The Committee will meet at 10.00 am in Committee Room 6 to consider the following agenda items:

1. **Accountability and Governance inquiry:** The Committee will take evidence from—
   
   Robert Black, Auditor General for Scotland; and Diane McGiffen, Director of Corporate Services, Audit Scotland;
   
   Margaret Jamieson MSP, Scottish Commission for Public Audit; and Andrew Munro, Adviser to the SCPA; and
   
   Linda Costelloe-Baker, former Scottish Legal Services Ombudsman.

2. **Item in private:** The Committee will decide whether to consider its draft report on the Financial Memorandum of the Adoption and Children (Scotland) Bill in private at its next meeting.

3. **Legal Profession and Legal Aid (Scotland) Bill (in private):** The Committee will consider its draft report on the Financial Memorandum of the Legal Profession and Legal Aid (Scotland) Bill.

Susan Duffy  
Clerk to the Committee  
Room T3.60  
Extn 85215
The papers for this meeting are:

**Agenda Item 1**

Clerks note and submissions from –
- Audit Scotland;
- Scottish Commission for Public Audit; and
- Scottish Legal Services Ombudsman.

Additional submissions from—
- Standards Commission for Scotland;
- Permanent Secretary, the Scottish Executive;
- Audit Committee;
- Communities Committee;
- Standards and Public Appointments Committee; and

**The Constitutional Unit Public Officials of Parliament Presentation**

Extracts of Reports from Other Legislatures

**SPICe Briefing: Regulatory and Investigatory Bodies created by the Parliament since Devolution**

PRIVATE PAPER

**Agenda Item 3**

PRIVATE PAPER
Finance Committee

14th Meeting 2006, Tuesday 16 May 2006

Accountability and Governance Inquiry

1. The Committee launched its Accountability and Governance Inquiry on 1 March 2006. The remit of this inquiry is to:

- examine the growth in the number of independent, regulatory and investigatory bodies and the associated growth in funds allocated since devolution;
- examine the adequacy of processes for setting and scrutinising the annual budgets of such bodies;
- examine the appropriateness of existing lines of accountability and how this process works in practice; and
- identify whether there are any potential overlaps in remits and responsibilities of independent, regulatory and investigatory bodies and any financial implications of such overlaps.

2. A call for evidence was issued and all submissions which have been received can be found on the Committee’s webpage.

3. The Committee will undertake four formal evidence sessions before the summer recess. The first of these sessions will involve taking evidence from the Auditor General for Scotland, the Scottish Commission for Public Audit and the former Scottish Legal Services Ombudsman. At its meeting on 23 May, the Committee will take evidence from a selection of regulatory bodies who are financed by the Executive, on 6 June, it will take evidence from parliamentary commissioners and the public services ombudsman and on 13 June, evidence will be taken from the Scottish Parliamentary Corporate Body (SPCB) and the Minister for Finance and Public Service Reform.

4. In addition to the attached written submissions provided by witnesses for the evidence session on 16 May, a number of papers are relevant to today’s session and should inform the inquiry as a whole, namely:

- a pack of additional written submissions to the inquiry (FI/S2/06/14/2);
- a set of slides which have been produced by the Public Officials of Parliament Study Group (FI/S2/06/14/3);
- a paper on the situation in other legislatures (FI/S2/06/14/4); and
- a SPICe briefing providing background on the role and funding of a number of regulatory and investigatory bodies (FI/S2/06/14/5).
Submission from Robert W Black, Auditor General for Scotland

1. Introduction

1.1. I am pleased to have the opportunity to contribute evidence to the Finance Committee’s inquiry. You have asked for comment from Audit Scotland’s perspective in two areas: our role as auditor of public bodies, including independent, investigatory and regulatory bodies and, secondly, in terms of the process for the scrutiny of our budgets by the SCPA.

1.2. I would also like to take the opportunity to provide some background on another area of interest to your inquiry. The Committee’s inquiry remit includes examining: "the growth in the number of independent, regulatory and investigatory bodies and the associated growth in funds allocated since devolution".

1.3. Audit Scotland is concerned to ensure that audit, inspection and regulation work is undertaken in a way which provides assurance and helps to improve public services while minimising costs and burdens. As the single public audit agency for Scotland, we arrange for the audit of over 200 audited bodies, involving annual spending of over £27 billion.

1.4. Your inquiry is considering the role of independent, regulatory and investigatory bodies. It may be helpful to describe briefly the roles of the different types of body and how they relate to each other.

1.5. The first point to make is that there are different and distinct reporting arrangements for the various bodies. The audit process provides independent reports to Parliament, Ministers and the public on whether public money is being spent properly, wisely and well. Inspectors and regulators generally report to Ministers rather than to Parliament, although their reports are generally public documents. The Ombudsman and the various commissioners make public reports on specific issues and report annually to Parliament.

1.6. The second point is that the approaches of audit, inspection, investigation and regulation are distinct but complementary.

1.7. Audit is the scrutiny of public bodies, covering their corporate governance and management, the financial statements and underlying financial systems; and performance, performance management and reporting.

1.8. Inspection is periodic, targeted scrutiny of specific services, to check whether they are meeting national and local performance standards, legislative and professional requirements, and the needs of service users.

1.9. Regulation focuses on providing a licence to operate and monitoring the quality of services provided. Regulation may also include elements of service inspection, and can be designed to drive up quality as well as to enforce standards.
1.10. In considering the growth of regulatory and investigatory bodies since devolution, it may be useful for the committee to consider the different remits that those bodies have against the above framework.

1.11. The processes of audit, inspection and regulation can be collectively called “scrutiny”. The various scrutiny bodies in Scotland have already put significant effort into working together to minimise the burden imposed on public bodies, while achieving our aims of accountability and improvement. This has been achieved primarily through the joint scrutiny forum and the inspectorate’s forum and through active and strong bilateral agreements. We could go further in a number of areas:
- Agreeing common principles
- Developing a shared code of practice
- Agreeing a joint scrutiny plan and programme
- Increasing information sharing
- Sharing resources and expertise
- Sharing best practice.

1.12. We also believe that scrutiny bodies should have a shared set of common principles, for example, that scrutiny should be:
- Risk-based and proportionate
- Independent
- Accountable
- Transparent
- Based on an agreed set of standards, to which the sector under scrutiny has contributed.

1.13. Agreement and consistency over the principles and practice of scrutiny would provide assurance to stakeholders and those scrutinised that arrangements are proportionate, and assurance to the public that scrutiny is independent and transparent.

2. Detailed comments

You asked for views on specific points. These are set out below.

2.1. How can budgetary control be balanced with independence?

2.1.1. Effective budgetary control must sit within transparent and informative public reporting, because public reporting is the main accountability mechanism. Prime responsibility for effective budgetary control lies with the designated accountable officers. This arrangement applies to the functions of audit, inspection, regulation, the ombudsman and commissioners as it does to all other public bodies. Audit, as I have described, provides the independent assurance that budgets are being properly managed by accountable officers, including scrutiny and standards bodies.

2.1.2. Budgetary control must be distinguished from the setting of budgets. It is for those in charge of public bodies to estimate and apply for the resources
that they need using the established systems and procedures that ultimately result in formal Parliamentary approval of budgets.

2.1.3. It is noted that the Finance Committee inquiry arose from its review of the proposed budgets for the Ombudsman & Commissioners. Parliament has set out in statute the responsibilities of the Ombudsman and Commissioners. It is for the office holders to determine how they should deliver against those responsibilities and to identify the resources required to achieve their objectives. This should be set out clearly in a business plan which will identify the main priorities of the body, expected outcomes and performance targets. In preparing their plans, it is for the Ombudsman/Commissioners to consider affordability and demonstrate value for money.

2.1.4. The SPCB (and subsequently the Finance Committee) can scrutinise the budget proposals to ensure they are robust and appropriate, before budgets are approved by Parliament. In my opinion, all of this happens in an open and transparent way, with opportunities throughout for the Ombudsman/Commissioners to submit a reasoned case for the resources that they require and to demonstrate value for money.

2.1.5. By statute, the Ombudsman/Commissioners are required to present annual reports to Parliament setting out what has been achieved. Should their ability to deliver their objectives or indeed their independence be compromised in any way, then it would be appropriate for them to highlight this in their annual reports. In practical terms, however, it is likely that any such issues would be identified and dealt with through routine business dealings.

2.1.6. Since the external audit also has a role to play in monitoring these activities, in the event of serious difficulties emerging the Auditor General for Scotland could make a report to Parliament.

