reform of the membership of the Lords recede. Involvement may not be appropriate for established Officers where there are well-known formal relationships with the Commons, but some newer bodies would benefit from expert scrutiny in the Lords, as a less partisan House. Canadian experience is particularly relevant here, as their Officers generally have a formal relationship with both Houses. In particular, the Senate has had a role in the appointments process and pre-appointment hearings.

Commonwealth comparisons

Officially recognised Officers, such as Ombudsmen and Auditor Generals have a formal reporting and operational relationship with their respective parliaments in the states surveyed. Practice varies with other types of constitutional watchdogs. None of the electoral commissions have formal operational relationships, although all report to parliament on an annual or electoral cycle.⁷⁷ But most tend to have close informal relationships, for instance, the Australian Electoral Commission has a regular dialogue with the Joint Standing Committee on Electoral Matters. Parliamentary ethics commissioners tend to be closely monitored by the relevant parliamentary committees. Some committees take a general

interest in constitutional issues and so will tend to hear evidence from the watchdogs on a regular basis. One example is the Finance and Public Administration Legislation Committee in the Australian Senate. This illustrates the potential role for committees in the upper house in monitoring the public service, as they tend to have a less partisan approach than their equivalents in the lower house.

In Canada, successive Information Commissioners have complained that parliamentary committees have not responded to annual reports and that the Parliament itself fails to use its scrutiny role effectively.⁷⁸ The Official Languages Commissioner receives regular reviews from parliamentary committees, and has a dedicated committee—the Joint Committee of Official Languages—but the Privacy and Human Rights Commissioners receive very little attention. The Commons committee designated as responsible for overseeing the Information Commissioner (Standing Committee on Justice and the Solicitor General) took 16 years to review the annual report of the Information Commissioner. Until very recently there was no parliamentary committee with responsibility for the public service, so the Public Services Commission did not receive dedicated scrutiny. On the other hand, there is much informal contact—MPs have become one of the largest groups of users of the *Access to Information Act*.

A debate is currently underway about the efficacy of the scrutiny role of Parliament in Canada, and the role of Officers of Parliament is an important aspect of that. A report from the Procedures Committee on the modernisation of Parliament in 2001 found that annual reports of Officers were often neglected and recommended that annual reports should be referred to the relevant parliamentary committee. A Commons Committee on Government Operations and Estimates has been established which will receive and review reports issued by a number of Officers of Parliament, including the Information and Privacy Commissioners.

The Senate has also established a Committee on Justice and Human Rights designed to build a relationship with the Commission on Human Rights. It has recommended that the federal and state human rights commissions be answerable to the legislature rather than to the executive.⁷⁹

The federal Commission now reports directly to the Speakers of both Houses. The impetus for change were drastic budget cuts in the British Columbian commission and other Australian commissions.⁸⁰ Symptomatic of trends of thinking was the suggestion from the Senate following September 11 2001 that an Officer of Parliament be appointed to oversee the implementation of the Anti-Terrorism legislation.⁸¹ Legislation to require the Ethics Commissioner to make annual reports directly to the Speakers of both Houses is also pending.⁸²

Professor Paul Thomas proposed a Joint Standing Committee on the Public Service to receive reports from the five parliamentary officers as well as the Public Service Commissioner and the Ethics Counsellor.⁸³ This has similarities with the New Zealand model, but takes account of a bicameral parliament where Senators have a traditional interest in public service matters. He suggested the additional function of performing a 'quinquennial review' on each Officer of Parliament in turn, to establish its continuing role. The Canadian Centre for Management Development published a report which calls on Parliamentarians to explore different ways of establishing and maintaining productive relations between Officers of Parliament and the public administration.⁸⁴

7. Independence from Parliament

Constitutional watchdogs need statutory protection from Parliament as well as government. The Comptroller and Auditor General is safeguarded from interference in his functions by section 1(3) of the 1983 Act. The Electoral Commission is not subject to parliamentary direction. The relationship between the PCS and the Standards and Privileges Committee, as currently set out in Standing Orders of the Commons does not offer sufficient protection of the Commissioner's independence. The clash between Elizabeth Filkin and the House of Commons Commission over the appropriate level of resourcing for the office also illustrates the need for institutional safeguards. These are issues which the Wicks Committee has highlighted for attention.

Commonwealth comparisons

Examples abroad illustrate the need for such protection. The zealous investigation of parliamentary allowances by Queensland's

Crime and Misconduct Commission led the Government to introduce legislation in 1997 designed to reduce the independence and resources of the Commission. The Parliamentary Criminal Justice Commissioner, now renamed the Parliamentary Crime and Misconduct Commissioner, assists a parliamentary committee in scrutinising the Commission.⁸⁵ The parliamentary committee can order the Commission to initiate specific investigations, and can also demand access to operational information gained by the Commission in the course of an investigation. The Commissioner can decide whether the Commission had exercised its powers appropriately, but an important safeguard remains. The Commissioner can only take action where requested by a bi-partisan majority of the committee. This is an important buffer, but may not be completely adequate protection for the Commission. It is particularly tricky to establish robust arrangements in the area of parliamentary ethics regulation.⁸⁶

8. Powers to secure information

Statutory regulatory bodies tend to possess powers to secure information from the executive to assist them with performing their role. These include the C and AG, and the Parliamentary Ombudsman. Other statutory bodies have more general powers to obtain information from a range of agencies, for instance, the Electoral Commission from political parties and the Information Commissioner from private sector bodies in respect of the data protection role. Both bodies also have enforcement powers, as does the Audit Commission in respect of district audit. The extent to which bodies with judicial and enforcement powers ought to be directly accountable to Parliament is problematic, since Parliament should not interfere with individual judicial decisions. Nor should powers of direction be automatically subject to parliamentary approval. This would carry the danger of interference by an executive—dominated parliament in the functions of an independent agency.

The legal position on the applicability of parliamentary privilege to those constitutional watchdogs currently categorised as Officers of Parliament is not clear-cut, but in practice the C and AG and the Ombudsman rely on their statutory powers to obtain information and summon witnesses.⁸⁷ But following legal advice,

the Standards and Privileges Committee have argued that the PCS cannot exercise powers independently of the committee, without statutory authority. Therefore parliamentary privilege is essential to compel compliance with the Commissioner. The C and AG also operates under the umbrella of parliamentary privilege which protects his communications with the Public Accounts Committee. However his main powers to obtain information are statutory. But a department which failed to provide him with documents reasonably needed for the discharge of his statutory functions would potentially be guilty of contempt, and punishable by the House as a breach of privilege. This type of protection commonly applies to servants of the House, whether constitutional watchdogs or permanent staff.

Today, the main practical effect of the existence of parliamentary privilege at Westminster is to protect exchanges of information between Officer and committee or reports to the House from legal challenge or FoI requests. In addition, a candidate for a direct appointment by the House might find it difficult to contest the selection in an employment tribunal, due to the uncertain boundary of parliamentary privilege. It probably does not extend as far as employment matters, but parliamentary privilege remains uncodified and its reach unexamined by the courts.⁸⁸ This contrasts with the position in the Scottish Parliament, where the Scottish Parliamentary Corporate Body is at risk of legal challenge, since Westminster did not confer parliamentary privilege on this devolved body.

Advisory bodies do not have these statutory powers, so that for example the Committee on Standards in Public Life has no power to compel witnesses to attend its hearings. Where the subject matter is clearly advisory, the lack of clear powers is probably acceptable. Problems arise where a non-statutory body also has a regulatory role. The Commissioner for Public Appointments expects departments to take action following audits of their appointments procedures, but it lacks formal enforcement powers.

Commonwealth comparisons

Auditors and Ombudsmen have similar powers to their counterparts in the UK Parliament. Information and Privacy Commissioners tend to have semi-judicial powers in addition. Newer

models such as a Children's Commissioner, and Environmental Commissioner have mainly advisory powers. The parliaments surveyed in this study have the protection of parliamentary privilege. Australia has achieved statutory codification in the *Parliamentary Privilege Act 1987*.

As part of the review conducted by the JCPPA of the *Auditor General Act 1997* in August 2001, the question of the applicability of parliamentary privilege was discussed, and referred to the Privileges Committee to consider.⁸⁹

8. Extra-parliamentary accountability

Traditionally, Officers are accountable to Parliament in terms of annual reports, appearances before Committees, but this accountability is illusory if Parliament does not put time and effort into its relationship with its Officers. At the minimum this should mean finding time to review reports.

Most bodies which do not report directly to Parliament have some type of accountability relationship with their sponsoring department, if only in terms of expenditure properly accounted

for. Statutory bodies tend to be subject to the jurisdiction of the C and AG and the Parliamentary Ombudsman. Nearly all the bodies, apart from the Judicial Appointments Commission maintain separate websites, but these vary in quality. Not all are structured to appeal to the general public.

The Committee on Standards in Public Life has set much of the parameter for the debate on public ethics since its creation in 1994. But the bodies which were created following its recommendations do not have any reporting responsibility to it. A number of watchdogs have a role in appealing to the public interest or the crown, but this is a very amorphous area (Public Appointments Commissioner, Civil Service Commissioner, Committee on Standards in Public Life, Parliamentary Commissioner for Standards). Others have tried to develop relationships with consumers (Audit Commission, Public Appointments Commissioner, Judicial Appointments Commission, House of Lords Appointments Commission, Committee on Standards in Public Life, equalities commissions) which involves a strategy of raising public profile and attempts to gauge public opinion about their subject area.

⁶⁹ The potential applicability of employment law to the Commissioner in relation to parliamentary privilege has not been tested

⁷⁰ Part III illustrates one example of this, with the appointment of the Scottish Information Commissioner, Kevin Dunion

⁷¹ Prof Paul G Thomas 'The Past, the Present and Future of Officers of Parliament: Paper for conference Independence and Responsibility: A Conference on Officers of Parliament University of Saskatchewan 2-3 November 2001'. Pp 26-27 Report of the Special Committee on the Modernisation and Improvement of the Procedures of the House of Commons 21 March 2001

⁷² *The Past the Present and the Future of Parliamentary Officers* p26

⁷³ Canadian Centre for Management Development *Relations between Parliamentary Agencies and the Public Service: New Perspectives* November 2002 p16

⁷⁴ Annual Report 1998-99. The Minister of Justice is the adversary for the Commissioner in any legal action undertaken by him, but his budget falls under that department's control.

⁷⁵ Privacy Commissioner Annual Report 1997-98

⁷⁶ The Parliamentary Ombudsman staff form an exception, as civil servants

⁷⁷ The Irish Referendum Commission is included within this classification

⁷⁸ *Ottawa Citizen* 9 October 2002 'Watchdog's bark commonly ignored

⁷⁹ *Promises to keep: Implementing Canada's Human Rights Obligations*

⁸⁰ Colm O' Cinneide *A Single Equality Body: Lessons from Abroad* 2002 University College London for the Equal Opportunities Commission p48

⁸¹ Megan Furi, "Officers of Parliament: A Study in Government Adaptation" (University of Saskatchewan, 2002) MA thesis

⁸² The Ethics Commissioner reports to the Prime Minister following investigations of complaints against ministers. There has been a long campaign to make his office accountable to Parliament

⁸³ Professor Paul G Thomas *The Past Present and Future of Officers of Parliament*

⁸⁴ *Relations between Parliamentary Agencies and the Public Service: New Perspectives* November 2002

⁸⁵ Criminal Justice Act 1989 and Crime Commission Act 1997. A summary of the functions is available from the Queensland Parliamentary Service Annual Report at <http://www.parliament.qld.gov.au/>

⁸⁶ Crime and Misconduct Act 2001, Part IV

⁸⁷ *R v Parliamentary Commissioner for Administration ex p Dyer* 1994 All ER 375 found that the Ombudsman was amenable to judicial review. The courts have not been asked to establish whether the Ombudsman possesses parliamentary privilege, but this must be considered unlikely

⁸⁸ The Report of the Joint Committee on Parliamentary Privilege; HL 43-I, HC 214-I, Session 1998-99 recommended legislation to establish the parameters of privilege—it remains unimplemented

⁸⁹ Report 386

Part III The Scottish experience

A Introduction

This part looks at how Scotland has wrestled with the relationship between constitutional watchdogs and the new Parliament, to create, by default, a template for new watchdogs.

