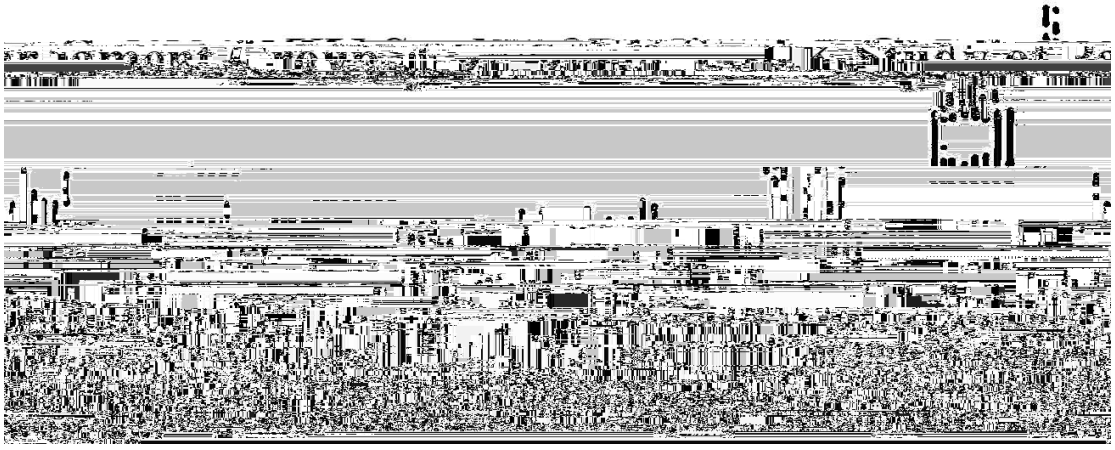
Parliament's Watchdogs: At The Crossroads

edited by
Oonagh Gay & Barry K Winetrobe

UK Study of Parliament Group



ISBN: 978-1-903903-49-0

Published by The Constitution Unit
Department of Political Science
UCL (University College London)
29-30 Tavistock Square
London WC1H 9QU
Tel: 020 7679 4977 Fax: 020 7679 4978
Email: constitution@ucl.ac.uk
Web: www.ucl.ac.uk/constitution-unit/

First published December 2008

Table of Contents

Foreword

Dr Tony Wright MP

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

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

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

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

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

Contributors

Ruth Barry

politics at the University of Glamorgan and has published on the subjects of government and politics in Wales and devolution.

Barry Winetrobe was, until 2007, Reader in Law at Napier University, Edinburgh, and is now a parliamentary and constitutional consultant. He has published on constitutional reform and devolution, including the Scottish Parliament.

Tony Wright has been a Labour MP since 1992, and, since 1999, has chaired the House of Cn(t)(Cn5.0(a)-3.91.9(s)5.0((ha42-3.9Ad)-340.0(9.0(e)-2.9in(s)5.0(he)-2.ı

Preface

Oonagh Gay & Barry K Winetrobe

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

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

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

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

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

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

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

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

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

The 2003 publication struggled to define what a constitutional watchdog actually was. It considered that the definition covered bodies from the Audit Commission to the Political Honours Scrutiny Committee (since subsumed into the House of Lords Appointments Commission). There is a clear overla.0(is)-446.0(a)-454.0(246.0(t)-7.re

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

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

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

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

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

are particularly important since the decisions of these watchdogs may directly affect the composition of the Parliament. Tensions

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

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

The structure of this report

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

Five chapters approach the issues territorially: Chapter 2 looks at UK-wide watchdogs, and at other bodies whose primary focus is England; Chapter 3 analyses recent changes in Scotland, where tensions have developed over the appropriate form of sponsorship of parliamentary commissioners by the Scottish Parliamentary Corporate Body. Both of these chapters offer a narrative follow-up to the Constitution Unit report of 2003. Chapters 4 and 5 sketch the watchdog landscape in Wales and Northern Ireland, and are

http://revitalisingpolitics.files.wordpress.com/2008/09/revitalising-politics-position-paper.pdf

House of Commons Public Accounts Committee The Proper Conduct of Public Business 2004 Eighth Report HC 154, 1993-94 London