2.2. Is it possible to implement section B2 of the UN Paris Principles and retain suitable budgetary controls?

2.2.1. Yes.

2.3. What internal process occurs to establish Audit Scotland’s required budgets for each financial year?

2.3.1. Audit Scotland provides services for both the Audit General and the Accounts Commission for Scotland. Each year a budget is prepared setting out the resources required for Audit Scotland to deliver the work programmes of the Auditor General and the Accounts Commission. This budget is considered by the Audit Scotland Board who consult with the Auditor General and the Accounts Commission regarding the charges to be made upon audited bodies to recover audit costs. It is for the Auditor General and the Accounts Commission to formally determine the charges. A budget submission is made to the SCPA for the balance of funding that is needed for
the work that is not covered by charges to audited bodies. The SCPA considers and questions the Auditor General, in his capacity as accountable officer of Audit Scotland, before making its report recommending an allocation of resources. The Audit Scotland Board gives final approval to the budget annually.

2.4. What is your view on how the process for scrutinising your budgets works in practice?

2.4.1. Audit Scotland has a robust set of governance arrangements with appropriate opportunities for our budget to be scrutinised. Our governance arrangements include the Audit Scotland Board, which has an Audit Committee and a Remuneration Committee. The Board is limited by statute to five people. It consists of the Auditor General (who is the accountable officer), the Chair of the Accounts Commission (who chairs the Board) and it has two non-executive members. One non-executive member is a member of the Accounts Commission, and the other was appointed following advertisement. The Deputy Auditor General is an executive member of the Board and the Managing Director of Audit Services also attends.

2.4.2. When the Audit Scotland Board is scrutinising the Audit Scotland budget, it therefore has a well-balanced range of stakeholder representatives and independent challenge.

2.4.3. The SCPA scrutinise our budget annually. It is supported in this work by the Parliament’s Audit Advisor. The SCPA also appoints Audit Scotland’s auditors who report directly to them on our annual accounts, and conduct economy, efficiency and effectiveness reviews of Audit Scotland.

2.4.4. The SCPA now opens its meetings to members of the public and a record of its meetings are placed on the Parliament’s web site.

2.4.5. The SCPA perform an important and effective role in scrutinising the Audit Scotland budget. Their interest in Audit Scotland’s effectiveness is clear and transparent, and the process ensures our accountability to those we serve, but in a way that maintains our independence.

2.5. Do you have any observations to make about the differences which exist between the various commissioners and ombudsman and the above regulatory and investigatory bodies in terms of lines of accountability and budgetary control?

2.5.1. The main components of budget setting and budgetary control should be broadly similar regardless of the lines of accountability. The essential difference is in the lines of accountability and the extent to which the bodies are associated with the Parliament or with the Executive. All of these bodies conduct their business in the public eye, and operate in an open and transparent manner. They are all subject to the public audit regime that I have described.
2.6. How does Audit Scotland go about assessing whether these bodies provide value for money? Are there any difficulties with this process due to the independent nature of these bodies?

2.6.1. We have not so far undertaken any specific value for money studies to assess whether the bodies provide value for money. I would not anticipate the independent nature of the bodies would compromise our ability to undertake value for money studies or that such studies would impact upon their independence. As part of our annual audit we may comment on the arrangements the bodies have in place for securing value for money.

2.6.2. We are currently finalising a review of “shared services” across the Ombudsman & Commissioner offices which we carried out at the request of the SPCB Accountable Officer. Our review also included an examination of the accountability arrangements. We would be happy to share that report with the Committee when it is finalised.
Submission from the Scottish Commission for Public Audit

I am writing in response to your invitation to provide a written submission to the Finance Committee’s inquiry into Accountability and Governance which I attach.

In addition, I would like to take this opportunity to accept your invitation to attend the Finance Committee on 16 May to give oral evidence on behalf of the Commission.

For information, Andrew Munro, Adviser to the SCPA, will also attend to give evidence on behalf of the SCPA.

Yours sincerely

Margaret Jamieson MSP
Convener
Scottish Commission for Public Audit
Submission from the Scottish Commission for Public Audit

This submission sets out the specifics of the legislative basis for the SCPA and also details how the Commission has operated in practice since 1999. Representatives of the SCPA will of course be happy to discuss further the issues raised in this submission when they appear before the Finance Committee on 16 May.

Legislative basis for the SCPA

The Scottish Commission for Public Audit is a statutory body established under the Public Finance and Accountability (Scotland) Act 2000 [the PFA Act].

Audit Scotland expenditure proposals
The role of the SCPA in relation to Audit Scotland’s expenditure proposals, is set out in Section 11 (9) of the PFA Act which states:

“Audit Scotland must, for each financial year, prepare proposals for its use of resources and expenditure and send the proposals to the Scottish Commission for Public Audit…which is to examine the proposals and report to the Parliament on them.”

It is worth noting, in relation to this provision, that the Commission is not responsible for determining the salary of the Auditor General, as the Act goes on to state that:

“The Auditor General is entitled to a salary of such amount and such allowances as the SPCB may determine.”

The Act also requires the SCPA to report ‘from time to time’ on the exercise of these functions.

Audit Scotland accounts and 3E’s
The Act also gives the SCPA responsibility for securing the audit of Audit Scotland’s accounts and initiating any examination into the economy, efficiency and effectiveness with which Audit Scotland uses its available resources.

Membership
The Act states that the Commission should consist of 5 MSPs and that one of these members should be the Convener of the Audit Committee who should be an ex-officio member of the Commission.

The remaining 4 members are appointed in accordance with the Standing Orders of the Parliament (Rule 3.13) which states, amongst other things, that the membership will have regard to the balance of political parties in the Parliament.

Operation in practice

Audit Scotland expenditure proposals
In practice the SCPA meets at least twice a year to consider Audit Scotland’s corporate plan, draft budget bids, their accounts and 3E’s examinations. The meeting
to consider Audit Scotland’s detailed draft budget bid takes place in November, the SCPA then lays a report before Parliament on this budget bid.

It should be noted that the PFA Act does not state that the Parliament should vote on the SCPA’s report i.e. the Act is silent on whether the SCPA’s report can recommend that Audit Scotland’s proposals be rejected or amended in any way. Consequently, it does not say how – if the SCPA were to suggest rejection or amendment – the Parliament would deal with this proposal and how it would impact on the subsequent budget bill. Standing Orders are silent on whether the SCPA, in publishing its report, could lodge a motion to ask the Parliament to debate and vote on the report.

It may be helpful to note in relation to this issue, in contrast to the SCPA’s statutory obligation to ‘examine proposals and report’, the legislative basis for the Public Accounts Commission\(^1\), provides that the Commission has the power to:

“examine any Estimates prepared by the C&AG to cover the expenses of the NAO, and to lay such Estimates before the House of Commons with such modifications, if any, as the Commission thinks fit.”

- **Role of the Finance Committee**
The PFA Act only stipulates that the Commission should report to the Parliament on Audit Scotland’s budgets, there is no detail as to the form that this reporting should take or indeed how this reporting sits alongside the Finance Committee’s role in considering budgets for organisations which receive top-sliced funding from the Scottish consolidated fund.

To address this situation the SCPA has agreed a protocol with the Finance Committee which stipulates that the SCPA provides the Finance Committee with a copy of its report on Audit Scotland’s budget bid to inform the Committee’s consideration of each budget bill. It also states that ‘the SCPA will seek to answer any questions from the Committee and, provided it is not commercially confidential or otherwise sensitive, make information available to the Committee’.

Whilst the agreed protocol clarifies the information that the SCPA will provide to the Finance Committee, it should be noted that there is still an element of uncertainty as to whether, should the Finance Committee wish to do so, it could over-turn a recommendation of the SCPA in relation to Audit Scotland’s budget, particularly given that the SCPA is established by legislation and the Finance Committee is not.

**Auditors to Audit Scotland**

- **appointment**
The SCPA has recently appointed new auditors to Audit Scotland (Haines Watts), following the end of the previous auditors’ (Mazars) contract. The competitive tendering process for external auditors is managed by the Parliament’s procurement office in conjunction with the adviser and the secretary to the SCPA. In terms of funding for the external auditors, although the SCPA selects and appoints the auditors to Audit Scotland, Audit Scotland provides the funding for the auditors.

\(^1\) National Audit Act 1983
3E’s examinations
The SCPA has initiated one economy, efficiency and effectiveness review by the previous auditors (Mazars) into Audit Scotland’s graduate training programme. Mazars conducted the examination before reporting to the Commission in May 2005. The auditors’ findings did not include any specific recommendations on Audit Scotland’s practices.