1. A different type of parliament

Devolved Scotland⁹⁰ is a useful comparator for this research into 'Officers of Parliament', as it has both points of comparison and of contrast with the Westminster situation. The Scottish Parliament operates in similar ways to the UK Parliament, as a member of the 'Westminster model' family of parliaments, but with the key difference, that it is a creature of statute. It was established by an Act of the Westminster Parliament, the Scotland Act 1998, and so its powers, duties, procedures and practices all derive from that statutory basis. This means that, although many aspects of the Scottish Parliament may bear a superficial similarity to those at Westminster, they are often founded upon a completely different basis.⁹¹

This is especially the case with the powers and immunities of the Parliament as a body which does not benefit from any form of 'parliamentary privilege' in the Westminster sense. It simply has a range of legal protections granted to it, either by the general law, or by statute.⁹² Its actions are subject to challenge, either in the courts or by administrative action by UK or Scottish ministers, and this applies to its institutional activities as well as to its formal proceedings.⁹³

Therefore, not only must the legislation of the Parliament be within its lawful powers, so must any action it takes, directly or through its staff, as an employer, a contractor or otherwise. This means that the Parliament takes great care that its actions are 'challenge-proof'. In this respect, the Parliament is a relevant comparator for what might be the situation at Westminster if the actions and proceedings of the UK Parliament were ever, through reform or abolition of its current privilege regime, to be subject to legal challenge.

2. A parliament with no 'Officers'

The Scottish Parliament does not use the concept of the 'Officer of Parliament', either in

the sense used in this study, or to denote the most senior members of its permanent staff. Chapter 3 of the Parliament's initial Standing Orders, which was entitled 'Officers of the Parliament', contained provisions relating to the Presiding Officers, the Scottish Parliamentary Corporate Body ('SPCB'⁹⁴) and the Auditor General for Scotland.⁹⁵ However there was no attempt to define what, if anything, these 3 categories had in common or why they were encompassed within the term 'officers of the Parliament', and the phrase did not feature in either the 'index of defined expressions' in Rule 18.2 or the Index to the SOs itself. It certainly did not seem to be related to any sense of employees of the Parliament, which are described in the Scotland Act as the Clerk, Assistant Clerks⁹⁶ and the members of 'staff of the Parliament', none of whom is anywhere described in terms of an 'officer'. It may simply be an extension of the term used as part of the title of the first, and most important official, in that Chapter, the Presiding Officer.

The Parliament has not been required to address this terminological issue, other than in this SO connection. When officials briefed the Procedures Committee in September 2001 on proposed new SOs covering the selection of nominees for royal appointment, they demonstrated the inherent ambiguities in the SOs' use of the phrase, 'officers of the Parliament':⁹⁷

The title of Chapter 3 of the existing standing orders is "Officers of the Parliament". The heading for the new draft standing orders that were seen by the Presiding Officer, the Bureau and the SPCB fitted in with this title by referring to the new Rules as being concerned with the "Appointment of particular officers of the Parliament". On reflection, we now think that the people who are appointed to these new independent posts are not "officers of the Parliament" in the same way as the people who are presently covered by Chapter 3. We have therefore taken the view that it would be more appropriate to change the title of Chapter 3 so that it read "Officers of the Parliament and other officers". We have also changed the heading of the new Rules so that they now refer to the "Nomination of individuals for appointment by Her Majesty".

As at Westminster, a statutory body rather than the parliament itself is the formal, legal employer and contractor for the purposes of the Parliament's administration. In the Scottish context, this body is the Scottish Parliamentary Corporate Body ('SPCB' or the 'Parliamentary corporation'),⁹⁸ whose members are the Presiding Officer and four MSPs appointed in accordance with Standing Orders. Its general duty is to "provide the Parliament, or ensure that the Parliament is provided with the property, staff and resources required for the Parliament's purposes."⁹⁹ In particular, it appoints, and determines the terms and conditions of, the "staff of the Scottish Parliament", that is, the Clerk of the Parliament, Assistant Clerks and "other staff".¹⁰⁰ No relevant guidance is provided by or under the Scotland Act as to the status of parliamentary staff. For example there is no requirement for terms and conditions to be 'broadly in line' with the Civil Service, as is applied to House of Commons staff.¹⁰¹

3. Identifying Scottish 'parliamentary officers'

As there is no official designation of 'Officer of the Parliament' in devolved Scotland, either for the most senior staff of the Parliament or for any public officials, other as already described, any attempt to devise such a categorisation is essentially subjective. It could even be misleading, if order is attempted to be made of something that may be genuinely ad hoc. This study analyses those public offices which have been created because of, or under, devolution, which appear to be similar to what could be regarded, in the Westminster sense, as an 'Officer of Parliament' post. They include both single-person posts, and collective bodies.¹⁰²

Three groups of posts were identified for the purposes of this research. A more detailed table of these 12 posts is contained in a separate note accompanying this study, which summarises some of the key characteristics used here.¹⁰³ The three groupings may be described as follows:

1. 'Parliamentary officers':

These are:

(i) *nominated by the Sovereign on the Parliament's nomination (4):*

- *Scottish Public Services Ombudsman (and deputy Ombudsmen) ('SPSO')*: This post came into being in late 2002, under the Scottish Public Services Ombudsman Act 2002, following an Executive consultation exercise on a proposal to create a 'one-stop shop' public ombudsman service to replace, among others, the temporary Scottish Parliamentary Commissioner for Administration
- *Scottish Information Commissioner ('SIC')*: Under the Freedom of Information (Scotland) Act 2002, this Officer will oversee the statutory Fol scheme which is due to come into full force in the coming years.
- *Commissioner for Public Appointments in Scotland ('CPAS')*: This official, created by the Public Appointments and Public Bodies etc (Scotland) Act 2003, and to be appointed after the Parliamentary elections of May 2003, will replace existing administrative arrangements for ensuring propriety in the public appointments process
- *Commissioner for Children and Young People ('CCYP')*: This post follows a similar innovation in Wales, and was established through a Committee Bill, enacted as the Commissioner for Children and Young People (Scotland) Act 2003

(ii) *established in a similar way immediately prior to devolution (2):*

- *Auditor General for Scotland ('AGS')*: This is the devolved equivalent of the Comptroller & Auditor General, essential in the system of public audit, and established in the Scotland Act 1998 itself.
- *Scottish Parliamentary Commissioner for Administration ('SPCA')*: The SPCA scheme was expressly created by an Order under the Scotland Act 1998 as a transitional arrangement until the Parliament made its own arrangements, and so ceased once the SPSO scheme was established.

(iii) established in a similar way under devolution (2):

- *Scottish Parliamentary Standards Commissioner ('SPSC')*: Unlike the House of Commons' own Standards Commissioner, this post was created by statute (the Scottish Parliamentary Standards Commissioner Act 2002) to oversee ethical standards in the Parliament, and the Officer was appointed at the end of 2002.
- *Temporary Standards Adviser ('TSA')*: This post was created in 2000, under the Parliament's Standing Orders, as a committee advisor to assist the Standards Committee pending the establishment of what became the SPSC.

2. 'Quasi-parliamentary officers'

These are statutory bodies directly connected with the Parliament, and which have direct links to 'parliamentary officers' (2):

- *Scottish Commission for Public Audit ('SCPA')*: This is the devolved equivalent of the House of Commons' Public Accounts Commission, a body created by the Public Finance & Accountability (Scotland) Act 2000 to examine the proposed budget of Audit Scotland and for related functions
- *Scottish Parliamentary Corporate Body ('SPCB')*: This body was created by the Scotland Act 1998, to be the legal face of the Parliament, and to provide it with its staff, property and resources, much as the House of Commons Commission does at Westminster.

3. 'Non-parliamentary officers':

These are statutory bodies, which may include Non-Departmental Public Bodies (NDPBs), primarily accountable to Scottish ministers, but which bear significant similarities to 'parliamentary officers', and so could have been established as such (2):

- *Audit Scotland ('AS')*: This is roughly equivalent to a combination of the National Audit Office, including the local government audit service, established by the Public Finance and Accountability (Scotland) Act 2000
- *Standards Commission for Scotland ('SCS') (and its Chief Investigating Officer)*: This

supervises the ethical standards schemes for much of the devolved public sector, and was established by the Ethical Standards in Public Life etc (Scotland) Act 2000.

By designating the first group 'parliamentary officers', this study is assuming that these are the core posts which would or could, in a Westminster sense, be regarded as 'Officers of the Scottish Parliament' if such a designation existed. The key common criterion which is said to underpin such officers is independence—which means independence from the Executive and from other public bodies, but sometimes, in varying degrees, also independence from, though accountable to, the Parliament. As this whole research report demonstrates, the crucial structural and institutional issue for such posts is their relationship with a parliament. Can a public official be truly independent, if substantively dependent on, and accountable to, a parliament rather than an executive? How can a parliament balance, through its relationship with an officer, that degree of independence from it, and of dependence on it, that is built into the statutory scheme?¹⁰⁴

Further, as this study shows, there is a clear trend for such 'parliamentary officers' to be

- established in a substantively standard way by an Act of the Scottish Parliament;
- appointed by the Sovereign on the nomination of the Parliament,
- reporting annually to the Parliament, and
- resourced by and through the Parliament itself (primarily through the medium of the Scottish Parliamentary Corporate Body)
- subject to standard auditing and accounting arrangements.

B Key characteristics of a 'parliamentary officer'

While such a trend can be identified, it seems to have developed in a substantially unplanned way. The Parliament has made internal administrative and procedural arrangements to deal with their statutory obligations in respect of these officers, but there is no indication that it treats them as a discrete group, with particular rights and duties. As such, there is no formal or comprehensive theory or model—constitutional, political, administrative or otherwise—of such posts. Interestingly, the one attempt at such an overview has come from the Scottish Executive

itself, in a consultation paper published in early February 2003, on the establishment of a Scottish Human Rights Commission ('SHRC'). While this paper was published too late for proposed body itself to be included in this study as an example of a 'parliamentary officer', it does provide a neat description against which the other posts can be compared.

1. Scottish Human Rights Commission¹⁰⁵

The basis of the Executive's approach to the structure and accountability of the proposed Commission (SHRC) can be summed up by remarks of the Minister of Justice, Jim Wallace, at the consultation's launch:¹⁰⁶

The Commission will be established as an independent body. To ensure its independence, and more importantly to ensure that it is perceived as independent, we have proposed that the Commission should not be accountable to Scottish ministers but to the Scottish Parliament directly.

The Executive's detailed proposals are contained in Part C of the consultation paper, which is divided into 4 sections: accountability; membership and staff; accessibility, and funding

Though the Executive proposes that the Human Rights Commission be not accountable to it, but to the Parliament, it appears to assume that the constituent legislation will come from a bill initiated by the Executive rather than from the Parliament (either as a Member's Bill or a Committee Bill), and it did not appear to include the Parliament itself among the long list of 'interested parties' met by officials in formulating its proposals.¹⁰⁷

The paper identifies the independence of the Commission as "a key factor in its success" which "should be reflected in the arrangements for accountability." It defines these two criteria. *Independence* means that the Commission "must be in control of its own strategic direction and priorities (within the limits set by the statutory remit)" and "should not be subject to external control or direction." *Accountability* "is about ensuring that the Commission is answerable for the public funds it will spend and for the way it carries out its statutory functions. Since this is a public body, there must also be an appointments process that can offer guarantees of independence and impartiality."

