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

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Unit

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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.

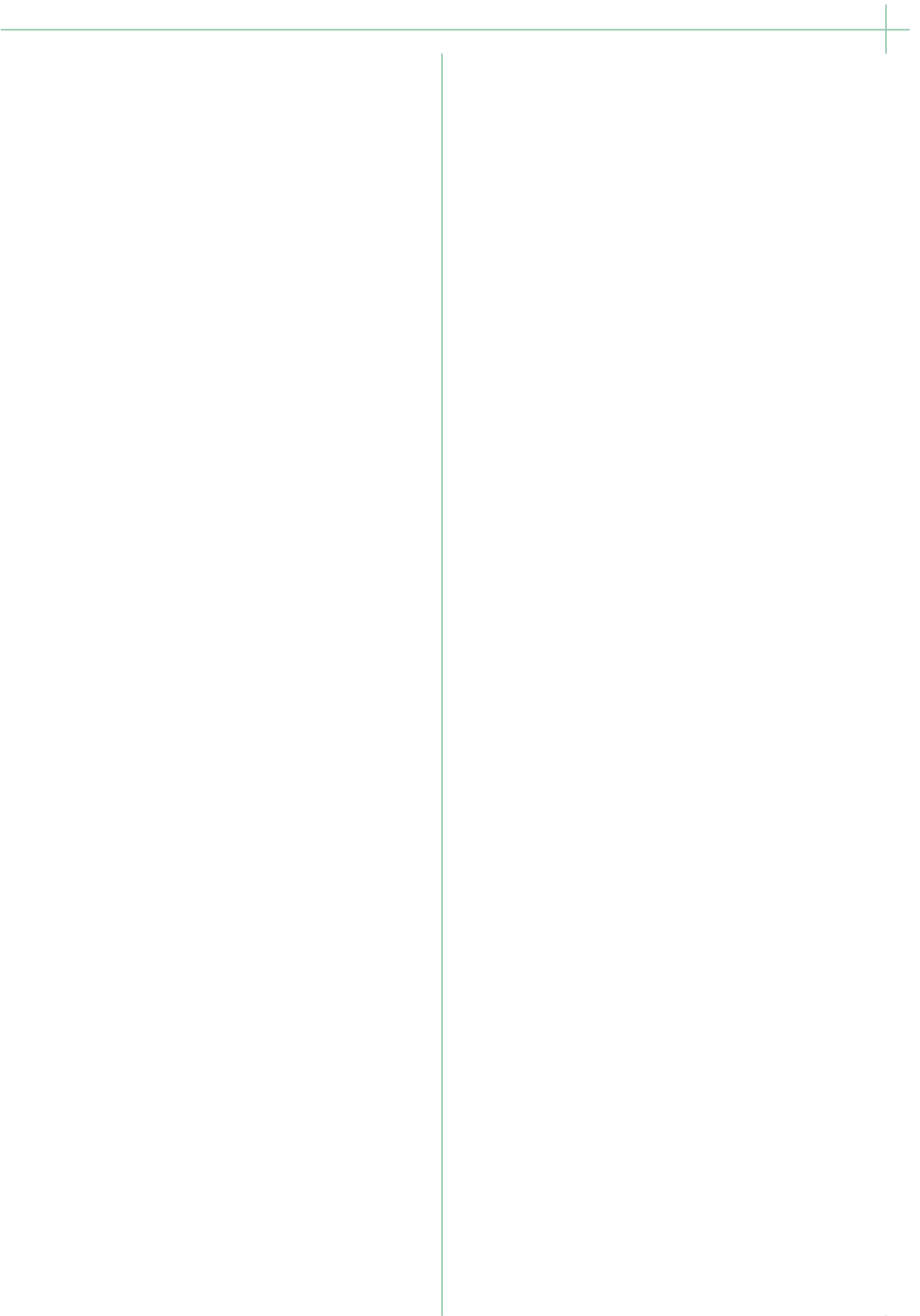
Constitutional watchdogs in the UK value regular interaction with select committees since at the minimum they gain a publicity platform. But the quality of their work and advice can also be improved by input from interested parliamentarians. The quality of enquiries undertaken by individual committees 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

- 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 of o2 3673nt



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

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

C

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 annus s as an imar

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

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,

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

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. PPERA provides for a separate Parliamentary Parties Panel, which is designed to be a link between registered political