The Commission has recently agreed to instruct Haines Watts to undertake a further economy, efficiency and effectiveness examination, the subject matter of which is an issued of continued interest to the Commission which will enable Haines’ Watts to draw on their expertise as external auditors to the National Audit Office. The subject matter of this examination will remain confidential until the proposed remit has been discussed with Audit Scotland.

Membership
At present, 4 of the 5 members of the SCPA are also members of the Audit Committee. Apart from the requirement for the Convener of the Audit Committee to be an ex-officio member of the SCPA, the link between the Audit Committee membership and the SCPA membership has been as a result of business managers continually selecting members of the Audit Committee to become members of the SCPA. Clearly, members of the SCPA have a keen awareness of the distinction between their role in scrutinising Audit Scotland on the SCPA and their role on the Audit Committee.

Procedure
The PFA Act also does not provide specific details of the procedure for meetings of the SCPA, the make-up of support services for members of the SCPA or any process for the approval of funding for the SCPA beyond stating that “the Parliamentary corporation is to provide the Commission with the property, staff and services required for its purposes” and that “the Commission may determine its own procedure”.

- meeting procedures
The SCPA has sought to mirror the procedures of other Parliamentary committees, where appropriate, with the aim of ensuring that the Commission is as open and accessible as these committees. Therefore, meetings are conducted in public wherever possible and operate in accordance with the rules defined in Standing Orders. In addition, meeting papers are published on the web alongside meeting minutes and reports from the SCPA and Audit Scotland’s internal auditors.

- staff
In practice the Commission’s support staff consist of a secretary (who is also the Senior Assistant Clerk to the Finance Committee), an assistant secretary (also Assistant Clerk to the Audit Committee) and the adviser (also audit adviser to the SPCB).

- funding
The funds required for the SCPA have been minimal since 1999, the only expenditure having been a visit to the Danish Parliament’s Public Accounts
Committee by the Convener. Although there is no requirement to do so, the Convener has requested that such bids should be considered by the Convener’s Group, in order to ensure that the Parliament is formally in favour of funding any future fact-finding visits.

- Status
  At present the SCPA does not currently have the same status as parliamentary committees in a number of respects. For example, the Convener is not part of the Conveners Group. In addition, having insisted on public meetings, the SCPA is not entitled to an *Official Report*.

  The SCPA notes that the submission from the Parliamentary Standards Commissioner suggests that the Parliament delegates taking an interest in the work programme of commissioners and ombudsman alongside the examination of their budgets to a body of MSPs and cites the SCPA as an example.

  Members of the SCPA appreciate the logic of having a body which can consider proposed budgets in the context of work programme. However, members are of the view that, should any proposals for additional functions for the SCPA be approved, careful consideration would need to be given as to how the status of the SCPA may need to change and how it should be resourced to ensure the SCPA can carry out any new functions effectively.

  Margaret Jamieson  
  Convener  
  Scottish Commission for Public Audit
Submission by the Scottish Legal Services Ombudsman

1. I note that the Committee recommended that there should be a review of the powers of direction in relation to the various Parliamentary appointed commissioners and ombudsman in the legislation which set them up. I am concerned that the Inquiry refers to Ombudsmen, in the plural, when there is only one that is within the remit of the Inquiry, the Scottish Public Services Ombudsman. I am the other Scottish Ombudsman; the Scottish Legal Services Ombudsman, a Statutory Post which was established by The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The role of the Scottish Legal Services Ombudsman is to investigate the handling of complaints about practitioners by the Law Society of Scotland and Faculty of Advocates. I consider that the SLSO provides a front line service, dealing directly with consumer complaints.

BIOA

2. I am a member of the Executive Committee of the British and Irish Ombudsman Association and have recommended that BIOA should provide guidance to this Inquiry on general principles. I commend BIOA to the Finance Committee as a valuable source of information on policy and principle. I refer the Committee to BIOA’s Criteria for recognition which sets out basic principles to ensure that Ombudsmen and similar organisations are independent.

3. So far as this Inquiry is concerned, the Scottish Public Services Ombudsman and Scottish Legal Services Ombudsman are full voting members of BIOA. The Scottish Prison Complaints Commissioner, Scottish Parliamentary Standards Commissioner, Standards Commission for Scotland and Scottish Information Commissioner are associate members. BIOA also has a wide range of members who handle private sector complaints, and members who represent general consumer issues such as The Scottish Consumer Council.

Governance and accountability

4. I share the Committee’s concerns about governance and accountability, but ironically I have, without success, been asking the Scottish Executive Justice Department (SEJD) and Scottish Ministers for more control and clarification. In my view there has been significant in clarity of the roles and responsibilities of the Scottish Executive and Ombudsman, and the budgetary controls on my Office have been far from adequate.

5. In 2000, on appointment, I asked for written guidance on financial management. In the absence of such guidance I developed written risk management policies and accounting procedures. My accounts have never been audited. I warned the SEJD that the lack of written guidance and oversight has been a considerable personal risk issue for me and will continue to be for the incoming Ombudsman. Finally, 5 years and 8 months after first asking, and a week after the launch of this Inquiry, I
received a draft financial guidance note for comment. I am relieved that it is very much like my own guidance.

6. I agree that no public body should be able to spend public money without a specific approval mechanism. Each year, I prepare and publish a 3 year forward plan, with expenditure estimates based on predictions of future demand. My prediction system has proved to be robust.

7. I submit a proposed annual budget to the SEJD and provide a range of accounting and budgetary information to the SEJD on a regular basis; quarterly reconciliations statements; quarterly statements of anticipated expenditure with a drawdown request; monthly confirmation of whether the planned budget is under or overspent; an end of year statement of expenditure.

8. The SEJD’s demands for financial information are sometimes confusing and appear to vary between resource accounting and what I might term “money in your purse” information. The SEJD has been unable, until this year, to provide information on staff costs. Until very recently, two of my staff appear to have been allocated to some other, unidentified, budget.

**Independence and controls**

9. One of the key criteria for independence is an organisation that is adequately resourced. For all independent complaint handlers, it is positively good news when someone makes a complaint because that normally fulfils one of the organisation’s aims: to be known and accessible. My recent requests for an increase in administrative support were refused on the grounds that the SEJD had run out of money, although officials accepted that I had made an adequate business case. Administration support, 28 hours per week, has not increased since 1999 despite incoming complaints rising more than five-fold.

10. Resourcing needs to take the principal of accessibility into account. I note that one of BIOA’s Rules says *Those complaining to the Ombudsman should be entitled to do so free of charge* and that means that the Scottish Parliament and Scottish Executive should ensure that publicly funded complaint handling bodies are adequately resourced to undertake their statutory responsibilities.

11. Traditionally, those regulated pay for their regulator and there are sound reasons for applying that principle to complaint handling. Complaint handling in particular is a demand led activity and it is often hard to predict the factors that will lead to a sudden upturn in complaints: for example the downturn in the stock market and complaints of endowment mis-selling; media comment on a health scare and related complaints. Resourcing that recognises swings in demand and is adaptable and flexible, is in my view, necessary.
12. I commend the recommendation I made in respect of the new legal services complaint handling body, that there is a base line central funding for the Complaint Handling Body (CHB) complemented by a case handling charge to the service provider for complaints made against them. The advantage of a complaint handling charge is that the CHB’s resources move relatively smoothly and quickly in line with the case related workload. The CHB should have the power to recover the complaint handling fee as a civil debt.

13. I do not support the view that the service provider should only meet the costs of handling a complaint that is upheld. That could be open to abuse: if the CHB needed a new printer but had run out of money, all it would need to do would be to uphold a few more complaints. I do commend the Financial Ombudsman Service system where there is a standard complaint handling charge with, perhaps, the first two per year being free of charge. That method would also concentrate service provider’s efforts on resolving the complaint because there would be a financial advantage to them.

14. There does need to be a transparent and evidence based discussion between the baseline funders - Parliament and the Executive - and the CHB in order to determine realistic costs. However, the funders do need to accept that the CHB has the expertise and is well placed to assess what the baseline costs should be in order to provide the level of service intended by statute.

15. There are, I think, two mechanisms that can be used to test reasonableness in order to ensure that there is budgetary control for an organisation that must have independence. The first is to use BIOA’s membership criteria; Parliament and the Executive would, I am sure, want to have BIOA compliant publicly funded bodies. The second test is to assess spending plans against other similar bodies using a competent benchmarking exercise comparing, as far as possible, similar services.