Two forms of accountability were considered—to the Scottish Ministers, and to the Scottish Parliament. NDPBs are conventionally accountable to ministers, who would retain a degree of control over the organization, in areas such as budgeting, appointments, reporting and sponsorship/monitoring. However the paper noted that "Commissioner and Ombudsman bodies recently established in Scotland have been made accountable to the Scottish Parliament". This would mean that the areas of accountability noted above would be covered by the Parliament and the Scottish Parliamentary Corporate Body rather than the Scottish government. Thus,

The traditional accountability model (to Scottish Ministers) does not in any way compromise independence. However, we believe that it may imply a closer relationship to government than we envisage for the Scottish Commission. It may sit less well with the need for the Commission to be, and to be perceived to be, an independent body that can hold Scottish Ministers to account. Accountability to the Scottish Parliament may be seen to be a more appropriate, more open and more accessible model. MSPs would have an opportunity to hold the body publicly to account. In addition, recent procedures put in place for other Commissioners and Ombudsmen have established this as an acceptable and workable model.

The paper's preferred option is for the parliamentary model, and this is reflected in its detailed proposals. However, this does not mean that government would have no role in the Commission after its establishment. For example, the paper considers whether the location of the new body should be determined by the Executive or by the body itself.¹⁰⁸

2. Characteristics of the officers examined

A number of characteristics were identified, which appear to be relevant to this study. These relate primarily to the officer's establishment and status; appointment and removal; terms and conditions; staffing; financial and reporting arrangements, and relationship with the Parliament.

(i) Legislative basis

The type of legislation, if any, which creates the post is relevant, especially under a system of devolution. Amendment or repeal of statutory provisions covering posts created by or under UK legislation will, subject to any contrary provision, be outwith the power of the devolved Parliament or Executive. Devolved legislation—either Acts of the Scottish Parliament (hereafter ‘ASPs’ or ‘Scottish legislation’), or subordinate legislation made thereunder—must be made within the limits of the competence provided. This means that matters such as the structure, remit, scope and powers of a post must be *intra vires*, otherwise the legislation, and any relevant actions by, or relating to, the post-holder will not be valid.

The UK Parliament retains full power to legislate even in areas which are devolved, and can do so, and frequently does, with the consent of the Scottish Parliament under the ‘Sewel Convention’.¹⁰⁹ However, this mechanism has not yet been used directly to enact any legislation covering ‘parliamentary officers’.

The variety of legislative mechanisms used for the posts examined in this study mainly reflects the period covered, which straddled the establishment of devolution in 1999. From 1999, the norm (subject to any resort to the Sewel Convention) will be legislation by the Scottish Parliament,¹¹⁰ even where the Parliament was required or empowered to act by UK legislation, including the Scotland Act itself. This is the case for the ‘parliamentary officer’ posts of the Standards Commissioner and the Public Services Ombudsman, the Information Commissioner, the Public Appointments Commissioner and the Commissioner for Children and Young People. It is also the case for other posts examined here, that is, Commission for Public Audit, Audit Scotland and the Standards Commission. Most have been by way of an Executive Bill, though two (the Parliamentary Standards Commissioner and the Children’s Commissioner) have been by Committee Bills.

The type of Public Bill used to enact such legislation by the Parliament has no relevance to the legal nature of the subsequent legislation, as all Acts of the Parliament are of equal status. However, the choice between an Executive Bill

or a Committee or Member’s Bill can have a symbolic importance, especially

- for those posts directly connected with the Parliament (such as the SPSC);
- where it is thought that the perception of independence from the Executive is especially relevant (such as SIC or CPAS), or
- where the Parliament wishes to take ownership of the scheme within which the post operates (such as the CCYP).

A strong case can be made that any post that can be identified as a ‘parliamentary officer’ post, being, by definition a non-executive office, should be established by a non-Executive Bill.¹¹¹ It would seem contradictory for the Executive to steer through the Parliament legislation designed to establish a post intended to be both independent of ministers and accountable only to the Parliament.¹¹²

Only one ‘parliamentary officer’, the Auditor General for Scotland has been created by UK primary legislation, the Scotland Act 1998. Even in that case, further elaboration of that officer’s role and functions came in Scottish legislation, the Public Finance and Accountability (Scotland) Act 2000, though such further legislation was itself provided for by the Scotland Act itself (s70). One other body examined in this study, the SPCB, was created by UK primary legislation, the Scotland Act. One post, the now-defunct Scottish parliamentary ombudsman, was established by UK subordinate legislation under the Scotland Act, and its successor, the Scottish Public Service Ombudsman, was established by Scottish legislation, in part in fulfillment of a requirement in s91 of the Scotland Act.

All these posts, therefore, owe their existence to UK legislation or to a combination of UK and Scottish legislation.¹¹³ This means that any consideration of their legal regime has to take account of the ‘hierarchy of legislation’ that devolution has created. This could be relevant in a range of practical areas, such as the nature and extent of their operational powers. This hierarchy point can be carried ‘below’ the level of legislation, to action by the Parliament itself, by or under Standing Orders. In terms of comparison with the UK Parliament, this is relevant in establishment of the Parliament’s ‘standards regulator’, where a temporary post of

Standards Adviser was established as a committee adviser under Standing Orders, but the Standards Commissioner was deliberately established under Scottish primary legislation.

(ii) Status

The exact legal status of many of these posts, other than being creatures of statute, as appropriate, is often not stated explicitly in the constituent legislation. Collective bodies are more likely to be described more specifically, such as the SPCB, AS and the SCS each being a ‘body corporate’. The Temporary Standard Adviser’s status was clear, because it was established under the Standing Orders’ provisions for the appointment of committee advisers. Various statutory formulations are used for the creation of the individual officers. For example, the Public Services Ombudsman is described as “an officer”, whereas the Public Appointments Commissioner is “an office”.

More generally, the status of the posts is described negatively, in that they are not to be regarded as servants or agents of the Crown, or having any status, immunities or privileges of the Crown. The SPCB has crown status for certain purposes.¹¹⁴ By contrast, the Scottish Parliamentary Ombudsman did hold office under Her Majesty, and exercised his functions on behalf of the Crown, though both he and his staff were expressly stated not to be civil servants.

In terms of status, the most interesting post is that of the Parliamentary Standards Commissioner (SPSC), who, unlike the other ‘parliamentary officers’, is directly appointed by the SPCB, rather than by the Sovereign. This may mean that the Commissioner is a member of the staff of the Parliament, as the Scotland Act provides that “the Clerk and other persons appointed by the [SPCB] are referred to in this Act as the staff of the Parliament.”¹¹⁵ However, it seems clear that the Parliament does not regard the SPSC as being a member of its staff in exactly the same sense as any of its clerking, security, reporting or other employees, any more than the House of Commons regards its Parliamentary Commissioner for Standards as a member of the House’s usual establishment, whatever its formal status. How the status of this post works out in practice (and, by extension, for example, the status of any staff appointed by the Commissioner) will go a long way towards determining how ‘parliamentary officers’ operate in devolved Scotland.

(iii) Appointment

The developing norm for ‘parliamentary officers’ is for their appointment to be made by the Sovereign upon the nomination of the Parliament. This is the method used for the appointment of the Auditor General, which was a procedure contained in the Scotland Act itself, and has been followed for the Scottish legislation establishing the Public Service Ombudsman, the Information Commissioner, the Public Appointments Commissioner and the Children’s Commissioner. As already noted, the Parliamentary Standards Commissioner is the exception, as it is an appointment entirely within the Parliament, being made by the SPCB with the agreement of the Parliament.

The method of appointment is therefore one characteristic which distinguishes ‘parliamentary officers’ from other types of public office, although it must be borne in mind that some of these others examined here were

- intended to be transitional appointments—the Parliamentary Ombudsman was appointed directly by the Sovereign from time to time,¹¹⁶ and the Temporary Standards Adviser was appointed under Standing Orders procedures for committee advisers, though, uniquely, by way of an open recruitment process; or
- appointed very early in the devolution era, and so may have been made under the ‘royal appointment on parliamentary nomination’ procedure had their constituent legislation appeared at a later date—the Standards Commission for Scotland, created under a Scottish Act in 2000, is the obvious example.

The SPCB and the Scottish Commission for Public Audit are special cases of internal parliamentary appointment, where their constituent legislation sets out their membership with some precision (all are to be MSPs; the Presiding Officer is to be a member of the SPCB, and the convener of the Audit Committee is to be a member of the SCPA). Even in these cases, the Parliament adopts an elective process for the selection of those members who are not specified, although the legislation simply requires them to be “appointed in accordance with standing orders”.

Audit Scotland (AS) is a distinct example because of its audit-related remit. Like the Standards Commission, it is a collective body not composed of MSPs, but, it is not subject to ministerial appointment or control as an NDPB-type body would be. It could have been a more ‘parliamentary officer’ model if it not been established in very early Scottish legislation.¹¹⁷ Its membership—the AGS, the Chairman of the Accounts Commission and 3 others appointed jointly by these two officers—can be regarded as being designed specifically to reflect both the nature of public audit, and the creation of AS out of the existing audit bodies of the Accounts Commission and ‘NAO Scotland’.

How the various appointments have been made is a good indication of the issues which a parliament—especially, but not exclusively, a statutory parliament—may have to face when dealing with ‘parliamentary officers’. In particular, the ways in which the parliament is involved in the recruitment process places it squarely in positions not directly related to its more usual parliamentary roles of debate, scrutiny, legislating and the like.

Whereas the Scotland Act required the election of the Parliament’s Presiding Officers, and the appointment “in accordance with standing orders” of the 4 ordinary members of the SPCB, it did not specify how the Parliament was to nominate the AGS under s69 any more than it did for the procedure for the nomination of Executive ministers. The Financial Issues Advisory Group (FIAG) proposed a selection procedure involving an open recruitment exercise and a selection panel making a recommendation to the full Parliament, and the relevant procedural requirements were included in the Parliament’s initial SOs.¹¹⁸ These provisions provided the template for later ‘officers’ appointed by the Queen on the nomination of the Parliament, and in 2001 the SOs were extended to apply to all such appointments (Rule 3.11). Note that this is not the process employed for the SPSC, as that is the direct appointment of the SPCB with the agreement of the Parliament (Rule 3A.1).

This template can be described in general terms as follows:

When a vacancy (including a first appointment) arises, or is known to be imminent, or for a first appointment under a Scottish Parliament Bill,

that bill has been approved at Stage 1,119 a Selection Panel is set up, consisting of the Presiding Officer; the relevant Convener that is considering the legislation and between 4 and 7 Members of the Parliament appointed by the Presiding Officer.

- Recruitment advertisement and job description, as approved by the Selection Panel, is published
- Initial blind sift by Selection Panel (following advisory sift by officials and independent adviser), and selection of applicants for interview
- Interview round(s) by Selection Panel and preferred candidate agreed.
- Motion nominating agreed candidate (who has accepted nomination) lodged by member of Selection Panel
- Motion debated (no more than 30 minutes) and decided upon by the Parliament
- If motion agreed (and if this is by a division, more than 25% of all Members must have voted¹²⁰ for it to be valid), recommendation made to the Queen that nominee be appointed.

