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Parliamentary Involvement in Public Appointments

The *Governance of Britain* Green Paper, published in July 2007, announced plans for select committees to be involved in some public appointments. For certain posts, it was proposed that select committees would be able to hold pre-appointment hearings. For “market-sensitive” positions the hearings would take place after appointment but prior to commencement. In neither case could an appointment be vetoed. Further details were announced in a letter to the Chairman of the Liaison Committee in January 2008. The Liaison Committee responded in a report published in March 2008.

This paper sets out the Government’s proposal and responses to it, which include reservations by the Commissioner for Public Appointments. It also provides background information on the role of the Commissioner for Public Appointments, and previous proposals for pre-appointment hearings by select committees. Finally, the paper sets out some comparative information on the involvement of parliaments and legislatures in public appointments in other jurisdictions both in the UK and overseas.

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Summary of main points

The *Governance of Britain* Green Paper, published in July 2007, proposed that nominees for certain public posts should be subject to pre-appointment hearings by select committees in Parliament. For “market-sensitive” appointments, hearings would take place “pre-commencement” rather than pre-appointment. In both cases, committees would have no power of veto. The Government gave further details in a letter from the Cabinet Office minister, Ed Miliband, to the Liaison Committee in January 2008. The letter said that the hearings should focus on posts which exercise statutory or other powers in relation to protecting the public’s rights, as well as those that play a key role in the regulation and administration of the appointments process itself. 29 posts were listed. Hearings would be expected to focus on “professional competence”.

The Liaison Committee published a report in March 2008 in response to Ed Miliband’s letter. They consulted each select committee and, as a result, added a number of posts to the Government’s list. However, they concluded that the list should be neither exclusive nor mandatory for pre-appointment hearings. They also agreed a set of draft guidelines. These require committee chairmen to ensure that Members are aware that their questions must remain relevant to the “professional competence and personal independence of the candidate”. Questioning, however, might be “robust” as candidates should be able to withstand “parliamentary and public scrutiny should they take up the post”.

The Government’s proposals followed calls for greater parliamentary scrutiny of public appointments from a number of sources. The Liaison Committee and the Public Administration Select Committee had made recommendations for such hearings, as had the Conservative Party’s Democracy Task Force and the Liberal Democrats. Individual departmental select committees have also proposed that they should be more closely involved in appointments processes. The Treasury Select Committee, for example, has taken evidence from every new appointee to the Monetary Policy Committee of the Bank of England, and reported to the House on the suitability of the appointee.

There has not been universal enthusiasm for the Government’s proposals. The Commissioner for Public Appointments has raised a number of concerns. These include potential for damage to the principle of appointment on merit and the possibility and consequences of legal challenges. The Government itself, pre-July 2007, had rejected calls for greater parliamentary involvement in public appointments. Their concerns included: that such involvement would break the accountability of ministers for appointments; risk the appointment of ‘lame duck’ appointees – appointed by the minister but without select committee approval; and would contravene the status of select committees as scrutiny bodies rather than decision-making bodies.

This Paper sets out the Government’s proposal and responses to it. It outlines the current public appointments process and public appointments which are already subject to some parliamentary involvement. It considers concerns and reservations that have been raised. Finally, this note looks at the proposals raised in the Scottish Parliament, and the powers of the Greater London Assembly to be involved in public appointments processes. It also sets out some experiences of the European Parliament, the United States Senate, the Canadian parliament, and the Nova Scotia and Ontario legislatures.

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I The Government's proposals for pre-appointment hearings by select committees

A. The *Governance of Britain* Green Paper

On 3 July 2007, in his first statement to the House as Prime Minister, Gordon Brown announced the publication of *The Governance of Britain* Green Paper.¹ This broad package of proposals for constitutional reform was set out under four themes:

- limiting the powers of the executive;
- making the executive more accountable;
- reinvigorating democracy;
- and developing the relationship between the citizen and the state.

Many of the proposals would give a greater role for Parliament in territory traditionally the preserve of government. For example, the Commons would have a role in the dissolution of Parliament ahead of a general election, in the commitment of troops overseas, and in consideration of the draft legislative programme.

One of the Prime Minister's proposals for limiting the powers of the executive was that "The House of Commons should also have a bigger role in the selection of key public officials".² The Green Paper provided some detail:

... the Government nominee for key positions such as those listed below should be subject to a pre-appointment hearing with the relevant select committee. The hearing would be non-binding, but in the light of the report from the committee, Ministers would decide whether to proceed. The hearings would cover issues such as the candidate's suitability for the role, his or her key priorities, and the process used in selection.

The Government, in consultation with the Liaison Committee, will prepare a list of appointments for which these hearings will apply. Where responsibility is devolved, it will be for the respective administration to consider the appointment. Examples might include:

- The First Civil Service Commissioner (following the announcement by the Government that it is to legislate to place the Civil Service and its independent Commissioners on a statutory footing, it is right that Parliament should have a role in this appointment);

¹ Ministry of Justice, *The Governance of Britain*, July 2007, Cm 7170. For more information about the *Governance of Britain* see the House of Commons Library Research Paper RP 7/72, [The Governance of Britain](#)

² HC Deb 3 July 2007 c816

- The Commissioner for Public Appointments (who is responsible for ensuring public confidence in several thousand other appointments);
- The Parliamentary Commissioner for Administration and Health Service Commissioner for England (who is responsible for investigating maladministration in central government and the NHS);
- The Local Government Ombudsman for England; and
- Independent inspectors such as the Chief Inspector of Prisons and the Chief Inspector of Probation for England and Wales.

This list will be kept under review and discussed with the Liaison Committee, and, where appropriate, the Commissioner for Public Appointments.

For market-sensitive and certain other appointments, including the Governor and the two Deputy Governors of the Bank of England, the Chairman of the Financial Services Authority, and some utility regulators, there is a particular set of issues around confirmation hearings. But the Government does believe that it is important to ensure greater accountability than currently exists. So, for these positions, once an appointment has been approved, the relevant select committee will be invited to convene a hearing with the nominee before he or she takes up post. The relevant department will consult with the select committee as to what such hearings might usefully cover.³

The Green Paper also announced that the appointment of the chair of the newly created Statistics Board (now known as the UK Statistics Authority) would be subject to a vote in the House of Commons to confirm the Government's nominee.⁴

On 3 July 2007 the Chancellor of the Exchequer, Alistair Darling, gave further details about the appointment of members of the Monetary Policy Committee (MPC) and the chairman of the Financial Services Authority (FSA). There had been an announcement the previous month by Gordon Brown, when he was Chancellor of the Exchequer, that in future the external MPC places would be advertised and the criteria for appointment published.⁵ Mr Darling told the House in a written answer that:

To further increase parliamentary accountability and scrutiny of appointments I am today announcing that, following their appointment, I will invite the Treasury Select Committee to convene pre-commencement hearings with all appointees to the MPC of the Bank of England and the chairman of the FSA.

These hearings will give the committee a full opportunity to discuss with the appointee their priorities and experience, and for external MPC appointments, coupled with the reforms announced last month, will allow the committee to evaluate their skills and qualities against the published criteria.⁶

³ Ministry of Justice, *The Governance of Britain*, Cm 7170, July 2007, paras 76-79

⁴ *Ibid*, para 80

⁵ For more details see House of Commons Library Standard Note, *Appointments to the Monetary Policy Committee of the Bank of England*, SN/EP/4011

⁶ HC Deb 3 July 2007 c43W

In an interview with the *Financial Times*, Mr Darling explained:

What we're going to do is that all members of the monetary policy committee, including the executives, in other words the governor and the deputy governor of the Bank of England people, when they're appointed they will be subject to, not pre-appointment, but pre-commencement hearings by the select committee. The reason that we're going for that is because the personality of the governor is so important, we don't think that we should have any uncertainty that the report emerging from those hearings is so dramatic that you would rule them out. We want to be able to say this is the governor. However, before he takes up his duties he would be open to be questioned by the select committee. Now, that would apply to all members of the MPC, so you've got executive and non-executive people. And that would also apply to the chairman of the FSA for the same reason....

But what we want to do is make the process progressively more open because I think that will help reinforce the independence of the MPC which, as I say, is very, very important to maintaining its credibility.⁷

B. January 2008 report by the Public Administration Select Committee

The Public Administration Select Committee (PASC) has had a long-running interest in public appointments processes. In 2003 they published a report, *Government by Appointment: Opening up the patronage state*. This looked at the process for public appointments, including the role of select committees. In June 2007 they took evidence from the Commissioner for Public Appointments, Janet Gaymer, on her views on proposals for pre-appointment hearings by select committees. She raised a number of concerns, including the impact hearings would have on the application of the merit principle and the possibility that hearings would be open to legal challenge. Janet Gaymer's concerns are set out in detail in section V below. The Committee revisited the issue at the end of 2007 in light of the Government's proposals in the Green Paper. PASC published their report *Parliament and Public Appointments: Pre-appointment hearings by select committees* in January 2008.⁸ Despite the Commissioner for Public Appointments' reservations, the Committee welcomed the Government's proposals for pre-appointment hearings. PASC then suggested the proper purpose of pre-appointment hearings, and criteria for deciding which posts should be subject to them.

The Committee argued that pre-appointment hearings could not be for the purpose of accountability: a person could not be held accountable for the performance of an organisation to which they had not been appointed.⁹ Instead, the Committee believed that pre-appointment hearings must be about the selection of the candidate. The role of select committees in the selection of candidates should be:

⁷ "Interview transcript: Alistair Darling", *The Financial Times*, 3 July 2007, available at <http://www.ft.com/cms/s/ebd1ce6a-299d-11dc-a530-000b5df10621.html> (last viewed 10 April 2008)

⁸ Public Administration Select Committee, *Pre-appointment hearings by select committees*, 16 January 2008, HC 152

⁹ *Ibid*, para 10

... in informing the final ministerial decision, not in influencing the impartial process that precedes that decision. Select committees should only become involved once every part of the interview and selection process has been completed except for this final decision.¹⁰

The Committee stated that pre-appointment hearings must add some value to the appointments process. Their report stated:

The value that committees can add over and above that provided by a rigorous selection process is to expose a candidate to parliamentary and public scrutiny. It follows that hearings should normally apply only to posts for which accountability to Parliament and the public are an important part of the role. A positive outcome of holding pre-appointment hearings for such posts is the likelihood that appointees will perform this accountability function more effectively.¹¹

PASC considered which public appointments should be made subject to pre-appointment hearings. The Committee said:

The Government's suggestion is that hearings should apply to "positions in which Parliament has a particularly strong interest because the officeholder exercises statutory or other powers in relation to protecting the public's rights and interests". We agree that this is a necessary criterion, but it is not sufficient: it would not be appropriate for the judiciary to be subject to pre-appointment hearings, despite their role in protecting the public's rights and interests. Positions subject to pre-appointment hearings should also... carry an expectation of accountability to Parliament and the public. **We would expect pre-appointment hearings to apply to major auditors, ombudsmen, regulators and inspectors, as well as to those responsible for the appointments system itself.**¹²

The Committee maintained, however, that pre-appointment hearings would only be appropriate in cases where the final decision on the appointment remains in the hands of a politician. Therefore posts such as the Chair of the Financial Ombudsman Service would not qualify (this post is appointed by the Financial Services Authority).