**Efficient working and sharing services**

16. In 2001, I recommended that there should be a central Scottish Executive unit to manage its interface with the very wide range of postholders, public bodies and similar organisations because it seemed to me that there was duplication of effort and lack of expertise. Much time was spent by SEJD staff researching issues that were, presumably, familiar elsewhere within the Executive. That recommendation was not accepted. I am, therefore pleased by the announcement that Audit Scotland will review the opportunities for Commissioners and Ombudsmen to share services.

17. The SEJD has, in fact, done the exact opposite and services that used to be provided from a central resource have been withdrawn. I have entered into a number of service related contracts, often at short notice, when expected to do so even though Scottish Ministers’ legal advice is that the Ombudsman does not have the power to enter into contracts except in a
personal capacity. I remain concerned that the Ombudsman, in a personal capacity, is expected to carry an inappropriate burden of risk. From a taxpayers point of view, this fragmentation is poor value for money; for example, confidential waste used to be collected by the Executive and I am sure that the cost per bag given the overall volumes, was less than I now pay in a stand alone contract.

18. I have attempted to share resources and services with other similar organisations. In 2001, I set up an Ombudsman's Forum (Local Government, Housing and Legal Services) to provide common training in twice a year seminars. After devolution, an expanded grouping had less success. It was not possible to negotiate a common contract for legal advice, for example, as each organisation had its own preferred provider. Shared training foundered because the new organisations found it hard to think of common training needs.

19. More recently, I tried to arrange a common contract for IT support with the Scottish Public Services Ombudsman (SPSO). That did not go ahead because the provider wanted the contract to run through the SPSO and I was concerned about liability. I also noted that my stand-alone comparator was cheaper.

**Benchmarking data from the Scottish Legal Services Ombudsman**

20. **Costs** The Scottish Legal Services Ombudsman negotiates a budget with the Scottish Executive Justice Department each year. For 2005-6 it was £400,141, to which the Executive added a one off pension supplement of £6,000. I have reported an under spend for the accounting year and the costs incurred total £360,645; 71% on staff, 15% on day to day administration and 14% on accommodation for rent, tax and insurance.

21. We handle around 1,400 enquiries each year, many of them are not complaints within the Ombudsman's remit. If people make general consumer complaints, or make a complaint about a legal practitioner, we provide them with information about the correct complaint route. There is a cost in doing that, and dividing the whole budget by the number of enquiries the cost per case is around **£250**. That average masks a wide range of resource demands, from responding to a quick phone call, to the detailed analysis of boxes of complex documents.

22. In my current reporting year, April 2005 to March 2006, we received 519 complaints that are within the Scottish Legal Services Ombudsman’s remit. Dividing the whole budget by the number of complaints within remit, the cost per case is **£681**.

23. Our own benchmarking exercise shows that the cost per case for the Legal Services Ombudsman, who exercises very similar functions in England and Wales was over £1,200 in 2004-5.
24. **Turnround targets.** We set ourselves very tight turnaround targets. In 2005-6, we achieved our aim to respond to new eligible complaints within 2 days: complainants appreciate that rapid response. Our overall performance has been affected by the significant rise in workload during 2005 combined with the under-resourcing of the Office. We failed to meet our target to complete 95% of Opinions within 13 weeks from the date we receive a letter of complaint to the date the Opinion is issued, and took under 13 weeks in only 41% of cases. We completed 76% of Opinions in under 20 weeks and 100% in under 27 weeks. We failed to meet our target to reduce the average time to complete an Opinion and took, on average, 12.7 weeks (2004-05=8.5 weeks). For fully investigated cases we took, on average, 18.3 weeks; for cases that have not been investigated by the professional body we took, on average, 4.6 weeks.

25. **Method.** Of complaints within remit, 34 were dealt with by requesting a written report from the legal services professional body, assessing that report and then deciding if the Ombudsman’s intervention is justified. That decision can only be made by the Ombudsman, though the administrative work is undertaken by support staff. Of complaints within remit, 465 led to a formal Ombudsman’s written Opinion. In order to prepare that we obtain the professional body’s complaint file, which can be substantial, we obtain, in some cases, the practitioner’s file, which can be substantial, and we examine the documents provided by the complainant, which can be substantial. In the most paper heavy case I have examined in the past year, the complainant provided 7 boxes of documents, and the professional body 3 thick files - all are read carefully and thoroughly.

26. **Workload** The Office has 6 full time Complaints Investigators and a part time, 28 hour per week, Office Secretary. The workload for each Complaints Investigator is assessed as 90 workload points per year for an experienced member of staff; equivalent to 90 draft reports on fully investigated cases plus handling correspondence once an Opinion has been issued Each Complaints Investigator also has administrative responsibilities, such as accounts, information management, and IT support. One staff member works full time responding to incoming mail, callers and phone calls.

27. **Skills and qualifications** Complaints Investigators need to be of graduate or equivalent education and to be able to analyse complex information and draft reports in plain English. They do not need to be legally qualified, though they must be familiar with Scots law.

28. **Remuneration** Complaints Investigators are assessed as the equivalent of the Civil Service B2 grade (£21,292 to £26,803) though they are not crown servants. The recent Hay report on Civil Service pay found that the Scottish Executive B2 Grade benefits packages did not compare adequately with equivalents in the non-public sector and the maximum will be increased.

29. The Office Secretary is linked to the A3 Grade: maximum £15,968.
30. The Ombudsman’s full time equivalent salary is £54,788 having been linked to the bottom point of the scales for senior civil servants. The SLSO is entitled to an annual pay award if performance is satisfactory and that is set as the cost of living element recommended by the Senior Salaries Review Body. There are no performance related increments so my successor will start on the same salary as I am paid after being in post for almost six years.

31. The Ombudsman, Complaints Investigators and the Office Secretary are entitled to be members of the Principal Civil Service pension Scheme, being included in Schedule 1 of the Superannuation Act 1972.

32. **Comparators** Although the SLSO’s responsibilities are very similar to the Ombudsman and Commissioners appointed by Parliament, the SEJD did not apply the recommendations in the Office of Manpower Economics (OME) 2004 Report to the Scottish Parliament. That report noted that the Ombudsman and Commissioners were more public, exposed and in many senses accountable than civil servants. The SEJD also decided that it would not implement the recommendations on pay increases where the OME noted that salaries received by individuals in the Senior Civil Service tend to rise by more than the headline movements recommended by the Senior Salaries Review Body so that some compensation should be built in to initial starting salaries.

L M Costelloe Baker  
Scottish Legal Services Ombudsman  
April 2006
Finance Committee

14th Meeting 2006, Tuesday 16 May 2006

Accountability and Governance Inquiry – Additional Submissions

The following submissions are attached to this paper:

- Standards Commission for Scotland;
- Permanent Secretary, the Scottish Executive;
- Audit Committee;
- Communities Committee;
- Standards and Public Appointments Committee; and
Submission from the Standards Commission for Scotland

Thank you for your letter of 01 March 2006 in which you invite the Commission to make a written submission to the inquiry.

I enclose the Commission’s submission in which we respond to the three questions you asked us to address.

The Commission would be pleased to assist further in this inquiry if required.

Yours sincerely

PROFESSOR LORNE D CRERAR
Convener

Can you outline the internal process which occurs to establish what your required budgets are for each financial year.

1 The Standards Commission for Scotland determines its budgetary requirement over a three year cycle. Funding requirements are calculated using three individual departmental budgets, which are subject to robust internal processes before being amalgamated into one composite organisational budget for each of the three years.

2 The first financial year’s budget is supported with a narrative report which details the rationale and requirements applied in calculating the organisation’s requirements during this period.

3 The Standards Commission for Scotland’s budget comprises of three separate Departmental budgets:
   - Office of Administration and Hearings;
   - Office of the Chief Investigating Officer; and
   - Standards Commission Members Budget*

   *The Office of Administration and Hearings is responsible for the Commission Members budget.

4 During January draft budgets are initially determined by each office manager, by using source information as detailed within Appendix A, who calculate the estimated monthly requirement for each budget heading appropriate to their office requirements. Following completion of this process the budget of the Office of the Chief Investigating Officer is reviewed by Chief Investigating Officer and all budgets by the Secretary to the Commission.

5 The budgets are then submitted for the consideration and approval of the Commission’s Accounting and Monitoring Sub Committee before
final approval is sought for the overall budget profiles from the Members of the Standards Commission. It is only at the conclusion of this final approval stage that the composite budget is submitted for consideration of the Scottish Executive.

6 During February the Scottish Executive sponsor division writes to the Secretary of the Commission to confirm the baseline budget allocated to the Commission in totality. Currently the baseline budgets allocated to the Commission do not meet operational requirements. Therefore, the Budget profiles, as approved by the Members of the Commission, are submitted for the scrutiny and agreement of our Scottish Executive sponsor division during February.