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

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

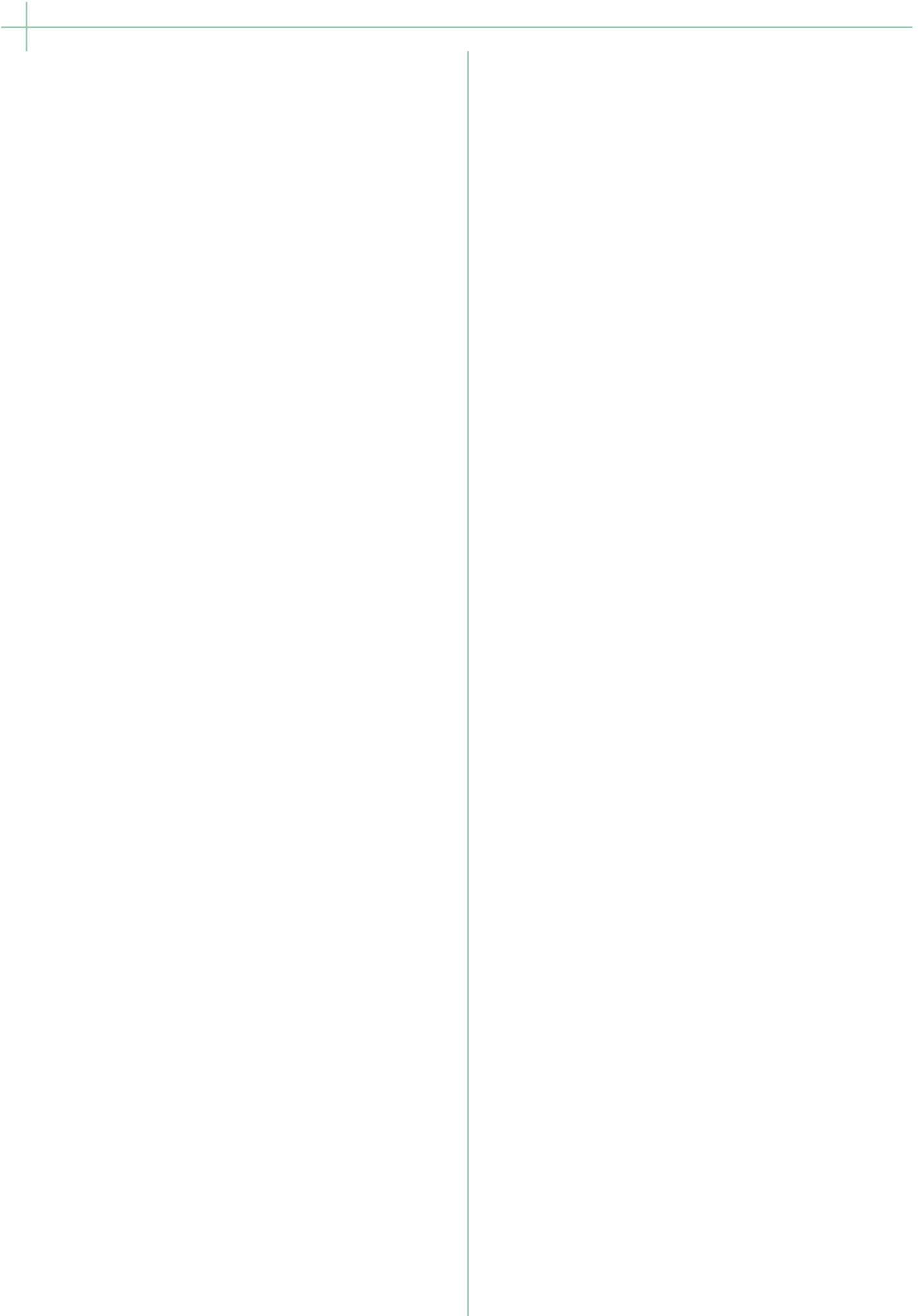
and failure to fulfil functions, which are set out in the schedule.

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 CIPFA. Its annual report is not made available 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.



