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Officers of Parliament- A Comparative Perspective

Originally applying to senior staff members and selected Members the term Officer of the House has now been applied to statutory officers such as the Comptroller and Auditor General and the Parliamentary Commissioner for Administration. The term was also adopted for the non-statutory office of Parliamentary Commissioner for Standards. The creation of new bodies expected to have some relationship with Parliament, such as the Judicial Appointments Commission and the Lords Appointment Commission has sparked new interest in appropriate constitutional models. This Paper examines models from a number of states within the Westminster tradition, which have also developed the concept of Officers of Parliament to fit a variety of constitutional watchdogs.

Oonagh Gay

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Summary of main points

The term Officer of the House has traditionally been applied to Members of either House with relevant duties, such as Speaker, or Deputy Speaker, but also to senior staff such as the Clerk of the House of Commons. During the nineteenth and twentieth centuries the term was also applied to the post of Comptroller and Auditor General, although this was not acknowledged in statute until the *National Audit Act 1983*. The Parliamentary Commissioner for Administration (Ombudsman) was also accorded the privileges of an Officer of the House, although this has not been recognised in statute. The Parliamentary Commissioner for Standards was established on a non-statutory basis as an Officer of the House, and the Eighth Report of the Committee on Standards in Public Life has commented on the lack of a clear legal definition separating Officers of the House, as independent constitutional watchdogs, from employees of the House.¹

The Comptroller and Auditor General's relationship with Parliament is often used as a benchmark of independence and accountability to be applied to the creation of new constitutional watchdogs. The key characteristics of this model can be summarised as:

- parliamentary involvement in appointment and dismissal
- a statutory committee which is responsible for budget approval and oversight
- a specific select committee to which the Officer is bound to report
- staffing independent of the civil service.

At present in the UK, there are a number of posts whose structure and relationship with Parliament is under review. There is parliamentary interest in designing bodies which, like the C&AG, offer regular opportunities to account to Parliament, while preserving independence from both the legislature and the executive. The Government announced plans to make both the House of Lords Appointments Commission and the Judicial Appointments Commission statutory bodies; the Joint Committee on Human Rights has called for a statutory Human Rights Commission and the Public Administration Select Committee have argued for the Commissioner for Public Appointments to become an Officer of Parliament.

The concept of independent constitutional officers with an institutional relationship with Parliament is found in other Commonwealth Parliaments and the Republic of Ireland. This paper examines the key posts in New Zealand, Canada, Australia and South Africa, as well as Ireland and attempts to illustrate how the development of these officers or commissions might provide useful precedents for the UK. It is not an exhaustive survey of the subject.

¹ *Standards of Conduct in the House of Commons* Cm 5663 November 2002

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I Officers of Parliament in the UK

A. Derivation from staff of both Houses

The term Officer of Parliament or Officer of the House appears very rarely in statute and has never been subject to judicial interpretation. Its usage is largely confined within the Palace of Westminster. Successive editions of the authoritative guide to parliamentary procedure and practice, Erskine May, give the fullest description of the applicability of the term, but do not offer a definition.² The first edition appeared in 1844, but it was not until the 15th edition (1950) that the term Officer of the House of Commons was applied to the Comptroller and Auditor General. Generally, Erskine May lists the office-holders who are accorded the privileges of an Officer of the House of Commons. Four categories can be distinguished from the description in Erskine May:

- Elected officers: the Speaker and three deputy Speakers
- Crown appointed officers, the Clerk, Clerk Assistant, Serjeant at Arms, Clerk of the Crown in Chancery³
- Senior staff appointed by the Speaker, or House of Commons Commission, including Speaker's Counsel and Parliamentary Commissioner for Standards
- 'Statutory' officers – the Comptroller and Auditor General, and the Parliamentary Commissioner for Administration

For the House of Lords there are two categories:

- Members in senior positions: Lord Chancellor, deputy speakers
- Crown appointed officers: The Clerk of the Parliaments, Clerk Assistant and Reading Clerk, Black Rod,

Crown appointments for senior employees take various forms such as letters patent. These appointments can 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*.

The offices of Speaker, Clerk of the House and Serjeant have existed since at least the fourteenth century and their slow development into separate modern offices is detailed in a study by a former senior official in the House.⁴ The Speaker holds one of the highest constitutional offices, ranking sixth in the official order of precedence after the Royal Family and receives royal approbation following election by the House. The Speakers' salary (although not that part attributable to his position as a Member) is a direct charge on the Consolidated Fund, following the *House of Commons (Speaker) Act 1832*. This follows the precedent of the independence of the judiciary under the *Act of Settlement 1701*. The independence of the Speaker's office was adapted as a model for constitutional

² *Parliamentary Practice* (22nd edition) 1997 p184-200

³ The latter is an Officer in both Houses

⁴ Philip Marsden *The Officers of the House of Commons 1363-1965* 1966

officers, such as the Comptroller and Auditor General, as described below, rather than for senior staff offices, such as the Clerk of the House or the Serjeant, which have evolved into permanent positions with the responsibility of administering House affairs. However, under the *Clerk of Parliaments Act 1824* the Clerk of the Parliaments may be removed from office only by the Crown following an address from the House of Lords.⁵ The *Parliamentary Corporate Bodies Act 1992* designated the Clerk of the Parliaments and the Clerk of the House of Commons as ‘Corporate Officers’ of the Lords and Commons respectively. Legislation was found necessary to enable permanent staff to enter into contracts on behalf of the Palace of Westminster after responsibility for the building was transferred from central government, following an efficiency study by Sir Robin Ibbs into the administration of the Commons in 1990.⁶

B. Extension of the term to statutory watchdogs

The concept of Officers of the House was developed in the twentieth century, well beyond its earlier usage, to apply to new types of constitutional watchdogs. The term has come to denote a special relationship of accountability to Parliament and such designation implies 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 independence. A similar development has occurred in a number of other Westminster style Parliaments, which have adopted the term from Westminster. (See Part II of the paper for full details).

Within the UK Parliament the term has been applied in this way to three Officers as follows:

- Comptroller and Auditor General
- Parliamentary Commissioner for Administration (Ombudsman)
- Parliamentary Commissioner for Standards

Auditors and Ombudsmen relate to the historic functions of Parliament -authorising expenditure and redressing grievances. The positioning of ethics commissioners is less clear, as their categorisation as Officers has been more related to the traditional concept of an Officer as a senior staff member or servant of Parliament.

1. The Comptroller and Auditor General

The new definition can be traced from the development of the role of the Comptroller and Auditor General. Although the C&AG was described as an officer in nineteenth century texts, this was not officially recognised until the *National Audit Act 1983*, which established the office as an Officer of the House of Commons, to be appointed by the Crown, but in consultation with the Chairman of the Public Accounts Committee (PAC).

⁵ The Clerk of the Parliaments is the head of the Parliament Office, consisting of the permanent staff of the House

⁶ HC 38 of 1990-01

The C&AG holds office during good behaviour and can only be dismissed following resolutions of both Houses.⁷

This legislation also created an independent National Audit Office, with staff employed directly by the C&AG and gave the C&AG complete discretion over discharge of functions. However, in determining to carry out an audit examination, he must take into account any proposals made by the PAC. Finally it created a statutory Public Accounts Commission to oversee the budget of the NAO and appoint its auditor. It consists of the Chairman of the PAC, the Leader of the House (a Cabinet Minister) and seven other MPs, none of whom can be ministers.

2. The Parliamentary Ombudsman

The post of Parliamentary Commissioner for Administration (Parliamentary Ombudsman) was created in 1967 and partially modelled on the C&AG. This link was explicitly stated in the parliamentary debates on the *Parliamentary Commissioner for Administration Act 1967*. 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 mirrored those for the C&AG. The new postholder was not to be subject to directions from Parliament on how to undertake his investigations. But the model then predated the 1983 legislation clarified the independent status of the C&AG.

Although the Ombudsman's personal salary was met from the Consolidated Fund and 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. This mirrored arrangements for the C&AG in the 1960s. The first Ombudsman was Sir Edmond Compton who was a former C&AG and was selected some months earlier as a distinguished public servant who would establish the reputation of the new position. A specific select committee of the House, the Parliamentary Commissioner for Administration Committee, took on the role of monitoring the Ombudsman.

The select committee made major proposals in 1993, recommending that its chairman and the Leader of the Opposition have a statutory role in the appointment of the Ombudsman. It also proposed that the funds for the office should be voted directly by Parliament on estimates prepared by a Public Appointments Commission, clearly modelled on the Public Accounts Commission, that is a separate body to take responsibility for setting the budget of the office.⁸ These proposals would have enabled the Ombudsman to 'catch up' with the institutional advances made by the C&AG in 1983. The then Government agreed

⁷ The term 'good behaviour' is used as a shorthand for undertaking the duties of the office. See the *Exchequer and Audits Department Act 1866*

⁸ PCA Select Committee First Report HC 1993-94. See also R. Gregory, P. Giddings and V. Moore 'Auditing the Auditors: The select committee review of the powers, work and jurisdiction of the ombudsman 1993' *Public Law* Summer 1994

to amending legislation making the Ombudsman's staff public servants and an equivalent to the Public Accounts Commission to supervise a budget voted directly by the House of Commons.⁹ But a suitable legislative slot did not appear. Legislation to modernise the role of the Ombudsman is now expected following the review of ombudsman services by the Cabinet Office in April 2000. This recommended a new Commission to cover the remits of the parliamentary ombudsman, the health service commissioner and the local government ombudsman, but it did not focus in any detail on the reporting arrangements to Parliament and the role of a select committee in monitoring the work of the new Commission.¹⁰ The Public Administration Select Committee, which now is responsible for monitoring the work of the Ombudsman, has argued for an end to the continued uncertainty about the future of the post.¹¹

C. The non-statutory Parliamentary Commissioner for Standards

The office of Parliamentary Commissioner for Standards was created following the first report of the (Nolan) Committee on Standards in Public Life in 1995. This recommended an officer to oversee parliamentary standards, drawing analogies with the role of the C&AG and the Parliamentary Ombudsman. But these analogies were not exact, since the new post was to be non-statutory. The details of the new post and its relationship with the new Standards and Privileges Committee were left for a specially constituted select committee to consider in detail. Their proposals were endorsed in a general debate in the House. The first PCS, Sir Gordon Downey, was appointed by the House of Commons Commission, as the body responsible for employing staff of the House. His status as a former C&AG assisted the establishment of this new post as a prestigious office.