7 Throughout the financial year the following monitoring and reporting activities occur:

**Monthly**
- Expenditure on the combined and individual budget reports for the current year is monitored and reported on a monthly basis to the Chief Investigating Officer and Secretary to the Commission
- A Monthly financial report is provided to sponsor division detailing expenditure incurred in month and also expenditure requirement for the following month – (Grant in Aid application)
- Sponsor division is informed about the projected combined budget outturn as part of the monthly reporting process.

**Quarterly**
- The Accounting and Monitoring Sub Committee given quarterly budget / expenditure reports. In addition, an update provided to all Members of Standards Commission during appropriate monthly meeting
Methodology Used to determine budgetary requirements

<table>
<thead>
<tr>
<th>Budget Heading</th>
<th>Methodology Used</th>
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<tr>
<td></td>
<td>Corporate and Business Plans</td>
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<td>Salary and Staff Costs</td>
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<tr>
<td>Travel and Subsistence Costs</td>
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<td>Other staff Costs</td>
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<tr>
<td>Hearing Costs</td>
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<td>Office and Premises Costs</td>
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<tr>
<td>External Communications</td>
<td>x</td>
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<tr>
<td>Professional and Administration</td>
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</table>
Can you outline the process for the Scottish Executive scrutinising and approving this budget bid.

8 The budget, as approved by the Members of the Standards Commission, is submitted with a supporting narrative to the Public Bodies and Relocation Division, Finance and Central Services Department, Scottish Executive. As scrutinising and approving the budget bid is the responsibility of the Scottish Executive we are not aware of the detail of the process. However, we understand that Sponsor Division officials scrutinise the budget, if applicable ask the Commission to revise the budget submission and, following agreement and acceptance of the proposed budget, submit to Scottish Ministers for approval.

Do you consider there to be any overlaps between your remit and the remit of any established or proposed independent, regulatory or investigatory body.

9 There are no overlaps between the Commission’s remit and the remit of any established or proposed independent, regulatory or investigatory body.

10 The Commission’s remit is to encourage high ethical standards in public life through the promotion and enforcement of Codes of Conduct for Councillors and Members of Devolved Public Bodies. Alleged breaches of these Codes are investigated by the Chief Investigating Officer (“CIO”) who operates independently of the Commission when undertaking investigations.

11 For the assistance of the Committee a one page background sheet outlining the functions of the Commission and CIO is attached at Appendix B
Background information

1. The Standards Commission for Scotland (“the Commission”) was appointed by Scottish Ministers on 27 January 2002 in terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (“the 2000 Act”) and has been set up to encourage high ethical standards in public life through the promotion and enforcement of Codes of Conduct for Councillors and Members of Devolved Public Bodies.

2. The 2000 Act also established the post of the Chief Investigating Officer (“CIO”) who is appointed by Ministers.

3. The CIO’s functions as provided for by the Act are to:
   - investigate cases in which a councillor or member of a devolved public body may have or is alleged to have contravened the Councillors’ or, as the case may be, the Members’ Code
   - decide whether to report the outcome of any investigation to the Commission
   - report to the Commission on the outcome of investigations.

4. The Commission’s functions as provided for by the Act are to:
   - receive reports from the CIO on the outcome of his investigations and determine whether to:
     - direct the CIO to carry out further investigations
     - hold a hearing or
     - take no action
   - hold a hearing to determine whether a councillor or member of a devolved public body may have or is alleged to have contravened the Councillors’, or as the case may be, the Members’ Code
   - where the members of the Commission find that a councillor or member has breached the relevant Code, to determine, in accordance with the Act, the sanction to be applied
   - issue guidance to councils and devolved public bodies:
     - to assist them in promoting high standards of conduct and
     - on the Commission’s relationship with them in carrying out its functions under the Act.

5. The Commission and the CIO are separate bodies who each operate independently. However, the CIO reports to the Commission on the outcome of his investigations and the Commission then determines, in the case of a finding of breach, whether or not to hold a hearing. Their combined statutory duties under the Act provide for investigation and adjudication in relation to alleged breaches of the Codes of Conduct.
Submission from the Permanent Secretary, the Scottish Executive

1. I note the Committee’s concerns relating to the statutory independence of Parliamentary commissioners and ombudsmen versus their accountability for expenditure of public funds and the Committee’s desire to establish, for bodies which are set up to have some degree of independence, whether different accountability mechanisms exist and the reason for any differences.

2. I note the remit of your inquiry to:

- examine the growth in the number of independent, regulatory and investigatory bodies and the associated growth in funds allocated since devolution;
- examine the adequacy of processes for setting and scrutinising the annual budgets of such bodies;
- examine the appropriateness of existing lines of accountability and how this process works in practice; and
- identify whether there are any potential overlaps in remits and responsibilities of independent, regulatory and investigatory bodies and any financial implications of such overlaps.

3. The Executive welcomes this inquiry and I hope that I will be able to assist by providing an explanation of the Executive’s general approach in these matters and by addressing the specific questions you have asked.

4. As will be clear from the following response, the existing arrangements have grown up through consideration of what is appropriate for each body, principally at the time of its creation. The arrangements for any particular body should take account of what is being done elsewhere and of changes which time and experience may suggest are useful or necessary.

Review of Regulation, Audit, Inspection and Complaints Handling

5. The Committee will also wish to be aware that Scottish Ministers are considering establishing a review of regulation, audit, inspection and complaints handling for devolved public services. Any review would focus on whether there are any potential overlaps in remits and responsibilities of the various regulatory and investigatory bodies and on the financial and practical implications of such overlaps, so the findings of your Inquiry will be of considerable assistance to Ministers in helping progress this work.

General Considerations

6. As the Committee has acknowledged, there are a number of different constitutional and governance models for the various and prospective Ombudsmen, Commissions, Commissioners, Inspectorates and other regulatory bodies in Scotland (including some which operate on a UK or GB basis but, for simplicity, I will not address them here). The pattern of organisational arrangements is diverse, reflecting the spread of activity required in the exercise of devolved functions. While provision is made for each body according to its role and functions, public bodies including regulatory and scrutiny bodies broadly fall into categories in each of which
the governance arrangements strike a different balance between independence and accountability – they differ mainly in the degree of operational freedom conferred on or delegated to each type of body. This is often referred to as the “arm’s length relationship”, and the main categories of bodies are discussed in more detail below.

7. In each case, the governance and accountability arrangements surrounding the activities of statutory office-holders and other regulatory and investigatory bodies have been arrived at after a careful consideration by Ministers, and often by Parliament, of the particular arrangements that should apply in each case. The chosen framework of controls must be proportionate to the role and functions of the office-holder or body and must take into account the need for proximity to Ministers.

8. Scottish Ministers expect all arm’s length bodies for which they have responsibility to be able to demonstrate that the public funds they are responsible for are:

   (a) used properly, observing propriety and regularity; and
   (b) used in a way that maximises value for money.

9. The exact means by which the expenditure of bodies is agreed and monitored, and their activities scrutinised, differs according to the degree of independence from Ministers it is judged necessary or desirable for each body to have. The different categories of public body which currently perform regulatory or investigatory functions are described in turn below. Further details and a classification of the bodies in which the Committee has expressed an interest are provided in Annex A.

Department of the Scottish Executive

10. In some cases, the Departments of the Scottish Executive themselves provide support for statutory office-holders in the execution of their regulatory or investigative functions. For example, the Chief Inspector of Prosecution in Scotland plays an important part in the continuous improvement of the prosecution service – he and his staff are set up as a free-standing team within the Finance and Central Services Department, to ensure independence from the Crown Office and Procurator Fiscal Service and from the Justice Department. In the same way, the Drinking Water Quality Regulator is supported in his work to ensure that Scottish Water meet water quality standards by a small team within the Environment and Rural Affairs Department. Both these teams account for their financial activities to their respective Departmental Accountable Officers. Departments are directly accountable to Ministers. Departmental Accountable Officers are accountable to me, as Principal Accountable Officer for the Scottish Administration, for the regularity, propriety and value for money in relation to their budgets.

Executive Agencies

11. Inspection and regulatory activities are also lodged within the Executive Agencies that form part of the Scottish Executive Departments. Since devolution, four regulatory bodies have been established, or re-classified, as Executive Agencies: Communities Scotland; Her Majesty’s Inspectorate of Education; the
Buildings Standards Agency and the Social Work Inspection Agency. The annual budgets of the agencies are set and scrutinised as part of the annual budgeting exercise for the responsibilities of their parent Departments within the Executive. Direct lines of accountability to Ministers and parent Departments are clearly set out in agency framework documents.