The Committee added some "obvious candidates" to the Government's list:

- auditors: the Comptroller and Auditor General (whose appointment is already subject to a vote in the House of Commons) and the Chair of the Audit Commission;
- ombudsmen and complaint investigators: the Pensions Ombudsman and the Chair of the Independent Police Complaints Commission;
- regulators: the Information Commissioner and the Chairman of the Committee on Standards in Public Life;
- inspectors: HM Inspector for Education, Children's Services and Skills, and HM Inspector for Constabulary; and

¹⁰ *Ibid*, para 13

¹¹ *Ibid*, para 14

¹² *Ibid*, para 17

- appointers: the Chair of the Appointments Commission (formerly the NHS Appointments Commission) and the Chair of the House of Lords Appointments Commission.¹³

The Report's final paragraph stated that where ministers make public appointments without following the usual process, such appointments should be tested by a cross-party committee. The Committee gave the example of appointments of former Members of Parliament to the Diplomatic Service.¹⁴

The Committee did not agree with the Government's suggestion that market sensitive posts should have "pre-commencement hearings" rather than "pre-appointment hearings". They stated that they were "not clear what the value would be of a hearing which was able neither to influence the appointment of a candidate nor to allow an office-holder to account for their performance". Furthermore, they questioned whether it might put the appointing minister in a difficult position if issues of competence or acceptability did emerge before an appointee had begun work but too late to prevent the appointment going ahead. Instead they suggested that:

For a limited range of genuinely sensitive appointments, an alternative to a public hearing might be for a pre-appointment hearing to be held in private, with the transcript of evidence published once the status of the appointment had been confirmed.¹⁵

C. The Government's letter to the Liaison Committee

On 23 January 2008 the Cabinet Office minister Ed Miliband wrote to the chairman of the Liaison Committee with a list of posts that the Government proposed should be subject to pre-appointment scrutiny. The Government said that they would focus on posts which exercise statutory or other powers in relation to protecting the public's rights and interests, as well as those that play a key role in the regulation and administration of the appointments process itself.¹⁶ The list consisted of various public service ombudsmen, inspectors and regulators:

- Chair of the Gas and Electricity Markets Authority (GEMA)
- Chair of OFCOM
- Chair of the Appointments Commission
- Chair of the Care Quality Commission
- Chair of the Charity Commission

¹³ *Ibid*, para 19

¹⁴ *Ibid*, para 43

¹⁵ *Ibid*, para 21

¹⁶ Letter dated 23 January 2008 from Ed Miliband MP to Alan Williams MP, chair of the Liaison Committee, regarding pre-appointment hearings by select committees, Deposited Paper Number: DEP2008-0185. Printed as Annex A to the Liaison Committee, *Pre-appointment hearings by select committees*, HC 394 2007-08

- Chair of the Committee on Standards in Public Life
- Chair of the Food Standards Agency
- Chair of the Judicial Appointments Commission
- Chair of the Office for Legal Complaints
- Chair of the Office of Rail Regulation
- Chair of the Postal Services Commission
- Chair of the Statistics Board
- Chair of the Water Service Regulatory Authority (OFWAT)
- Chief Fire and Rescue Officer
- Commissioner for Public Appointments
- Comptroller and Auditor General
- First Civil Service Commissioner
- Health Service Commissioner for England (Health Ombudsman)
- HM Chief Inspector of Constabulary
- HM Chief Inspector of Education, Children's Services and Skills
- HM Chief Inspector of Prisons
- HM Chief Inspector of Probation
- HM Chief Inspector of the Crown Prosecution Service
- Information Commissioner
- Local Commissioners for Administration for England (Local Government Ombudsmen)
- Parliamentary Commissioner for Administration (Parliamentary Ombudsman)
- Pensions Ombudsman
- Pensions Protection Fund Ombudsman

- Prison and Probation Ombudsman¹⁷

The Government also stated that they expected a committee hearing “to focus on professional competence”,¹⁸ and that “it is essential that it is conducted in such a way that we both enhance the role of Parliament in scrutinising public appointments and maintains an appointments process which is proportionate and continues to attract high quality candidates”. The letter proposed that the hearings should go ahead on a pilot basis with regular feedback from those involved, including from select committees.¹⁹

D. The Liaison Committee’s response

The Liaison Committee had considered the role of Parliament and its committees in public appointments in previous reports. Their 2000 report *Shifting the balance: Select committees and the executive* had made proposals for statutory provision for pre-appointment hearings. The list of core tasks for select committees agreed in 2002 included the scrutiny of “major appointments made by the department”. The Committee published a short report in March 2008 in response to the letter from the Minister.

1. Additional posts

The Liaison Committee consulted individual select committees on the list of proposed posts. The letters from the chairmen were reproduced in an annex to the report. The chairmen made a number of suggestions for additional posts which should have been included on the list. Most of these posts fell into the categories outlined as appropriate for pre-appointment hearings by PASC: inspectors, regulators, auditors, and complaint investigators. A number of them had already been suggested by select committees in previous reports. The Liaison Committee’s list of additional posts that should be subject to hearings was:

- Chairman, Office of Fair Trading
- Chairman, Competition Commission
- Qualifications and Examinations Regulator
- (possibly) Head, new agency on the monitoring and development of curriculum, assessment and qualifications
- Chair of OFSTED
- Children’s Commissioner
- Chair of the Audit Commission
- Chair of the Standards Board

¹⁷ *Ibid*

¹⁸ *Ibid*

¹⁹ *Ibid*

- Chair of the Commission for Equality and Human Rights²⁰
- Chair of Ofstentant (subject to the passage of the Housing and Regeneration Bill)
- Chief Executive of the Planning Inspectorate
- Chair of the Infrastructure Planning Commission (subject to the passage of the Housing and Regeneration Bill)
- Chairman of the BBC Trust
- Chief of Defence Staff
- Three Services Chiefs
- Chief of Defence Materiel
- Service Complaints Commissioner
- Chair of the Committee on Climate Change (subject to the passage of the relevant Bill)
- Rural Advocate
- Chair of the Consumer Council for Water
- Chair of Agricultural Wages Board
- Chair of Gangmaster Licensing Authority
- Chief Executive, Environment Agency
- Chief Executive, Natural England
- European Commissioner nominated by the UK prior to confirmation by the European Parliament
- Any major diplomatic or consular appointment of a person from outside the diplomatic service
- Chair of the Higher Education Funding Council for England
- Chair of the Office for Fair Access
- Chair and Chief Executives of Research Councils
- Chair of the Office for Strategic Coordination of Health Research

²⁰ This was requested both by the Communities and Local Government Committee and by the Chairman of the Joint Committee on Human Rights.

- Government Chief Scientific Adviser
- Chair of the Advisory Committee on Business Appointments
- Chair of the House of Lords Appointments Commission
- Prime Minister's Independent Adviser on Ministerial Interests
- Executive Chair of the Better Regulation Executive
- London Underground Public Private Partnership Arbiter
- Chair of the Civil Aviation Authority
- Chair of Network Rail
- Chair of the Social Security Advisory Committee
- Chair of the Independent Case Examiner
- Chief Executives of the agencies of the Department for Work and Pensions.²¹

The Liaison Committee expressed some reservations about proposals for additional parliamentary scrutiny of the appointment of the Comptroller and Auditor General. These are considered in section II B 1 below.

2. Draft guidelines

The Liaison Committee agreed a set of draft guidelines for pre-appointment hearings:

Preparing for the session

The Committee should aim to give the witness at least a week's notice of the session. Standard briefing should be available to the candidate on what to expect from the session. The candidate should also be informed how long the session is likely to last.

During the session

The Chairman should ensure that Members are aware that their questions must remain relevant to the professional competence and personal independence of the candidate. Questions eliciting background information about the candidate's past career and about the selection process for the post are also normally acceptable.

The candidate will need to be able to withstand parliamentary and public scrutiny should they take up the post, and the purpose of the session is to test this. Questioning may therefore be robust, and it may cover some areas that might not be appropriate at interview, such as party political allegiance. The Chairman

²¹ Liaison Committee, *Pre-appointment hearings by select committees*, 5 March 2008, HC 384 2007-08, p7-8

should intervene, however, if questions are irrelevant, unduly personal, or discriminatory.

After the session

Immediately after the evidence session, the Committee should meet in private to agree a report to the House containing its views on the suitability of the candidate. This will ensure both that the evidence is fresh in Members' minds and that Members who were not present at the evidence do not influence the content of the report. It will also avoid unnecessarily prolonged speculation about a candidate's fate. The Committee may also wish to instruct the Chairman to write to the relevant Minister with any opinions that it prefers to express privately, to supplement the published report.

The Committee's report should be published as soon as possible after the evidence session. Reports should be subject to a 24 hour embargo to allow the candidate and the Minister to prepare a response to any negative comments. They should be provided under embargo only to the candidate and the Minister.²²

The Liaison Committee took the view that:

Personal independence is a key requirement in all public posts and most obviously in those such as a regulator, or the Chairman of the BBC Trust. It should be included explicitly as a focus of any hearings...²³

The Liaison Committee also took issue with the Government's suggestion that the hearings should go ahead on a 'pilot' basis. The Committee stated that this did not seem "appropriate". The Report said that:

...It is not a process to be "supervised by the Government or which can only proceed if Ministers give their approval" [*letter from the Chairman of the Foreign Affairs Committee*]. Indeed, as the Chairman of the Joint Committee on Human Rights writes in his letter to our Chairman:

"Committees are entitled to call any newly-appointed official to discuss issues in relation to their qualifications for the post and future plans, regardless of whether the Government considers this appropriate. We welcome the Government's willingness to engage in pre-appointment hearings but we would not wish the work of Committees to be constrained, or appear to be constrained, in any way. It will also be important to make clear that the Government remains solely responsible for appointments to posts where pre-appointment hearings have taken place. Endorsement of the Government's nominee at a pre-appointment hearing must not preclude robust scrutiny of performance in the job."²⁴

The Liaison Committee concluded that:

²² Liaison Committee, *Pre-appointment hearings by select committees*, 5 March 2008, HC 384 2007-08, p9

²³ *Ibid*, para 12

²⁴ *Ibid*, para 14

The Government's proposals are a welcome response to our belief that select committees can add value to an appointments process. The relationship between Parliament and these public bodies, of communication, scrutiny and, when needed, of support, can only be strengthened as a consequence. Subject to the additions proposed by Chairmen... we would endorse the Minister's list of appointments on which committees should have the opportunity to take evidence. As we have made clear earlier, this list, which can be kept under review, should be neither exclusive, nor mandatory where a committee does not wish to add such a session to its current programme of work. Nonetheless, it is our firm view that committees will now wish to work together with Ministers and their departments to carry forward a developing series of evidence sessions that can be helpful to the postholder and the department while providing enhanced accountability to Parliament.²⁵

E. *The Governance of Britain – Constitutional Renewal White Paper*

In March 2008 the Government published a White Paper on Constitutional Renewal along with the *Draft Constitutional Renewal Bill*.²⁶ The White Paper set out the progress made on appointments hearings so far, as outlined above. On the list of suitable posts, the Government stated that "it will continue to work with the Liaison Committee to agree a final list of posts".²⁷ The Government said that they will work with the relevant House authorities on any appropriate amendments to Standing Orders.²⁸ The Government said that "the hearings should focus on professional competence", whereas the Liaison Committee had said that "personal independence" should also explicitly be a focus.

II Public appointment processes – current practice

A. The role of the Commissioner for Public Appointments

The Committee on Standards in Public Life (CSPL) was established in 1994 by the then Prime Minister, John Major, in response to a series of ethical issues and questions about the standards of those holding public office. The Committee, then chaired by Lord Nolan, considered the accountability and openness of public bodies in its first report. The CSPL recommended that appointments to the boards of executive Non Departmental Public Bodies (NDPBs) and NHS bodies should be made on the basis of merit, to form boards with a balance of relevant skills and backgrounds. Responsibility for appointments should remain with Ministers, advised by committees which include independent members. They recommended that a Public Appointments Commissioner should be appointed, to regulate, monitor and report on the public appointments process.²⁹

²⁵ *Ibid*, para 16

²⁶ Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, March 2008, Cm 7342

²⁷ *Ibid*, para 252

²⁸ *Ibid*, para 253

²⁹ First Report of the Committee on Standards in Public Life, *Standards in Public Life*, Cm 2850, May 1995, p65. See also Library Standard Note SN/PC/3368, [The Commissioner for Public Appointments](#)

In response to these proposals, the Government appointed the first Commissioner for Public Appointments, Sir Leonard Peach, in November 1995. The Commissioner is currently Janet Gaymer CBE who was appointed in January 2006. The appointment and functions of the Commissioner for Public Appointments are now set out in the *Public Appointments Order in Council 2002*.³⁰

In its first report, the CSPL proposed “seven principles of public life” (also known as the “Nolan principles”) of selflessness, integrity, objectivity, accountability, openness, honesty and leadership. These were incorporated into the Commissioner’s own principles for public appointments as set out in her Code of Practice:

Ministerial responsibility

The ultimate responsibility for appointments is with ministers.

Merit

All public appointments should be governed by the overriding principle of selection based on merit, by the well-informed choice of individuals who through their abilities, experience and qualities match the need of the public body in question.

Independent scrutiny

No appointment will take place without first being scrutinised by an independent panel or by a group including membership independent of the department filling the post.

Equal opportunities

Departments should sustain programmes to deliver equal opportunities principles.

Probity

Board members of public bodies must be committed to the principles and values of public service and perform their duties with integrity.

Openness and transparency

The principles of open government must be applied to the appointments process, its working must be transparent and information provided about the appointments made.

Proportionality

The appointments procedures need to be subject to the principle of proportionality, that is they should be appropriate for the nature of the post and the size and weight of its responsibilities.³¹

After a critical report from a former Public Appointments Commissioner, an independent appointments commission was established for NHS appointments in 2001. Following changes in the *Health Act 2006*, the NHS Appointments Commission has now become the Appointments Commission, a non-departmental public body.³² This uses the

³⁰ *Public Appointments Order in Council 2002*, 16 July 2002; this consolidates the 1995 and 1998 orders

³¹ Office of the Commissioner for Public Appointments, *Code of Practice for Ministerial Appointments in Public Bodies*, August 2005, p9

³² For more information see www.appointments.org.uk.