Public Administration Select Committee April 2007 Fourth Report Ethics and Standards: The Regulation of Conduct in Public Life HC 121 2006-07 London

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

Oonagh Gay

Introduction

There have been some rapid developments since the original Constitution Unit report (Gay and Winetrobe 2003a) on UK-wide and English watchdogs. New regulators tend to undergo a period of turbulence shortly af

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

The Tiner review's main proposals

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

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

The review argued that a single non-renewable eight-year term was the appropriate length of time for appointment as C&AG, and proposed the retention of the current arrangements whereby the appointment is made by the Crown following approval by the Commons, with the Prime Minister moving the appropriate motion with the agreement of the Chairman of the Public Accounts Committee, by convention an Opposition Member. This retained executive control over the appointment process, compared to the

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

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

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

Confusingly, the Government had made separate proposals in the Governance of Britain green paper (Cabinet Office 2007) to subject the C&AG to a pre-appointment hearing by the Public Accounts Committee. This lack of communication with Parliament was displayed when the Chairman of the Public Accounts Committee protested to the Liaison Committee (composed of select committee chairs) that the proposals were in conflict with the National Audit Act 1983. The Liaison Committee recommended that a

Ombudsman

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

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

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

CSPL initiated a shift of thinking about the non-political status of Commissioners, in response to pressure from senior politicians of all major parties, who argued that the Commission lacked practical experience of politics, and was consequently ill-equipped to regulate party political activities. In effect, party funding issues had been depoliticised. Under PPERA, its staff and Commissioners were banned from membership of political parties. CSPL recommended that four additional Commissioners be appointed with recent experience of politics, one Labour, one Conservative, one Liberal Democrat and one drawn from the minor parties in the Commons. Their appointments would, however, be on merit, following OCPA guidelines and they should act independently, not as party delegates –

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

Information Commissioner

Successive reports from the Justice Committee (formerly the Constitutional Affairs Committee) have called for the Information Commissioner to be given Officer of

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

As part of the proposals to put the Civil Service on a statutory basis, the white paper of March 2008 contained plans to make the Civil Service Commission statutory, but was silent on the status of the other Cabinet Office watchdogs (Cabinet Office 2008). The executives in Scotland and Wales, as well as the leaders of the two major opposition parties at Westminster, would be consulted before the appointment of the First Commissioner and a single five-year term is proposed for both the First Commissioner and the other Commissioners. Statutory reasons for dismissal (absence, convictions, unfitness) are set out, and removal would take place without resolutions of both Houses. The Commission would employ its own non civil service staff and there is scope in the

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

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

The passage of that Bill had offered another opportunity to examine the Officer model. The official Opposition proposed a parliamentary commission for official statistics, similar to the role of the Public Accounts Commission, recalling that, when Shadow Home Secretary in 1995, Jack Straw had put forward a similar proposal during a speech to the Royal Statistical Society. The Opposition amendments proposed in the Public Bill Committee would have provided for representation from both Houses of Parliament in the oversight committee, rather than exclusively the House of Commons in the case of oversight of the NAO. The commission would also have been responsible for appointing the National Statistician. The Government's position was that the production of official statistics was an executive function and it was appropriate to locate the Board within Government rather than Parliament (Statistics and Registration Service Bill 2007). As the

Ministry of Justice). The purpose of the Commission is to take responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and to make the appointments process clearer and more accountable. It was born out of the decision to end the traditional role of the Lord Chancellor, which included responsibility for judicial

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

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

References

Abraham, 2008a "The Ombudsman as part of the UK Constitution: A Contested Role" Parliamentary Affairs Vol. 61, No. 1, pp. 206-215

Abraham, 2008b "The Ombudsman and the Executive: The road to Accountability" Parliamentary Affairs Vol 61 No 2 pp 535-544

Cabinet Office July 2007 The Governance of Britain Green Paper Cm 7170 London

Cabinet Office March 2008 The Governance of Britain-Constitutional Renewal Cm 7432 London

Committee on Standards in Public Life January 2005 Tenth report Getting the balance right: Cm 6407 London