The eighth report from the Wicks Committee on Standards in Public Life commented on the ambiguous nature of the office in terms of its operational independence.¹² The terms and conditions for the post were set out in annexes to the House of Commons Commission's report recommending the appointment of a Commissioner, endorsed by resolutions of the House.¹³ The Committee considered that this was not necessarily the most suitable way of making this information known. The Wicks Committee stated:

8.13 It is essential that the Commissioner's status be clarified because it is basic to the operational independence of the post. Otherwise there will continue to be questions about the extent to which the Commissioner can bring independence to the regulation of the House of Commons when he or she is in the direct employ of the House.

⁹ Government reply to the First Report from the Select Committee on the Parliamentary Commissioner for Administration HC 619 session 1993-94

¹⁰ Review of the Public Sector Ombudsmen in England

¹¹ *Ombudsman issues* HC 448 Session 2002-03

¹² *Eighth Report Standards of Conduct in the House of Commons* Cm 5663 November 2002

¹³ See <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcomm/598/59802.htm#a1> for the most recent report *Parliamentary Commissioner for Standards: Nomination of Candidates 2001-2*

These recommendations were considered by the Committee on Standards and Privileges and the House of Commons Commission. Their responses to Wicks, while promising greater transparency and clarity about the relationship between PCS and Committee, indicated some differences of opinion.¹⁴ Parliamentary authorities argued that statute would be necessary to ensure the model of an independent office-holder in the manner described by Wicks.

The House accepted significant changes to the appointment and dismissal process for the PCS in amendments to Standing Order 150 on 26 June 2000, when debating the Wicks report. The main changes are:

- All future appointments of Commissioners will be for a term of five years, non-renewable and
- The term of the current Commissioner will be extended for a five year period until June 2008
- The Commissioner may now only be dismissed following a motion before the House, where the Committee of Standards and Privileges has reported (with reasons) that he cannot carry out his functions or is unfit for the office
- The Standards and Privileges Committee will no longer have a government majority, but will consist of five government and five opposition members, chaired by an Opposition spokesman (selection will remain with the whips)
- No Parliamentary Private Secretary will be appointed to the Committee
- The Commissioner will publish an annual report which will give details of the budget for the office.¹⁵

The office however remains distinct from the statutory posts of C&AG and Parliamentary Ombudsman.

D. Characteristics of an Officer - The Electoral Commission and the Information Commissioner

Electoral commissioners perform the central role of overseeing the election of a parliament's own members. The UK Electoral Commissioners can be seen as possessing the essential characteristics of an Officer. They are appointed by royal warrant, following a resolution of the Commons, and the Commission is overseen by a Speaker's Committee, broadly modelled on the Public Accounts Commission. The Speaker's Committee consists of the Home Secretary, the Minister for Local Government, the Chair of the Constitutional Affairs Select Committee and five backbenchers. The Committee supervises the budget of the Commission, but does not otherwise play a role in examining its policy objectives. Staff are not civil servants but enjoy similar employment benefits. The Commission is funded from the parliamentary vote, in the same way as the National

¹⁴ House of Commons Commission report HC 422 Session 2002-3, Standards and Privileges Select Committee report HC 403 Session 2002-3

¹⁵ The position of PPSs on the Committee is dealt with more fully later in Chapter 4. There were other changes to Standing Order 149 relating to the investigation process, covered in Chapter 5

Audit Office. The salaries of the Commissioners are met from the consolidated fund standing services, in the same way as the C&AG, and the Chief Electoral Officer for Northern Ireland.¹⁶ However, the Commissioners are not officially recognised as such, in contrast to the position in Canada.

Some characteristics of parliamentary officers apply to the Information Commissioner. This post was established by the *Freedom of Information Act 2000*, 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 the duties of guidance and enforcement of the legislation. The salary of the Information Commissioner itself is funded from the standing services of the consolidated fund and he is appointed by letters patent. A resolution of both Houses is also required under Schedule 5 of the 1998 Act to remove the Commissioner from office. No grounds are specified for removal. Originally under the *Data Protection Act 1984* there had to be a parliamentary resolution every time the salary was increased – this was changed with the *Data Protection Act 1998*.¹⁷

E. Core Characteristics of a statutory Officer of Parliament

Drawing mainly on the institutional design of the C&AG, which, it can be argued, sets the standard for other constitutional watchdogs in terms of accountability and independence, the essential characteristics can be described as:

- parliamentary involvement in appointment and dismissal
- a statutory committee which is responsible for budget approval and oversight
- a specific select committee to which the Officer is bound to report
- staffing independent of the civil service.

The model developed in the UK has been adapted for use in a number of different states whose Parliaments follow what is characterised as the Westminster system. The history of their development of this concept can offer some useful design features for innovation in the UK Parliament. But the application of officer status to a wide range of constitutional watchdogs raises issues about the appropriate boundaries for the use of the Officer model. There are growing numbers of independent watchdogs with powers of persuasion and publicity to alter actions of the executive and other public bodies in areas which can be characterised as constitutional. This includes human rights, electoral matters, the redress of grievances and the voting of supply. Some watchdogs also have judicial powers or powers to enforce decisions.

¹⁶ *Electoral Law Act 1962 (Northern Ireland)* as amended in 1973

¹⁷ The question of classification of a range of other constitutional bodies is explored in *Officers of Parliament- Transforming the Role* Constitution Unit 2003

But there are likely to be finite limits as to the number of Officers which with parliaments can be expected to sustain a real relationship of accountability. Some Canadian provinces for example, have made Children's Commissioners an Officer of Parliament.¹⁸ The Children and Young Persons' Commissioner in Scotland is appointed by the Scottish Parliamentary Corporate Body and is required to report to that Parliament, rather than to the executive.¹⁹ The Children's Commissioner for Wales established in the *Care Standards Act 2000* and the *Children's Commissioner for Wales Act 2001* was appointed by an all party committee of the Assembly and has duties to report to the Assembly on his work.²⁰ There has been no suggestion that the proposed Children's Commissioner for England should become an Officer of the Commons.²¹ But in the absence of clear criteria, the office might conceivably acquire such a status. Recent proposals for the creation of a number of constitutional bodies bring these issues to the fore.

F. Current UK debate on models for constitutional bodies

1. Public Appointments Commissioner

Interest is growing in methods of establishing new bodies in the UK, which bolster their independence from the executive, while offering some form of accountability. The Select Committee on Public Administration has recommended in its report on Patronage that the Office of the Public Appointments Commissioner (OCPA) become an Officer of Parliament. It commented as follows:²²

98. The Cabinet Office currently funds OCPA and houses the Office. The London staff of eight officials is drawn from officials from the Lord Chancellor's Department, the Cabinet Office and other departments on secondment.[52] We regard this as an unsatisfactory state of affairs that has potential practical consequences. The simple fact that the Commissioner and her Office are funded and serviced from Whitehall creates the impression that she works for and reports to ministers.

99. Just as independent assessors working in different departments should be truly independent of those departments, so too should the Office that assumes overall responsibility for the independence of the process in central government be independent of the executive. The Commissioner recognises that there are advantages in employing officials who are well versed in the ways of government departments, but she has long argued that OCPA should be funded and housed independently of the executive; and that she should have the power to appoint staff permanently.[53] If the Commissioner's office is to be independent of the executive, it should be rooted in Parliament. The Commission should therefore be

¹⁸ See below, Part II

¹⁹ For further detail see *Officers of Parliament: Transforming the Role* Constitution Unit 2003

²⁰ See National Assembly for Wales Members' Research Service Research Paper 01/005 *Children's Commissioner for Wales* March 2001

²¹ Green Paper

²² *Government by Appointment: Opening Up the Patronage State* HC 165 Fourth Report of Session 2002-3, para. 99.

an officer of Parliament, as one of the key constitutional watchdogs. The appointment should be approved by Parliament and it is to Parliament that the Commissioner should report.

The Committee also recommended that a new Public Appointments Commission (with responsibility for making appointments to public bodies) be established and drew on the precedent of the Electoral Commission for institutional design, as displaying sufficient parliamentary involvement and accountability.