Commissioner for Public Appointment's Code of Practice and processes for making appointments.³³

The Commissioner for Public Appointment's Code of Practice covers all ministerial appointments to the boards of executive and advisory non-departmental public bodies, NHS bodies, public corporations, nationalised industries, and utility regulators. The current Commissioner, Janet Gaymer, has explained her role as follows:

I currently regulate around 10,000 appointments made by ministers to just over 1,000 public bodies in England and Wales. There are some 20,000 public appointments which I do not regulate. Nor do I make appointments myself. Those conducting public appointments processes are required to follow my Code of Practice, the aim of which is to facilitate public appointments made on merit, and after an open and transparent process.³⁴

During 2006-07 Ministers made over 3,800 appointments and reappointments to the boards of public bodies.³⁵

There has been some concern that the Office of the Commission for Public Appointments (OCPA) processes are disproportionate, and that this is off-putting to people who want to enter public life. A 2007 report by the Public Administration Select Committee recommended that Ministers should have a reserve power to make appointments to high profile public bodies without going through the OCPA process, as long as a full report was made public by the Commissioner.³⁶ The current Commissioner for Public Appointments, Janet Gaymer, has argued that such appointments would go:

...completely against the basic principle in respect of which I was set up, which is to make an appointment on merit after an open and transparent process. So one has to look for something else to give you comfort, and if a confirmatory hearing gives you comfort that may be one way of doing it.³⁷

B. Appointments subject to parliamentary approval

Some public appointments are already subject to a formal decision of the House of Commons: these are the Comptroller and Auditor General (C&AG) (head of the National Audit Office) and the members of the Electoral Commission. The *Governance of Britain* announced that the appointment of the chair of the new UK Statistics Authority would be made subject to a vote of the House of Commons. This is discussed in section II C below.

³³ For more information see the Appointments Commission website, <http://www.appointments.org.uk/default.asp> (last viewed 21 April 2008)

³⁴ 'Parliamentary Procedure' in *Public Service Magazine*, February-March 2008

³⁵ Office of the Commissioner for Public Appointments, *Annual Report 2006-07*, p12

³⁶ Public Administration Select Committee, *Politics and Administration: Ministers and Civil Servants*, 13 March 2007, HC 122 2006-07

³⁷ Public Administration Select Committee, *Public Appointments: Confirmation Hearings*, Oral and Written Evidence given by Ms Janet Gaymer CBE, Commissioner for Public Appointments, 19 June 2007, HC 731-i 2006-07, Q 25

1. The appointment of the Comptroller and Auditor General

The Comptroller and Auditor General (C&AG) is an Officer of the House of Commons. The C&AG is a Crown appointment on a motion of the House of Commons moved following agreement between the Prime Minister and the Chairman of the Public Accounts Committee. Section 1 of the *National Audit Act 1983* states that:

1.—(1) The power of Her Majesty under section 6 of the Exchequer and Audit Departments Act 1866 (appointment of and status of Comptroller and Auditor General) shall be exercisable on an address presented by the House of Commons, and no motion or shall be made for such an address except by the Prime Minister acting with the agreement of the Chairman of the Committee of Public Accounts.³⁸

In February 2008 a review of corporate governance of the National Audit Office (NAO), commissioned by the Public Accounts Commission and carried out by Sir John Tiner, was published.³⁹ Amongst its recommendations was a proposal that a new Nominations Committee be formed to appoint the C&AG. The Nominations Committee's members would include the NAO Chairman and an Independent Assessor from the Public Appointments Commissioner list. The report did not specify whether any MPs would also sit on the Committee. However, it stated that it "remained essential" that the appointment was made is made by the Crown following approval by the House of Commons, with the involvement of the Prime Minister and the Chairman of the PAC.⁴⁰

The Public Accounts Commission published a response to the corporate governance review on 4 March 2008.⁴¹ The Commission agreed with the review that the appointment of the C&AG should continue to be by a process which involves agreement between the Prime Minister and the Chairman of the Committee of Public Accounts, and also follows the principles of the Commissioner for Public Appointments' Code of Practice.⁴² More information is available in the Library Standard Note, *Comptroller and Auditor General*.⁴³

However, under separate proposals in the *Governance of Britain* green paper, a select committee would be expected to hold a pre-appointment hearing in respect of the C&AG. This has raised some interest, as this post is already subject to parliamentary approval, and the involvement of the chairman of the Public Accounts Committee (PAC). The Chairman of the PAC, Edward Leigh, has objected to making this post subject to a pre-appointment hearing. In his letter to the Liaison Committee in February 2008 he stated that:

³⁸ *National Audit Act 1983 (c. 44)*

³⁹ The review was published by the Public Accounts Commission as its fourteenth report of 2007-08, HC 328 2007-08

⁴⁰ *Ibid*, para 63-64

⁴¹ The Public Accounts Commission, *Corporate Governance of the National Audit Office: Response to John Tiner's Review*, 4 March 2008, HC 402 2007-08

⁴² *Ibid*, para 16

⁴³ HC Deb 23 January c1520. See Library Standard Note SN/PC/04595, [Comptroller and Auditor General](#)

...I feel strongly that this is not suitable for a pre-appointment hearing with the Committee. The reasons are that the statutory provisions for the appointment of the C&AG provide a balance between the executive and this House and between the Government and Opposition through the requirement for the consent of both the Prime Minister and the Chairman of the PAC. A pre-appointment hearing with the whole Committee, with its inevitable government majority, would clearly upset this balance and thus potentially compromise perceptions of the C&AG's independence from the Government, an essential element in the effective functioning of the National Audit Office as a whole.

However I would not object to the C&AG-designate appearing before the Committee, once the Prime Minister and the PAC Chairman had agreed his or her name, but in advance of the debate on the motion for his or her appointment.⁴⁴

The Liaison Committee stated that they shared Edward Leigh's concerns in their March 2008 report.⁴⁵

The House of Commons debated the appointment of the current C&AG on 23 January 2008. The formal motion was moved by the Prime Minister, Gordon Brown, and seconded by the chairman of the Public Accounts Committee. The new C&AG, Tim Burr, is an interim appointment. A further appointment will be made once the review of the NAO's corporate governance procedures has been adopted. During the 23 January debate, Tony Wright, chairman of the Public Administration Select Committee, spoke about Parliamentary involvement in the appointment of the new permanent C&AG:

I hope that the appointment process will be controlled by the Commissioner for Public Appointments; that is the system that we have put in place over the past 10 or 15 years to ensure the integrity of the public appointments process. The system should be supervised by the Office of the Commissioner for Public Appointments, and should be linked to pre-appointment hearings in the House, which would, I presume, be held by the Public Accounts Committee. That would give Parliament a role in the process. A motion should also be brought before the House, as has happened today. I hope that that is the process at which we arrive. In a sense, we are discussing an interim point on the journey to that destination.⁴⁶

In response, Alan Williams, chairman of the Liaison Committee and the Public Accounts Commission, expressed some nervousness that a vote of the whole House might affect the independence of the office, given the Government majority.⁴⁷

The appointment of the previous C&AG (Sir John Bourn) was debated on 16 December 1987.⁴⁸

⁴⁴ Liaison Committee, *Pre-appointment hearings by select committees*, 5 March 2008, HC 384 2007-2008, p23

⁴⁵ *Ibid*, para 16

⁴⁶ HC Deb 23 January 2008 c1529

⁴⁷ *Ibid*, c1529

⁴⁸ House of Commons, *Votes and Proceedings*, 16 December 1987

2. The Electoral Commission

The Electoral Commission is supervised by five Commissioners who are appointed by Royal Warrant to exercise the functions of the Commission. There is a statutory requirement for consultation with the registered leaders of certain political parties and for a motion to be moved in the House of Commons.⁴⁹ The original appointment of the Commissioners was debated in the House of Commons on 8 and 9 January 2001, as a result of which an Humble Address was presented to Her Majesty, praying that Her Majesty appointed the named Electoral Commissioners.⁵⁰

There were questions about the renewal of the chairman of the Electoral Commission's term of office in November 2006. It was announced that although the chairman's term of office was due to expire on 18 January 2007, the incumbent chairman, Sam Younger, had been offered a further period of office, to expire on 31 December 2008, subject to the necessary consultations and agreement of the House of Commons.⁵¹ More information is available in the Library Standard Note, *The Electoral Commission*.⁵²

3. The Chair of the UK Statistics Authority

The Chair of the new Statistics Board (now known as the UK Statistics Authority) was singled out by the Government in the *Governance of Britain* Green Paper as suitable not only for a pre-appointment hearing, but also for a vote in the House.⁵³ The Green Paper stated that:

The Statistics and Registration Service Bill, currently before Parliament, provides for the creation of an independent Statistics Board, with a non-executive Chair, appointed by the Crown. Because of the importance of this appointment in ensuring public confidence in official statistics, the Government believes that there should be a vote in the House of Commons to confirm the Government's nominee.⁵⁴

The appointment process was already underway when this announcement took place. The Treasury Select Committee (TSC) held a pre-appointment hearing with the candidate and reported to the House before the Commons vote. The Government's nominee, Sir Michael Scholar, had already been subject to an appointments process that adhered to OCPA guidance. The TSC had been informed on Friday 13 July that the Government was to announce its nominee for the post, and that there would be an opportunity for the Committee to undertake a pre-appointment hearing. The announcement of the name of the nominee was made on Tuesday 17 July, and the hearing was held on Wednesday 18 July. The Committee's report stated that the timetable for their work had been "exceptionally compressed".

⁴⁹ *Political Parties, Elections and Referendums Act 2000*, Part I, s3

⁵⁰ HC Deb 8 January 2001 cc828-46 and 9 January 2001 cc1029-52

⁵¹ HC Deb 6 November 2006 c577

⁵² House of Commons Library Standard Note, SN/PC/3127, [The Electoral Commission](#)

⁵³ Library Standard Note, SN/SG/4396, [The Chair of the Statistics Board](#)

⁵⁴ Ministry of Justice, *The Governance of Britain*, July 2007, Cm 7170, para 80

In their report, published on Monday 23 July, the TSC explained the approach the Committee took to the hearing:

We have noted the Government's suggestion that pre-appointment hearings might cover "issues such as the candidate's suitability for the role, his or her key priorities, and the process used in selection" [*The Governance of Britain*] Just as it is appropriate to ask appointees to the Monetary Policy Committee of the Bank of England questions about monetary policy and inflation, so we considered it appropriate to ask the nominee for the Chair of the Statistics Board wide-ranging questions about statistical issues. As the proposed first holder of a new post, we decided it would be important to examine the key challenges that he expected to face. We also thought it proper to ask about the individual's experience of the selection process. However, we agreed in advance of the hearing that we would ask only those questions that had a bearing on an assessment of the nominee's suitability for the post, the selection and appointment processes or his proposed actions following appointment.⁵⁵

The TSC also stated that:

We accept that the circumstances of the current nomination for the post of Chair of the Statistics Board are exceptional, coming so soon after the Government's initial proposals for improving parliamentary involvement in public appointments and relating to a newly-established post. Nevertheless, if select committees are to be enabled to be properly equipped to consider nominations for major public appointments, it is vital for Ministers to provide initial information to a select committee about the proposed timetable for a particular appointment at the earliest possible opportunity, and then to ensure that the committee is provided on a timely basis with subsequent information about the conduct of the appointment process.⁵⁶

The Committee recommended Sir Michael's appointment to the House.⁵⁷ They stated that:

In the basis of our examination of the role and functions of the new Statistics Board, the information available to us about Sir Michael Scholar and the oral evidence which he gave to the Committee on Wednesday 18 July, we consider that Sir Michael Scholar is a suitable nominee for the post of Chair of the Statistics Board and has demonstrated to us his commitment to the independence, integrity and importance of statistics. We therefore recommend him to the House. We note that he is taking on a six-day week: we expect that his position as Chair of the Statistics Board will be his primary commitment.⁵⁸

However, the Committee noted that:

⁵⁵ *Ibid*, para 26

⁵⁶ Treasury Select Committee, *The appointment of the Chair of the Statistics Board*, 23 July 2007, HC 934-I, para 32

⁵⁷ *Ibid*, para 29

⁵⁸ *Ibid*, para 29

The way in which parliamentary involvement in subsequent appointments of the Chair of the Statistics Board and in other high-status appointments develops in future depends in part on views taken on the value of a vote in the House of Commons in this context. Provision for such a vote has the potential to enhance the perceived independence of a post-holder from Government, but also carries with it the risk that the appointment will be the subject of votes along party lines which might have the contrary effect.

The Government's general proposals for select committee involvement in public appointments are based on the Government's view that any opinions expressed in reports of select committees about nominees should be "non-binding". The Government has proposed a vote of the House of Commons on the nomination of Chair of the Statistics Commission, but not on nominations to other posts. Given the Government's commitment to strengthening the role of the House of Commons and its select committees in public appointments, the Government should consider whether such a vote should be required for certain other high-status appointments. We recommend that, in relation to such appointments, where a select committee comes to an adverse opinion on a nomination, that select committee should have the power to require that the nomination be the subject of a vote in the House of Commons or a debate in a General Committee.

The motion on the Order Paper for Wednesday 25 July asked the House to endorse the nomination of Sir Michael Scholar. The TSC report and evidence was tagged on the Order Paper. The appointment was agreed to without a division.⁵⁹

During the debate, there was some interest in the involvement of the House of Commons in confirming the appointment. The process was in general, broadly welcomed. David Gauke MP, who is in the Shadow Treasury team, questioned Ms. Eagle, the Exchequer Secretary to the Treasury, about when she knew of the appointment:

... may I express my support for the broad principle behind the process—the principle of ensuring greater parliamentary involvement in public appointments, particularly the appointment of the chairman of the Statistics Board? It would be difficult for me not to do so, given that when considering the Statistics and Registration Service Bill in Committee I tabled amendments calling for much greater parliamentary involvement in appointments to the board, which of course includes the chairman. Unfortunately, although the proposals were supported by my hon. Friends, they were opposed by the Government. The hon. Member for Wentworth (John Healey), who was then the Financial Secretary to the Treasury, stated:

“It is appropriate that Ministers play a role in appointments, because it is an Executive function.”