Non-Ministerial Departments

12. In a small number of cases, the need to demonstrate operational independence from Ministers is such that bodies are established as Departments in their own right. The Office of the Scottish Charity Regulator (OSCR) has been operating as an executive agency, but, alongside its new powers, it will have a new status as a Non-Ministerial Department (NMD). As a NMD, OSCR will determine its operational practices, manage its own financial affairs and report directly to Parliament. OSCR’s budget is determined by the Executive as part of the Spending Review process and is considered by Parliament through the Budget process.

Non-Departmental Public Bodies

13. As the Committee has noted, since devolution the Parliament has approved legislation providing for the establishment of a number of new regulatory and investigatory bodies to operate with a much greater degree of independence from Scottish Ministers. Some of these new bodies (e.g. the Scottish Commission for the Regulation of Care, and the Water Industry Commission) have the status of Non-Departmental Public Bodies (NDPBs). Bodies classified as NDPBs operate within a clearly defined framework of financial accountability and performance management. Key features of the framework for NDPBs include:

- management statements
- financial memoranda
- corporate plans
- business/operating plans
- annual report and accounts
- Accountable Officer/Audit arrangements
- Annual budget letter

14. NDPBs are accountable to Ministers; and a key part of the framework is also the role of sponsoring Departments and teams within those Departments in supporting Ministers to exercise that accountability. The annual budgets for NDPBs are set and scrutinised as part of the annual budget exercise for the responsibilities of their sponsor Departments. The sponsor teams within Departments ensure that there are adequate procedures in place to give assurance to the Departmental Accountable Officers in relation to the regularity and propriety of the public finances under the stewardship of the sponsored bodies for which they are responsible.

15. The Standards Commission for Scotland (which comprises the Office of the Chief Investigating Officer and the Office of Administration and Hearings) is an independent statutory body funded directly by Ministers (who appoint its Members) and accountable to them for its financial and operational performance. The Commission is entirely independent of government when considering alleged
contraventions of the Councillors Code of Conduct and the Code of Conduct for Members of Devolved Public Bodies and in its decisions on complaints. Although it is not currently classified as an NDPB – its classification is currently under review – the framework of accountability and financial controls in place follows the NDPB model.

Public Bodies reporting to the Scottish Parliament

16. In a few cases, as is seen in other Parliamentary democracies, it has been deemed appropriate – because of functions relating to the protection of individuals rights or to the challenge of the legislature – to establish public bodies which operate with complete independence from Scottish Ministers. This category, which has grown as the natural consequence of devolution, includes the Scottish Information Commissioner, the Commissioner for Public Appointments in Scotland, the Scottish Public Services Ombudsman, and the Commissioner for Children and Young People in Scotland. The annual budgets of these bodies are set by the Scottish Parliament. In addition, the Scottish Parliamentary Corporate Body is responsible for the nomination to Parliament of the appointment of the Parliamentary Standards Commissioner whose role is carried out independently of Parliament.

17. Audit Scotland is an independent statutory body providing services to the Auditor General for Scotland and the Accounts Commission. The Auditor General is a statutory office holder appointed by the Crown and reports to the Scottish Parliament. He is responsible for securing the audit of the Scottish Executive – and is therefore independent from Ministers – and most other public sector bodies except local authorities and fire and police boards. The Accounts Commission is an NDPB and secures the audit of local authorities and joint boards (including police and fire services). The Auditor General is the Chief Executive of Audit Scotland and is its Accountable Officer. The Public Finance and Accountability Act 2000 provides for the Scottish Commission for Public Audit to examine Audit Scotland’s expenditure proposals and to report to the Parliament on these.

Financial Accountability of NDPBs and other Public Bodies

18. Turning now to a key area of concern to the Committee, I would like to describe in greater detail the general provisions for ensuring that all Executive-sponsored public bodies are held financially accountable.

19. Under section 15 of the Public Finance and Accountability (Scotland) Act 2000, in my role as the Principal Accountable Officer for the Scottish Administration – which, for the avoidance of doubt, does not include bodies who report to Parliament – I may appoint as Accountable Officers members of staff of the Scottish Administration or any other body the accounts of which are subject to audit by the Auditor General for Scotland. In practice this includes the heads of Scottish Executive Departments, senior officials in Non-Ministerial Departments, and the chief executives of Scottish Executive Agencies and executive NDPBs. Accountable Officers have a personal responsibility to the Parliament for the propriety and regularity of the finances under their stewardship and for ensuring that the resources for which they are answerable are used economically, efficiently and effectively. In addition the heads of Scottish Executive Departments, in their capacity as
Departmental Accountable Officers, must ensure in relation to NDPBs funded from their departmental budgets that:

- appropriate financial and other management controls are in place to safeguard public funds and that compliance with those controls is effectively monitored;

- the financial relationship between the department and the NDPB or Agency is clearly set out in a framework document and kept under regular review;

- the conditions attached to the funding of the NDPB conform with the terms of the Budget Act and that compliance with those conditions is monitored;

20. As a development of these long-established formal mechanisms, Scottish Ministers are currently extending new policies to ensure that arm’s length bodies are held fully accountable for their activities. As the Committee is aware, we are rolling out Best Value to the wider public sector by placing a duty on Accountable Officers; we are also promoting a vigorous Efficient Government agenda which applies no less to the scrutiny sector than to other parts of the public sector.

21. Scottish Ministers are determined to ensure that all publicly funded bodies are able, so far as is possible without compromising their essential functions, to demonstrate that they are best value organisations and are properly run, efficient and effective and deliver value for money. Arm’s length bodies should only have stand-alone support services where there is clear evidence that it is more efficient than shared provision.

Proposals to Establish New Regulatory Bodies

22. The Committee is aware of the proposals to establish the Scottish Civil Enforcement Commission as an NDPB and to appoint a Scottish Commissioner for Human Rights. In addition, I am aware that Scottish Ministers are currently considering three other proposals which may give rise to new regulatory bodies or ombudsmen:

- the Legal Complaints Commission is proposed as a new NDPB to replace the Scottish Legal Services Ombudsman;
- a new Police Complaints Commissioner is proposed as an independent statutory office holder; and
- a new Roadworks Commissioner is proposed, also as an independent statutory office holder.

Specific Questions

23. The general explanation above has sought to address many of the issues that are relevant to your inquiry. It may, however, be helpful to the Committee to address the specific questions raised in your letter by means of cross-references, or by supplying additional information:
• What accountability mechanisms exist for such regulatory bodies?
See paragraphs 6-15 above, and Annex A.

• How are the budgets for these bodies scrutinised and agreed by the Executive?
Bodies which fall under the responsibility of the Executive are controlled either under the Executive Agency or NDPB framework of controls.

• What (if any) differences are there between these bodies in terms of accountability and budget setting and what is the reason for any differences?
The general principles are discussed at paragraphs 6 & 7.

• What degree of independence from the Executive are these bodies expected to have and why?
Again, see paragraphs 6 & 7. Bodies set up to carry out regulatory functions on behalf of Ministers need to have operational independence but remain accountable to Ministers for performance and expenditure of public funds (NDPBs and Agencies). By comparison, and as is recognised in the Paris Principles, bodies which protect the rights of individuals or which perform challenge functions which may sometimes involve the scrutiny of Ministers and/or the Executive, require independence from Ministers to avoid compromising their ability to discharge their functions.

• What are your views on the appropriateness of having some bodies within the control of the Parliament and some within the control of the Executive?
As outlined above, there are clearly circumstances where it would not be appropriate for certain types of body to be subject to Ministerial control (see para 16). Where bodies need to be beyond the Scottish Executive’s direct funding and influence, it is for the Scottish Parliamentary Corporate Body to exercise financial control.

• In relation to commissioners and the Scottish Public Sector Ombudsman, how do you believe budgetary control can be balanced with independence?
This is a matter for the Parliament.

• Is it possible to implement section B2 of the UN Paris Principles and retain suitable budgetary controls?
The Paris Principles relate specifically to national institutions for the promotion and protection of human rights, and we have noted the views of the Finance Committee in its recent consideration of the proposals contained in the Scottish Commissioner for Human Rights Bill. The central issue is the extent to which the operation of the body in question is open to influence by
government. As the Committee have highlighted, Paris Principle B2 states that:

“The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect this independence.”