2. Proposals for a Human Rights Commission

The Joint Committee on Human Rights has also drawn attention to the inadequacies of the NDPB model for constitutional watchdogs in its report on the case for a Human Rights Commission in 2003. It argued strongly that Parliament should be directly involved in the setting of the commission's budget, as a guarantee of independence. It concluded that the model of accountability adopted for the existing anti-discrimination commissions was not entirely satisfactory from the point of view of independence or accountability. It noted:²³

In negotiating their budgets, such bodies have little leverage against their parent department—a very central concern of the Commonwealth commissions which we visited. Ministers will have very varied levels of interest in the work of a particular body, and may on occasions even be hostile. There is often little sustained engagement between a commission and its government sponsor.[161] The level of formal parliamentary accountability is generally low, reliant on the intermittent attention of select committees with very crowded agenda or of individual members using questions or adjournment debates either to probe or support their work. The level of informal engagement in Parliament is often also poor.

228. A more attractive model is the National Audit Office, with its direct engagement with Committee of Public Accounts, and its much more independent funding stream through the statutory Public Accounts Commission. Here we see the highest level of parliamentary engagement and accountability, a very clearly established independence from Government, a more openly negotiated funding stream, and a high reputation for its work.

229. Something of a halfway house between these two models is the Parliamentary Commissioner for Administration. Though funded from central government voted expenditure, his or her reporting line is more directly to a specified parliamentary committee (currently the Public Administration Committee of the House of Commons).

230. We note that the Scottish Executive has reached the view that the Scottish Human Rights Commission should be directly accountable to the Scottish Parliament with its funding overseen by the Scottish Parliament Corporate Body.[162] **Similarly, we do not consider that the standard model of NDPB accountability is a sufficiently outward and visible guarantee of**

²³ *The Case for a Human Rights Commission* HL Paper 67/HC 489 Sixth Report of Session 2002-3.

independence from the Government to be appropriate to a national human rights commission (or indeed the proposed single equality body, whether or not integrated with a human rights commission). We intend to examine the other options more fully in the light of the Government's decisions following its consultation on a single equalities body.

3. Judicial Appointments Commission

Most recently, proposals for a new Judicial Appointments Commission are likely to lead to renewed debate over its institutional status and the procedure for making appointments to the new body:

116. The Government proposes that members of the Judicial Appointments Commission for England and Wales are appointed using open and transparent methods, in accordance with the Nolan principles]. The Government does not believe that appointments should simply be made by the Secretary of State for Constitutional Affairs, as this would leave the decision about who sits on the Commission solely in the hands of the Executive. The preferred option would be to have the appointments made by The Queen. The Permanent Secretary of the Department for Constitutional Affairs would chair a separate recommending body, whose recommendations would be passed up to the Prime Minister who would make the formal recommendation for appointment to The Queen. Other members of that recommending body might be a senior judge, for example, a senior figure entirely removed from the Department and the judiciary, and of course an Independent Assessor, appointed in line with the *Code of Practice for Public Appointments Procedures*.²⁴

Responses to the paper are requested by 7 November. In a debate in the Lords on 8 September 2003 Lord Alexander of Weedon argued that a civil servant should not chair the selection board for the commission:

First, like the noble Lord, Lord Lester, I do not think it right that a civil servant, however eminent, should chair the small group which makes recommendations for appointment to the commission. I think that it should be better if a judge chaired that group, or at any rate someone else of stature wholly independent of government. ...I would not find a trade-off acceptable between the present arrangements and an independent commission which ultimately led to appointments being made by a very political Minister. We must remember that this is different from any other department of state. All other departments of state are ultimately accountable to the Government. The law is separate. It is a separate branch of the constitution, accountable to the people. I believe that that tradition should be preserved, and the mechanism of adapting the Lord Chancellor's role is a simple one.²⁵

²⁴ Department for Constitutional Affairs *Constitutional Reform: a new way of appointing judges* CP 10/03 (2003).

²⁵ HL Deb 8 September 2003. A number of other speakers also made similar points.

Lord Lester called for some parliamentary involvement in the appointments process:

I share the concern of the noble and learned Lord, Lord Woolf, that the proposed judicial appointments commission might be unduly influenced by politicians. As he has said:

"If the Executive can influence who is on the appointments commission and who the commission appoints that is interfering with the judiciary".

It may be desirable, for reasons of political legitimacy and parliamentary accountability, for a parliamentary Select Committee to be involved in some way and for the Prime Minister to recommend to the Sovereign appointments to the senior judiciary, but this must not mean that Ministers should be able to influence the process other than by accepting or rejecting the proposals of a genuinely independent commission. Ministers' discretionary powers should be strictly confined to ratification or rejection of nominations. We certainly would oppose politically partisan and oppressive confirmation proceedings of the kind operated in the United States.²⁶

The non-statutory Judicial Appointments Commission currently in existence was appointed in March 2001. Professor Sir Colin Campbell, Vice-Chancellor of Nottingham University, was appointed First Commissioner for Judicial Appointments and seven Deputy Commissioners were appointed in December 2001 to support Sir Colin in his role. One of the Deputy Commissioners is also Commissioner for Judicial Appointments for Northern Ireland. All their appointments were for a term of five years, which is renewable for a further five years. The panel for the appointment of the First Commissioner was chaired by the then LCD's Permanent Secretary, with a senior judge and an independent assessor. The panel for the other Commissioners was chaired by the First Commissioner, with a senior LCD official and an independent assessor.

The appointments were made by Order in Council in exercise of the Royal Prerogative, on the recommendation of the Lord Chancellor. The Commissioners were selected through an open competition conducted by the Lord Chancellor's Department under the usual Office of the Commission for Public Appointments (OCPA) Code of Practice.

4. House of Lords Appointments Commission

Interest in the structure of the non-statutory House of Lords Appointments Commission has also been evident. A selection panel prepared the final shortlist for the chairman and independent members.²⁷ The Wakeham Commission proposed a statutory Appointments Commission with an institutional model guaranteeing independence, in a similar way to the Electoral Commission under the *Political Parties, Elections and Referendums Act*

²⁶ HL Deb 8 September 2003 c113

²⁷ 10 Downing Street Press Notice 'Prime Minister Announces Members of the House of Lords Appointments Commission' 4 May 2000. See Library Research Paper 01/77 *House of Lords reform: Developments since 1997* for further details

2000.²⁸ It saw the process of legislation as an important aspect of the establishment of the new body, provoking proper parliamentary scrutiny and providing entrenchment against change. The White Paper on reform of the House of Lords accepted the case for a Commission with parliamentary accountability, without providing further details.²⁹ The Government has now decided to create an Appointments Commission with more limited functions than envisaged by Wakeham. The consultation paper issued by the Department for Constitutional Affairs in September 2003 examined the options for the accountability of the new statutory version of the Appointments Commission as follows:

The Government proposes to take the opportunity for setting up the Appointments Commission on a statutory basis to enhance significantly its independence from the Government. It believes, as proposed in its 2001 White Paper, that a good model to follow would be that of the Electoral Commission. The Electoral Commission is appointed by The Queen in response to an Address from the House of Commons. Such an Address can be moved only with the agreement of the Speaker and that of the leader of each registered political party with two or more members sitting in the House of Commons. Members of the Commission can only be removed in response to an Address from the House, which itself must be based on the report of a special Committee of the House chaired by the Speaker, on which backbench members are in a majority. Its funding is voted by the House directly, on the basis of Estimates approved by and laid before Parliament by the Speaker's Committee.

Given that the functions of the Appointments Commission will be related to the House of Lords rather than the House of Commons, the arrangements for the appointment of the Commission cannot exactly duplicate those for the Electoral Commission. On the other hand, nor will it be possible simply to substitute the House of Lords for the House of Commons throughout the arrangements, since a Committee of the House of Lords would have no power to lay an Estimate before the House of Commons for the Commission's funding. The options would appear to be to make the Commission answerable to both Houses, but provide that only the Commons members of the equivalent to the Speaker's Committee should be responsible for funding; or to make the Commission answerable only to the House of Lords and make other arrangements for voting the Commission's funding.

Issue 1:

The Government proposes that the Appointments Commission should be put on a statutory footing at the next legislative opportunity.

Should the arrangements for accountability for such a body follow those for the Electoral Commission in making it accountable to Parliament rather than Government Ministers?

If so, should the different circumstances of the Appointments Commission be reflected by (i) making it accountable to the House of Lords alone (as the

²⁸ Cm 4534 *A House for the Future* January 2000

²⁹ Cm 5291 *The House of Lords: Completing the Reform* November 2001

Electoral Commission is responsible to the House of Commons alone); or (ii) making it accountable to both Houses of Parliament?³⁰

The paper's proposals on appointments to the Commission were to allow cross-party consultation, as follows:

The new statutory Appointments Commission will wield very significant powers. It is therefore vital that the appointment of Commissioners is transparent, open, and free from Prime Ministerial patronage. The White Paper proposed a Commission of eight members, four nominated and recommended by the parties and cross-benchers; and three members and the Chairman to be recruited through an open selection process according to Nolan principles. The Commission will have significant powers in relation to the appointment of party members of the House, and will be wholly responsible for the nomination of cross-bench members. The Government therefore believes it is right that these groups should be directly represented on the Commission. The addition of a direct nomination from the cross-benchers would mean that the independently appointed members would not be in a majority. To restore this majority would require a Commission of nine members, which might be considered to be too large. One possible option could be to invite the selection panel, rather than the Convenor of the cross-benchers, to select the cross-bench representative. They could do this using Nolan principles and it would relieve the Convenor of a responsibility that sits rather uneasily with the informal nature of his position, since he is not a party leader and the cross-benchers do not have a party position or any formal discipline arrangements. The Government proposes that the actual appointment should be made by The Queen in response to a Parliamentary Address made on the motion moved by the Leader of the House, following the normal consultation with the leaders of the other party groupings and the Convenor.³¹

One major difference with the Electoral Commission model is the decision, in line with Wakeham, to make some appointments to the Commission on a party political basis, to allow the individuals to fulfil a representative function. Wakeham had recommended a ten year maximum term for a Commissioner and that MPs should not be eligible for appointment. The consultation paper did not set out preferred views on these points, but asked for responses. The deadline for consultation on the proposals was given as 12 December 2003. There is expected to be considerable parliamentary interest in the process for appointing the Commission and for achieving a balance between independence and accountability.