Public Administration Select Committee July 2008d London Official Statistics HC 965-I 2007-08

Public Administration Select Committee 2008e London Investigating the Conduct of Ministers: Government Response to the Committee's Seventh Report of 2007-08 HC 1088 2007-08

Select Committee on the Parliamentary Ombudsman First Report 2003 Work and Jurisdiction of the

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

Barry K Winetrobe

Background

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

This template had the following general characteristics:

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

Devolved Scotland's Parliamentary Commissioners

> Auditor General for Scotland (AGS)
> Scottish Public Services Ombudsman (SPSO)
> Scottish Information Commissioner (SIC)
> Scottish Parliamentary Standards Commissioner (SPCS)
> Commissioner for Public Appointments in Scotland (CPAS)

that the commissioner model was desirable because it meant independence from the Executive, the risk of ‘commissioner proliferation’ became obvious. However, for those

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

Review and Reform

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

Finance Committee Inquiry

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

The Committee's report of September 2006 (Finance Committee 2006a) called for 'a stronger governance framework for commissioners to ensure their greater accountability to Parliament for their spending.' Central to its analysis was a belief that statutory independence did not, cldiomnetc,le cate parliamentarylvlovemaenyt

Commissioneris25ssldide or

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

Following the Justice 1 Committee's Stage 1 scrutiny, it exceptionally refused to endorse the Bill's general principles, because of its concerns about various governance and operational issues, and its doubts as to whether the case for creation of an SCHR had been made (Justice 1 Committee 2006). Major amendments -

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

SPCB attitudes to Commissioner governance

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

especially a distinction between ‘office holders’ (ie those it directly appointed) and

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

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

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

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

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

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

parliamentary body to deal with most or all aspects of governance work on behalf of the

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

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

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

Stop Press

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

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

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

References

Crerar Review (2007) Final Report, September 2007. Available at http://www.scotland.gov.uk/Resource/Doc/82980/0053065.pdf

FPCSAG (2008) Fit for Purpose Complaints System Action Group Report to Ministers, Scottish Government, July 2008:

http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/IndependentReviewofReg/ActionGroups/ReporttoMinisters

Finance Committee (2005) 26th Meeting 2005, 15 November 2005

Finance Committee (2006a) Accountability and governance, Seventh Report, 2006, 15 September 2006

Finance Committee (2006b) Press Release PN CFIN004/2006, 15 September 2005

Finance Committee (2006c) Financial Memorandum on the Scottish Commissioner for Human Rights Bill, 11 January 2006, para 34

Finance Committee (2008) Third meeting 2008, 22 January 2008

SPCB (2007) Legacy Report, March 2007. Available from: http://www.scottish.parliament.uk/corporate/spcb/publications/LegacyReport.pdf

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

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

The PSOW is concerned with complaints that injustice has been caused by 'maladministration' and 'service failure'

The Presiding Officer replied:

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

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

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

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

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

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

In his evidence, the Commissioner explained his current remit to advise the Standards Committee on matters of general principle relating to 'standards of conduct' or the 'registration of Members' Interests'. Assembly staff assist the Commissioner in providing this advice by identifying areas where there could be some concerns; undertaking

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

In his evidence to the Assembly Committee on the UK Government's White Paper, Better Governance for Wales

Conclusion

Since the National Assembly for Wales came into being in 1999, the Welsh devolution settlement has evolved, and since 2007 has taken a step change with the separation of government and legislature. The role of the core parliamentary officers has similarly evolved. The Auditor General for Wales is now based in Wales and heads up a separate Welsh office; the Public Services Ombudsman for Wales is a one stop shop for Welsh public concerns about maladministration, and the Standards Commissioner's role has

National Assembly for Wales (2000) The Role of, and Access to, the Independent Adviser on Standards of Conduct, Office of the Presiding Officer Note.

National Assembly for Wales (2003) Professor Diana Woodhouse: Report for the Committee on Standards of Conduct.

Public Services Ombudsman for Wales (2008) Annual Report 2007/8.

Rawlings, R. (2003) Delineating Wales, University of Wales Press.