When pressed on whether there was a role for confirmation hearings, he said:

⁵⁹ HC Deb 25 July 2007 c914

“That is not a matter for the Government.”—[*Official Report*, Statistics and Registration Service Public Bill Committee, 16 January 2007; c. 68.]

I raised the issue again on 2 July with the Exchequer Secretary to the Treasury. I asked about an increased role for Parliament in major public appointments, including the appointment of members of the Statistics Board. She responded:

“Clearly, Parliament will not have an added role and not in respect of the initial board appointments.”

She went on to say that

“A proper appointments process has to be in place”

for April 2008, and that

“It may then be for Parliament to decide...how it wishes to ensure adequate scrutiny of the new department’s activities.”—[*Official Report*, 2 July 2007; Vol. 462, c. 709.]

I assume that when the Exchequer Secretary made that statement she did not know that the Prime Minister would the next day announce the change of process and specifically that there would be a parliamentary vote on the appointment of the chairman of the Statistics Board. I should be grateful to know whether the Exchequer Secretary was consulted on the matter, whether she was aware of any rumours, and when she first knew or suspected that the process would change.⁶⁰

The Minister did not respond to this point during the debate.

For the Liberal Democrats, Julia Goldsworthy stated that:

It is new and welcome. It is excellent to have the opportunity not only to hold a pre-appointment hearing but to debate and potentially vote on the nomination on the Floor of the House.⁶¹

She went on to question whether in future, if departmental responsibility for the new statistics body was to move from the Treasury to the Cabinet Office, it might be the Public Administration Select Committee which considered this appointment. In her closing remarks, the Minister agreed that in future, it might be more appropriate for another committee to undertake the pre-appointment hearing.⁶²

⁶⁰ HC Deb 25 July 2007 c903

⁶¹ *Ibid*, c907

⁶² *Ibid*, c914

III Previous calls for pre-appointment or confirmatory hearings

The proposals in *The Governance of Britain* Green Paper followed previous rejections of calls for pre-appointment or confirmatory hearings. Proposals had been made by Parliamentary select committees and outside groups such as the independent Power Inquiry. The proposals were often made alongside others to “strengthen” Parliament, which was considered to be disadvantaged by an overly dominant executive.

A. The Liaison Committee

The involvement of select committees in public appointments has been of interest to the Liaison Committee for some time. Their report *Shifting the Balance: Select Committees and the Executive* published in March 2000, observed that although committees had no formal role in appointments, some did hold “confirmation hearings” for major public appointments.⁶³ The Treasury Select Committee, for example, had held hearings with newly appointed members of the Monetary Policy Committee of the Bank of England since it was made independent in 1997. The Liaison Committee stated that:

Select committees have as yet no formal role in appointments, but hearings of this sort, and the exposure that they involve, are proving increasingly influential. We will be seeking statutory acknowledgement of this process in new legislation.⁶⁴

In its response, the Government stated that no formal role should be given to select committees in scrutinising appointments as it would: (a) break the accountability of ministers for appointments; (b) risk the appointment of ‘lame duck’ appointees – appointed by the minister but without select committee approval; and (c) would contravene the role of select committees as scrutiny bodies rather than decision-making bodies.⁶⁵

The Liaison Committee returned to public appointments when it drafted its list of ‘core tasks’ for select committees in 2002,⁶⁶ in response to a similar list of tasks proposed by the Modernisation Committee in their 2002 report *Select Committees*.⁶⁷ Core task number 8 is: “To scrutinise major public appointments made by the department”. Committees report their practice in relation to this task in their annual reports. The Liaison Committee then collates information across committees in its own annual report.

⁶³ Liaison Committee, *Shifting the Balance: Select Committees and the Executive*, 3 March 2000, HC 300, para 24

⁶⁴ *Ibid*

⁶⁵ Liaison Committee, *Independence or control? The Government’s Response to the First Report from the Liaison Committee: Shifting the Balance*, 25 July 2000, HC 748

⁶⁶ Liaison Committee, *Annual Report 2002*, 1 April 2003, HC 558, 2002-03, para 13

⁶⁷ Select Committee on the Modernisation of the House of Commons, *Select Committees*, 12 February 2002, HC 224 2001-02, para 34

B. The Public Administration Select Committee

In the 2002-03 Session the Public Administration Select Committee (PASC) undertook a wide-ranging inquiry into public appointments. Their report, *Government by Appointment: Opening up the patronage state*, looked at the role of the then newly created Commissioner for Public Appointments. They also looked at the role of Parliament in the appointments process. PASC recognised that the “democratic spirit” of those who argued in favour of greater select committee involvement was “admirable”, but also recognised that the issue raised “practical and constitutional difficulties”:

The sheer numbers of chairs and members involved would overwhelm select committees and prevent them from tackling other matters, even if their staffs were vastly expanded. Moreover many of these bodies are specialist in nature and neither Members nor the general public would be well equipped to decide or oversee appointments to them. There is also the issue of whether the scrutiny role is compromised by an involvement in appointments.

Further, the risk that appointments could become the subject of intense political or media debate, or political horse-trading, as confirmation hearings sometimes do in the United States, may well deter possible candidates from allowing their names to go forward. In recent months, for example, there has been controversy in the US Senate about the appointment of the new chairman of the Securities and Exchange Commission. Nominations of senior judges are also drawn into controversy, and the Washington Post recently referred (30 April 2003) to “the Senate's increasingly contentious partisan impasse over judicial appointments”.⁶⁸

The Committee argued for an explicit yet proportional role for select committees in the appointments process. They stated:

We are therefore attracted to the idea that there should be a requirement for ministers to inform the relevant select committees of the proposed appointee in the case of the most major public appointments. The list of these appointments could be agreed between the minister and the committee, and would confine itself to such 'peak' appointments as the chair of the BBC, industry regulators, and the major watchdogs. The relevant committee would have the right to hold a hearing, if it chose to do so, before the appointment of the candidate was confirmed. We do not propose that the committee would explicitly confirm such appointments, but that in those cases where it was the view of the Committee that a proposed appointee was unsuitable then it should have the power to enter a Letter of Reservation, leading to the competition for the post in question to be reopened. We believe that this approach strikes a sensible balance. We envisage that the committee's new powers would be used only rarely, but they could help to readjust the balance between Parliament and the executive, as well as providing a salutary quality control check for the public appointments system.

We therefore recommend that ministers should agree a list of key appointments with relevant select committees and notify them of the names of proposed appointees for these posts as they arise. Committees could

⁶⁸ Public Administration Select Committee, *Government by Appointment: Opening up the patronage state*, 10 July 2003, HC 165-I, paras 105-106

decide, if they chose to do so, to hold a meeting with proposed appointees, and would be able to enter a Letter of Reservation as a result of such a hearing in any case where there was a decision to do so. In such circumstances the competition for the post would be re-opened.⁶⁹

The Government turned down this recommendation, stating that:

The Government is committed to maintaining a rigorous and effective process based on the overriding principle of appointment on merit. The current arrangements combine the key elements of fair and open competition; independent scrutiny; equal opportunities; and Ministerial responsibility. The Government believes that these arrangements are robust and provide a clear line of accountability. It also believes that it is important to have a process which commands public confidence, and avoids the perception of politicising appointments.

Existing opportunities allow for post-hoc scrutiny of appointments. This can, and does, include inviting a successful candidate to appear before a select committee for a discussion of a personal or policy approach (either before or after taking up the post). It allows Parliament to hold the Executive to account through scrutiny of its actions. Committees can also seek advance notice of appointments so that they can arrange their programmes sensibly. The Government believes that this is the right approach.⁷⁰

C. The Conservative Party Democracy Task Force

The Conservative Party Democracy Task Force, chaired by Ken Clarke, was established at the beginning of the 2005 Parliament “to examine the full range of issues which contribute to a healthy and accountable democracy, aiming to restore trust in politics”.⁷¹ The Task Force includes Conservative Party parliamentarians and party members, and was advised by former Cabinet Secretary Lord Butler of Brockwell and Sir Christopher Foster of the Better Government Initiative.⁷² In their June 2007 report *Power to the People: Rebuilding parliament* they raised the involvement of Parliament in major appointments by departments:

...we believe that Select Committees should be the vehicle through which Parliament plays an increased role in public appointments. Given the need for ministers to be clearly accountable for appointments, and the negative experience in some countries of intrusive confirmation hearings, we believe in a cautious approach to change in this area. However, we believe that there should be an interview procedure to cover a small number of ‘peak’ appointments (the scope for this to be agreed between ministers and the relevant select committee). Ministers would inform the committee of a proposed appointee for a post; the committee would then have the right to hold a hearing before the candidate’s

⁶⁹ *Ibid*, paras 109-110

⁷⁰ Cabinet Office, *Government Response to the Public Administration Select Committee’s Fourth Report of Session 2002-2003 “Government by Appointment: Opening Up the Patronage State”*, December 2003, Cm 6056, p6

⁷¹ For more information see <http://www.conservatives.com/tile.do?def=democracy.taskforce.page> (last viewed 10 April 2008)

⁷² See <http://www.bettergovernmentinitiative.co.uk/da/57700> (last viewed 11 April 2008)

appointment was confirmed. The committee would be able to express its reservations over an appointment that it felt to be unsuitable, but would have no right of veto. However, a minister who insisted on an appointment over the committee's reservations would bear very public responsibility for poor performance by the candidate once in post.⁷³

The recommendations of the Task Force have not yet been adopted as official Conservative Party policy.

D. The Liberal Democrats: *Real Democracy for Britain*

In their document, *Real Democracy for Britain*, published in June 2007, the Liberal Democrats made “20 proposals to strengthen Britain’s democracy, restore faith in politics, bring government back to the people”. They recommended:

Introducing confirmatory hearings of key ministerial appointments (particularly those unelected members who are elevated to the House of Lords specifically and immediately to place them in Government), civil service and quango appointments.⁷⁴

The policy paper, *For the People, By the People*, published after the *Governance of Britain Green Paper*, welcomed the proposals for pre-appointment hearings. However, the Party proposed that:

...the Government should go further, subjecting all such appointments to confirmatory hearings by Departmental Select Committees before appointments are made. We believe that it is possible for safeguards to be built into this process which would avoid difficulties with the market sensitivity of such appointments.⁷⁵

E. The Power Inquiry

Power to the People, the report of the independent Power Commission chaired by Baroness Kennedy of The Shaws, made a number of recommendations about the relationship between Parliament and government.⁷⁶ The report, published in February 2006, argued that select committees should, “have the power to initiate their own formal scrutiny and approval process for the most senior appointments made by the Prime Minister or government ministers and which appear on a list approved annually by Parliament and drawn up by the House of Commons Liaison Committee”.⁷⁷ It stated that:

⁷³ Conservative Party Democracy Task Force, *Power to the People: Rebuilding parliament*, June 2007, p4

⁷⁴ Liberal Democrats, *Real Democracy for Britain*, 29 June 2007, <http://www.libdems.org.uk/media/documents/parliament/Real%20Democracy%20for%20Britain1.pdf> (last viewed 10 April 2008)

⁷⁵ Liberal Democrats, *For the people, by the people*, Policy Paper, 6 September 2007, http://www.libdems.org.uk/media/documents/policies/PP83_constitutional_Sep07.pdf (last viewed 10 April 2008)

⁷⁶ House of Commons Library Standard Note SN/PC/3948, *Power to the People: The report of Power, an independent inquiry into Britain’s democracy*

⁷⁷ The Power Commission, *Power to the People*, February 2006, pp139-142

the appointment would be required to be approved or vetoed within 28 days, or else the appointment would be deemed to have been approved. In this way Select Committees would only scrutinize appointments about which it had concerns. It is likely that the great majority of appointments to bodies on the list would go ahead without any scrutiny process.⁷⁸

Such hearings would be possible for a wide range of appointments, including:

The most senior officials in the military, the diplomatic corps and uniformed civilian services since considerable policy and decision-making power and influence are invested in these posts which may have a deep impact on the everyday lives of British citizens.⁷⁹

The report went on to argue that:

This power of scrutiny would not undermine the Commissioners for Public Appointments operating in the UK, whose role it is to ensure that the procedures for a large number of public appointments meet a code of practice. Indeed, the Commissioners may on occasion, be asked to appear before a Select Committee as expert witnesses when conducting hearings on particular appointments.⁸⁰

IV Select committee scrutiny of major appointments made by departments

Although select committees have had no formal role in the process of making public appointments, they often scrutinize major appointments made by the department. This is in fact a 'core task' of select committees, as agreed by the Liaison Committee in 2002. Some committees have recommended that they should have a greater part in making various appointments; some examples are outlined here.