II International Comparisons

The concept of independent constitutional officers with an institutional relationship with Parliament is also found in other Commonwealth Parliaments and in the Republic of Ireland, although only Canada and New Zealand have formally titled certain watchdogs

³⁰ *Constitutional Reform: Next Steps for the House of Lords* September 2003 CP 14/03

as Officers of Parliament. These states have developed the association of the term Officer of Parliament into a more formal concept applied to independent constitutional watchdogs. These bodies exhibit some or all of the core characteristics of the Officer of Parliament model outlined above at Part I, E.

International comparators have often offered the Westminster Parliament examples of innovation which might bear translation to the United Kingdom. One recent example is the creation of Westminster Hall as a parallel debating chamber, which was based on the Main Committee in the federal Australian parliament. This Part attempts to describe recent models whose characteristics might be of relevance to current debates about the design of independent constitutional bodies. But models taken from abroad do not always transplant well to other Parliaments. The information presented below is culled from a number of official sources.

A. New Zealand

This Parliament has developed one specific committee designed to oversee its constitutional officers on behalf of its Members. This is an alternative to separate parliamentary committees monitoring the work of individual officers. The Officers of Parliament Committee is chaired by the Speaker, thus ensuring that it is seen as an important parliamentary committee, rather than one dominated by the executive. The Committee has four functions, as set out in the current Standing Order 191:

191 Officers of Parliament Committee

- (1) The House establishes an Officers of Parliament Committee at the commencement of each Parliament. The committee consists of the Speaker and seven other members. The Speaker is the chairperson of the committee.
- (2) The committee—
 - (a) recommends to the House in respect of each Office of Parliament an estimate of appropriations for inclusion as a Vote in an Appropriation Bill, and also recommends to the House any alteration to such a Vote;
 - (b) recommends to the House an auditor to be appointed by the House to audit the financial statements of each Office of Parliament;
 - (c) considers any proposal referred to it by a Minister for the creation of an Officer of Parliament;
 - (d) may develop a code of practice applicable to all Officers of Parliament.

Each statute creating the Officer gives details of the appointments process. They are confirmed in post by parliamentary resolution. The Officers of Parliament Committee plays a major role in this process. The formal resolution is unanimous by convention and there is no tradition of confirmation or appointment hearings.

The Committee takes its responsibilities seriously and is mindful of the importance of fixing funding levels for Officers at levels which maintain their independence. The Committee is chaired by the Speaker and there is no Government majority as a matter of principle. There are four government members and four opposition members as well as the Speaker and an assistant Speaker. Some are whips of their parties, indicating however

that they are not ordinary backbenchers. The operation of supervision is therefore the responsibility of Parliament rather than the executive.

New Zealand Officers are funded by individual Annual Votes, which are recommended by the Officers Committee for adoption in an appropriation bill, thus ensuring parliamentary supervision of the budget. There are three Officers of Parliament:

- Comptroller and Auditor General
- The Ombudsman
- The Environment Commissioner

The parliamentary authorities take a cautious line in recommending the creation of further Officers. An influential report from the Finance and Expenditure Committee in 1989 found that Officers had been created on an ad hoc basis to date and recommended the creation of the specific parliamentary committee for officers. It also drew up some guiding principles for the creation of new Officers:

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

The reasoning behind principle 2 was that watchdogs which had judicial powers would not be appropriate, since the House did not have judicial powers itself. The Parliament has held to these principles mostly recently in a private member's bill which attempted to upgrade the existing Children's Commissioner to an Officer.³² The Bill was referred back by the Social Services Committee in favour of a government bill which did not make the Commissioner an Officer. In addition, a memorandum from the Clerk of the House advised against the creation of a new Officer during a hearing by the Commerce Committee of a bill dealing with energy supply reform.³³

These principles offer an attractive definition of the boundaries of the Officer concept, but may appear unduly restrictive given the range of constitutional office-holders now in existence where an institutional link with the parliament would appear valuable. The development of the Officers is described below, with reference to the core characteristics identified above.

1. Comptroller and Auditor General

The Comptroller and Auditor General (C&AG) did not become a statutory Officer of the House until the *Public Finance Act 2001* which was a major enactment on the auditing of

³² *The Parliamentary Commissioner for Children Bill*

³³ *Commerce Amendment Bill*, as reported by Commerce Committee on 2 February 2001 296-2

public sector organisations. He is appointed for a non-renewable seven year term. The C&AG became appointed following a resolution from the Parliament, the first such appointment being Kevin Bernard Brady on 26 February 2002, and confirmed by the Governor General. The C&AG is required to report to the Finance and Expenditure Committee. The statute gives considerable detail of the interaction of the C&AG with Parliament. Under section 36 the Speaker tables a proposed work programme on behalf of the C&AG. The Speaker or any committee of the House may request changes to the plan. The Auditor General may then amend the plan, taking those comments into account, but must indicate the nature of any changes to the work programme priorities requested, but not included in the plan. In 2002, the first year for which the legislation was effective, the C&AG briefed the Finance and Expenditure Committee, which then invited responses from the select committees on the discretionary work programme of the Controller and Auditor General. The legislation brought the office of C&AG more into line with the independent nature of the office and emphasised the importance of the parliamentary link. It can be seen as developing the concepts in the UK *National Audit Act 1983* to a higher level of interactivity with Parliament and its committees.

The C&AG may assist select committees by offering technical advice independent of evidence given by Government and government officials. He may attend as an assistant to the Committee during evidence taking. The Officers of Parliament Committee drafted a Code of Practice for the provision of assistance to select committees and Members of Parliament, using its powers under SO 191. The possibility of a formal Code has not been on the formal agenda in the UK Parliament, but its use in New Zealand may prompt further examination of the idea.

2. Ombudsman

The term Officers of Parliament in relation to New Zealand first appeared in the legislation in 1962 establishing the first Ombudsman in the English speaking world.³⁴ Unlike the UK, no MP filter applies and the Ombudsman covers the range of central and local government and associated agencies. There are also duties under the *Official Information Act 1982* and the *Protected Disclosures Act 1962*. The Office is technically a 'wholly owned entity of the Crown'. Appointments are made for five year terms with possibility of reappointment and the current chief Ombudsman, Sir Brian Elwood, was first appointed an Ombudsman in 1992 and re-appointed by Parliament in 1997. Technically there is one Chief Ombudsmen and two Deputies. The Ombudsman is appointed by the Governor General following a parliamentary resolution. The convention since the first appointment has been that the resolution be unanimous. Staff are independent of Government.

Parliamentary committees will examine the reports of the Ombudsman. A select committee may ask the ombudsman to investigate and report on any petition before the

³⁴ *Parliamentary Commissioner (Ombudsman) Act 1962*

House if the subject matter is within the Ombudsman's jurisdiction. Unlike the UK, the Ombudsman does not report to a single committee. The office is considered an effective body, whose staff handle a considerable caseload.

3. Environment Commissioner

The current Commissioner is Dr J Morgan Williams, reappointed for a second five year term on 27 February 2002 by parliamentary resolution. It was following the creation of this Officer in 1986 that the Parliament began to consider guiding principles for establishing Officers. The Commissioner has a role in assisting select committees, specifically Local Government and Environment Committee, with their enquiries, and in scrutinising relevant annual reports. This appears to go well beyond the role of appearing as a witness. The Commissioner also has an ombudsman type role in responding to private citizens concerns.³⁵

4. Other constitutional watchdogs

There are a series of other bodies that could be categorised as constitutional watchdogs which are not officially designated as Officers. These include:

1. Privacy Commissioner,
2. Human Rights Commissioner
3. Retirement Commissioner
4. Health and Disability Commissioner
5. Inspector General of Intelligence and Security
6. Children's Commissioner

As noted above, the New Zealand Parliament is cautious about applying the Officer concept to these types of bodies.

B. Canada

The term Parliamentary Officer or Officer of Parliament is in general use as describing both the senior staff of the Parliament and constitutional watchdogs with a parliamentary focus. The term is not defined in federal legislation, but Standing Order 111 of the Commons makes specific reference to the concept. At the time of writing, a bill to reform the regulation of parliamentary ethics is before Parliament which will both introduce an ethics commissioner for the Senate and enable the Federal Ethics Counsellor to act as ethics commissioner for the Commons. Unlike the UK Parliamentary Commissioner for Standards, the Commons post will be statutory and will report to the House as a whole rather than a specific committee.