Until the nomination of the Information Commissioner in December 2002, this process had proceeded smoothly, with a recommendation to the Parliament by selection panels being based on unanimous selections or, in one case, a majority selection supported thereafter by the whole Panel, and subsequent nomination by the Parliament. However the debate on the nomination of the Information Commissioner on 12 December 2002 revealed that that selection process was far from smooth.¹²¹ One member of the Panel, Duncan Hamilton (SNP) led an attempt to convince the Parliament not to approve the nomination, arguing that the nominee was supported only by a vote of 4-3, after a second round of interviews, and that another particular candidate would have been the better choice. The debate was acrimonious, with much discussion of what went on during the selection process, with the identity of the losing candidate being hinted at. A majority of the Panel, including the Presiding Officer, appeared unhappy at this breakdown of the normal processes, and referred to the danger that such a public dispute could have on future recruitments of this type. After a division, the Panel’s recommendation was accepted by the Parliament.

There were accusations of partisan motives at work both in the selection and in the objections of the minority, something which the media ran with, pointing out apparent close relations between the successful nominee and the Labour leadership, and accusations that the new Commissioner would (unlike the other candidate in question) be taking a full-time salary for what was described as a 'part-time' job in the two years before the new FoI Act came fully into effect.¹²² The nominee himself sought to defend himself in the media, and the losing candidate, a high-profile public figure himself, also discussed the affair in the media.¹²³

Although this episode may well turn out to be a rare exception to the generally uncontroversial operation of these selection processes,¹²⁴ it did highlight how, if and when they do break down, they can do so rather publicly and dramatically. For a parliament subject to the law, including employment law, any disruption of these processes could potentially lead to legal action, perhaps even on behalf of one or more of the candidates. For example, in the absence of any authoritative judicial determination, the legal status of the MSPs involved in the selection process may not be entirely clear, as the selection process (other than the plenary debate itself on a Panel's recommendation) presumably cannot be regarded as 'proceedings of the Parliament' for the purposes of absolute privilege under the Scotland Act. Even for a parliament, such as Westminster, which operates under parliamentary privilege and exclusive cognisance, it must be questionable, in the modern legal climate, quite how much an equivalent process would be beyond the reach of the courts.

(iv) (Dis)qualifications for appointment

The developing practice seems to be for any qualifications or disqualifications (or other incompatibilities) to be related to the nature and remit of each particular post. Thus the SPCB and SCPA are required not just to be composed of MSPs, but of particular ones—the Presiding Officer on the SPCB, and the convener of the Audit Committee on the SCPA. The particular composition of AS has already been noted. For those posts of a regulatory or investigatory type, in particular, the practice tends to be to specify disqualifications rather than qualifications, related to the bodies or persons who could be subject to that officer's jurisdiction. An

interesting example came in a late amendment to the Bill establishing the CPAS, which added to the list of disqualifying offices, "a member of the House of Lords and entitled to vote in the House." Unusually, there are no specified qualifications or disqualifications for the post of Information Commissioner.

(v) Period of appointment

Again, the developing practice seems to be for the period of appointment, and whether, if at all, there can be reappointment, to be related to the nature and remit of each particular post. Most posts require retirement at or around 65 years of age, and provision for the officer to be relieved of office on request, or by resignation. Legislation dealing with those posts which are held by MSPs tend to provide arrangements for dealing with vacancies as they arise, which may or may not be due to the post-holder no longer being an MSP, or holder of the relevant qualifying position of Presiding Officer or committee convener.

While the Scottish Parliamentary Ombudsman had a continuing tenure subject to good behaviour, the tendency since has been to learn from Westminster practice,¹²⁵ both in terms of specifying a retirement provision and, more importantly, fixed periods of office and, if at all, limitations on reappointment. The Auditor General is different because there is no fixed period for appointment, and can remain in post beyond 65 if the Parliament, by resolution, so determines.

A first appointment for a 'parliamentary officer' tends to be for a period of up to 5 years as determined by the SPCB. However the reappointment provisions vary. The Public Services Ombudsman, the Information Commissioner and the Public Appointments Commissioner can be reappointed, but can only be reappointed for a second time if, by reason of special circumstances, it is desirable in the public interest.¹²⁶ The Parliamentary Standards Commissioner and the Children's Commissioner can be only be reappointed once.

(vi) Removal

An important aspect of the formal independence of a parliamentary officer, complementing the arrangements for appointment and tenure, is provision for the officer's removal. The developing norm, for officers which are royal

appointments following parliamentary nomination, is that they can be removed from office by the Sovereign, following a recommendation of the Parliament, supported by high specified majority. For the Auditor General, Public Services Ombudsman, Information Commissioner and Public Appointments Commissioners, the Parliament's recommendation must be supported by 2/3 of all MSPs, not just those voting.

The need for the special majority for removal was explained by UK ministers during the passage of the Scotland Bill provisions creating the AGS: "We do not envisage it being a factual proposition that the Executive would try to sneak through, if I may be allowed to use that phrase, a motion late at night, or in any other circumstances to try to achieve that."¹²⁷ These assurances were repeated in the later Lords proceedings, when the Minister, Lord Sewel, said that¹²⁸

I am afraid that Her Majesty, knowledgeable as she is, would not act independently to appoint the auditor general. She would act on the basis of advice received in Scotland. The protection is there.... It is simply to protect that particular official, to give him a degree of protection, to secure his independence. The parliament would have to cross a significant barrier in order to dismiss him. It could not be done on the basis of a slight political whim.

In the case of the Parliamentary Standards Commissioner (an SPCB appointment) and the Children's Commissioner (a royal, not SPCB appointment), the threshold is less, being 2/3 of those MSPs voting. The former Parliamentary Ombudsman scheme did not specify any particular majority for the parliamentary resolution seeking the Ombudsman's removal by the Sovereign. Neither does the legislation relating to the removal of the appointed members of the Scottish Commission for Public Audit though the SCPA member who is convener of the Audit Committee can only be removed as convener of that Committee (and thereby as a member of the SCPA) by an absolute majority of the Committee. Similarly, in relation to the SPCB, the Presiding Officer can be removed as PO (and thereby as an SPCB member) by a resolution of an absolute majority of the Parliament, but the appointed members can be removed by resolution of the Parliament, with no special majority specified. Removal of members

of Audit Scotland (other than the AGS) and of the Standards Commission does not require parliamentary involvement.

Generally the constituent legislation does not specify the grounds cited for removal. The former Parliamentary Ombudsman scheme enabled removal on grounds of misbehaviour, and the Sovereign could have declared the office vacated if satisfied that the Ombudsman was incapable for medical reasons of performing the required duties. The Children's Commissioner can be removed when either the Commissioner has breached the terms of appointment; or the Parliament has lost confidence in his willingness, ability or suitability to carry out the functions of the office.

(vii) Independence

Some constituent legislation contains specific provisions designed to delineate the degree of independence that an officer has. This is generally of the form that the officer is "not subject to the control or direction of" certain public bodies or office-holders related to their institution or their functions. These may be Ministers or MSPs (AGS) or Ministers, MSPs or the SPCB (Public Services Ombudsman, Public Appointments Commissioner, Information Commissioner and Children's Commissioner).¹²⁹ These provisions may be subject to specific exceptions, such as to the preparing of accounts (AGS), reports or both (SPSO, CPAS), or relating to SPCB approval of staffing or related matters (SIC, CCYP).

The SPCA had, and the SPSO has, a more proactive form of protection of its independence related to the exercise of their investigatory functions. This is a power to petition the Court of Session when any person obstructs the Ombudsman's work or fails to act as required, as if that person was committing a contempt.

The Parliamentary Standards Commissioner must comply with any Parliamentary directions¹³⁰, except in relation to any particular investigation. In this respect, these statutory provisions resemble those applying to the SPCB, to which the Parliament may give special or general directions concerning the exercise of its functions. The AS can similarly be given directions by the AGS or the Chairman of the Accounts Commission, and the Standards

Commission can require its Chief Investigating Officer to comply with any directions given by it, except as to how to carry out an investigation.

(viii) Terms and conditions

The constituent legislation describes, to varying degrees, who sets an officer's terms and conditions of office, and some of their content and parameters. The developing norm is for some or all of these matters to be for determination, or arrangement, by the SPCB. This is the case for the Auditor General, Parliamentary Standards Commissioner, Information Commissioner, Public Appointments Commissioner and Children's Commissioner.

In some cases, some matters are determined by the Parliament itself. For example, the old SPCA scheme provided that the Ombudsman's salary, allowances and expenses were determined by the Parliament; pensions matters were provided for by the Parliament, and other terms and conditions were by SPCB determination. The salary, allowances and expenses of the Public Services Ombudsman are determined by the Parliament, whereas pensions matters are by SPCB arrangement.

The constituent legislation for the two statutory parliamentary bodies—SPCB and SCPA—does not deal with this matter explicitly, presumably because this does not arise for such bodies. As a more traditional NDPB-type body, the terms and conditions of members of the Standards Commission (and of its Chief Investigating Officer) are determined by Ministers. Those of the appointed members of AS are determined by the AGS and the Chairman of the Accounts Commission.

(ix) Financing

The financing of an individual 'Officer' should, where appropriate, be distinguished from any body that that Officer is part of, or is in charge of, especially where that body can itself be regarded as a form of 'Officer' body in its own right. The SPCB is generally required to provide the finances of statutory officers. It is also required to provide the finances of the Scottish Commission for Public Audit, and its own finances—both to fund all these officers and for its own internal parliamentary purposes¹³¹—are payable directly from the Scottish Consolidated Fund.

The AGS stands out as the exception to these arrangements, in that AS provides that officer's finances, and, in that sense, the relationship between AS and the AGS is similar to that between the SPCB and the Parliament. AS's own finances are primarily to be derived from the charges it makes for its services, and the balance from the Scottish Consolidated Fund, and its proposed budget is scrutinized by the SCPA. The finances of the SCS are provided by Ministers.

(x) Accounting

The accounting and auditing arrangements of statutory officers are not always specified (as in the case of the Parliamentary Ombudsman, the Commission for Public Audit, the Standards Commission and the Parliamentary Standards Commissioner). The Clerk of the Parliament is the principal accountable officer for the SPCB. The developing practice in constituent legislation¹³² is for the SPCB to designate the Officer, a deputy (if any) or a member of his or her staff as accountable officer, and for the Officer to prepare accounts annually, in accordance with such directions by Scottish Ministers, and to send a copy to the AGS for auditing.

As the officer and body concerned directly with the public accounting and auditing functions, the arrangements for the AGS and AS are unique. For example, AS's own accounts must be sent to the SCPA for auditing, and the SCPA designates either the AGS or a member of AS's staff as its accountable officer.

(xi) Temporary replacement

The constituent legislation generally provides for some other person to take over when the office is vacant. In some cases, the replacement is expressly designated as the 'acting' Commissioner/Ombudsman (Public Services Ombudsman, Parliamentary Standards Commissioner, Public Appointments Commissioner and Children's Commissioner).¹³³ The SPCB is responsible for appointing the replacement, and that person's terms and conditions of employment. The AGS's replacement is appointed by the SCPA, though the terms and conditions are determined by the SPCB. No express arrangement is made for a temporary replacement for the various 'non-officer' bodies examined—SCPA, SPCB, AS and SCS—nor was it for the SPCA.

(xii) Staffing

Generally an officer can, with SPCB approval (either generally or in relation to specific aspects, such as staff numbers), appoint staff as he or she considers necessary and determine their terms and conditions of service (Public Services Ombudsman, Parliamentary Standards Commissioner, Information Commissioner, Public Appointments Commissioner and Children's Commissioner). AS provides staff for the AGS as that officer requires, and the SCPA receives the staff it requires from the SPCB. The SPCB itself is, as can be seen, primarily an appointer of staff, both for the various statutory officers and bodies, and for the Parliament itself, and uses the latter to assist it in the exercise of its own functions. The former SPCA appointed staff, and determined their terms and conditions, as that Officer determined. AS appoints its own staff, and the SCS and its CIO appoint their own staff, subject to the approval or consent of Ministers.