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 S

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

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 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

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

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

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 (JCPA) 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

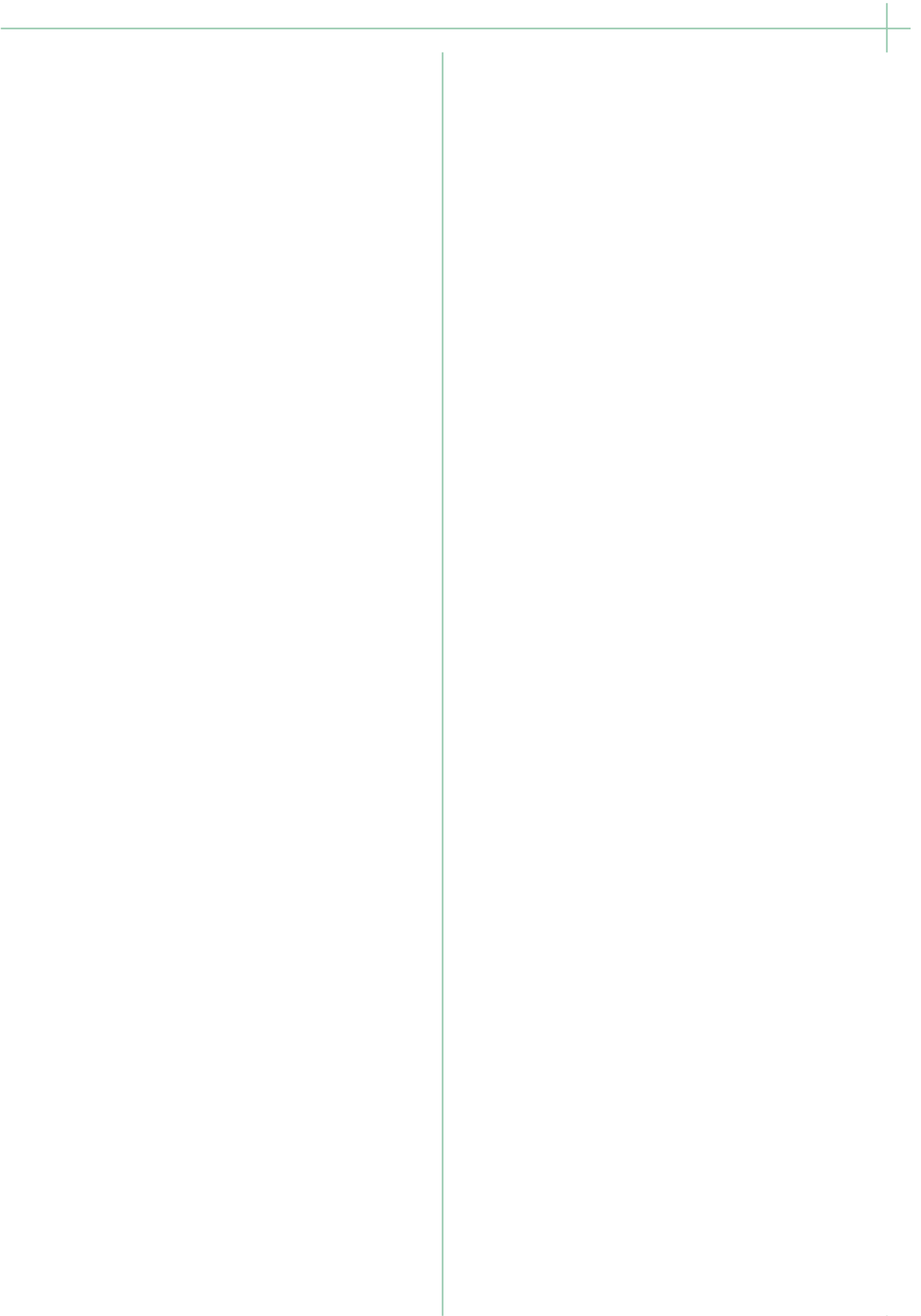
More importantly, the activities of the following watchdogs are funded from the consolidated fund protecting them from across the board budget cuts:

- 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.