The Executive’s experience is that it is possible for Ministers and Departments to exercise adequate financial controls over arm’s length bodies for which it is accountable, whilst permitting the bodies to exercise their functions free from political interference. The bodies which need to enjoy a greater degree of freedom (so that, for example, they may be properly critical of the activities of Scottish Ministers and/or the Executive) have been established in such a way as to place them beyond Ministerial influence at an operational level, but they should not be outwith proper scrutiny for their expenditure. As noted above, it is for the Scottish Parliamentary Corporate Body to exercise financial control over bodies which report to Parliament.

In this respect I note that Audit Scotland’s expenditure proposals (like those of the SPCB and ombudsmen/commissioners funded by the SPCB) represent a prior call on the Scottish Budget. The Public Finance and Accountability Act 2000 provides for the Scottish Commission for Public Audit (SCPA) to examine Audit Scotland’s expenditure proposals and to report to the Parliament on these.

**Conclusion**

24. I hope that this account of our general approach on accountability and governance, illustrated with reference to a number of bodies in which the Committee has expressed an interest, taken together with our answers to the specific questions posed by the Committee will be helpful to your in your Inquiry.

John Elvidge  
Permanent Secretary  
The Scottish Executive  
April 2006
### Independent Statutory Office Holders supported by Scottish Executive Departments

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<th>Purpose</th>
<th>Key Characteristics</th>
<th>Comments</th>
<th>Regulatory and Investigative Bodies established since 1999</th>
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</table>
| Single person office holders set up to carry out statutory functions | • Appointed by Ministers (or the Monarch on the advice of Ministers).  
• Functions set out in legislation.  
• Functions reside in an individual rather than a body corporate.  
• Normally appointed in line with SCS recruitment procedures.  
• Size and number of staff involved do not warrant a separate structure - normally set up as a stand alone unit within a Department.  
• Operationally independent from Ministers in carrying out statutory functions.  
• Office holders may be civil servants.  
• Accounts are normally consolidated into those of the parent department. | • Staff are usually seconded civil servants. | • Drinking Water Quality Regulator  
• Chief Inspector of Prosecution  
• Scottish Legal Services Ombudsman (status under review) |
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<th>Purpose</th>
<th>Key Characteristics</th>
<th>Comments</th>
<th>Regulatory and Investigative Bodies established since 1999</th>
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</table>
| To carry out a service or function within Government, by a well-defined business unit that has a clear focus on delivering specific outputs and a framework of accountability to Ministers. | • Directly accountable to Scottish Ministers, but Ministers do not concern themselves with the day to day running of the agency.  
• Flexible and responsive framework, able to cover a wide range of organisational sizes and responsibilities.  
• Part of the Scottish Administration  
• Chief Executive is answerable on delegated operational issues to a Minister in the parent Department.  
• The Chief Executive is a civil servant employed by the Scottish Executive and is normally recruited through open competition.  
• All staff (except secondees) are civil servants employed by the Scottish Executive.  
• Accounts are consolidated into those of the parent department. | Best suited in cases where:  
• It is appropriate for Ministers to have direct strategic and policy control but it is neither realistic nor appropriate for Ministers to take personal responsibility for day-to-day decisions.  
• The function is predominantly concerned with the delivery of services to the public or arms of Government but can also, in some cases, have an important advisory role.  
• The number of staff involved is large enough to justify a separate structure.  
• The function can be independently accountable within the parent Department (i.e. it is possible to have specific targets and separate annual reports and accounts). | • Communities Scotland  
• HM Inspectorate of Education  
• Social Work Inspection Agency  
• Scottish Building Standards Agency |
### Non Ministerial Departments (NMDs)

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<th>Purpose</th>
<th>Key Characteristics</th>
<th>Comments</th>
<th>Regulatory and Investigative Bodies established since 1999</th>
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</table>
| Small government departments in their own right, established to deliver a specific service and not funded by a sponsor department. | - Usually headed by a statutory office holder, commissioner or a board with statutory responsibilities.  
  - Some NMDs may have links to Ministers in other interested Departments but that Minister will not be responsible for the NMD’s overall performance or delivery (eg Forestry Commission)  
  - Staff are civil servants employed by the Scottish Executive  
  - Usually responsible for their own accounts | | - Office of the Charity Regulator |
## Non-Departmental Public Bodies (NDPBs)

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<th>Purpose</th>
<th>Key Characteristics</th>
<th>Comments</th>
<th>Regulatory and Investigative Bodies established since 1999</th>
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</table>
| To permit a service or function to be carried out at arm's length from the Government. | - Are established by statute such as an Act of Parliament or Royal Charter or set up under the companies Act as companies limited by guarantee.  
- **Carry out administrative, commercial, executive or regulatory functions on behalf of, and accountable to, Ministers.**  
- Can provide specialist advice to Ministers and others.  
- The Chief Executive is accountable to a board whose members are appointed by Ministers or by the Queen on the advice of Ministers.  
- Have a national remit.  
- Ministers are answerable to Parliament for the body and have the power to wind it up (subject to, where appropriate, the approval of Parliament or, where a Royal Charter has been previously granted, the Queen). | NDPBs function deliberately at one stage removed from Ministers, with a considerable measure of policy independence within strategic Ministerial direction and Ministerial target setting.  
**Ideally suited in areas where:**  
- political considerations should play little part in decisions (e.g. exercising some regulatory functions, or managing public services such as museums and art galleries) but where it is agreed that the function should still be carried out in the public sector.  
- it is desirable to involve many people, including the general public and representative groups, in decisions about delivery of the service  
- it is desirable to underwrite the body’s independence, powers and obligations through legislation. | • Scottish Commission for the Regulation of Care  
• Scottish Environment Protection Agency  
• Scottish Social Services Council  
• Water Industry Commission for Scotland  
• Standards Commission (classification under review) |
<p>| Funding for NDPBs is subject to Departmental financial planning and the spending review process. Within these overall requirements and any |</p>
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<tr>
<th><strong>Staff are not civil servants and are employed directly by the body itself.</strong></th>
<th>relevant legislation, the financial regime for each NDPB needs to be tailored to meet the individual circumstances. Most NDPBs will be financed by a grant-in-aid, appropriate where the Government has decided that the recipient body can operate at arm’s length, though subject to controls from the relevant Government Department and those from Parliament.</th>
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<td><strong>Most NDPBs are funded by grant in aid but some are funded by levies on particular sectors and receive no central funding.</strong></td>
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<tr>
<td><strong>An NDPB has an Accountable Officer with a personal responsibility to the Parliament for the propriety and regularity of the finances under their stewardship and for ensuring that resources are used economically, efficiently and effectively.</strong></td>
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Submission from the Audit Committee

INTRODUCTION

1. The Audit Committee welcomes the opportunity to contribute to the above inquiry. The Committee notes the remit for the inquiry and has considered both this and the detailed questions posed in your letter of 1 March to the Convener. Our response deals only with those questions which are relevant to the remit of the Audit Committee.

2. Your letter states “that the distinct role of the Audit Committee and the nature of the working relations with Audit Scotland may not be conducive to commenting on Audit Scotland’s accountability”. The Committee would like to reassure you that this is not the case. The Audit Committee is the Committee of the Parliament with responsibility for the public audit system and in particular with responsibility for the accountability and scrutiny arrangements for Audit Scotland.

3. This is shown in the role played by the Committee in the passage of the Public Finance and Accountability (Scotland) Act 2000. The Committee was the lead committee for Stage 1 consideration of this Bill, which was considered by the Parliament in 1999. The Committee was also the lead Committee for Parts 2 and 3 of the Bill at Stage 2 when it considered issues such as the establishment of Audit Scotland and the Scottish Commission for Public Audit (SCPA) and the functions and duties of Accountable Officers.

ROLES OF INDEPENDENT, REGULATORY AND INVESTIGATORY BODIES.

- Do you think there is any confusion or overlaps between the remits and responsibilities of the various commissioners and ombudsman? (Bullets 1 and 4 of the inquiry remit)

4. The Committee does not intend to comment on whether there are overlaps between the remits of specific commissioners and the Ombudsman, or indeed between the other bodies which come under the scope of this inquiry.

5. However, given the Committees role in scrutinising the performance of and value for money provided by public bodies, the Committee is concerned to ensure that the overarching scrutiny framework for the public sector in Scotland is focussed, effective and avoids duplication of effort.

6. In relation to audit, inspection, regulatory and investigative bodies, the question of whether we currently have the right number of bodies with the right remits and with sufficient clarity of role and purpose is both important and complex.

7. Any consideration of whether a change to the overarching framework of regulation, inspection and audit is required must be undertaken in a measured and inclusive way. In particular, the views of those who run and use the services which are scrutinised by these bodies must be taken into
account when considering whether adjustments to the scrutiny framework are required.