The status of any staff appointed by an 'Officer' will generally reflect that of the appointing officer. As such, they will not be civil servants, and, in the case of the SPCB, for example, its staff is, by statutory definition, staff of the Parliament. Just as the employment status of the Standards Commissioner is of interest for the purpose of this study, so the status of any staff appointed by the Commissioner may also not be entirely clear, in terms of their employment relationship, if any, to the Parliament and/or the SPCB.

(xiii) Annual reporting

Most public bodies are required to produce an annual report as a practical aspect of their public accountability, and this is the case with the officers and bodies under examination here. Officers are required to lay their annual report before the Parliament (SPCA, Public Services Ombudsman, Information Commissioner, Parliamentary Standards Commissioner and Information Commissioner), and some are also empowered to lay further reports from time to time (as above and Children's Commissioner). Under Standing Orders, SPSC reports are to be made to the Standards Committee.¹³⁴ The SCPA is only required to report to the Parliament "from time to time .. on the exercise of its functions", and chose to do so for the first time (other than

operational reports) in late March 2003, at the end of the first parliamentary session.

In some cases, the constituent legislation specifies (either directly or by way of directions by the Parliament or the SPCB as to form, content etc.) some matters which are to be covered in the annual reports, or the deadlines for their publication. For example, the Parliamentary Standards Commissioner and the Information Commissioner are required to include a range of specified statistics in their annual reports, and the Children's Commissioner is required to cover a range of matters, including any recommendations and proposed forward work programme.

These requirements are in addition to any particular reports some of the officers may be required to produce as a consequence of their operational functions, such as an investigation of a complaint or an inquiry.¹³⁵

There is no specific requirement for the AGS to produce an annual report, though this is done as part of the AS reporting process (which itself is not required by statute). Neither, perhaps surprisingly, is there any statutory requirement for the SPCB to produce an annual report, though it (like AS) has done so in practice every year since its establishment.

(xiv) Procedures

The powers and procedures of officers and bodies provided in their constituent legislation are generally related to their substantive operational requirements, such as the conduct of investigations or inquiries, though some also cover organizational matters. The statutory bodies—AS, SPCB, SCS and SCPA—are empowered to determine their own procedure, and the SCPA can appoint one of its members to preside at its meetings. The Presiding Officer presides at SPCB meetings. In relation to any powers, protections or immunities, the legal limitations inherent in the Scottish devolution scheme must be borne in mind, as described in the Introduction. The legislative provenance of such provisions will be relevant to their extent, and any provisions made by or under an Act of the Parliament will be subject to the Parliament's legislative competence.

These factors were of particular relevance in the Parliament's decision to establish a statutory Standards Commissioner, rather than simply by

way of an internal administrative scheme. This was examined by the Standards Committee, which initially identified and considered four models of investigation by the Standards Committee; an Independent Commission; an Independent Commissioner; and a Standards Officer/Adviser.

This was rapidly reduced to two options, that of an independent commissioner and of a standards officer/adviser. A purely Committee model was rejected because it did not offer sufficient independence in the investigative stage, and because the Committee was also influenced by the evidence of Elizabeth Filkin, then PCS at the House of Commons, that “investigations could be substantially time-consuming”, something the Committee had already experience of in the Lobbygate inquiry. It also did not support a statutory standards commission scheme (either as a free-standing arrangement or by linking it to what became the SCS) because it did not consider that would be appropriate and would not provide sufficient independence from the Executive or involvement by the Parliament itself.

In deciding between the two remaining options, it was influenced by two main factors: the extent of the powers of the proposed investigating officer, and the impact that this would have upon the independence and status of the post.” The Committee determined that an independent element was essential to ensure public confidence in the robustness of the Parliament’s investigative procedures. The creation of an officer under an Act of the Parliament, rather than as part of the Committee’s apparatus, would not only dispel any impression that, in having to rely on the Committee’s own powers, an investigator was acting for the Committee, but would surmount any limitations there may be in the Parliament’s own investigative powers under the Scotland Act.¹³⁶ For these reasons, the Committee proposed a statutory Standards Commissioner.

(xv) Relevant Parliamentary Committee

One of the more important accountability features, and a key determinant of a ‘parliamentary officer’, is the relationship, if any, that it has with parliamentary committees. In no case does the constituent legislation specify any particular committee (other than the Audit Committee convener being a member of the

SCPA). This is consistent with the devolution legislation itself, which does not require the Parliament to establish any committees at all, though it does envisage that such committees will be established. Even where the involvement of a particular committee has been contemplated in the policy leading to the passing of the relevant legislative scheme, such as the Standards Committee’s close involvement with the SPSC’s operation and activities, this is not explicit in the constituent legislation, being left to SOs. This is explained in the Explanatory Notes to the legislation.¹³⁷

In the absence of any provision in legislation, in Standing Orders¹³⁸ or, for the SPSC scheme, the Parliament’s Code of Conduct for Members, the identification of any committee relevant to a particular statutory officer or body is a matter of conjecture. A strong clue may be given when the constituent legislation originated as a committee bill, as was the case with the Standards Committee and the SPSC, and the Education, Culture and Sport Committee and the CCYP.¹³⁹ In the absence of any such indication, recourse may be had to the terms of the remit of the various existing committees, such as the Audit Committee in relation to the AGS and AS, or the Local Government Committee in relation to the SCS.

In some cases, as in the much-discussed proposed Public Appointments Committee in relation to the Public Appointments Commissioner, a new committee may be considered. However, the scope and extent of the Parliament’s committee system since 1999 has imposed a significant burden on the Parliament and its members and staff (leading to a major restructuring of the committees in January 2001). This makes the establishment of new committees, especially those with a ‘single function’, rather unlikely without any compensating reduction in the overall committee workload. The particular committee structure that is established following the May 2003 elections will provide an early opportunity for the Parliament to decide whether or how particular committees will have a role in the parliamentary accountability processes of the various ‘parliamentary officers’ that are being created.

It would be consistent with the Parliament’s underlying ‘CSG’ culture, emphasizing accountability, participation and transparency, as well as for administrative convenience and

efficiency, if the accountability lines between the various parliamentary officers and the Parliament itself, and especially its committees, were made clear. If this is not done through the relevant constituent legislation, then it would best be done so internally by the Parliament, through its SOs or in the remits of the appropriate committee. This need not provide for an exclusive relationship between a particular Officer and a specific Committee;¹⁴⁰ would encourage a holistic approach to these Officers' work, and minimize the risk of insufficient parliamentary oversight of them. As suggested in the next section, one option could be for a common, structured approach to this oversight of most or all Officers, through a single, dedicated Committee.

C Conclusions and prospects

1. Evolution of the 'parliamentary officer' template

Devolved Scotland provides an interesting case-study for this research project, not just as a convenient and relevant comparator for the Westminster situation, but also in terms of the nature and development of its own arrangements. The main finding of this case-study has been the development of a class of public officers (including collective offices), which have substantially common characteristics and, over time, a similar institutional template, which appear to be substantially similar to what may be regarded as 'parliamentary officers'. A major influence in these developments was the Parliament itself, through its statutory legal basis and its unique culture, ethos and practice¹⁴¹, and its evolving relationship with the new Scottish Executive.

This class of public official has developed in a generally unplanned way, mainly through the evolution of practice, based on the adoption and, where relevant, the adaptation of precedents. These precedents began during the implementation of devolution in the late 1990s, in the Scotland Act itself and its transitional delegated legislation, which saw the creation of officers and offices such as the SPCB, the AGS and the SPCA.

This was followed by a brief period, after the Parliament's establishment, when there was a perceptible transition from pre-devolution thinking about how such public offices were

established, towards the Parliament taking a more pro-active and distinctive approach, separate from the guiding influence of the Executive.¹⁴² The main 'Officer' output during this period was under the Public Finance and Accountability (Scotland) Act 2000, creating the AS and SCPA, and fleshing-out the institutional arrangements for the AGS within the Act's financial edifice. These arrangements were based primarily on Executive initiative, initially through the Scottish Office-driven CSG process in 1998-9, and then by way of an Executive Bill introduced as the first 'programme bill' in the new Parliament's life. This period also saw the establishment of the SCS, again on Executive initiative, through an Executive Bill.

The latest phase is the period, still in progress, when the institutional template has evolved through the steady creation of a series of 'Officers'. The notion of a template is noticeable, even though the new posts have been created both under Executive and Parliament initiative (including in the form of constituent Bill). This trend has reached the stage, at this convenient end-point of the first parliamentary session, of the evolving template even being described as "an acceptable and workable model" in the Executive's consultation on its proposed SHRC. As has been noted throughout, the main exception, in some important institutional respects, has been the SPSC. This is hardly surprising, as the equivalent Westminster post has been the focus of the current interest in, and concerns about, the whole idea of 'Officers of Parliament'.

2. Characteristics of the template

The study has noted some of the key characteristics of the evolving template, in terms of the appointment, removal, and status of such offices; their financing and resourcing; and their accountability arrangements and relationship with the Parliament. The core criteria of this template are their linkage with the Parliament rather than with the Executive, and the impact that linkage has in terms of the accountability and independence which is perceived, by their creators, as necessary and appropriate for public officers holding such sensitive and important posts at the heart of Scottish devolved governance.

At this early stage, relatively little can be said, based on actual practice, about the effectiveness or robustness of the institutional

template itself, and the means by which such posts are established.¹⁴³ It will require a period of operation of the various schemes before such initial assessments can be made, by the officers themselves (through their reporting arrangements and otherwise); by the Parliament and Executive; in any legal challenges that may occur, and, equally important, by those in devolved Scotland who interact with the officers, whether as customers, witnesses, bodies under investigation or otherwise.

Any assessment will also have to take into account whatever changes in structure, operation or approach may result from the forthcoming Scottish general election, and the new Parliament and Executive which may result. While there have been no substantive or substantial differences between the main political parties to the developments noted in this study over the past 4 years, any changes in the make-up of the Parliament or the Executive could well see some shifts in their approach to these 'parliamentary officers' (perhaps in their proliferation, organisation or accountability) from what might otherwise have been the case had the present political situation continued.

3. Some issues for the future

Nevertheless, some initial points can be made. These relate primarily to the situation as it has developed, rather than seeking to address more fundamental issues, such as whether or not these developments are 'good' or 'bad' as such. Further and more substantial research would be required to address such questions properly.

The initial issues are whether it is fair and helpful to regard the 'parliamentary officers' as a discrete class of public office, and, if so, what that means in terms of their institutional arrangements and oversight by the Parliament and the Executive. The clear conclusion of this research is that a distinct, identifiable class has indeed evolved, whether or not wholly intentionally, and that this provides an appropriate and convenient opportunity for them to be dealt with in common ways, in so far as that is practicable, especially by the Parliament. Any arrangements must full regard to the legal and statutory basis of the devolved institutions, and the limitations and requirements that basis imposes on them when establishing or operating 'parliamentary officer' schemes.

Overseas parliamentary practice suggests ways in which the Parliament could establish and oversee this identifiable class of public officer in a systematic and structured way. This can be through the relevant overarching statutory and administrative arrangements, perhaps even through framework legislation providing a common statutory basis for the evolving institutional template. The Parliament could also devise a standard approach to the ways in which it deals with appointment and resourcing matters, and their oversight and accountability. Such a formal common structure would be especially suitable for a parliament of the size of the Scottish Parliament, where it may not be practicable for a separate committee to be established to scrutinise each particular officer. Based on the Parliament's principles and practice, a common 'Officers of Parliament Committee' model should be adopted by the Parliament.