³⁵ is <http://www.pce.govt.nz>

There are five federal Officers as follows:

- Auditor General
- Chief Electoral Officer
- Privacy Commissioner
- Access to Information Commissioner
- Official Languages Commissioner

However, constitutional authorities do not agree on the precise boundaries of the use of the term ‘Officer’. For example, some constitutional watchdogs are required to report directly to Parliament – such as the Human Rights Commission. However, this body is not recognised within the category of Parliamentary Officers by internal parliamentary documents.³⁶ On the other hand a report by the Canadian Centre for Management Development includes the Human Rights Commission within its definition of ‘parliamentary agencies’. To take another example, the Public Service Commission, with responsibility for oversight of civil servants, reports to the relevant minister who then lays their reports before both Houses. However both bodies have characteristics similar to Parliamentary Officers, in that they have lengthy terms of appointment and parliamentary involvement in removal. On its website, the Public Service Commission describes itself as an independent agent of Parliament.

One obvious omission from the list above is an Ombudsman. Canada does not have an ombudsman for the federal government, although the office exists in several provincial legislatures. Except for the Auditor General, Officers are appointed or approved by Parliament, thus meeting one of the core characteristics of the Officer model. The Governor General is responsible for appointing the Auditor General for a ten year term. Other appointments are made by resolution of one or both Houses. The chief Electoral Officer is appointed by the Commons only until retirement. There is no standard term in operation for all Officers, but in general, seven year terms are the norm, with the possibility of re-appointment. The identification of suitable candidates takes place within government, with soundings from Opposition parties, rather than resulting from parliamentary involvement in the selection process.

All Officers are required to make an annual report to Parliament, but the extent of engagement within Parliament varies considerably. The Auditor General has a close working relationship with the Public Accounts Committee (PAC), where at least 95 per cent of its time is spent examining his reports.³⁷ Moreover, several parliamentary committees make use of the special studies prepared by his office, notably the National Finance Committee of the Senate.³⁸ However, the PAC lacks the powers available to equivalent committees in the UK, Australia and New Zealand to make input into the

³⁶ Canadian Parliamentary Library *Topical Information for Parliamentarians: Appointment of Parliamentary Officers* 31 May 2001

³⁷ *The Overseers: Public Accounts Committees and Public Spending* David G McGee QC CPA 2002

³⁸ *The Past, the Present and the Future of Parliamentary Officers* p34

programme of work of the Auditor. Although it is the authority to request special studies, in practice this power has never been used.

The Chief Electoral Officer has a close relationship with the Parliament, appearing before a number of committees, but 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.³⁹ 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*. The Official Languages Commissioner is the subject of regular reviews by parliamentary committees, and has a dedicated committee –the Joint Committee of Official Languages- but the Privacy and Human Rights Commissioners receive very little attention. There is no parliamentary committee with specific responsibility for the public service, so the Public Services Commission does not receive dedicated scrutiny. So overall, the quality of scrutiny undertaken by the Canadian Parliament in respect of its Officers varies according to the political profile of the post.

This unevenness in scrutiny was picked up as part of parliamentary initiatives to strengthen the procedures of Parliament. A report from the Special Committee on the Modernisation and Improvement of the Procedures of the House in 2001 recommended that annual reports of Officers should be referred to the relevant parliamentary committee. A Commons Committee on Government Operation and Estimates was established which has reviewed 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 which may 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.⁴⁰ The federal Commission now reports directly to the Speakers of both Houses. The impetus for change was drastic budget cuts in the British Columbian commission and Australian commissions.⁴¹ Symptomatic of trends of thinking was the (unimplemented) suggestion from the Senate following the events of September 11 2001 that an Officer of Parliament be appointed to oversee the implementation of the anti-terrorism legislation.⁴²

The staff of the Officers are generally recruited separately from central government staff. But the current Information Commissioner, John Reid, has complained about budget cuts inflicted on his office by Treasury Board and Ministry of Justice and has called for a more

³⁹ *Ottawa Citizen* 9 October 2002 'Watchdog's bark commonly ignored'

⁴⁰ *Promises to keep: Implementing Canada's Human Rights Obligations*

⁴¹ Colm O' Cinneide *A Single Equality Body: Lessons from Abroad* 2002 University College London for the Equal Opportunities Commission p48

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

independent process.⁴³ Similar problems have been faced by the Privacy Commissioner, particularly when his office attacked the executive for new security measures following the events of 11 September 2001.⁴⁴

1. Resignation of the Privacy Commissioner

The independence and accountability of Officers of Parliament was the subject of parliamentary and media attention in the summer of 2003.⁴⁵ The Privacy Commissioner, George Radwanski, was effectively forced to resign following a very critical report from a Commons committee, the Standing Committee on Government Operations and Estimates,⁴⁶ about his personal expenses, followed by public demonstrations against him by his own staff. Radwanski had been appointed for a seven year term in 2000, following resolutions in both Houses.⁴⁷ The final report of the Committee recommended that the Commons establish a committee to examine the role and functions of Officers of Parliament generally, with particular reference to the process of appointment and dismissal, the independence required by Officers, the determination of salary and benefits, and the applicability of the annual estimates process.⁴⁸ It also promised more work on protection for whistleblowers and the role of privilege in compelling disclosure of evidence.⁴⁹

The appointment of the previous Commissioner, Mr Bruce Philips, had also provoked some opposition because of perceived close links with the government party of the time (Progressive Conservatives). The Senate had taken nearly six months to approve the appointment by resolution. In 1998 Parliament was given the opportunity to hold pre-appointment hearings, before a government nomination had been formally tabled. The first was held into the appointment of Mr John Reid as Information Commissioner. The Modernisation Committee recommended in 2001 that all prospective government nominees should appear before a parliamentary committee before nomination, and this

⁴³ *Information Commissioner Annual Report 1998-99*. The Minister of Justice is the adversary for the Commissioner in any legal action undertaken by him, but his budget falls under that department's control.

⁴⁴ *Privacy Commissioner Annual Report 2001-2*

⁴⁵ See *Public Law* Winter 2003 'The fall of Canada's privacy czar: institutionalising Officers of Parliament' forthcoming for background

⁴⁶ This new Committee was established in May 2002 as part of the parliamentary modernisation initiative in Canada, in order to offer more structured scrutiny of government estimates. For background see *Report of the Special Committee on the Modernisation and Improvement of the Procedures of the House of Commons* June 2001. Standing Order 108(3) gave the Committee the power to review and report on the Privacy Commissioner.

⁴⁷ Mr Radwanski was appointed as interim Commissioner for a six month term on September 1 2000 and then appointed for seven years on October 19 2000. The appointment is made on the advice of the Prime Minister. Following the vacancy, an interim Commissioner has been appointed for a term of six months. This is Robert Marleau, a former Clerk of the House of Commons.

⁴⁸ The Sub Committee on matters related to the Review of the Office of the Privacy Commissioner by the Standing Committee on Government Operations and Estimates has been established. At the time of writing, it has not yet met

⁴⁹ Fifth Report of 37th Parliament

recommendation was incorporated in Standing Order 111.1. but has yet to be used. The decision to hold a hearing is at the discretion of the relevant parliamentary committee. The Procedure committee report envisaged that nomination would be put forward after consultation with the opposition parties. The committee would have 30 days to consider and report on a nomination. After no more than 30 days, a non-debatable motion would be passed in both Houses to confirm or reject the appointment.⁵⁰

The debate within Parliament may draw on a wider public policy debate about the role of Officers of Parliament. One leading academic has 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.⁵¹ 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. Professor Paul Thomas suggests the additional function of performing a ‘quinquennial review’ on each Officer of Parliament in turn, to establish its continuing role.⁵² 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.⁵³ It identifies three essentials for a healthy relationship:

- mutual knowledge and understanding,
- a values-driven relationship and a
- favourable institutional environment.

Further developments in this debate can be expected in 2004, as the Standing Committee on Government Operations and Estimates continues its inquiry.

C. Officers in the Canadian Provincial Assemblies

A number of Canadian provinces have developed more systematic models for assessing the accountability and independence arrangements for their Officers, which draw on the core characteristics identified above. Committee involvement in appointments of these parliamentary officers is common in Canadian provincial legislatures. The number and type of bodies treated as Officers is not uniform. For example, the Children’s Advocate in Saskatchewan is an Officer, as is the Police Complaints Commissioner in British Columbia. However, the core Officers appear to be:

- Auditor
- Ombudsman

⁵⁰ Prof Paul G Thomas *The Past, the Present and Future of Officers of Parliament: Paper for conference Independence and Responsibility: A Conference on Officers of Parliament University of Saskatchewan 2-3 November 2001*. Pp 26-27 Report of the Special Committee on the Modernisation and Improvement of the Procedures of the House of Commons 21 March 2001 <http://www.parl.gc.ca/InfoComDoc/37/1/SMIP/Studies/Reports/SMIP-E.htm>

⁵¹ Professor Paul G Thomas *The Past Present and Future of Officers of Parliament*

⁵² *ibid* p 24

⁵³ *Relations between Parliamentary Agencies and the Public Service: New Perspectives* November 2002

- Ethics Commission
- Electoral Officer
- Information/Privacy Commissioner

This corresponds to the bodies with characteristics of Officers in the UK, with the addition of Information/Privacy Commissioners. Unlike the UK, there appears to be little interest in having a separate parliamentary body to oversee the budget of the Auditor or to monitor relations with the auditor. This is seen as the role of the audit committee of the legislative assembly. However, a number of legislative assemblies have set up committees to oversee the functions and budgets of all its Officers. This list includes British Columbia, Alberta and Saskatchewan. This drive to improve the accountability of legislative Officers can bring tensions, given that these are independent Officers often criticising the executive in their reports. Under the Westminster system, the executive is formed from members of the legislature, and in Canada party discipline is generally characterised as strong.