A. The Treasury Select Committee

1. Appointments to the Monetary Policy Committee of the Bank of England⁸¹

The Treasury Select Committee's involvement in the appointment of members of the Monetary Policy Committee of the Bank of England pre-dates the core tasks of select committees. When the independence of the Bank of England was announced in 1997, the Treasury Select Committee (TSC) recommended that the Bank of England Act should:

...make provision for the confirmation of nominations to the post of Governor, deputy Governor or nominated member of the MPC [Monetary Policy Committee]

⁷⁸ *Ibid*

⁷⁹ *Ibid*

⁸⁰ *Ibid*

⁸¹ See also House of Commons Library Standard Note SN/EP/4011, [Appointments to the Monetary Policy Committee of the Bank of England](#)

unless the Treasury Committee, within 30 calendar days of a nomination being made, makes a report to the House of Commons stating its reasons for considering that the candidate does not meet the criteria of competence and personal independence and recommending that the appointment be not confirmed.

We are aware of concerns that any involvement in the selection process might be thought to prejudice the Committee's objectivity and its willingness to criticize when necessary the conduct of the Bank. However, we do not propose that the Committee should have any role in promoting or selecting particular candidates. The Committee's task should be simply to satisfy itself that the Executive is nominating suitable individuals of proven professional competence and independence.

We believe very strongly in the importance of ensuring that the appointment process is carried out with openness and independence from political influence. We therefore intend, even in the absence of statutory provision, to instigate hearings and make reports to Parliament.⁸²

At the report stage of the *Bank of England Bill 1997-98*, some members of the TSC tabled a new clause which provided that an adverse report by the Committee would delay confirmation of appointment until the Chancellor of the Exchequer had given his reasons for going ahead with it, but would not act as a veto. This clause was defeated.⁸³

The TSC decided to press ahead with hearings as outlined in their First Report. In their Third Report of the 1997-98 Parliament they set out a resolution to indicate the scope of these 'confirmation' hearings:

That, when the Committee is taking evidence at a confirmation hearing to consider the appointment or re-appointment of the Governor or a Deputy Governor of the Bank of England or a member of the Monetary Policy Committee, questioning will be restricted to issues of the appointee's personal independence and professional competence, including the possession of knowledge or experience likely to be relevant to the functions of the Monetary Policy Committee.⁸⁴

They have taken evidence from every new appointee since 1998. There has only been a single case where they have reported against an appointment. In 2000 they reported that:

In the case of Mr Allsopp... we were disappointed in his answers to our questions, and believe that this casts doubt on whether he possesses the skills required to take part in meetings of the Monetary Policy Committee. **We therefore call on the Chancellor of the Exchequer to think again about Mr Allsopp's appointment.**⁸⁵

⁸² Treasury Select Committee, *Accountability of the Bank of England*, 29 October 1997, HC 282, paras 47-49

⁸³ HC Deb 22 January 1998 cc1153-87

⁸⁴ Treasury Select Committee, *Confirmation Hearings*, 25 February 1998, HC 571, para 6

⁸⁵ Treasury Select Committee, *The Monetary Policy Committee of the Bank of England: Confirmation Hearings*, 24 May 2000, HC 520, para 5

In their response, the Government stated that:

Mr Christopher Allsopp fully satisfies the criteria for appointments to the Bank of England Monetary Policy Committee. He is one of a line of distinguished academics who serve on the MPC. A specialist in international macroeconomics, Mr Allsopp's previous experience includes work at the OECD in Paris and three years as Adviser at the Bank of England as well as consultancy appointments with many other leading UK and international organisations. His appointment has been widely welcomed, including personally by the Governor and Deputy Governor.⁸⁶

Mr Allsopp was appointed to the MPC and served on the Committee for one three-year term (2000-2003).

2. Appointments to the Financial Services Authority

When the Financial Services Authority (FSA) was established under the *Financial Services and Markets Act 2000* the TSC's scrutiny of the legislation stressed the need for the new regulator to be accountable and efficient; in particular, it mentioned the advantages of confirmation hearings for FSA board members.⁸⁷ The Government responded that they were not persuaded that confirmation hearings would be appropriate, but thought that it might be helpful for new executive appointments to discuss how they intended to carry out their functions before a Parliamentary committee. The TSC took evidence from the new chairman and chief executive of the FSA shortly after they took up their posts in October 2003.⁸⁸

3. The Treasury Select Committee's response to the proposals in the *Governance of Britain Green Paper*

The TSC held evidence sessions on *The Monetary Policy Committee of the Bank of England: Ten Years On* during 2007. The Committee's report considered its part in the appointment process. The Committee's report, published in September 2007, stated:⁸⁹

On 3 July 2007 the Prime Minister announced a series of reforms of parliamentary involvement in public appointments, some of which directly affect 'external' appointments to the MPC and responded to our concerns about timing. The Prime Minister proposed "pre-appointment" hearings for a nominee suggested by the Government, which would be "non-binding", but which would precede the formal appointment. **We welcome the Government's commitment to enable appointment hearings by this Committee for nominees for the post of 'external' member of the MPC to take place prior to formal appointment. We note that the Government considers such hearings would**

⁸⁶ Treasury Select Committee, *The Monetary Policy Committee of the Bank of England: Confirmation Hearings: The Government's Response to the Committee's Seventh Report of Session 1999-2000*, HC 859

⁸⁷ Treasury Select Committee, *Financial Services Regulation*, 4 February 1999, HC 73-I, 1998-99

⁸⁸ Treasury Select Committee, *Minutes of evidence for Tuesday 21 October 2003*, HC 1211-i-ii

⁸⁹ Treasury Select Committee, *The Monetary Policy Committee of the Bank of England: ten years on*, 18 September 2007, HC 299 2006-07

be "non-binding". We consider it important that such hearings can be scheduled sufficiently far in advance of the date of the formal appointment to enable the Chancellor of the Exchequer to be able to give proper consideration to any view expressed by the Treasury Committee without there being a danger of the MPC membership being temporarily reduced as a result of reconsideration of a nominee. We recommend accordingly that nominations be announced at least three months prior to the date on which the vacancy falls to be filled. We also consider that, if the Treasury Committee were to reach an adverse opinion on a nominee, which would only be after careful and considered reflection, the Committee ought to have the power to require a debate in the House of Commons on the nomination.⁹⁰

B. The Education and Skills Committee

In their 1999 report, *The Work of Ofsted*, the Education and Employment Select Committee considered the role of Parliament in the appointment of Her Majesty's Chief Inspector of Schools in England (HMCI). They concluded that:

We recognise the formal position that Crown appointments cannot be made subject to Parliamentary veto. However, we believe that Parliament should be given an advisory role in the appointment or re-appointment of HM Chief Inspector. We recommend that the Chief Inspector would continue to be appointed by the Crown on the advice of the Prime Minister, as at present, but before the appointment (or re-appointment) was confirmed, this Select Committee should be given the opportunity to take evidence in public from the nominee and report to Parliament on the proposed appointment. A debate could then be held in the House on the Committee's report. Although the Government would not formally be obliged to make time for such a debate, we recommend that the Government should give an undertaking to do so.⁹¹

The Government response cited the principles of merit and ministerial responsibility in turning down this recommendation:

The Government has accepted the recommendation in the First Report of the Committee on Standards in Public Life that ministerial accountability and selection on merit should be the key elements of the appointment system for public bodies. The Government therefore has no plans to propose Parliamentary involvement in such appointments, including that of HM Chief Inspector of Schools.⁹²

The Education and Skills Committee took oral evidence in public from David Bell on 8 May 2002, shortly after he took up his appointment as HCMI. In the report which

⁹⁰ Treasury Select Committee, *The Monetary Policy Committee of the Bank of England: ten years on*, 18 September 2007, HC 299 2006-07, para 82

⁹¹ Education and Employment Committee, *The Work of OFSTED*, HC 62-I, 1998-99, overview

⁹² Education and Employment Committee, Fifth Special Report, *The Government and OFSTED's Response to the Committee's Fourth Report of 1998-99, The work of OFSTED*, HC 791

followed, they again recommended that the appointment of HMCI should be subject to Parliamentary approval.⁹³

C. The Foreign Affairs Committee

The Foreign Affairs Committee (FAC) has expressed an intention to be involved in the scrutiny of major diplomatic or consular appointments, where the appointee is a person from outside the diplomatic service. However, the only appointments of this kind (of Rt Hon Helen Liddell as High Commissioner to Australia and Rt Hon Paul Boateng as High Commissioner to South Africa) were made at the start of the 2005 Parliament, before the nomination of the select committees. The FAC's report on the Foreign and Commonwealth Office's annual departmental report stated that:

Both appointments were *faits accomplis* by the time the committee was appointed in the new Parliament, so we did not hold hearings on them. It is our intention, should comparable nominations be made during this Parliament, to move with some expedition to hold 'confirmatory hearings' hopefully before the decision is made.⁹⁴

D. Science and Technology Committee

In their July 2007 report, the Science and Technology Select Committee considered the appointment of Sir John Chisholm as Chairman of the Medical Research Council. The Committee holds an evidence session with new incumbents a few months after taking up the post as part of their commitment to the Core Tasks. The purpose of their hearings was "to satisfy Parliament that the post has been filled with someone of sufficient calibre, to establish the views and principles that he or she brings to the job, to alert them to our interests and concerns and to heighten awareness of our role in scrutinising each individual's performance and that of their divisions or organisations".⁹⁵

In the case of Sir John Chisholm the Committee reported that they had "serious reservations" about his appointment because:

14. At our introductory hearing Sir John appeared to us to show a lack of focus and clarity. He was vague about the process of his appointment and evasive when discussing the process of appointing Ernst & Young to help with the Joint Review. He was unable to explain adequately some of the details of the Joint Review, such as how MRC staff and other stakeholders were consulted, his role as chairman of the Steering Group and the reasons for reducing the size of the MRC Council. His explanation for the policy decision to increase contingency funding was unsatisfactory and he lacked the necessary knowledge to discuss the MRC's relationship with the other Research Councils. We do not consider that these shortcomings were resolved fully in his supplementary written evidence. **For the reasons set out in this paragraph, we have serious**

⁹³ Education and Skills Select Committee, *The Appointment of the new HMCI*, HC 830, 2001-2002

⁹⁴ Foreign Affairs Committee, *Foreign and Commonwealth Office Annual Report*, 8 March 2005, HC 522, para 142

⁹⁵ Science and Technology Select Committee, *Chairman of the Medical Research Council: Introductory hearing*, 31 July 2007, HC 746 2006-07, para 1

reservations as to whether Sir John is the right person to guide the MRC Executive through the coming period of change.

The Committee went on to recommend that in general,

... Chairpersons and Chief Executives of the Research Councils [should] be included in the proposed list of appointments that should be subject to these hearings.⁹⁶

The Government response to the Committee's report stated that:

10. The Government disagrees with the Committee's reservations. The Government, the MRC Council and the MRC senior executive have every confidence in Sir John Chisholm and believe that the skills and experience he can bring as chair will be invaluable through this period of change.

It continued:

11. The Government notes this recommendation. Its position on pre-appointment scrutiny of public appointments is as set out in Cm 7170, *The Governance of Britain*, published on 3 July 2007, which states that there should be a role for Parliament, through its select committees, in scrutinising a number of key appointments that are not subject to oversight by the Commissioner for Public Appointments or other form of independent scrutiny. This scrutiny should take the form of non-binding, pre-appointment hearings. The Government, in consultation with the Liaison Committee, will prepare a list of such appointments for which these hearings will apply.⁹⁷

However, when the list was published on 23 January 2008 the chairpersons and chief executives of the research councils were not included. The Liaison Committee included them in their list provided in response to the Government's proposals (see section I A1 above).

E. Lords Select Committee on Communications

In August 2007 the House of Lords Select Committee on Communications published a report on the Chairmanship of the BBC.⁹⁸ Although the Committee did not question the appointee's ability to do the job, the Committee had "concerns about the way that the selection was carried out" and made various recommendations for improvements in the process. The Committee also considered whether Parliament should have a greater role in the appointment. They recommended that:

... We recommend that the House of Commons Liaison Committee and the Government agree that the Chairman of the BBC Trust should be one of the appointments that Parliament vets. This vetting should focus only on the

⁹⁶ *Ibid*, paras 14-15

⁹⁷ Science and Technology Select Committee, *Chairman of the Medical Research Council: Introductory Hearing: Government Response to the Committee's Eighth Report of Session 2006-07*, 24 October 2007, HC 1043 2006-07

⁹⁸ House of Lords Select Committee on Communications, *The Chairmanship of the BBC*, HL 171 2006-07

candidate's qualifications and aptitude for the job. Both Houses should have a role in this vetting. We therefore propose that a method be found whereby a Joint Committee of both Houses of Parliament should carry out the pre-appointment hearing...⁹⁹

The Committee had taken evidence from Michael Grade who had been concerned that public hearings would “deter a lot of very talented people from putting their names forward”. The Committee believed that if they agreed a resolution about lines of questioning, as the TSC had done for its MPC hearings, then “With such safeguards in place we question whether the type of person who would still be put off by the prospect of a Committee hearing is the type of person who should be chairman of the BBC”. Sir Michael Lyons told the committee that, although he did have concerns about pre-appointment hearings, post-hoc parliamentary scrutiny of his appointment would not have deterred him from applying.¹⁰⁰

The Chairman of the BBC Trust was not, however, included on the Government's list of 23 January 2008.¹⁰¹ The Culture Media and Sport Committee suggested that this post should be included on the Government's list.¹⁰²

V Objections to greater parliamentary involvement in public appointments

Although proposals for greater parliamentary involvement in public appointments have come from a variety of sources, there have also been objections raised. Before the publication of the *Governance of Britain* in July 2007, the Government had consistently rejected proposals for a more formal role of committees in the appointments process. Its arguments have included:

- that ministerial responsibility for appointments would be blurred;
- that there was the risk of ‘lame duck’ appointments – those who had been appointed by the minister but without select committee approval;
- that the status of select committees as scrutiny bodies rather than decision-making bodies would be changed.