An important issue is the proper boundary for the class of public offices to be regarded as 'parliamentary officers'. Virtually all those created have an obvious connection with core governance issues, such as parliamentary standards, public appointments, public audit, administrative performance and so on. However, the Children's Commissioner crosses this boundary, and its inclusion lays the Officer template open to be applied inappropriately to all sorts of governmental ombudsmen, inspectors and commissioners, including those with more regulatory rather than investigatory functions. Such a development would dilute the effectiveness of the evolving Officer system itself.

The nature of the constituent legislation which establishes a 'parliamentary officer' post is of importance, both symbolically and practically. As these are, by definition, non-executive posts, accountable not to ministers, but to the Parliament, the convention should be established that they are created through non-Executive means, either by a Committee Bill or a Member's Bill, so that the Parliament takes the initiative in, and ownership of, the process.

There are also very practical issues for the Parliament to consider in terms of the burden imposed on it. The more posts are regarded as 'parliamentary officers', the greater the work imposed on its staff and Members—through its committees, the SPCB and otherwise—and the

greater potential call on its time and resources. This could include services such as legal, information, procurement and personnel, which individual Officers may not have sufficient staffs or resources to provide 'in-house', though some or all of them may choose (in so far as this is permitted) to pool their resources so as to provide these types of practical services. This raises the fundamental question of the extent to which it is proper and practicable for the Parliament to be a substantial 'sponsoring body' for this growing cadre of public officers and offices. This is being increasingly discussed within the Parliament,¹⁴⁴ and the SPCB's statutory duties established by the various constituent statutes were enumerated in its recent annual report for 2002,¹⁴⁵ where it noted that "this role is likely to increase in the forthcoming year" because of further similar legislation.

The greater this burden, the more the balance between such sponsorship activity and what may be regarded as direct 'parliamentary' activity (whether in relation to formal proceedings, PQs or otherwise) will be tilted away from the latter. Even if the Parliament is fully compensated, in terms of staff, resources and funding, for this increasing sponsorship role, and even though such activity will inform its parliamentary work, it is harmful to the long-term core parliamentary functions of the Parliament for this sponsorship activity to grow too much. The Executive's enthusiastic support for the evolving template, as evidenced in its recent SHRC consultation, probably has something to do with the shifting of the administrative burden of such sponsorship from itself to the Parliament.

The Executive may well also feel that they are less directly accountable to the Parliament—in terms of questions, debates, committee inquiries and so on—for the operation of such Officers (as opposed to the areas of public policy within the Officers' remits) than they are for its own staff or for other public officials and bodies they sponsor. If such an 'accountability gap' appears as the class of parliamentary officers evolves, it will have to be filled by the Parliament, through other means. This may include, for example, the

provision of greater direct oversight by the Parliament of the SPCB than exists in practice at present, such as the introduction of oral questions. This is permitted under the current Standing Orders, but only exceptionally, and has not been used in the first session.

In addition, as this study has demonstrated, there are many inter-relationships between the various 'parliamentary officers', and between them and some of the 'quasi-parliamentary officers' and related bodies examined here. These linkages may raise important public policy, ethical and legal¹⁴⁶ issues, both in terms of linkages of membership, financing and other institutional aspects, and in the officers' respective (and sometimes potentially overlapping) operational jurisdictions.

Where an 'Officer' has a remit wholly or partly dealing with non-devolved matters, whether within Scotland or on a UK/GB basis, its accountability will tend to be to Westminster rather than the Scottish Parliament. However, where they deal with matters that impinge on devolved areas (such as the Electoral Commission, for example) there should be some form of accountability also to the Scottish Parliament. The exact nature of this dual parliamentary accountability would depend on each particular case, and may, in appropriate cases, be through informal parliamentary cooperation rather than explicit statutory or other formal rules.

In conclusion, this study demonstrates that the evolution of this class of 'parliamentary officers', however unplanned, provides opportunities for devolved Scotland to develop innovative, and effective ways of dealing with these important and sensitive core areas of public policy and administration. The Parliament, in particular, should take the initiative, through imaginative planning, in transforming what could become an undesired and intrusive administrative burden into a structured and robust internal system that is fully in tune with its underlying culture and ethos and which adds value to, and becomes mainstreamed into, its more conventional core parliamentary work.

⁹⁰ This study only deals with devolved matters and institutions. 'Officers' dealing with non-devolved matters, either on a Scottish basis or on a wider UK or GB basis are examined in the Westminster section of this overall research project.

- ⁹¹ On the legal basis of the Parliament, see generally *Stair Memorial Encyclopaedia on the Laws of Scotland: Constitutional Law Reissue*, 2002, chapter 6, esp. paras. 326-332.
- ⁹² See, for example, the Scotland Act 1998 ss40-42.
- ⁹³ These principles have already been subject to judicial interpretation. In *Whaley v Lord Watson* 2000 SC 340, the Lord President, Lord Rodger of Earlsferry referred to “the fundamental character of the Parliament as a body which—however important its role—has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers” (at p348).
- ⁹⁴ This research topic is replete with acronyms and abbreviations, some of which appear rather similar. Though perhaps initially confusing for the reader, they are used here for reasons of brevity and convenience, and a full list is set out in the Appendix.
- ⁹⁵ The CSG report had a chapter (section 3.2) entitled *Issues relating to members, offices and bodies of the Parliament*, which covered a wide range of matters—the Presiding Officers, Executive ministers, MSPs, the SPCB and parliamentary committees—without any attempt to define or distinguish ‘offices’ and ‘bodies’, for example.
- ⁹⁶ ‘Assistant Clerk’ is not a term in general use within the Parliament, but was inserted in the Act as a ‘catch all’ for other very senior staff. In practice, the most senior managers under the Clerk, the Directors, are deemed to be Assistant Clerks for any statutory purposes, but they otherwise do not comprise thereby a distinct ‘class’ of staff.
- ⁹⁷ Procedures Committee 7th meeting, 2001, paper PR/01/7/3, para 15
- ⁹⁸ Scotland Act 1998 s21 and sch 2
- ⁹⁹ Scotland Act 1998 s21(3). This is detailed further in sch 2
- ¹⁰⁰ Scotland Act 1998 s20(2) and sch 2, para 3
- ¹⁰¹ House of Commons (Administration) Act 1978
- ¹⁰² For convenience, this study subsumes both types within the notion of ‘parliamentary officer’, rather than apply a different term like ‘parliamentary office’ to collective bodies.
- ¹⁰³ For details contact the Constitution Unit
- ¹⁰⁴ A flavour of this debate can be seen in the brief exchanges on a backbench amendment at Stage 3 of the CCYP Bill on 26 March 2003, which sought to clarify the relationship of the proposed CCYP to the Parliament (cols 19961-3): http://www.scottish.parliament.uk/official_report/session-03/sor0326-02.htm#Col19961
- ¹⁰⁵ *The Scottish Human Rights Commission*, Scottish Executive Consultation Paper, 4 February 2003: <http://www.scotland.gov.uk/consultations/justice/shrs-00.asp>. See also, “Consultation on Human Rights Commission”, Scottish Executive press release, 4.2.03: <http://www.scotland.gov.uk/pages/news/2003/02/SEJD204.aspx>, and written parliamentary answer by the Justice Minister, 4.2.03: http://www.scottish.parliament.uk/official_report/wa-03/wa0204.htm
- ¹⁰⁶ Quoted in the Executive press release, cited above.
- ¹⁰⁷ Introduction, pp4 and 5 respectively
- ¹⁰⁸ This particular example may have arisen because of the controversy which arose over the location of the offices of the SPSO in 2002.
- ¹⁰⁹ B Winetrobe, “Counter-devolution? The Sewel Convention on devolved legislation at Westminster”, (2001) 6 *Scottish Law and Practice Quarterly* 286-92; A Page and A Batey, ‘Scotland’s other parliament: Westminster legislation in the Devolved Areas since devolution [2002] *Public Law*, 501-523
- ¹¹⁰ Including, as required, subordinate legislation made under such Acts.
- ¹¹¹ The legislative pre-history of the CCYP measure is instructive, as it began as a request from the Executive to the Education, Culture & Sport Committee to examine the case for such a Commissioner. The Committee then decided not just to do that, but also to promote a Committee Bill of its own to implement the proposal, and the Executive (apparently after some persuasion) accepted this legislative process.
- ¹¹² This apparent paradox can be illustrated in the discussion in the SHRC consultation, described above.
- ¹¹³ In a broader sense, all posts examined here are likely to be covered, to a greater or lesser extent, by many provisions in UK legislation.
- ¹¹⁴ Sch 2 para 7, Scotland Act 1998, and delegated legislation made thereunder.
- ¹¹⁵ Sch 2 para 3(2), Scotland Act 1998
- ¹¹⁶ The Sovereign would have been expected to make such appointments on ministerial advice. If there had been a need for such an appointment to fill a vacancy, after devolution had come fully into effect, would she have taken advice from her UK or Scottish ministers, or from both?
- ¹¹⁷ The *Public Finance and Accountability (Scotland) Act 2000* was the Parliament’s second ever enactment, the first being emergency legislation. It was also the result of much pre-devolution policy consultation, through the Financial Issues Advisory Group (‘FIAG’).

- ¹¹⁸ The original set of SOs were not devised by the Parliament itself, as they were prepared prior to its establishment, and promulgated in an SI made under the *Scotland Act* some weeks before the May 1999 election
- ¹¹⁹ There was much discussion in the Procedures Committee, when considering the extended Standing Order in 2001, whether it was appropriate and practical, or even lawful, for a recruitment to begin following Stage 1 approval rather than after royal assent. Eventually, following the Bureau's view that Stage 1 approval was sufficient authority for the process to begin, the Committee and the Parliament accepted that approach. This equates, very loosely, to the Westminster practice of administrative steps being initiated to implement statutory arrangements once the relevant Bill has gained a Commons second reading.
- ¹²⁰ Including those voting to abstain, as is permitted in the Parliament's voting system.
- ¹²¹ http://www.scottish.parliament.uk/official_report/session-02/sor1212-02.htm#Col16344
- ¹²² See, for example, "Cronyism row over £ 72k job with no power", *Scotsman*, 20.12.02 (<http://www.thescotsman.co.uk/politics.cfm?id=1415182002>); letter by successful nominee to *Scotsman*, 23.12.02 (<http://www.thescotsman.co.uk/letters.cfm?id=1426972002>)
- ¹²³ "Freedom of information row rages on", *Sunday Herald*, 15.12.02 (<http://www.sundayherald.com/30008>); "Watchdog with small teeth", *Sunday Times*, 22.12.02 (<http://www.timesonline.co.uk/article/0,,2090-519632,00.html>)
- ¹²⁴ Much to the relief of all concerned, the nomination of the Standards Commissioner was approved by the Parliament in January 2003 without debate or division.
- ¹²⁵ In particular, the controversy surrounding the failure or refusal of the House of Commons Commission to reappoint Elizabeth Filkin as Parliamentary Commissioner for Standards.
- ¹²⁶ The specific statutory terminology, especially in relation to whether reappointments may or may not be consecutive, differs slightly in these cases.
- ¹²⁷ Henry McLeish, junior Scottish Office minister, HC Deb vol 312 col 765, 19.5.98
- ¹²⁸ HL Deb vol 592 cols 1718.
- ¹²⁹ There is a distinction in the statutory language used relating to the Parliament. The provisions relating to the SPSO, CPAS and CCYP use the phrase "any member of the Parliament", whereas those relating to the AGS and the SIC use the more ambiguous "of any member of the Scottish Executive or of the Parliament", which in the particular context could mean to apply to MSPs or to the Parliament itself. The Explanatory Notes to the Freedom of Information (Scotland) Act 2002 prefers the latter interpretation (para 112), which, if correct, would explain why these provisions are formulated differently from the other Acts. If this is the case, it is not immediately clear why some Officers are 'independent' of any MSP and other are 'independent' of the Parliament.
- ¹³⁰ Under Standing Orders, they are given by the Standards Committee (Rule 3A.3)
- ¹³¹ The latter, of course, being overwhelmingly the larger portion.
- ¹³² At Stage 2 of the committee bill testablishing the CCYP, amendments were moved by the convener to "bring the provisions for the accountable officer into line with certain other acts that have been passed by the Parliament", and, referring to a particular amendment, she said that "the amendment will bring the bill into line with recent precedent—for example, it follows the Scottish Public Services Ombudsman Act 2002." See meeting 2 (4.2.03) of the Bill Committee.
- ¹³³ For example, the Temporary Standards Adviser was appointed as Acting Parliamentary Standards Commissioner until the permanent appointee as SPSC could take up his post.
- ¹³⁴ Rule 3A.4
- ¹³⁵ The SPSO, for example, is required to send any report following an investigation (and any further special reports) to the person aggrieved, the body being investigated, and to Scottish Ministers, as well as laying it before the Parliament.
- ¹³⁶ See the discussion in the Committee on the scope of any statutory investigative powers granted under an Act of the Parliament: *Models of investigation of complaints*, 4th report, 2000, SP Paper 186, September 2000, para 14.
- ¹³⁷ Explanatory Notes to the Scottish Parliamentary Standards Commissioner Act 2002, paras 10-16, which also notes that s20 of the legislation defines the Parliament as including any committee of the Parliament.
- ¹³⁸ As in the requirements, already noted, for directions to the SPSC to be made by, and reports by the SPSC to be made to, the Standards Committee (Rules 3A.3-4)
- ¹³⁹ Similarly further clues may be provided by the committees involved in the scrutiny of the relevant bill, whether as lead committee or otherwise.
- ¹⁴⁰ Occasions may well arise where other Committees would have a legitimate interest in the work or output of an Officer, especially those with a cross-cutting jurisdiction, which can be exercised themselves or in conjunction with the primary committee as appropriate.
- ¹⁴¹ One important and obvious consequence of the Parliament's culture and ethos is that virtually all its consideration of the establishment and operation of these various public officers has been conducted, not