Wales Audit Office (2006) Ambulance Services in Wales, 4 December.

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

Ruth Barry & Zoe Robinson

Introduction

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

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

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

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

Officers of the Assembly

While the signing of the Good Friday Agreement in 1998 may have been the most notable landmark of the peace process, the devolved future it heralded has been noted for its intermittence, with frequent suspensions - the longest lasting for over four and a half years - hampering the evolution of the Assembly as a legislature. Although largely based on the Westminster model, the term 'officer of the Assembly' technically applies to only three posts: the Assembly Ombudsman, the Comptroller and Auditor General and

The role of the Northern Ireland Ombudsman is to promote accountability within government departments and certain other areas of the public sector, and to represent the inte

The duties and functions of the Chief Electoral Officer are exercised by the staff of the Electoral Office of Northern Ireland (EONI), yet this body does not have discrete status

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

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

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

Office of the Police Ombudsman of Northern Ireland

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

The Ombudsman has operated during an unstable period in Northern Ireland politics, and while several reports may not have been well received in some quarters, surveys have shown that confidence in the impartiality of the police complaints system has consistently risen. Section 51 of the 1998 Act provides that the Ombudsman shall

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

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

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

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

Devolved watchdogs

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

Commissioner for Public Appointments in Northern Ireland

The appointment of Felicity Huston to the Office of the Commissioner for Public Appointments in Northern Ireland (OCPANI) in 2005 represented a change in the public appointments process in Northern Ireland, in that she is the first incumbent born and based in Northern Ireland. Until that date, public appointments in Northern Ireland fell withincmITm [(f)3.0(or).9(c)-point91.0(U)K2.9(d)-483.0(C)-4.9(om)1.0(m)1.0(is)4

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

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

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

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

Northern Ireland Commissioner for Children and Young People

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

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

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

20

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

Civil Service Commissioners for Northern Ireland

The six Civil Service Commissioners for Northern Ireland (CSCNI) were first established in 1923 to uphold the principle of appointment on merit in recruitment to the Northern Ireland Civil Service (NICS). The appointments to the Commission are made by Her

Independence

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

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

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

Accountability

Devolution emerged from a 30-year conflict where any attempt at stable government was subject to suspensions and intermittent periods of direct rule. Hence, the Assembly lacks practical experience of the substantive issues of self-government due to its difficult

Bennett, M 2005 Belfast

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

Elise Hurtubise-Loranger

Summary

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

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

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

Officers of Parliament - From 1878 to 1983

Auditor General

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

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

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

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

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

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

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

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

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

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

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

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

Public Sector Integrity Commissioner

The Public Sector Integrity Commissioner position was also created in 2007. The Commissioner's mandate under the *Public Servants Disclosure Protection Act* (2005) is to receive and investigate disclosures of wrongdoing and make recommendations based on his or her findings. The Commissioner is also responsible for hearing the complaints of public servants who have experienced a reprisal as a result of reporting a wrongdoing. The Commissioner may conduct investigations and attempt to conciliate a settlement between the parties, buF3 12 Tf ot-313.0(s)5.e W n BT 0 0 0 r d3.9(d)-4

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

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

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

Conclusion

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

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

It will be interesting to see if this trend continues and if it will extend evenly to all officers of Parliament. It will also be interesting to note in the next few years how the three new officers of Parliament settle into their new functions and what impact they might have in their respective areas of expertise. Will they bring more accountability to government? These three new officer of Parliament positions were established with that very goal in mind. These recent developments stemmed from the government's intention

http://www.oag-

Legislation

Auditor General Act, R.S.C., 1985, c. A-17.

Canada Elections Act, S.C. 2000, c. 9.

Conflict of Interest Act, S.C. 2006, c. 9, s. 2.

Federal Accountability Act, S.C. 2006, c. 9.

Lobbying Act, R.S.C. 1985, c. 44 (4th supp.).

Official Languages Act, R.S.C. 1985, c. 31 (4th suppl.).

Parliament of Canada Act, R.S.C. 1985, c. P-1.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

Privacy Act, R.S.C. 1985, c. P-21.