Each type of officer, whether auditor, ombudsman or conflict of interest commissioner, is also part of a professional Canadian-wide network, such as the Canadian Legislative Ombudsmen. This can offer support to Officers when they consider that their independence is being compromised. The Ontario Ombudsman's relations with his Assembly committee have led to tensions on a number of occasions. Ontario is unusual in Canadian provincial legislatures in having a dedicated Ombudsman's Committee, which reviews his work.⁵⁴ It operates in a non-partisan manner.⁵⁵ In 1977 the Ombudsman refused to entertain criticism of his work by individual Members and in 1982 there was a dispute over committee access to financial information on the Ombudsman's office.⁵⁶

But Officers have to consider the question of accountability as well as independence.⁵⁷ Provincial Officers normally have a duty to report to the Assembly, either directly to the Speaker or via the appropriate minister, who must lay the report before the Assembly. As in federal Canada, there are marked variations in the interest provoked by the reports. Ombudsmen, Information and Privacy Commissioners and Children's Advocates in particular sometimes have difficulty in publicising their work to the Assembly. In contrast, Members can be expected to show more interest in the reports from the Auditor General, Ethics Commissioners and Chief Electoral Officers, as these correspond most closely with their specialist knowledge. The Auditor General (AG) in each jurisdiction can normally expect most interest in his reports, because his relationship with the accounts committee is normally the least troubled. The AG gives advice and support to the PAC and his findings are rarely questioned. The committee is scrutinising the work of

⁵⁴ Alberta also had such a committee

⁵⁵ *Table Vol L 1982 'Ontario's Select Committee on the Ombudsman'*

⁵⁶ *Tenth Report of the Select Committee on the Ombudsman 1983*

⁵⁷ *Canadian Parliamentary Review Vol 7 no 3 1984 'Ombudsmen and Legislatures: Allies or Adversaries?'* Robert W Runciman

the executive, and the AG's expertise is seen as crucial to this endeavour. The AG produces regular reports for the PAC, encouraging a close relationship. In some legislatures he will appear as an advisor when witnesses are examined, sitting next to the Chairman.⁵⁸

The extent to which parliamentary committees monitor the performance of individual Officers can also cause controversy. Alberta has introduced achievement bonuses for its Officers (described in more detail below). This can be characterised as unusual, underlining the extent to which the Assembly considers that it 'owns' its Officers. The responsibility for assessing performance is felt most keenly when it comes to the question of reappointment. Individual Officers can feel under pressure to moderate criticisms when their term of office is due to expire.

It is unusual for electoral officers to be the subject of controversy, but the policy role of ombudsmen and privacy/information commissioners can be perceived as likely to provoke more party political reaction. No Ombudsman in Ontario, for example, has been reappointed to the post, and commentators believed that the abolition of the separate office of the Children's Advocate in British Columbia was prompted by political considerations. The Office of Ethics Commissioner can be particularly vulnerable, when the question of the propriety of Members is at issue. Legal action followed the dismissal of its Commissioner by the North West Territories Assembly.⁵⁹

The extent to which Officers are held accountable to other Officers appears to vary greatly. Almost all are scrutinised by the AG, but by no means all are subject to information or privacy legislation. There are issues of confidentiality which apply, but to achieve proper accountability relevant information should be made available where possible. The resignation of the Police Complaints Commissioner in British Columbia in 2002 followed complaints of financial mismanagement, and the resignation of the federal Privacy Commissioner was prompted by similar allegations.

1. Developments in British Columbia

The experience of British Columbia illustrates some of the tension between the need for accountability and the desirability of independence from the executive which exists in the Officer model. A number of new legislative officers were created in the 1990s, supplementing the traditional officers, which included the auditor general and the Chief Electoral Officer. In 2000 the list was as follows:

- Auditor General
- Chief Electoral Officer
- Child Youth and Family Advocate

⁵⁸ This is the procedure in Saskatchewan for example. For detailed consideration of this point, see *Parliamentary Audit: The Audit Committee in Comparative Context* Oonagh Gay and Barry K Winetrobe Constitution Unit 2003

⁵⁹ *Roberts v Commissioner of the NWT et al*, [2002] NWTSC 68.

- Conflict of Interest Commissioner
- Information and Privacy Commissioner
- Ombudsman
- Police Complaints Commissioner

In April 1998 the British Columbian Officers issued a statement of principle: *Statutory Officers of the British Columbia Legislature: Fundamental Operating Principles and Related Legislation* as a way of encouraging debate about their role and financing arrangements. The report said:

The Officers believe that a clear statement of these principles should assist in confirming the expectations of the Legislature in respect of its Officers, and in ensuring that these principles are properly recognised and supported by all who play a process in the provincial governance process – Members of the Legislative Assembly, government officials and the public.

The Officers wanted to deal with inconsistencies in the legislation establishing the respective officers to incorporate common principles of independence and accountability. The role of the Auditor General was important in aligning himself with other legislative officers, as his prestigious office gave credibility to the initiative.

With the advent of a new government in June 2001, the role of Officers was re-considered. The budgets of each officer were transferred to a new committee, the Select Standing Committee on Finance and Government Services, although a role remained to the provincial Treasury Board under the *Financial Administration Act* 1996.⁶⁰ The main role of this committee was to review government expenditure under the Budget Accountability and Transparency Act 2002. The new ruling party, the Progressive Conservatives, expected budget reductions from the legislative Officers, in line with proposals elsewhere in the public sector. The Committee is composed of backbenchers, and there is considerable overlap in membership with the Public Accounts Committee of the legislature. However this Committee is not chaired by an Opposition member, as would be the case with the PAC.

The Officers have to appear in public before the Committee to justify their budget plans. The Committee has promoted sharing of services in an effort to cut costs. Reductions have been considerable - in the order of 35 per cent for the Information/Privacy Commissioner and 44 per cent for Elections British Columbia over the next three financial years. The role and functions of the Auditor General has been regulated in the *Auditor General Act* 2003. This gives statutory authority for the appointment to be recommended to the Lieutenant Governor by the Legislative Assembly, following a unanimous recommendation from a special committee of the Assembly. The term is six

⁶⁰ The formal transfer of responsibility for annual reports, performance plans budgets and business plans was made on 27 August 2001 by the authority of the whole Assembly. The Treasury Board is the cabinet committee responsible for budget and management matters

years, with one reappointment allowed for. The Act also gives the AG power to appoint staff and to report to the PAC. However there is no explicit statutory authority for the role of the Standing Committee on Finance and Government Services in overseeing the budget and expenditure of the AG.

The increased transparency of the budget setting process has been welcomed by most Officers in British Columbia. The hearings are in public and transcripts are made available afterwards on the Assembly website, so reasons for setting the level of budgets need to be justified. A full report is issued.⁶¹ On the other hand, Officers had to build relationships with committee members, who lacked special knowledge of their work. This contrasted with dealings with Treasury Board officials who were used to the subject area and had experience in assessing budgetary needs. The budget cuts imposed by the committee have led to considerable financial strains. In February 2003 the Ombudsman issued the first special report in the history of the office in British Columbia, drawing attention to the fact that he considered that the funding was inadequate for him to fulfil his statutory duties.⁶² The report took issue with the conclusions made by the Committee on Finance and Government Services.⁶³

There are only two Opposition members in the Assembly at present, and so the scope for involving opposition parties in the financial problems of the Officers is minimal. The governing Liberal Party has proved cohesive in office. Although the members of the Committee on Finance and Government Service are backbenchers, they are likely to display the party loyalism typical of Canadian parliamentarians, and are aware of their government's budget priorities.

The normal term of office for Officers is six years. Appointments are made following an open recruitment process administered by the Assembly itself. A special committee is appointed for the process and a report issued.⁶⁴ The interview includes a written examination and appointments are made following unanimous recommendations of a special all-party committee. The Assembly staff estimate that there have been considerable cost-savings by undertaking the whole procedure in-house, rather than using private sector consultants.

The Child Youth and Family Advocate was merged into a new agency under the direction of the Ministry of Attorney General and so lost its Officer status. Therefore, the existence of a special legislative committee does not suggest that the number of officers will not be

⁶¹ Select Standing Committee on Finance and Government Services *Financial Review of the Independent Officers of the Legislative Assembly* December 2001 and December 2002

⁶² This action is not unprecedented for Ombudsmen. The Irish Ombudsman issued a similar special report when faced with budget cuts proposed by the Irish Government.

⁶³ *Funding the Office of the Ombudsman: A Special Financial Report to the Legislative Assembly of British Columbia* February 2003

⁶⁴ Sometimes the special committee is a statutory requirement. See for example s 47 of the Police Act, described in *Special Committee to Appoint a Police Complaint Commissioner* 2002

reduced. The Assembly's relationship with its Officers has not always been harmonious. The Police Complaints Commissioner, Don Morrison resigned in May 2002, following a review of his office conducted by a special committee of the Assembly. This began as a cyclical review as part of a statutory requirement, but information provided by employees of the Commissioner meant that the committee began to review the performance of the Commissioner in detail.⁶⁵ The Committee was concerned at the level of criticism from staff and other witnesses involving allegations of financial mismanagement and lack of leadership. There was a process of negotiation between the Committee and the Commissioner, leading to an offer of resignation made to the Speaker.⁶⁶ Much of the evidence came from whistleblowers and the Committee decided not to publish confidential information. However, it issued a full report in August 2002 drawing together some main themes from the review.⁶⁷ It recommended that the term of office be reduced from six to four years, and that one reappointment be permitted. It also recommended that a special committee of the Assembly conduct a review of the Office every four years.