only in the public domain, but through a substantive and genuine process of public engagement and consultation.

¹⁴² The Executive itself is a body inevitably influenced by its own pre-devolution ethos as a UK government department.

¹⁴³ This includes any variations, whether minor or otherwise, that have been applied to particular posts.

¹⁴⁴ See, for example, the discussion at the Finance Committee's meeting of 8 October 2002 at cols 2211-2, on the SPCB's budget submission for 2003-04: http://www.scottish.parliament.uk/official_report/cttee/finance-02/fi02-1902.htm#Col2211

¹⁴⁵ See para 5.4: <http://www.scottish.parliament.uk/spcb/spar02-01.html#54>

¹⁴⁶ These could relate, for example, to issues of competence, in terms of the complex devolved/reserved boundaries under the devolution legislation.

Part IV Conclusions

The mapping exercise and typology of Officers has demonstrated that there are a set of bodies which have been established without any overall thought as to their proper relationship with Parliament. This is not surprising, given the pragmatic approach endemic in the operation of the British constitution.

There are two key issues for this research

- Which bodies fall within the classification of an independent Officer?
- What are the guiding principles which make the Officer role worthwhile?

Part III illustrates how the Scottish Parliament (with the assistance of the Scottish executive) has begun to develop a parliamentary officer template, faced with the practical question of creating the appropriate constitutional architecture for a new set of independent watchdogs. But even this opportunity for a blank sheet of paper has not yet prompted a coherent set of principles determining which watchdogs should have such a special relationship with Parliament as to be classified as a parliamentary officer. The creation of the Commissioner for Children and Young People as a parliamentary officer seems to open the door for a host of other bodies which will inevitably dilute the effectiveness of the role. Nor is it clear that the Scottish Parliament has established a monitoring system which makes most efficient use of its resources. There are strong arguments for a cross-cutting committee to provide administrative support and oversight of all its parliamentary officers.

These are issues common to other Commonwealth Parliaments which have inherited the concept of Officers. The New Zealand Parliament has drawn up a set of principles which would preclude the creation of officers such as privacy commissioners, children's commissioners, and police complaints commissioners. These principles have not been recognised internationally, and the exclusion of bodies with any regulatory functions is too restrictive. But Officers can be divided into those which are central to the concept and those which have a more peripheral constitutional role or status. These should or should not be categorised as Officers, depending on the

relative political and constitutional importance of their functions. The categories are:

Core Officers

- Auditors
- Ombudsmen
- Parliamentary ethics commissioners
- Electoral commissioners

Other constitutional Officers

- Privacy commissioners
- Information commissioners
- Human rights commissioners
- Civil/public service commissioners
- Public appointments commissioners

A decision to categorise a constitutional watchdog as an Officer will involve a number of factors, but the importance of institutional support cannot be underestimated, particularly in a small parliament. This is the next issue to be considered.

Officers cover different functions but the same set of issues need to be addressed when considering their independence from the executive and their relationship with parliament. It is essential for the watchdog to have a budget setting mechanism which is institutionally separate from the executive. This role is already undertaken by the Public Accounts Commission for the Comptroller and Auditor General, and has been a very successful innovation, mimicked by the Speaker's Committee which undertakes the same role for the Electoral Commission. The decision to publish the minutes of these bodies brings a necessary degree of transparency to their workings.

But the concept should be developed more generally to take in other Officers. There was government agreement in principle for a similar model for the parliamentary ombudsman in the mid 1990s, and only lack of legislative time prevented its enactment. However, separate statutory committees for each watchdog, whose membership consists of busy MPs, is not a good use of resources. The New Zealand Parliament operates an effective Officers of Parliament committee whose main function is to review their budget and ensure that Officers and committee interact appropriately. It would make sense to

work towards such a committee at both Westminster and Holyrood. The Committee would not only be responsible for financial oversight, but would also help ensure that Parliament took the work of its Officers seriously, by debating annual reports and being in regular communication.

A. Officers of Parliament Committee—a model

The Committee would have the following functions. It would:

- agree the appropriate budget for each Officer, which would be met directly from the consolidated fund
- arrange for the auditing of expenditure of each Officer
- ensure that the annual report of each Officer is debated in an appropriate committee
- take responsibility for ensuring that there was regular communication between Officer and Parliament, usually through the medium of a select committee.
- be responsible for the arrangements preceding the formal appointment of an Officer by Parliament
- be the forum for any proposals to create a new Officer of Parliament

At Westminster it is probably not appropriate for such a committee to have full responsibility for the recruitment and appointment of constitutional watchdogs. The New Zealand model does not have responsibility for appointment of its Officers, the process for which is set out in individual statutes. Such recruitment exercises are not only an administrative burden, but may involve the committee in damaging allegations about political partisanship. Holyrood recruits its parliamentary officers directly, with the consequent responsibility for personnel issues which this entails. This may be manageable at present, but could pose problems for the future, given the political row over the appointment of the Information Commissioner there.

Instead, the Westminster committee could contract out the recruitment exercise, either to the Cabinet Office or an outside agency, and retain the type of role which a minister has under the Public Appointments Commissioner code of practice, that of deciding between a short list of

suitable candidates.¹⁴⁷ At the minimum, it could play an important role in ensuring that appropriate rules had been followed in the recruitment and consultation exercise and act as the constitutional mechanism responsible for tabling the necessary resolutions in both Houses.

The committee could also be the appropriate forum for considering the desirability of re-appointment of a particular Officer. At present this falls to the executive to consider, using informal soundings about the performance of a watchdog. But if the committee's oversight role properly develops from considering the annual budget to encompassing a critical appraisal of each Officer's strategic plan, then it would be the most suitable body in which to consider issues about the performance of individual Officers. If this is too sensitive an issue to give to a parliamentary forum, then re-appointments should be avoided altogether in favour of a longer term.

The composition of the committee should include backbenchers from both government and opposition benches, including representatives beyond the main Opposition party.¹⁴⁸ The possibility of a joint committee of both Houses should be considered for Westminster. There are suitable candidates in the Lords for this type of non party political committee. There have been practical difficulties in agreeing the membership of joint select committees, as political parties have haggled over the number of seats allocated. But this could be avoided by making membership statutory, and possibly giving the Speaker overall authority to make selections, as with the Speaker's Committee, if this is acceptable to the Lords. Deputy Speakers from either House would be suitable members to represent the interests of Parliament.

The role of the Leader of the House and other Government members on this type of committee needs to be considered with care. If this appointment is seen as essential, his role should be to represent the interests of the House of Commons Commission, rather than the Commons, and it would be more appropriate to have a backbench Commission member, or a deputy Speaker. Ministers of relevant departments are members of the Speaker's Committee for the Electoral Commission, but this should not form a precedent for an Officers

Committee. The Public Accounts Commission is in effect a backbench committee, since the Leader has an ex officio place only, and takes no part in its deliberations. The New Zealand Committee is chaired by the Speaker and there is no Government majority, as a matter of principle. Instead there are four government and four opposition members, apart from the Speaker and an assistant Speaker. Some are whips of their parties, indicating that they are not ordinary backbenchers. Indeed, the Deputy Leader of the House is a member. But the principle of equality would assist in preserving the function of an Officers Committee as independent of Government.

The relationship of an Officers Committee with other parliamentary committees and offices also needs some care. The Speaker in New Zealand is also responsible for the House administration, in consultation with the Parliamentary Services Commission.¹⁴⁹ The Westminster equivalent is the House of Commons Commission, which employs the staff of the House and runs its services, and is also chaired by the Speaker. Some communication between the Commission and the Officers Committee could be ensured through interlinking membership. The model is more developed in Scotland which has both the Scottish Parliamentary Corporate Body and a business committee in the form of a Parliamentary Bureau. These two bodies appear to enable Holyrood to be more proactive and more institutionally separate from the executive than Westminster. At Westminster, the Officers Committee would also need appropriate staffing, probably from the Office of the Clerk, who service the Commission, rather than the usual Clerk's Department Committee Office.

B Effective dialogue with Parliament

Issues of appointment and budget control are important and are not merely window dressing. International experience in Canada, South Africa and Australia has shown how the executive can cut budgets and can interfere with the appointments process when watchdogs do not behave as the Government of the day would wish. This is why Parliament needs to have effective institutional mechanisms to ensure some independence of action. In the Westminster system of course, parliament and executive are fused, and governments have a major role in influencing the decisions of the parliament. This is where committees formed mainly or solely by backbenchers are important in preserving the institutional independence of a parliament. An Officer of Parliament committee would not necessarily prevent budget cuts, but would at least provide a transparent forum for discussion.

The arrangements for institutional independence are only part of the issue. The South African constitutional watchdogs have their independence guaranteed by the founding constitution. But their relationship with Parliament has been slow to develop effectively. There are wider accountability issues for each constitutional watchdog surveyed in the mapping exercise. The C and AG has his own select committee and a close and productive relationship with the Public Accounts Committee. Other watchdogs do not need such close relationships, but the principle of a dedicated committee for each watchdog is sound. There does not need to be separate committees for each watchdog, of course, as long as one committee is not responsible for too many watchdogs at once. The scheme might look as follows:

Existing Officers and Almost Officers

PCS	Standards and Privileges select committee
Ombudsman	New public service joint committee
Electoral Commission	Lord Chancellors Department select committee

Other statutory bodies

Information Commissioner	LCD/New public service committee
Audit Commission	Office of Deputy PM select committee
Local Government Ombudsman	ODPM select committee
Standards Board for England	ODPM select committee
Health Service Ombudsman	Health select committee
Equalities/ Human Rights bodies	Joint Committee on Human Rights

Nolan bodies

Public Appointments Commissioner	New public service committee
Civil Service Commissioners	New public service committee

Other non-statutory bodies

Statistics Commission	Treasury select committee
Commission for Judicial Appointments	LCD select committee

The Committee on Standards in Public Life would not have a formal reporting relationship in its current form. It could be supervised more generally by the Officers of Parliament committee to preserve institutional independence.