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
-

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

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.

models such as a Children's Commissioner, and

(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

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 the postfo3 10ates 227ent ret2.2(tion,TJ0 -1.75study mainly as)], the sis,813 Tc0.1386 Tw[(Parliament(Parl
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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 of'

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

Commission can require its Chief Investigating Officer to comply with any directions given by it,

(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 experienced 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 on the model of the Executive, initially implemented

template itself, and the means by which such

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

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 sT#0mesch 2

99A71 1998 sT#0(3)

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

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,

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

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

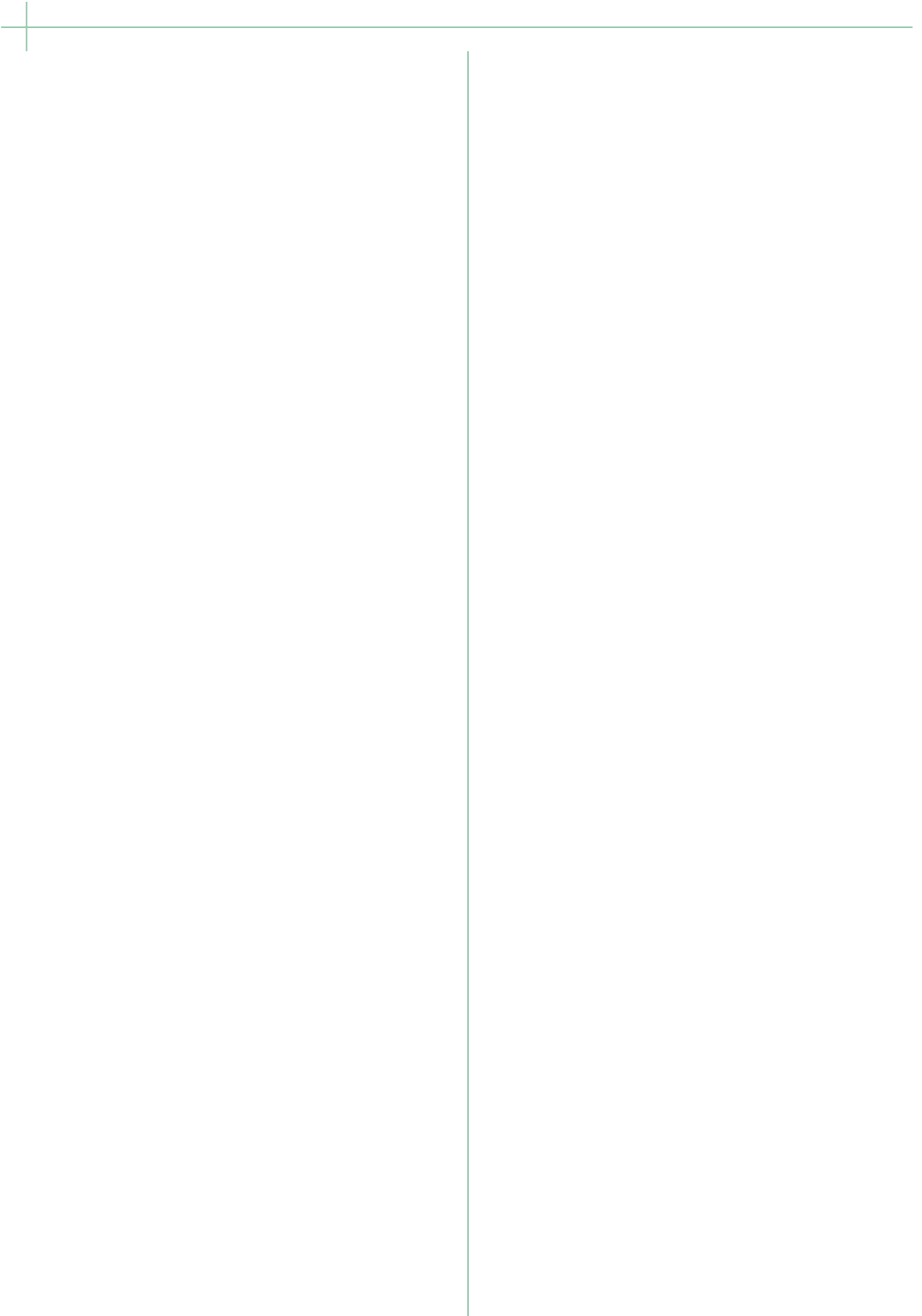
The Committee would have the following functions. It would:

- 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

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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



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.



Appendix 1 Acronyms and abbreviations used in this study

AC: Accounts Commission for Scotland



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

Speakers of both Houses

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Federal Legislation

Access to Information Act 1985,

Official Languages Act 1985

Privacy Act 1985

Auditor General Act 1995

Canada Elections Act 2000