Overall, therefore, Officers of the legislature have been recognised as a distinctive subset of public officers in British Columbia, with regular access to a committee of the Assembly. But this committee has been driven by a policy agenda of public expenditure restraint, which has not necessarily been in alignment with the policy objectives of the Officers.

2. Developments in Alberta

British Columbia was not the only Canadian province to develop the concept of officers of the legislature. Indeed, the Alberta legislature can be characterised as playing a leading role in developing mechanisms to hold Officers to account. Alberta has the following legislative Officers:

1. Auditor General
2. Chief Electoral Officer
3. Ethics Commissioner
4. Ombudsman
5. Information and Privacy Commissioner (split from Ethics Commissioner in 2002)

On the initiative of the Auditor General, a Select Standing Committee on the Office of the Auditor General was established in 1978. This Committee almost immediately took on the role of oversight of the Ombudsman and in November 1980 it changed its name to the present title – Committee on Legislative Offices. The functions of the Committee are

⁶⁵ *Police Act 1996* (RSBC c 367) s 51.2

⁶⁶ *Special Committee to review the Police Complaint Process First Report* May 2002. The involvement of the Committee is in contrast to the position at federal level, where the negotiations over the departure of the Privacy Commissioner was handled by the Clerk to the Privy Council Office

⁶⁷ *Special Committee to review the Police Complaints Process Second Report* August 2002

authorised in the relevant statutes governing the operation of legislative officers.⁶⁸ The membership of the committee reflects the political composition of the Assembly. The mandate of the Committee is to review and approve Officers budgets and conduct salary reviews. Most recently it has undertaken the assessment of the criteria for awarding achievement bonuses for its Officers.⁶⁹ The Committee is also empowered to entertain Officer' requests for changes in their establishing legislation, but acts more as a postbox, referring them to relevant government departments.

In 1992 this Committee was used to select Alberta's first Ethics Committee but subsequently, in common with British Columbia, Special Search Committees are established to make individual appointments of Officers. Details of the procedures used were given by its clerk in the *Canadian Parliamentary Review*:

The Search Committee establishes its own budget, approves a position profile and proposes advertisements for daily and weekly newspapers and/or periodicals and the Internet. When the competition closes, resumes are received and acknowledged. Applications and resumes are screened by the Personnel Administration Office, and a screening report is prepared for the Search Committee who identify candidates to be invited to preliminary interviews by the Personnel Administration Office. The Search Committee conducts final interviews and following reference checks, successful candidates are notified. The Search Committee proposes appointments of successful candidates to the Legislative Assembly after the recommendation is ratified by the Standing Committee on Legislative Offices.⁷⁰

3. Independence and Accountability – models in Saskatchewan and Ontario

The role of legislative Officers has been under development in other Canadian provinces as well. In Saskatchewan legislation in 1983 enhanced the independence of the Auditor General. As a result, his appointment now has to be approved by the (Opposition) Chair of the Public Accounts Committee, drawing on the UK model established in the *National Audit Act 1983*. There was more far reaching legislation in 2000, prompted largely by the concerns of the AG. The AG is now appointed through an open appointments procedure, conducted by the Public Accounts Committee. The interview panel included a representative from the Public Services Commission (with responsibility for civil service matters) and representative from a chartered accountants association. The current Chief Electoral Officer was also appointed by open competition, following new legislation governing elections in 1997. Open competitions were also held for the posts of Ombudsman and Children's Advocate. However, other officers were selected by personal approaches, so there is no universal practice in force. Interview panels are ad hoc, but

⁶⁸ *Auditor General Act, Conflicts of Interest Act, Freedom of Information and Protection of Privacy Act, Ombudsman Act and Election Act.*

⁶⁹ Legislative Offices committee meeting 10 June 2003, available from website

⁷⁰ *Canadian Parliamentary Review* Volume 23, no. 3, 2000 'Appointment of Officers by the Alberta Legislative Assembly'

normally include the Clerk to the Assembly, the Clerk of the Executive Council and public services representative. It is usual to allow reappointments.

The budget of the Auditor General is presented to the Public Accounts Committee, but other Officer's budgets are determined by the Board of Internal Economy. The Board is a statutory authority created in 1981 to emphasize the responsibilities of Members for the general administration of the Legislative Assembly. The establishment of the Board also served to reaffirm the independence of the legislative branch from the executive branch of government. *The Legislative Assembly and Executive Council Act* established the Board, its composition and duties. The Clerk, the Director of Financial Services and other senior Assembly officials serve as resources for the Board. It is an all-party committee, chaired by the Speaker, but there are two government nominees, and so it is not exclusively a backbench committee. Inevitably there is a role for political considerations when Officers present their budgets to the Board, but most Officers appear to welcome the greater transparency offered by appearances before the Board.

In Ontario, a Board of Internal Economy was established in 1974 following a Commission on the Legislature which had been established to review its operation and effectiveness. There are six officers, who are generally appointed for 5 year terms (apart from the auditor who serves until retirement age). The offices in Ontario are required to submit a report annually to the Speaker, and to submit estimates annually to the Board. In addition, the Standing Committee on Estimates may also decide to review particular estimates. The officers are:

- Provincial Auditor
- Chief Electoral Officer
- Ombudsman
- Integrity Commissioner
- Information and Privacy Commissioner
- The Environmental Commissioner

There have been a number of issues in relation to accountability. The Standing Committee on the Ombudsman argued in 1991 that it should be for the committee to review the estimates of the Ombudsman,⁷¹ but in a special report, the Ombudsman argued that this would be inappropriate and that the Committee should discontinue receiving complaints from the public about the Ombudsman's handling of cases.

⁷¹ Nineteenth Report. Further detail is given in Ontario Legislative Library *The Offices and Commissions of the Legislative Assembly Research Paper C161 (revised Dec 2000)*

D. Australia

Although Australia has not developed the concept of Officers as a distinctive subset of constitutional watchdogs, its two Officers exhibit the core characteristics found in the UK and elsewhere. Recent developments in the office of Auditor General have promoted its independence from the executive.

1. Auditor General

The office was established in 1901, but it was not until the *Auditor General Act 1997* that the AG was declared in statute to be an independent officer of the Parliament and was given statutory discretion for the performance of his functions:⁷²

Section 8(4) Subject to this Act and to other laws of the Commonwealth, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to direction from anyone in relation to:

- (a) whether or not a particular audit is to be conducted; or
- (b) the way in which a particular audit is to be conducted; or
- (c) the priority to be given to any particular matter.

In his speech on second reading, the then Minister for Finance, John Fahey MP said ‘ a range of statutory safeguards are included in the bill to prevent inappropriate influence being exerted on the Auditor General by either the executive or the parliament’.⁷³

The Act was preceded by a Joint Committee of Public Accounts (JCPA) report in 1996.⁷⁴In 1989 the Committee had called for the Auditor General to be referred to as an officer of the Parliament to emphasise its relationship with Parliament.⁷⁵ The importance of the office had grown in the 1990s as successive governments faced criticism about their standards of conduct. There has been concern that the role of the AG in tackling these types of issues may expose the office to political attack, endangering the office.⁷⁶

The 1997 Act provides for the Joint Committee of Public Accounts and Audit (JCPA) to examine the budget estimates of the Australian National Audit Office (ANAO) and make recommendations to Parliament about the proper resourcing of the office. In addition, the JCPA determines the audit priorities of the Parliament and advises the Auditor General of these priorities. The Act also contained provisions to strengthen the AG’s role as external auditor.

⁷² *Auditor General Act 1997*, s8

⁷³ Hansard 12 December 1996 House of Representatives p8341

⁷⁴ 346 in October 1996 *Guarding the Independence of the Auditor General*.

⁷⁵ *The Auditor General Ally of the People and Parliament report* no 296

⁷⁶ John Wanna and Alexander Gash ‘the Role of the Auditor General in scrutinising ministerial ethics’ in *Motivating Ministers to Morality* ed Ian Holland and Jenny Fleming 2001

The term of appointment is now fixed at 10 years, with no-re-appointment. The appointment is made formally by Governor General on the advice of the executive, but approval is required through the Joint Committee and this role involves active participation in the choice of candidate.⁷⁷ The AG remains protected from dismissal, which is contingent on an address from both Houses, in the same way as in the original 1901 statute. In Australia and Canada therefore, unlike the UK and Scotland, there is no intermediary body to safeguard the independence of the office from potential interference from the parliamentary audit committee. The AG has guaranteed availability of funds and the potential to report to Parliament at any time on any matter.