The current Commissioner for Public Appointments, Janet Gaymer, has also raised some potential difficulties. She warned of unintended consequences in an article in *Public Service Magazine*:

⁹⁹ *Ibid*, para 42

¹⁰⁰ *Ibid*, para 41

¹⁰¹ Letter dated 23 January 2008 from Ed Miliband MP to Alan Williams MP, chair of the Liaison Committee, regarding pre-appointment hearings from select committees, DEP2008-0185, published as Annex A to the Liaison Committee, *Pre-appointment hearings by select committees*, 5 March 2008, HC 384 2007-08

¹⁰² Liaison Committee, *Pre-appointment hearings by select committees*, 5 March 2008, HC 384 2007-08, pp16-17

Firstly, the prospect of a public hearing, which may carry reputational risk both to an individual or the individual's current organisation, may deter potential candidates. Secondly, it may be hard to dispel a perceived politicisation of public appointments when potential appointees are questioned by representatives of political parties without any form of independent scrutiny. Thirdly, there is a danger that the length of public appointments processes may be extended if, for example, the appointment procedure is taking place when Parliament is not sitting. Fourthly, experience in other jurisdictions suggests that intrusive questioning of candidates for appointment may be challenged and there is no guarantee that in any event that the questioning of one select committee will be consistent with the questioning of another, even though there may be strong chairmanship.

Generally, if there has already been an appointments process (such as those which fall within my remit), confusion about the purpose of any subsequent select committee hearing is more likely and in some instances could result in the appointments process itself falling into disrepute. It is vital, therefore, that the purpose of a pre-appointment hearing is made clear, with a categorical answer to the question, Is it or is it not part of the selection process?

In her evidence to PASC she set out her concerns as follows:

- there might be a reduction in the pool of candidates;
- there might be a perceived politicisation of the appointments process;
- there is a risk that committees would ask inappropriate questions;
- hearings might have an effect on the timing of the appointments process;
- the role of ministerial accountability for appointments might be changed;
- changes might have an effect on the OCPA regulated processes.¹⁰³

Some of these points are considered in more detail here.

A. The interaction with current appointments procedures

One of the main concerns of the Commissioner for Public Appointments was how a pre-appointment hearing by a select committee would interact with the current OCPA processes which apply to large numbers of public appointments. In her evidence to the Public Administration Select Committee in June 2007 Janet Gaymer explained that in her view, there was "a distinction between appointments that have followed a proper process with some checks and balances and safeguards and appointments where an individual is

¹⁰³ Public Administration Select Committee, *Parliament and public appointments: Pre-appointment hearings by select committees*, 16 January 2008, HC 152 2007-2008, Ev 16-18

suddenly appointed to a position with no apparent process".¹⁰⁴ When she gave evidence to PASC in December 2007, after the publication of the Green Paper she stated:

... If there has been a properly regulated selection process, then I have to ask the question: what is the point of the pre-appointment hearing?¹⁰⁵

Her written evidence to the Committee explained her view that:

If pre-appointment hearings were to be required in relation to appointments processes already regulated by the Commissioner, the Commissioner is concerned that the current confusion on the part of the public about the role of the Commissioner, the extent of her remit and the coverage of her processes may be worsened at a time when the Commissioner is seeking to be more open and explicit about her role in dealings with both the public and users of the process. She is also anxious to reduce perceived bureaucracy and emphasis on "process" in the appointments process within her remit. (She notes in this respect that Regional Ministers are to be involved in certain regional appointments in an advisory role which will complicate these processes further).

Importantly, the Commissioner would need to amend her Code of Practice in order to take into account any pre-hearing appointment process which does not fall within her remit. In particular, she would need to make it clear in her Code of Practice that such a pre-appointment hearing did not form part of a process regulated by her; that such a hearing would not be subject to any form of independent scrutiny (which is one of the Seven Principles which underpins her Code of Practice); that she would have no jurisdiction to hear any complaint from any member of the public concerning the conduct of any such hearing; that, contrary to the provisions in her Code, such a hearing may include questions about political activity and that she would not investigate any complaints of political bias in relation to the public appointments process as a whole if instigated by reference to such questioning. Finally, she would need to clarify what her role would be in the event of a process regulated by her not resulting in an appointment by reason of views expressed by a Select Committee prior to a Minister's decision not to appoint a candidate otherwise deemed appointable by the selection panel. She would also need to explain what procedures would apply if more than one appointable candidate had been identified (as is usually the case) before the Minister was asked to make a final decision.¹⁰⁶

B. The merit principle

The merit principle is one of OCPA's seven principles. As stated in Section II A above it requires that:

All public appointments should be governed by the overriding principle of selection based on merit, by the well-informed choice of individuals who through

¹⁰⁴ Public Administration Select Committee, *Public Appointments: Confirmation Hearings*, Oral and Written Evidence given by Ms Janet Gaymer CBE, Commissioner for Public Appointments, 19 June 2007, HC 731-i 2006-07, Q45

¹⁰⁵ *Ibid*, Q4

¹⁰⁶ Public Administration Select Committee, *Parliament and Public Appointments: Pre-appointment hearings by select committees*, 16 January 2008, HC 152, Ev 18

their abilities, experience and qualities match the need of the public body in question.¹⁰⁷

It has been argued that pre-appointment hearings might interfere with the merit principle in a number of ways:

- some potential candidates may not apply if they know that their appointment will be subject to public scrutiny;
- questions from Members may include personal or political matters;
- any judgment formed may be influenced by concerns which are not directly relevant to a candidate's ability to carry out a job.

When the Commissioner for Public Appointments gave evidence to the Public Administration Select Committee in June 2007, she repeated a concern she had picked up from recruitment consultants:

...that the confirmatory hearing process – and this is without being explicit about what kind of process it is – may put off a number of candidates from applying in the first place and, therefore, reduce the pool of candidates from which the ultimate choice is being made... I have in mind, for example, people on the boards of FTSE companies whose very act of voicing the thought of departure can affect share prices and goodness knows what else. There is also the question of reputational risk, and so on and so forth...¹⁰⁸

She also told PASC that:

...there is a concern that if Select Committees are involved in the process, people may be tempted, in the questioning of candidates, to do that questioning very much with their political bias in mind. With the best will in the world, that may lead to a perceived politicization, or further politicization, of the process which may not be there at the moment.¹⁰⁹

In her December 2007 evidence, Ms Gaymer stated that she would herself have been put off applying for her current post if a pre-appointment hearing had applied.¹¹⁰ Before taking up her current post, she had been the chair of an international law firm.

The Government alluded to potential difficulties of this kind in their letter to the Liaison Committee of 23 January 2008, when they stated:

¹⁰⁷ Office of the Commissioner for Public Appointments, *Code of Practice for Ministerial Appointments in Public Bodies*, August 2005, p9

¹⁰⁸ Public Administration Select Committee, *Public Appointments: Confirmation Hearings*, Oral and Written Evidence given by Ms Janet Gaymer CBE, Commissioner for Public Appointments, 19 June 2007, HC 731-i 2006-07, Q 1

¹⁰⁹ *Ibid*, Q 19

¹¹⁰ Public Administration Select Committee, *Parliament and Public Appointments: Pre-appointment hearings by select committees*, 16 January 2008, HC 152, Q 20

As we embark upon this process, it is essential that it is conducted in such a way that we both enhance the role of Parliament in scrutinising public appointments and maintain an appointments process which is proportionate and continues to attract high quality candidates.¹¹¹

In their hearings with appointees to the Monetary Policy Committee of the Bank of England, the Treasury Select Committee agreed that “questioning should be restricted to the two criteria of professional competence and personal independence”.¹¹² However, Janet Gaymer explained that the questions put to Michael Scholar in his pre-appointment hearing for the post of National Statistician about political activity “would not have been permitted in a selection panel under the OCPA code of practice”.¹¹³

PASC considered these concerns in their 2008 report, *Parliament and public appointments: Pre-appointment hearings by select committees*. They had little sympathy with the argument that public scrutiny would deter good and appropriate candidates from applying for such posts:

The posts to which we are recommending that pre-appointment hearings should apply require a substantial degree of parliamentary and public accountability. We therefore think it highly unlikely that suitable candidates would be dissuaded from applying because of fear or concern about a pre-appointment hearing.¹¹⁴

In conclusion, the Committee stated:

It is not our intention that pre-appointment hearings should put off suitable candidates from applying, and we do not think that they will be put off. Given the suggestion that this may be a risk, however, we recommend that the Government should attempt to monitor the effect of pre-appointment hearings on the number, balance and quality of applications for the positions to which they apply, and should aim to discuss with the Liaison Committee the results of this monitoring exercise as they become available.¹¹⁵

Furthermore, PASC disagreed with the Commissioner about questioning regarding political allegiances. In their view, where impartiality and independence were important to the role, questioning should properly cover concerns about political independence. Questioning should, however, remain “courteous”.¹¹⁶

PASC invited the Liaison Committee to agree guidelines for pre-appointment hearings.¹¹⁷ The Liaison Committee set out draft guidelines in their March 2008 report. The Liaison

¹¹¹ Letter dated 23 January 2008 from Ed Miliband MP to Alan Williams MP, chair of the Liaison Committee, regarding pre-appointment hearings from select committees, DEP2008-0185, published as Annex A to the Liaison Committee, *Pre-appointment hearings by select committees*, 5 March 2008, HC 384 2007-08

¹¹² Treasury Select Committee, *The Monetary Policy Committee of the Bank of England: Confirmation Hearings*, 24 May 2000, HC 520 1999-2000, para 3

¹¹³ Public Administration Select Committee, *Pre-appointment hearings by select committees*, 16 January 2008, HC 152 2007-08, Q 4

¹¹⁴ Public Administration Select Committee, *Pre-appointment hearings by select committees*, 16 January 2008, HC 152 2007-08

¹¹⁵ *Ibid*, para 29

¹¹⁶ *Ibid*, para 33

¹¹⁷ *Ibid*, paras 32-34

Committee also made it clear that in their view, it was perfectly proper for committees to consider political allegiances and independence when holding pre-appointment hearings. The draft guidelines warned potential appointees that they will need to be able to withstand “parliamentary and public scrutiny should they take up the post, and the purpose of the session is to test this”. They continued:

...Questioning may therefore be robust, and it may cover some areas that might not be appropriate at interview, such as party political allegiance. The Chairman should intervene, however, if questions are irrelevant, unduly personal, or discriminatory.

The draft guidelines also stated that:

The Chairman should ensure that Members are aware that their questions must remain relevant to the professional competence and personal independence of the candidate. Questions eliciting background information about the candidate’s past career and about the selection process for the post are normally acceptable.¹¹⁸

C. Ministerial responsibility and the role of select committees

The first principle outlined in the Commissioner’s Code of Practice is that of ministerial responsibility. The Government’s response to the Liaison Committee’s 2002 report *Shifting the Balance* reiterated this constitutional doctrine:

...the Government should perhaps make plain that it does not believe that Select Committees should have a formal role in scrutinising appointments. Any indication that a Ministerial appointment relied upon the approval of a Select Committee or was open to a Select Committee veto would break the clear lines of accountability by which Ministers are answerable to Committees for the actions of the executive...¹¹⁹

The Government explained that this was a key difference between the UK and the USA, “...Ministers making such appointments in the USA are not themselves members of, and so directly accountable to, the legislature, as they are in the UK.”¹²⁰

A related concern is whether involvement in appointments would affect the scrutiny role of select committees: the ability of a select committee to criticise the work of an appointee if they had been complicit in the appointment may be compromised. The Government appears to have attempted address these difficulties by making the pre-appointment hearings “non-binding”. The posts will remain government appointments and committees will not be able to veto appointments.

However, the lack of a veto might also lead to difficulties:

¹¹⁸ Liaison Committee, *Pre-appointment hearings by select committees*, 5 March 2008, HC 384 2007-08, p9

¹¹⁹ Liaison Committee, *Independence or Control? The Government’s Response to the First Report from the Liaison Committee: Shifting the Balance*, 25 July 2000, HC 748, para 17

¹²⁰ *Ibid*, para 19

- if a committee finds against an appointee, and the Government does not take action as a result to remove an appointment, then the committee could appear weak;
- if an appointee is found against and the Government does not take action, the individual is at risk becoming a 'lame duck' appointment;
- if an appointee is found against and the Government does not take action, and then the appointee is successful when in post, it could raise questions about the judgment of the committee.