A statutory House of Lords Appointments Commission might have a formal link to the Public Appointments Commissioner on general appointments issues and so through to the new joint committee on the public service.

The relationship with the select committee should involve regular appearances before its members. This would fit well with the new core tasks which select committees have taken on following the Modernisation Committee recommendations. These were adopted by the House on 14 May 2002 and subsequently remodelled by the Liaison Committee.¹⁵⁰ These include a commitment to monitor the work of departments and review associated bodies. But in order to accomplish these tasks, committees need more staff resources. The success of the PAC model owes much to the dedicated resources of the NAO. Select committees

inevitably have an interest in the pressing political issues of the day. But sufficient staff in a committee can ensure that regular monitoring takes place as well.

These watchdogs are different from the usual public body, in that direct appointment by the executive is not appropriate. They should be Parliament's Officers. But that does not necessarily involve select committees taking part in direct recruitment exercises. This should be the role of the Officers committee. Rather, there is a role for confirmation hearings, appropriately conducted, as an opportunity for the select committee to build an effective relationship. This is an approach being adopted by Canada at present, following its modernisation committee proposals.

Another important factor is greater dialogue between select committees about their programme of work. In Australia, for instance, the Joint Committee on Public Accounts and Audit determines the audit priorities of the Parliament and advises the Auditor General of these priorities, after consultation with other parliamentary committees. The New Zealand

Auditor General has a code of practice, promulgated by the Officers Committee governing access to his office by other committees.¹⁵¹ The concept could be extended beyond audit matters to create a more systematic scrutiny model. For instance, select committees could ask ombudsmen to investigate maladministration in particular areas of policy delivery.

Achievement of effective coordination requires the Liaison Committee at Westminster to develop its role considerably. It needs to become the main driver of scrutiny in Parliament. It has to ensure that committees are aware of each others' work, and cooperating where possible, and that the core tasks are being fulfilled effectively. It could be the vehicle by which the Officers of Parliament committee ensure that Officers are regularly held to account and that the information they collect is made use of by select committees.

Officers know that they have much to gain from a good relationship with a parliamentary committee. At the minimum, Parliament offers

them a publicity platform. But the quality of their work can also be improved through interaction with interested parliamentarians, who can provide a forum and a focus for the Officer.

The role of the independent Officer of Parliament needs further research. The added value of a 'template' for their creation has yet to be tested in the Scottish Parliament, where such officers are only just beginning their institutional life. The real test of their success will be whether the link with Parliament offers any real added value to their work. But the time is right for this debate to begin at Westminster. Parliamentary involvement in the work of constitutional watchdogs is appropriate and necessary. But the mechanisms to protect the work of such watchdogs is only intermittently in existence. If Westminster is to be serious about its scrutiny role, it needs to reorganise its committee structure to facilitate the task. Its Officers could provide the resources to enhance the scrutiny work, but there needs to be full parliamentary engagement in the process to ensure that resources are directed where needed.

¹⁴⁷ The possibility of following the Civil Service Commissioner's Code of recommending one appointee—to be accepted, or the competition rerun—might be too limiting in choice

¹⁴⁸ The possibility of making all constitutional watchdogs ex officio members of the Lords could also be considered. Some are already members.

¹⁴⁹ See *Parliamentary Service Act 2000*

¹⁵⁰ Liaison Committee Annual Report HC 558 Session 2002-3, para 12

¹⁵¹ Further details are given in O. Gay and B. Winetrobe *The Parliamentary Audit Function* Constitution Unit May 2003



Appendix 1 Acronyms and abbreviations used in this study

AC:	Accounts Commission for Scotland
AGS:	Auditor General for Scotland
AS:	Audit Scotland
ASP:	Act of the Scottish Parliament
C & AG	Comptroller and Auditor General
CCYP:	Commissioner for Children and Young People
CIO:	Chief Investigating Officer
CPAS:	Commissioner for Public Appointments in Scotland
CHA	Commission for Healthcare Audit and Improvement
CHA	Commission for Local Administration (Ombudsman)
CSG:	Consultative Steering Group
DTLR	Department of Transport, Local Government and the Regions
DPO:	Deputy Presiding Officer
FIAG:	Financial Issues Advisory Group
HM:	Her Majesty
HSC	Health Service Commissioner (Ombudsman)
LCD	Lord Chancellor's Department
MEP:	Member of the European Parliament
MP:	Member of the UK Parliament
MSP:	Member of the Scottish Parliament
NAO	National Audit Office
NDPB:	Non-Departmental Public Body ('quango')
ODPM:	Office of the Deputy Prime Minister
PAC	Public Accounts Committee
PASC	Public Administration Select Committee
PCA	Parliamentary Commissioner for Administration
PCS	Parliamentary Commissioner for Standards
Parl; Parly:	The Parliament; parliamentary
PPERA	Political Parties, Elections and Referendums Act 2000
PO:	Presiding Officer
SI:	Statutory Instrument
SIC:	Scottish Information Commissioner
SCPA:	Scottish Commission for Public Audit
SCS:	Standards Commission for Scotland
SHRC:	Scottish Human Rights Commission
SO:	Standing Order
SPCA:	Scottish Parliamentary Commissioner for Administration
SPCB:	Scottish Parliamentary Corporate Body
SPSC:	Scottish Parliamentary Standards Commissioner
SPSO:	Scottish Public Services Ombudsman
SSI:	Scottish Statutory Instrument
TSA:	Temporary Standards Adviser
UKA:	Act of the UK Parliament
VFM	Value for money

Appendix 2 Characteristics of Officers and Almost Officers in the UK Parliament

	Reports to	funded from and serviced by	Appointed by	Terms and Conditions of Office
Comptroller and Auditor General —Officer of House	Statutory Public Accounts Commission, composed mainly of backbenchers. Public Accounts Committee —monitors reports	Consolidated Fund. Appoints and supervises National Audit Office as a separate organisation with non civil servants appointed directly	Appointed by Crown on resolution of Commons by Prime Minister and Chairman of Public Accounts Committee. Appointments process conducted by Treasury	Indefinite. Removable on address by both Houses. Disqualifying offices include membership of either House, or holding another office of profit.
Parliamentary Commissioner for Administration —Officer of House	Annual report to Parliament. Reports monitored by Select Committee on Public Administration	Consolidated Fund. Separate organisation of non civil servants, appointed directly	Appointed by Crown. Appointments process conducted by Cabinet Office	No statutory term. Removable on address from both Houses. Disqualification from membership of Commons
Parliamentary Commissioner for Standards —Officer of House	The Standards and Privileges Committee of the House of Commons	House of Commons Commission, serviced by Speaker's staff	Appointed by resolution of the House of Commons	Three year term, with ambiguity about renewal. Removable on address from Commons
Electoral Commission	A statutory Speaker's Committee of ministers and backbenchers. Statutory annual report to that Committee. No duty to report to select committees.	Consolidated Fund. Separate organisation of non civil servants, appointed directly	Appointed by Crown on address of Commons, with agreement of Speaker and consultation with registered political parties. Process in 2000 handled by recruitment consultants for Home Office	Statutory maximum of ten years, with possibility of re-appointment, removal on address from Commons, upon report from Speaker's Committee, disqualifications for political party membership, elective office and making party donations

Legislation

Parliamentary Commissioner for Administration Act 1967

National Audit Act 1983

Political Parties, Elections and Referendums Act 2000

Appendix 3 Characteristics of Officers of Parliament in Australia

	Reports to	funded from and serviced by	Appointed by	Terms and Conditions of Office
Ombudsman	Minister, through to Parliament. Power to submit special reports	Salary set by Remuneration Tribunal. Staff organised as separate public service agency. Funding negotiated with central government	Governor General	Seven year renewable. Govr Gen may suspend for specified reasons or may dismiss by address of both Houses for misbehaviour or physical or mental incapacity
Comptroller and Auditor General	Parliament, then Minister. Power to submit special reports	Salary set by Remuneration Tribunal. ANAO budget set by JCPPA. Staff are public servants	Governor General but with approval of parliamentary joint committee	Ten years, with no reappointment. Govr Gen may dismiss by address of both Houses for misbehaviour or physical or mental incapacity

Legislation

Auditor General Act 1997

Ombudsman Act 1976

Appendix 4 Characteristics of Officers of Parliament in Canada

	Reports to	Funded from and serviced by	Appointed by	Terms and Conditions of Office
Auditor General	Speaker of House of Commons	Size of budget determined by the Treasury Board (govt department). Staff are hired separately	Governor in Council	10 years with no re-appointment. Can be removed by Governor in Council on address from Senate and Commons
Chief Electoral Officer	Speaker of House of Commons	Budget is not pre-determined, dependent on elections. Staff hired in compliance with Public Service Commission regulations	By resolution of the House of Commons	Undefined term but mandatory retirement at 65. Can be removed for specified reasons on address of Senate and House of Commons
Privacy Commissioner	Speakers of both Houses	Size of budget is determined by the Department of Justice Appoints staff directly	Governor in Council after approval by resolution by Senate and Commons	7 year term, with possibility of re-appointment. Can be removed by Governor in Council on address of Senate and House of Commons
Access to Information Commissioner	Speakers of both Houses	Size of budget is determined by the Department of Justice. Appoints staff directly	Governor in Council after approval by resolution by Senate and Commons	7 year term, with possibility of re-appointment. Can be removed by Governor in Council on address of Senate and House of Commons
Official Languages Commissioner	Speakers of both Houses	Size of budget determined by Treasury Board. Staff are part of the federal public service	Governor in Council on address of Senate and Commons	7 year term, with possibility of re-appointment. Can be removed by Governor in Council on address of Senate and House of Commons

Federal Legislation

Access to Information Act 1985,

Official Languages Act 1985

Privacy Act 1985

Auditor General Act 1995

Canada Elections Act 2000

Appendix 5 Characteristics of Officers of Parliament in New Zealand

	Reports to	funded from and serviced by	Appointed by	Terms and Conditions of Office
Chief Ombudsman	Annual report to House, which may issue guidance. May be directed by a select committee or by the Prime Minister to investigate complaint	Salary set by State Services Commission. Expenditure payable out of money to be appropriated by Parliament. The House must appoint an auditor. Staff are non civil servants and are also Officers	Governor General, on recommendation of House	5 year term, or until retirement at 72. May be re-appointed. Oath of office to House. Gov-General may remove on an address for inability, neglect, bankruptcy or misconduct May only hold office of profit with permission
Controller and Auditor General	Specific duty to act independently. Required to produce annual report to House. May produce report for Minister or select committee. Duty to produce draft annual workplan to Speaker	Salary set by State Services Commission from Crown Bank Account Expenditure payable out of money to be appropriated by Parliament House appoints auditor. Employs own staff.	Appointed by Govr General on recommendation of House	7 year term, no reappointment. Dismissed by Govr General on address of House for inability, neglect, bankruptcy or misconduct. Nor office of profit without permission. Has status of a body corporate.
Parliamentary Commissioner for the Environment	Required to make annual report to House, or report at any other time. Speaker may request Commissioner or staff to advise House committees .	Salary set by State Services Commission. Expenditure payable out of money to be appropriated by Parliament. House appoints auditor. Staff not civil servants	Appointed by Govr General on recommendation of House	Term of five years with reappointment. Takes oath to House.

Legislation

Ombudsman Act 1975

Environment Act 1986

Public Audit Act 2001