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

Robert Buchanan

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

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

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

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

Development of the officer of parliament status in New Zealand

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

Three significant milestones can be identified:

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

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

Officers of Parliament Committee (OPC) and a system for parliamentary appointment, funding, and oversight.

A series of legislative reforms from 2001 to 2004, which have laid the foundation for an interactive relationship between officers and the parliament.

Early developments

The 1962 Ombudsman legislation provided for the Ombudsman (who was, significantly, also known as the Parliamentary Commissioner for Investigations) to be appointed on the recommendation of the House of Representatives (House), but did not otherwise explain what was meant by the status of officer of parliament. It was nevertheless understood that the office would perform functions of a parliamentary nature. The Ombudsman's complaints jurisdiction was, in effect, an enhancement of the

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

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

The annual reports of the officers of parliament, and their reports to the parliament on their actual operations, are considered on the same basis as t

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

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

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

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

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

However, there remains considerable roomeidertur

mechanisms for citizen redress, across the whole of society rather than specific parts of it. From that flows the proposition that only in respect of those functions, and the extension of them through the work of appointed officers, should there be direct oversight and de

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

Independence – a brief assessment

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

> the nature of the agency's mandate;
> the provisions regarding appointment, tenure, and removal;
> the processes for deciding budgets and staffing;
> whether the agency is free to identify issues for study and whether it can compel

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

An officer of parliament, in turn, is dependent on the parliament for resources. While the funding procedure must recognise its operational independence and minimise (and,

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

A sim

Implementation of the officers' reports is another current issue in New Zealand and Australia, as it is elsewhere. Officers of parliament depend significantly on the parliament (as the recipient of their reports) for support in achieving the improvements that their reports so often urge. But the relationship has to be at arms' length to preserve their independence, and a failure to achieve action on their reports can not only stunt their effectiveness as public institutions but also lead the officers themselves into the

Chapter 8: The Parliamentary Ombudsman: A Classical Watchdog

Philip Giddings

Origins

Serious discussion within government

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

Dismissal of the Ombudsman, as in the case of a High Court judge, is only possible by joint address of the two Houses of Parliament. In this way, the Ombudsman has security of tenure for the period of the appointment, and in that respect can be considered independent of the Government even though prime-ministerial choice of office-holder

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

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

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

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

The third aspect of perceived independence concerns the background of the person appointed. The first Ombudsman, Sir Edmund Compton, was a former Comptroller and Auditor General, probably unknown to most of the public, but well-known to MPs and civil servants. He was followed by two former permanent secretaries of government departments w.0(huTh-505.0(w)-2.9(.0(huTh-505.0(w)3.0(t)2.0I505.0(w)3.505.ho(w)3.505

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

The Ombudsman's Work

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

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

Investigating complaints and securing remedies for injustice are the heart of the Ombudsman's work. Through them the PHSO makes a significant contribution to improving the quality of public services, and particularly complaint-handling. In recent years, as other Ombudsman schemes and complaint-handling bodies have been set up, this quality of administration work has become of increasing significance for the PHSO.

Although modelled on the Public Accounts Committee, the PCA Select Committee has never commanded anywhere near the PAC's prestige. Indeed, there have been times

Audit Committee and Advisory Board

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

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

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

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

Other Ombudsmen

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

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

Northern Ireland Parliament. In the same year a Commissioner for Complaints was also established to cover local and other public bodies. Although legally separate since 1973, the two Northern Ireland offices have been held in plurality by the same person, an arrangement which has continued through the period of direct rule and continues the new power-sharing arrangements (Gregory & Giddings, 2000, 284

cost and co-ordination of regulatory and supervisory bodies and their relationships with the Scottish Parliament, its corporate body and its committees, as Barry Winetrobe explains in Chapter 3. In September 2007 the Crerar Review recommended a standardized complaints handling system across public services in Scotland, to be

With legislation to remove the filter on the back-burner, if not abandoned, Ann Abraham has developed ways of co-operating with other public sector complaint-handlers, particularly the local government ombudsman service, and focussed her office's work on the more serious complaints, where PHSO's powers and expertise can significantly add value, and on promoting ways of improving the quality of administration. In both spheres the link with Parliament is critical, as PASC demonstrated with its high-profile report

PHSO, 2007b: Retrospective continuing care funding and redress, HC 386, 2006-07, TSO, March 2007.