As part of the review conducted by the JCPA of the 1997 Act in August 2001, the question of the applicability of parliamentary privilege was discussed, and referred to the Privileges Committee to consider.⁷⁸

2. Ombudsman

The Ombudsman is recognised as an independent Officer, but the statute establishing the post does not use the term. The appointment is made by the Governor General with no provision for a parliamentary resolution and is for seven years, with provision for re-appointment. However dismissal can only be triggered by an address from both Houses. The Governor General can suspend the Ombudsman for misbehaviour or incapacity and the *Ombudsman Act 1976* merely requires the presentation of an annual report to the relevant minister for presentation to Parliament.⁷⁹ But there is statutory provision for special reports to the President of the Senate and the Speaker of the House of Representatives following a report to the Prime Minister where the Ombudsman wishes to draw Parliament's attention to specific recommendations which have not been implemented. The salary level is set by the Remuneration Tribunal and so is set independently of parliament and government.

The constitutional architecture for the Ombudsman is therefore not very robust, but on the other hand it handles a much greater volume of cases than the Westminster equivalent and has a higher public profile, with additional duties under the *Freedom of Information Act 1982*.

3. Other constitutional watchdogs

Australia has several examples of constitutional watchdogs which in other jurisdictions might be classified as Officers. These include:

- Human Rights and Equal Opportunities Commission
- Privacy Commissioner

⁷⁷ Comments of current AG Pat Barrett in *From Auditing to Accountability: A Centenary History of the Australian National Audit Office* John Wanna, Christine Ryan and Chew Ng p234

⁷⁸ Report 386

⁷⁹ s19

- Electoral Commission

The trend is for the Governor General to appoint these types of Commissioners for a seven year renewable term. These bodies report to a minister, but with power to issue special reports to the minister or Prime Minister which are then passed to Parliament within a specified time period. There is a Parliamentary Committee that is particularly pertinent to the Electoral Commission, although there are no formal accountability links between the Commission and the Joint Standing Committee on Electoral Matters. The other bodies do not have specific parliamentary links, but would give evidence when invited. There have been sharp budget cuts affecting human rights and equal opportunities commissions in Australia, which has led to a debate on the importance of an independent budget-setting mechanism.

E. Ireland

Ireland has two watchdogs which may be considered as having a special institutional relationship with Parliament. The term Officers of Parliament is not however in use either within the Oireachtas or in statute. There are other bodies with a relationship with Parliament, but which do not fit the core characteristics of the Officer model, as derived from Westminster. Due to its relatively small population, Ireland has tended to give responsibility for various constitutional watchdog functions to one individual. Kevin Murphy has recently retired from being Ombudsman, Information Commissioner, a member of the Standards in Public Office Commission and of the Referendum Commission. These appointments were made under separate legislation and he was appointed by the President on the address of both Houses.

1. The Comptroller and Auditor General

The *Comptroller and Auditor General Act 1993* modernised the remit and powers of the C&AG, following a successful campaign by the chairman of the PAC in the early 1990s.⁸⁰ The legislation helped the PAC to fulfil its obligations to scrutinise public expenditure in a much more effective (if traditional) manner. But the role was extended further when information came to light about failures of officials in the Revenue Commissioners to deal with widespread evasion of the Deposit Interest Retention Tax (DIRT).

The matter was referred to the PAC to investigate. There were already a number of Tribunals of Inquiry in existence gathering evidence on other scandals and there was all-party agreement to use the PAC rather than to establish another judicial inquiry, which would be potentially both costly and lengthy.⁸¹ A special sub-committee was established to investigate, with powers analogous to those of a Tribunal of Inquiry under the *Tribunals of Inquiry Act 1921* (still in force in Ireland, as in the UK). The work of the

⁸⁰ On the inadequacies of the powers prior to 1993 see Eunan O’Halpin ‘The Dail Committee of Public Accounts’ in *Administration* Vol 33, No 4 1985 pp 505-7

⁸¹ These were Tribunals established under the UK *Tribunals Of Inquiry Act 1921*

C&AG was crucial to the success of the Inquiry. He spent seven months in work preparing for the Inquiry, enabling it to take evidence over a six week period only. The Inquiry's terms of reference were tightly drawn and the sub-committee was able to benefit from an extended parliamentary recess allowing its members to concentrate solely on the Inquiry.

The sub-committee's work generated major interest in the media and its three reports (1999-2001) have been very influential in establishing a reform agenda for the Dail and for strengthening parliamentary accountability. For the Clerk of the Dail, the Inquiry provided an opportunity to highlight problems with under-resourcing for parliamentary committees. An immediate result of the first report was a Government commitment to establish an Oireachtas Commission to manage the parliament (akin to the House of Commons Commission in the UK) with a separate Vote for the Committee system, set independently of the Department of Finance. A Bill was introduced into the Oireachtas in June 2002.⁸² Other relevant successful recommendations were:

- Agreement to the establishment of a Parliamentary Inspector, to assist committees in investigations
- Establishment of an Oireachtas Legal Adviser
- Appointment of external consultants to give objective assessment of the funding and staffing needs of both Houses

The Inquiry criticised the lack of accountability of the Executive and its agencies to the Oireachtas, but its attention was focused on officials rather than the successive Ministers of Finance in office during the period of tax evasion.

2. Ombudsman

The Ombudsman legislation dates back to 1980, and there is no MP filter, unlike in the UK. The Ombudsman is appointed following addresses of both Houses, but actual parliamentary involvement is minimal. Although he is required to produce an annual report the links with Parliament are not extensive. There are no special committees which review the work of the Ombudsman. A special report to Parliament following a rejection of Ombudsman proposals by the Inland Revenue was made in November 2002.⁸³ Because the Ombudsman is funded by Government, his independence from the executive can be threatened if there are insufficient funds to carry out the appointed functions. But attempts to cut the budget in 1987 were thwarted when the Ombudsman presented a special report to Parliament. This has proved to be a defining moment in the relationship and budget cut proposals have not been made since.

⁸² *House of the Oireachtas Commission Bill* (Bill 18 of 2002), available from <http://www.irlgov.ie/oireachtas/frame.htm>

⁸³ *Special Report by the Ombudsman: Redress for Taxpayers* November 2002

3. Other constitutional watchdogs

There are a series of other constitutional watchdogs including the following:

1. Information Commissioner
2. Standards in Public Offices Commission
3. Referendum Commission
4. Human Rights Commission

Staff of these various bodies are servants of the state rather than civil servants and this term is also applied to staff in courts, parliament, ombudsmen, and staff of the Comptroller and Auditor General. Staffing is often provided as a common service. For example, the nine staff in the Public Offices Commission are serviced from the Ombudsman's Office. There are some advantages in using the same people as they have already established a reputation for being independent. However the budgets for the Ombudsman, Information Commissioner and Standards in Public Office Commission are funded via departments. There have been suggestions that Parliament should have its own budget, as noted above.

Commentators have noted the comparatively weak tradition of independent-minded Deputies in the Dail of 166 members.⁸⁴ The existence of a written constitution means that Parliament is not supreme. Therefore it lacks the accountability ethos of Westminster, with its long history of calling ministers to account. The role of the courts is seen as more important, especially as they interpret and expand the law as passed by Parliament. Parliamentary committees do not normally expect to summon ministers as witnesses, but have a very adversarial approach to civil servants.

The Information Commissioner is required to present an annual report to Parliament, but is not specifically appointed by the Oireachtas. But the Commissioner does have a relationship with the Finance and Public Services Committee. The Standards in Public Office Commission has a relationship with the Members' interests committee of both Houses, but mainly in terms of recommending sanctions for Deputies found to have acted in contravention of ethical rules. However they also consult over codes of conduct.

The Standards in Public Offices Commission, reformed in 2001, consists of:

- High Court, or Supreme Court judge or former judge
- Comptroller and Auditor General
- Ombudsman
- Clerk of the Dail
- Clerk of the Senead
- A former Deputy appointed by the Government following resolutions in both Houses.

⁸⁴ See for example *Reflections on the Irish State* by Garret Fitzgerald 2003

This is an interesting attempt to involve all parliamentary type ‘watchdogs’ in a single commission.

A permanent Referendum Commission was established for the Amsterdam Treaty referendum because of its complexity, previously ad hoc commissions had existed to oversee the conduct of individual referendums, required for changes to the Irish Constitution. The institutional arrangements for the membership of Commission are very similar to Public Service Commission.

F. South Africa

The core characteristics outlined above do not guarantee that a Officer model will be effective in practice. As a state which has emerged from a long period of internal tension and change, South Africa offers some warning notes. Chapter 9 of the South African constitution gives specific constitutional protection to a number of Officer-type bodies. These are:

Section 181 Establishment and governing principles

(1) The following state institutions strengthen constitutional democracy in the Republic:

- (a) The Public Protector.
- (b) The Human Rights Commission.
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
- (d) The Commission for Gender Equality.
- (e) The Auditor-General.
- (f) The Electoral Commission

But all South African Commissions report concerns about the lack of specific committees to review their reports and the absence of a portal in parliamentary procedures which would allow reports to be subject to meaningful examination.⁸⁵ Problems in funding commissions via departments have led to recommendations for a Parliamentary Standing Committee on Constitutional Institutions to supervise commission budgets for Parliament, and to allocate funding by a special block vote. In an important case the Constitutional Court held that making the independent Electoral Commission accountable to a government department violated the Constitution and that Parliament was the appropriate institute for allocating funding.⁸⁶

⁸⁵ See report by Professor Hugh Corder *Parliamentary Oversight and Accountability* July 1999 cited in O’Cinneide p 50

⁸⁶ *New National Party of South Africa v Government of the Republic of South Africa* 1999 (5) BCLR 489 (CC), cited in O’Cinneide