Some of these potential difficulties were raised in an interview in the *Financial Times* with the Chancellor of the Exchequer, Alistair Darling. The interview referred to the case mentioned above where the TSC had recommended against the appointment of Christopher Allsopp to the MPC:

FT: And if you were to, in the pre-commencement hearings, come to the judgement that somebody was not a suitable member of the MPC, would that be taken into that account and that person not appointed?

Alistair Darling: Obviously if the Treasury select committee came up with an absolutely damaging report saying this person is not fit to hold office, no government could ignore that sort of thing. But I would hope, just as in relation to the MPC at the moment, the non-executive MPC people are going before the select committee at an early stage, not necessarily before they take up... the week of their first meeting, I think. And nobody has been done over, if you like

FT: Christopher Allsopp was rejected by the select committee in 2000?

Alistair Darling: Yes. But I think there's no point in having a select committee if you just blindly say, well, sod you, it doesn't matter. You can't do that.

FT: But you couldn't imagine if, in the future, another Chris Allsopp situation happened?

Alistair Darling: I would hope that wouldn't arise for perfectly obvious reasons. But I think what I don't want to do is to get into a... remember Judge Bork and the United States? Where you eventually get to a situation where nobody gets appointed. The governor of the Bank of England is a pretty important appointment, and I think it's got to be the right of the elected executive to be able to appoint somebody.¹²¹

In their 2008 report, the Public Administration Select Committee concluded that:

It is not intended that pre-appointment hearings will be binding, and Ministers will therefore retain the right to disagree with a committee's views on an appointee. Pre-appointment hearings will only be of any significance, however, if there is the possibility that Ministers might change their minds, and that a candidate's appointment might not be approved. We expect that

¹²¹ "Interview transcript: Alistair Darling", *The Financial Times*, 3 July 2007, available at <http://www.ft.com/cms/s/ebd1ce6a-299d-11dc-a530-000b5df10621.html> (last viewed 10 April 2008)

it will be only in very exceptional cases that committees will recommend against the appointment of a candidate; but the test of the Government's commitment to pre-appointment hearings will be how Ministers react in such cases.¹²²

D. The possibility of legal challenge

Janet Gaymer has stated her belief that there needs to be consideration of how confirmation hearings would fit within a legal context:

I think the legal consequences of this need very careful examination. I do not think it is just a question of examining human rights, for example; I think it is a question of examining broader international conventions that might be relevant in this context. To give you an example, we have been talking about intrusive questioning – perhaps intrusive questioning about someone's personal life. There is a protection in relation to private life in the Human Rights Convention, and I think there are interesting questions about how Parliamentary privilege interfaces with that kind of basic human right.¹²³

Janet Gaymer appeared to be drawing attention to Article 8 of the *European Convention on Human Rights*:

Article 8: Right to Respect for Private and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

She raised the interplay between this right, and parliamentary privilege. Article 9 of the *Bill of Rights 1689* states that “freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”. This is generally believed to refer to the court system but has not been subject to definitive interpretation. It should be noted that Parliament is not beyond the scope of the ECHR, although both Houses were not defined as public authorities for the purposes of the *Human Rights Act 1998*. Two recent applications at Strasbourg have not been successful in respect of challenging the principle of parliamentary privilege.¹²⁴

¹²² Public Administration Select Committee, *Pre-appointment hearings by select committees*, 16 January 2008, HC 152 2007-08, para 38

¹²³ Public Administration Select Committee, *Public Appointments: Confirmation Hearings*, Oral and Written Evidence given by Ms Janet Gaymer CBE, Commissioner for Public Appointments, 19 June 2007, HC 731-i 2006-07, HC 731-i, Q 37

¹²⁴ *A v United Kingdom* 2002 (35373/97) and *Decision as to the admissibility of application no 39511/98 by Martin McGuinness against the United Kingdom*

Another issue is that the status of proceedings in Parliament might also raise questions about the ability to judicially review the decision of a minister to appoint or not appoint an individual. A claim for judicial review can arise if, when reaching a decision, a relevant consideration has been ignored or an irrelevant consideration has been taken into account. In addition “the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it” otherwise a decision may be considered “illegal”.¹²⁵ Indeed the appointment of an interim Victim's Commissioner by Peter Hain as Secretary of State for Northern Ireland, was challenged by way of judicial review.¹²⁶ It may be conceivable that whether a minister has or has not taken into account a report or any proceedings of a select committee when making a decision about an appointment, could be subject to judicial review, and that might raise questions of parliamentary privilege.

The Public Administration Select Committee considered these concerns in their report:

Select committee hearings, like other parliamentary proceedings, are protected from challenge in the courts. As has been pointed out to us, however, the ministerial decision on an appointment could be open to challenge, and if it were challenge, “then questions arise as to what sort of considerations went into the decision”. It would be foolish of us to contradict Janet Gaymer, when she tells us as an expert on employment law that this is “a very arcane area of the law and it would be a very brave person who said that they knew the answer one way or the other”. It would, however, be perverse in the extreme if Ministers felt unable for legal reasons even to take into account the results of pre-appointment hearings.¹²⁷

The Government has not yet commented on these specific issues.

VI Devolved Institutions in the UK

Other institutions in the UK have also considered their role in public appointments processes. The Greater London Assembly has new powers to scrutinise appointments before they are made. A private Member's bill was introduced in the Scottish Parliament to introduce confirmation hearings, but this failed to pass into law.

A. The London Assembly

The *Greater London Authority Act 2007* included provisions to allow the London Assembly to hold confirmation hearings with candidates for key appointments to be made by the Mayor.¹²⁸ This part of the Act came into force in January 2008; hearings would be expected for mayoral appointments after the May 2008 elections.

¹²⁵ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

¹²⁶ See BBC News 16 November 2006 "Hain under fire over judge's ruling", <http://news.bbc.co.uk/1/hi/wales/6154634.stm> (last viewed 21 April 2008)

¹²⁷ Public Administration Select Committee, *Pre-appointment hearings by select committees*, 16 January 2008, HC 152, para 35

¹²⁸ *Greater London Authority Act 1999* (1999 c29), c60A and Schedule 4A (as amended by the *Greater London Authority Act 2007*)

The Act as passed means that the Assembly will be able to make recommendations to the Mayor as to whether or not the candidate should be appointed to the office in question. The Mayor may accept or reject the Assembly's recommendation. The offices to which the confirmation hearings will apply are:

- chairman, or deputy chairman, of Transport for London;
- chairman, or deputy chairman, of the London Development Agency;
- chairman, or vice chairman, of the Metropolitan Police Authority;
- chairman of the London Fire and Emergency Planning Authority;
- chair of the Culture Strategy Group for London; and
- chairman, or deputy chairman, of the London Pensions Fund Authority.

It is not essential for a confirmation hearing to be held for each post; the Mayor is allowed to go ahead and appoint if three weeks expire without the Assembly giving any recommendation to the Mayor about the planned appointment. However, he is constrained from formal appointment until the processes are carried out, although he does not have to follow the Assembly recommendations. The Assembly may make a recommendation without holding a confirmation hearing. The Assembly has powers to request a candidate to produce documents relating to the proposed appointment, but the Secretary of State has powers to restrict access to such documents, using his powers in section 63 of the *Greater London Authority Act 1999*. The assumption is that the decision to hold a confirmation hearing would be taken on a simple majority vote. The Assembly may delegate its powers on confirmation hearings to a committee.

During the Committee stage of the *Greater London Authority Bill 1999* both the Conservatives and the Liberal Democrats tabled amendments to widen the appointments subject to confirmation hearings but these were both defeated.¹²⁹ A Government amendment required the Secretary of State to consult the Mayor and Assembly before specifying further offices to which confirmation hearings should apply.¹³⁰

B. The Scottish Parliament

In May 1999 the Scottish Executive stated that it would:

...encourage the Parliament to review and monitor public appointments to ensure that the highest standards and accountability in public life and the effectiveness of appointment...¹³¹

¹²⁹ Library Research Paper 17/07, *The Greater London Authority Bill Committee Stage Report*, and Library Research Paper 06/60, *The Greater London Authority Bill [Bill 11 of 2006-07]*

¹³⁰ Library Standard Note, SN/PC/4282, *Greater London Authority Bill 2006-07 – Progress of the Bill*

¹³¹ Scottish Labour and Scottish Liberal Democrats, *Partnership for Scotland: An agreement for the first Scottish Parliament*, May 1999

However, in its consultation paper on *Appointments to Public Bodies in Scotland: Modernising the System* the Executive made clear its opposition to pre-appointment parliamentary scrutiny of ministerial nominations for public bodies. They stated that:

The Executive does not believe that it would be appropriate to import anything resembling the highly confrontational Parliamentary confirmation hearing systems that operate in some countries. They believe that the introduction of a confirmation hearing system could deter many able candidates from applying for high profile public service. The Executive also has reservations about other forms of pre-appointment Parliamentary involvement for the same reasons.¹³²

The Executive's analysis of the consultation exercise stated that there had been "little support for pre-appointment parliamentary involvement, and not much more for standardised post-appointment parliamentary involvement".¹³³

In 2001 Alex Neil introduced a Member's Bill to require the Scottish Parliament to approve nominations made by Scottish Ministers for specified public appointments. The *Public Appointments (Parliamentary Approval) (Scotland) Bill* also included provisions to approve recommendations that Scottish Ministers make appointments to bodies where the power to appoint is vested in another person, for example Her Majesty the Queen. The Parliament would have had the right to veto candidates considered inappropriate or unsuitable.¹³⁴ This Bill was defeated.

In June 2002 the Scottish Commissioner for Public Appointments was established. It has a similar role as the UK Commissioner. However, the Scottish Commissioner is a statutory body which reports to the Scottish Parliament whereas the UK Commissioner is a non-statutory body which reports to the Crown.¹³⁵

VII Overseas experience

A. The European Commission

Under the current European Union arrangements, the President of the European Commission is nominated by a majority vote in the Council. The European Parliament then has the power to approve or reject the proposed appointment. The Member States then appoint the Commissioners. The College of Commissioners must then be endorsed by the whole Parliament. The power is conferred on the European Parliament by Article 214 of the consolidated *Treaty on the European Union*.

Rule 99 of the European Parliament's Rules of Procedure states that:

¹³² Scottish Executive, *Appointments to public bodies in Scotland: Modernising the system: Consultation Paper*, February 2000, para 7.4

¹³³ Scottish Executive, *Public Bodies: Proposals for Change*, June 2001, p10

¹³⁴ The Scottish Parliament Information Centre, *Public Appointments (Parliamentary Approval) (Scotland) Bill*, Research Paper 01/14, 6 September 2001

¹³⁵ For more information see Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life*, 29 April 2007, HC 121-I 2006-07, Appendix 1

1. The President shall, after consulting the President-elect of the Commission, request the nominees proposed by the President-elect of the Commission and the Council for the various posts of Commissioners to appear before the appropriate committees according to their prospective fields of responsibility. These hearings shall be held in public.
2. The committee shall invite the nominee to make a statement and answer questions.
3. The President-elect shall present the college of Commissioners and their programme at a sitting of Parliament which the whole Council shall be invited to attend. The statement shall be followed by a debate.
4. In order to wind up the debate, any political group or at least forty Members may table a motion for a resolution. Rule 103(3), (4) and (5) shall apply. Following the vote on the motion for a resolution, Parliament shall elect or reject the Commission by a majority of the votes cast. The vote shall be taken by roll call. Parliament may defer the vote until the next sitting.
5. The President shall inform the Council of the election or rejection of the Commission.
6. In the event of portfolio changes during the Commission's term of office, the Commissioners concerned shall be invited to appear before the committees responsible for the areas of responsibility in question.

Following hearings with the Commissioners in 1999 the Economist reported that:

It had been billed as Europe's answer to the fierce confirmation hearings that American senators [sic] have to endure. But, in the end, the seven days of hearings undergone by the would-be members of the next European Commission before the European Parliament were less of a proper grilling than a light sauté.¹³⁶

The 2004 hearings were more controversial. Rocco Buttiglione, who was nominated to the justice and home affairs portfolio, was questioned on his views on issues including women and gay marriage.¹³⁷ He was replaced by another nominee. The nomination of the Latvian, Ingrida Udre, accused - but not convicted - of party-funding irregularities, also had to be withdrawn. Laszlo Kovacs, the former Hungarian foreign minister had to have his nomination switched to the tax portfolio after failing to persuade MEPs he was able to handle energy policy.¹³⁸

¹³⁶ "Timid hearings: Quizzing Europe's Commissioners", *The Economist*, 11 September 1999

¹³⁷ "The let's pretend parliament: MEPs try to vote down nominees to the European Commission", *The Economist*, 16 October 2004

¹³⁸ "Frattoni facing tough interview for European Commission job", *The Financial Times*, 15 November 2004

The *Lisbon Treaty* includes a requirement that the Commission President be elected or rejected by the European Parliament.¹³⁹ At the time of writing, the Treaty had not yet been ratified.