PHSO, 2008: Equitable Life: a decade of regulatory failure, HC 815i-v, TSO, July 2008

Prime Minister, 2002:
http://www.number10.gov.uk/Page2596

Prime Minister, 2007: HC Deb, 3 July 2007, c816

Prime Minister, 2008: HC Deb, 23 January 2008, cc1520-34

Stacey, F, 1971: The British Ombudsman, OUP

Wilson, J H, 1964: The New Britain, Penguin Books

Chapter 9: New Watchdogs: Public Appointments Commissioners

Robert Pyper

Introduction

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

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

The Office of the Commissioner for Public Appointments in Scotland was created by statute (the Public Appointments and Public Bodies etc (Scotland) Act 2003), with Karen Carlton taking up the post from June 2004. This Commissioner is appointed by the Queen on the nomination of the Scottish Parliament for terms of five years. The legislation makes it clear that the Commissioner is not a Crown servant, and neither is

successor,

2007a; Public Administration Select Committee, 2008). There were sharp exchanges between the Commissioner and members of the Committee as she sought to defend her concerns about the possible involvement of select committees in the public appointments process. The Committee's report, published in January 2008, explicitly rejected the Commissioner's position (describing it as 'arbitrary') that pre-appointment

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

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

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

It is difficult to be precise about the reasons behind the wariness with which these Commissioners approach dealings with the Parliaments. There is an undoubted caution, howeve

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

Conclusion: Future Development

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

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

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

Public Administration Select Committee (2003b) Evidence: Dame Rennie Fritchie, 27 February, HC 165-iv.

Public Administration Select Committee (2006) Ethics and Standards Inquiry: Evidence 15 June 2006 HC 884-viii.

Public Administration Select Committee (2007a) Public Appointments: Confirmation Hearings: Evidence 19 June 2007 HC 731-i.

Public Administration Select Committee (2007b) Fourth Report 2006-07 'Ethics and Standards: The Regulation of Conduct in Public Life' HC 121.

Public Administration Select Committee (2008) Third Report 2007-08 'Parliament and Public Appointments: Pre-Appointment Hearings by Select Committees' HC 152

Public Appointments Order in Council 1995, 23

Chapter 10: Conclusion - Parliamentary Watchdogs: Time For Decision

Barry K Winetrobe

Watchdogs & parliamentary watchdogs?

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

More specifically, for the purposes of this Report, it still begs the questions that underlie our study – why have parliamentary watchdogs at all? What benefits does this model provide for modern, democratic, effective public administration, which could not be achieved through other, more conventional models? Is there an 'added value' to the 'parliamentary officer' model in some or all cases? If so, does it, and need it, benefit all actors in the sector – parliaments, governments, watchdogs, those being 'watchdogged', and, ultimate purposes o99.

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

Again, the New Zealand emphasis on having parliamentary officers, where they 'only

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

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

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

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

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

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

Such cooperation, PASC suggested, could operate, not via parliamentary officers of

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

standards commissioner has died away to some extent, but a similar concern is building in relation to the Electoral Commission, whose regulatory powers are being strengthened in the Political Parties and Elections Bill. The intensely political questions of donations to party leaders, and the appropriate use of parliamentary allowances, mean that the decisions of watchdogs are likely to face hostility from politicians on the grounds that such bodies cannot understand political reality. The proposal to add representatives of political parties to the Electoral Commission is symptomatic of this unease. But

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

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

References

Ackerman, B (2000) The New Separation of Powers, Harvard Law Review vol.113(3), pp.633-729

Gay, O and Winetrobe, B (2008) Watchdogs of the Constitution – the biters bit? In: Hazell, R (ed) Constitutional Futures Revisited: Britain's Constitution to 2020, Palgrave, 2008

PASC (2007) Public Administration Select Committee, Ethics and Standards: The Regulation of Conduct in Public Life, Fourth Report 2006-07, HC 121