B. The United States

The President of the United States holds the powers of appointment to a large number of posts including federal judges, specified officers in cabinet-level departments, the military services and diplomats. The Constitution of the United States of America provides that the president:

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for...

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.¹⁴⁰

Approximately 4,000 civilian and 65,000 military nominations are submitted to the Senate during each two-year session of Congress. According to the Senate's website, the Senate has explicitly rejected less than two per cent of all Cabinet nominations since 1789 and nearly a quarter of all nominations have failed to be confirmed. Before 1860, most nominations were not referred to a committee for consideration. However, in 1868 Senate rules provided for the referral of nominations to "appropriate committees". It was not until the middle of the twentieth century that committees routinely began to require nominees for major appointees (to the Cabinet and other key executive appointments) to appear before a committee.¹⁴¹

The process that is normally followed, as described by the Scottish Parliament Information Centre is:

- The Committee investigates the nominee's background, financial situation and issues that may affect their suitability;
- A confidential report on the investigation is then presented to the Committee and a hearing is scheduled;
- The nominee testifies under oath before the Committee in open session;
- The Committee decides whether to report the nomination favourably or unfavourably;

¹³⁹ For more information see Library Research Paper 08/09, *The Treaty of Lisbon: amendments to the Treaty on European Union*

¹⁴⁰ The United States Constitution, Article II, Section 2

¹⁴¹ <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> (last viewed 10 April 2008)

- A Committee member reports to the Senate and the nominations are given a slot in the Senate Executive Calendar to be considered;
- The Senate confirms nominations. Nominations cannot be confirmed on the same day as they are entered on the calendar.¹⁴²

An independent taskforce that examined the appointment process, chaired jointly by former Democrat and Republican Senators, identified four problem areas:¹⁴³

The appointment process is too slow: The appointment process is now so routinely slow, whether at the outset or during the term, that, long vacancies in senior administrative positions have become commonplace. This is compounded by the fact that there is no requirement for the Senate to actually consider a nomination or a deadline by which they have to complete their consideration. Organisations are unlikely to operate at peak performance without senior management. In addition, the delays can be very stressful for potential appointees.

The appointment process is repellent to the very people it seeks: Some candidates are put off from applying for public positions, as they do not wish to be subjected to a lengthy and involved appointment process.

The appointment process is often abusive to appointees: Candidates can be subject to detailed, possibly hostile, questioning about their background. Questions such as “Have they ever used drugs?” or “Have they ever had an abortion?” could be asked to establish whether they have the qualities necessary for a particular post.

The appointment process has become a maelstrom of complexity, much of which services little purpose: The system has become too bureaucratic and no longer serves the purpose for which it was established: i.e. to ensure that candidates for public office have the character, experience and qualifications necessary for the post.

An article in *The Economist* from 1999 explained that:

...while the president has the power under article II, section 2 of the constitution to appoint ambassadors, public ministers and judges, this is supposed to be 'with the Advice and Consent of the Senate'; and there are times when president and Senate (or even one pivotal senator) are hopelessly at odds. In theory, a stalemate could go on indefinitely. This year, for example, the Senate has approved only two judges; another 44 nominations are pending before the Judiciary Committee, most of them stalled because the chairman, Orrin Hatch, is determined that Mr Clinton should nominate a political ally in Utah to a district

¹⁴² Scottish Parliament Information Centre, Research Paper 01/14, *Public Appointments (Parliamentary Approval) (Scotland) Bill*, 6 September 2001, http://www.scottish.parliament.uk/business/research/pdf_res_papers/rp01-14.pdf (last viewed 10 April 2008)

¹⁴³ *Obstacle Course: The Report of the Twentieth Century Fund on the Presidential Appointment Process*, Century Fund, 1996, cited by The Scottish Parliament Information Centre, *Public Appointments (Parliamentary Approval)(Scotland) Bill*, Research Paper 01/14, 6 September 2001.

court vacancy. The stalemate over the appointment of William Weld as ambassador to Mexico in 1997 lasted so long that the nominee withdrew, deciding he had better things to do with his time.

But in practice the way to break the deadlock is for the president to invoke the final sentence of article II, section 2: 'The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.' Mr Clinton has used this 'recess appointment' ruse some 40-odd times, making Mickey Kantor, for example, commerce secretary. But his most recent circumvention of the Senate came on June 4th. Just before Congress returned to work, the president formally appointed James Hormel as ambassador to Luxembourg, ending a stalemate that had lasted almost two years because of Republican opposition to Mr Hormel's declared homosexuality. Such Washington wrangles are hardly new. Jimmy Carter, for example, made 68 recess appointments, George Bush 78 and Ronald Reagan, in his eight years in office, 236—a spate that led at last to a presidential promise to notify Senate leaders in advance of planned recess appointments.

Do the wrangles matter? Perhaps not within the games-playing world of Washington, but it surely cannot be good for the country's international relations that Brazil has been without an American ambassador for a year and Argentina for two years, and that the UN post, during various Iraq crises and through the Kosovo war, has been held by a man whom the administration clearly regards as second to Mr Holbrooke.¹⁴⁴

C. Canada

1. Federal government and Parliament

There is a procedure in the *Standing Orders of the House of Commons* for Order in Council (i.e. prerogative) appointments to be tabled in the House and referred to the appropriate standing committee. The procedure is described in Marleau and Montpetit, *House of Commons Procedure and Practice*.¹⁴⁵ There have been proposals made for increased scrutiny in standing committees. A Canadian Parliamentary Information and Research Service paper explains that:

...Following the McGrath report of 1985, committees were allowed to review both GIC [Governor in Council] nominations and appointments; in practice, however, such review has been very limited. From 1989 to 2004, only 62 meetings out of a total of 12,783 committee meetings concerned GIC nominations or appointments. Allowing committees to potentially influence a GIC nomination or appointment could lead to increased attention being paid to these appointments.

In a research paper completed for the Gomery Commission, Peter Dobell and Martin Ulrich suggest that the government establish a formal selection process.

¹⁴⁴ "United States: Good and bad behaviour: The trouble with the appointments system", *The Economist*, 26 June 1999

¹⁴⁵ House of Commons Procedure and Practice, Edited by Robert Marleau and Camille Montpetit, www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch20&Seq=9&Lang=E#fnB365 (last viewed 10 April 2008)

After names had been gathered for a GIC appointment, committees could review the candidates as an “opportunity for MPs to expose to the public the qualifications of the candidates, their links to the government and to particular interests – including their responsibility for financial stewardship”. Endowing committees with a more meaningful role in the process could increase their interest in considering GIC nominations and appointments.

However, given the high number of GIC positions, it is unlikely that committees could integrate widespread review of GIC nominations or appointments into their already busy agendas. Some committees only have one or two GIC positions within their mandated portfolios... while others have thousands... A committee devoted entirely to reviewing GIC nominations and appointments could be set up to avoid burdening the other committees and distracting them from their other required agenda items, or committees might establish subcommittees on nominations and appointments. However, each of these options also has limitations as a means of coping effectively with the volume of GIC nominations and appointments.¹⁴⁶

The *Federal Accountability Act 2006* established a new Public Appointments Commission to oversee appointments to agencies, boards and commissions broadly along the lines of the UK Commissioner for Public Appointments. However, the House of Commons Standing Committee on Government Operations and Estimates rejected the proposed head of the Commission; it was then announced that the government would not proceed with its plan under minority government circumstances and interim procedures now apply.¹⁴⁷

2. Nova Scotia

Following a scandal in the early 1990s, Nova Scotia gave the Legislature’s Standing Committee on Human Resources the power to veto ministerial appointments but not to substitute names. Between 1993 and 1998 the Liberals had a majority on the committee. Most of the appointments went to well known Liberals and the committee was accused by the Opposition of being a rubber stamp. In 1998 the Liberals were reduced to a minority government. This meant that the opposition parties had a majority on the committee, and there was then a “stand-off” with large number of appointments left unfilled. The government then introduced a relative-merit standard that required the minister to put forward the name of the most qualified applicant, not merely a qualified candidate. In 1999, the Progressive Conservatives (PC) won a majority in the legislature. The new government introduced mandatory screening panels appointed by Ministers to determine qualified candidates. Ministers then select the nominee from pool of qualified candidates. After the recommendation has been approved by cabinet it is sent to the Human Resource Committee for final approval.

¹⁴⁶ Canada Library of Parliament, *Government in Council Appointments: Recent changes and suggestions for reform*, PRB 06-21E, 17 May 2006, pp9-10

¹⁴⁷ Canada Library of Parliament, *Government in Council Appointments: Recent changes and suggestions for reform*, PRB 06-21E, 17 May 2006

In January 2002, after signing a settlement in connection with a complaint of discrimination filed with the Human Rights Commission, the government committed itself to further reforms based on the following principles:

- The fundamental goal is to select the best candidate.
- Qualifications for a position must be stated clearly in advance and the positions must be properly advertised.
- A non-partisan advisory committee must determine which applicants are qualified and recommended, and from this list the government will determine the best candidate.
- Sufficient information on the nominees must be provided if the government's recommendation must go to the human resource committee.
- The entire process must be transparent to the public and the government must ensure that it is accountable to the public for its record of appointments.
- For adjudicative boards with quasi-judicial functions, an advisory committee must be composed of a human resource professional, two lay persons and two public servants.¹⁴⁸

3. Ontario

Since 1991, the Ontario Legislature's Standing Committee on Government Agencies has routinely interviewed cabinet appointments to semi-independent agencies, which are a major policy instrument at both federal and provincial levels in Canada. An article in *Parliamentary Affairs* by David Pond of the University of Toronto explained the process in the following terms:

When the Legislature is in session the Premier's Office releases lists (formally know as 'certificates of appointment') of intended appointments to ABCs on Thursday, following the regular Wednesday cabinet meeting, which are automatically referred to the sub-committee of the Standing Committee. Appointees to be called for interviews are selected by the three party caucuses represented on the sub-committee. (It is important to note that in the Ontario Legislature the caucuses enjoy equal representation on all sub-committees, while their representation on the full committees themselves must reflect their standing in the House, ensuring that a majority government can retain control). In practice, a week is allotted to this stage in the sub-committee. Once selections are made, biographical material on the appointees compiled by the government's Public Appointments Secretariat is packaged together with briefing notes prepared by the non-partisan Research Office assigned to the Committee by the Legislative Library, and sent to all Committee members. Another week is allotted to this

¹⁴⁸ Peter Aucoin and Elizabeth Goodyear-Grant, "Designing a Merit-Based Process for Appointing Boards of ABCs: Lessons from the Nova Scotia Reform Experience," *Canadian Public Administration*, vol. 45, no.3 (Fall 2002), pp. 301-327 as cited in Public Policy Forum, *Governor-in-Council Appointments: Best Practices and Recommendations for Reform*, February 2004 available at : http://ppforum.com/common/assets/publications/en/gov_apt_reform.pdf (last viewed 10 April 2008)

stage. The selected appointees appear before the Committee the next Wednesday. The Committee must meet within 30 days of a certificate's release in order to conduct a review of appointees selected from it.

The Committee is free to interview as many or as few appointees as it pleases, at any length. After some early experiments, a half-hour was settled upon as the standard time-period. At the close of the interview, the Committee can 'state its reasons' as to why it concurs or does not with the appointment; this presumes that the Committee as a corporate entity can agree on them. In fact, the Committee's reports to the House simply consist of a sentence declaring whether it concurs in the appointment or not. These reports are not debated on the floor of the House but deemed to be automatically adopted. While this disconnect between the Committee's work and House business might appear to discount the significance of the committee's mandate for the Legislature as a whole, it follows logically from the legislative oversight model, which holds that parliamentarians from different parties are more likely to work co-operatively away from glare and high tension of the Chamber. Once the Committee's report is tabled the Order-in-Council formally appointing the individual interviewed is forwarded to the Lieutenant-Governor for signature.¹⁴⁹

The terms of reference of the Committee is available on the Internet.¹⁵⁰ In practice, the Committee only interviews a fraction of the total number of new appointments. David Pond suggested that in practice, the Committee's primary function is to detect patronage appointments.¹⁵¹ David Pond also explained, however, that:

The Committee was assigned this task on the assumption that partisan members could agree on criteria for questioning witnesses about their qualifications, and that the government would be willing to withdraw candidates exposed as inadequate. At the same time, the governing party retained the discretion to make partisan appointments. An examination of how the committee conducts interviews reveals a tension between the Members' role in holding the executive accountable, and their identities as partisan politicians. In large part, the committee has become a forum for debates on the appropriate limits to patronage in appointments to public bodies.¹⁵²

¹⁴⁹ David Pond, 'Legislative control of Cabinet appointments to the public service: A Canadian case-study in the political limits to Parliamentary reform', *Parliamentary Affairs*, Vol. 61 No.1, pp 52-72

¹⁵⁰ http://www.ontla.on.ca/web/committee-proceedings/committees_detail.do?locale=en&detailPage=mandate&ID=142

¹⁵¹ David Pond, 'Legislative control of Cabinet appointments to the public service: A Canadian case-study in the political limits to Parliamentary reform', *Parliamentary Affairs*, Vol. 61 No.1, p67

¹⁵² *Ibid*, Abstract