8. The Committee would make the following observations:

- The role and purpose of the commissioners, Ombudsman and other public bodies within the scope of the inquiry are clearly very different and this needs to be recognised when considering arrangements for budget setting or holding bodies to account for their performance;
- The role and purpose of these bodies will clearly determine to a significant extent what budget setting and/or accountability processes may be appropriate;
- All those bodies and office holders involved in the audit, inspection, regulation or investigation of public bodies should have an awareness of their respective roles and appropriate memorandums of understanding should be in place to minimise the risk of duplication and the burden placed on public bodies.

APPROPRIATENESS OF EXISTING LINES OF ACCOUNTABILITY AND HOW THIS PROCESS WORKS IN PRACTICE

- How can we combine accountability of commissioners and ombudsman to Parliament with operational independence?
- Should Parliament or its Committees be able to influence the policy or work programme of commissioners or ombudsman or should this be a matter for the commissioners and ombudsman themselves?

9. The Committee does not intend to offer comment on the specific arrangements for scrutinising and agreeing the budgets of commissioners or the Ombudsman. However, the arrangements for scrutinising Audit Scotland’s budget proposals and expenditure may be a useful comparator when considering the arrangements for the commissioners and Ombudsman.

AUDIT SCOTLAND

Establishment of Audit Scotland

10. The budget setting and accountability arrangements for Audit Scotland drew on the long-standing arrangements in place for scrutiny of the budgets and performance of the National Audit Office. However, to ensure that these arrangements were right for a devolved Scotland, there was extensive policy consideration and consultation prior to the introduction of the Public Finance and Accountability (Scotland) Act 2000 (The “PF and A Act”), including the work of the Financial Issues Advisory Group (FIAG).

Public Finance And Accountability (Scotland) Act 2000

Financial Scrutiny of Audit Scotland
11. The Scottish Commission for Public Audit (SCPA) was established under section 12 of the PF and A Act. The Commission consists of the member of
the Parliament who is the Convener of the Audit Committee and 4 other members. (section 12 (2)). The Commission examines Audit Scotland’s budget proposals and reports to the Parliament on them (section 11(9)).

12. The Commission is also responsible for designating the Accountable Officer of Audit Scotland (section 18(1)) and for arranging the financial audit of Audit Scotland and may also initiate “value for money” investigations into the way in which Audit Scotland has used its resources (section 25).

13. The Committee considers that the statutory arrangements for the financial scrutiny of Audit Scotland are robust and effective, although, as with all legislation, they should be subject to periodic review, within the context of the PF and A Act.

*Independence of the AGS*

14. The independence of the AGS is enshrined in the Scotland Act. However, when preparing his programme of “value for money” examinations, under section 23 of the PF and A Act, the AGS must take into account any proposals made by the Parliament.

15. This obligation is fulfilled through consultation with the Audit Committee on the AGS’s draft forward study programme. While other parliamentary committees have always been able to comment on the AGS forward programme, following discussion with the Conveners’ Group, the AGS consultation will in future be extended to include more direct consultation with other parliamentary committees.

16. The Committee can also propose topics for examination by the AGS on an “ad-hoc” basis but, in recognition of the independence of the AGS, has done so rarely. The Session 1 Committee’s Legacy Paper commented that it is necessary to show restraint in this matter in order that the independence of the AGS is recognised by the Committee in its actions.

17. The Committee considers that this arrangement works well in that it protects the Auditor General’s independence, while offering the Parliament a formal opportunity to contribute to the development of the AGS programme and the reassurance that its proposals will be carefully considered.

*Lines of Accountability for Commissioners and the Ombudsman*

18. The Public Services Ombudsman and Commissioners, with the exception of the Standards Commissioner, are all statutory accountable officers. (The Parliament’s Chief Executive is the accountable officer for spending associated with the Standards Commissioner.) Their functions as accountable officers are set out in the Acts which established each office. These functions include:

Section 23(6) of the Public Finance and Accountability (Scotland) Act 2000
• Signing accounts;
• Ensuring the propriety and regularity of the office’s finances; and
• Ensuring that his/her resources are used economically, efficiently and effectively.

19. Under the PF and A Act accountable officers are answerable to the Parliament for the exercise of those functions. In practice accountable officers are “answerable” to the Parliament through the Audit Committee, where they can be held to account in connection with either laid accounts, an AGS report or another laid financial document.

20. **While the Audit Committee therefore has no role to play in considering budget proposals for the Ombudsman or Commissioners, it can hold Commissioners to account for the way in which their budgets are spent and so help ensure that their resources are used properly and provide value for money.**

21. **The Audit Committee’s role in holding Commissioners and the Ombudsman to account in this way does not in any way compromise their independence since the Committee’s interest is in issues of propriety, performance, value for money and the way in which policy is implemented, rather than policy itself.**

27 April 2006
Submission from the Communities Committee

Thank you for your letter of 1 March inviting comments from the Communities Committee on a range of issues related to your Committee’s inquiry into Accountability and Governance. The Committee considered your letter at its meeting on 19 April.

Your letter invites comments from Committees who have had a role in establishing any of a range of bodies identified or have taken oral or written evidence from any of them. The letter specifically identifies the Office of the Scottish Charity Regulator (OSCR) as one such body. In 2005, the Communities Committee considered the Charities and Trustee Investment (Scotland) Bill which proposed that OSCR be created and set out the terms under which it would operate.

I should perhaps say, first of all, that the Committee agreed that it would not be appropriate for it to comment on many of the wider issues about which the Finance Committee is seeking evidence, given that it has not taken evidence which would allow it to reach a view.

The Committee also asked me to make the point that as OSCR is a new body, there may be issues which arise in relation to how it operates in later years which it might wish to address. The comments which follow are therefore based on the evidence that the Committee took during the passage of the above Bill.

The Committee agreed to discuss the various questions posed on the second page of your letter and to respond as follows:

- **Do you think there is any confusion or overlaps between the remits and responsibilities of the various commissioners and ombudsman (if appropriate, please give an example)**

  The Committee has not taken evidence on this and can therefore only comment in relation to OSCR. No evidence of any confusion or overlap between the remit of OSCR and that of any commissioner or ombudsman emerged when taking evidence on the Charities and Trustee Investment (Scotland) Bill.

- **The total budget for all parliamentary commissioners and ombudsman is around £6m. Do you believe this is too much, too little or just about right?**

  It is unclear if the budget for OSCR – around £4m per annum – forms part of the £6m figure. The Communities Committee and the Finance Committee were of the view that the £4m proposed was reasonable and proportionate. It expects that the budget will be reduced after OSCR has established the Scottish Charity Register, reconsidered the charitable status of all charities in Scotland etc.

  The point was made however, that there is often a lack of clarity as to what Departmental budgets fund commissioners and ombudsmen and that it would be helpful if this could be addressed.
• How can we combine accountability of commissioners and ombudsman to Parliament with operational independence?

Again, we can only comment on OSCR – but it may be a helpful model. OSCR is a non-ministerial officeholder of the Scottish Administration (a non-Ministerial Department). OSCR will have operational independence and will not be directed by Ministers or Parliament. However, it will be required to present an annual report to Parliament which will ensure that it remains accountable for its use of public funds.

• Should Parliament or its Committees be able to influence the policy or work programme of commissioners or ombudsman or should this be a matter for the commissioners and ombudsman themselves?

We can only comment on OSCR. The Committee considers that it would not be appropriate for Parliament or its Committees to influence its operational policy or work – only the statutory framework under which it operates.

• Should there be an identical model of accountability for all commissioners and ombudsmen? If so, would you favour common budgetary controls as a key feature of such a model?

We have not taken evidence on this, but common budgetary controls would appear on the surface to be reasonable and would bring an element of consistency. However, it is considered important that the Finance Committee should explore this issue to ensure that whatever models are in place are both effective and robust.

• What are your views on the adequacy of existing budgetary controls on ombudsmen and commissioners? Is there any alternative to the model of having Commissioners and Ombudsman under the control of the SPCB?

One more, we can only comment with regard to OSCR which is not under the control of the SPCB – although there is a requirement to report to Parliament. The model which applies to OSCR could be worthy of examination as part of the Inquiry.

• Is it possible to implement section B2 of the Paris Principles and retain suitable budgetary controls?

The Committee has not considered this matter in detail, but it would appear that section B2 could apply to OSCR. In relation to other commissioners, B2 refers to bodies being “independent of the government” – not the legislature. The Finance Committee should consider how “suitable” should be defined in this context to ensure that a balance between accountability and independence is achieved.

• The Executive has proposed setting up a Scottish Civil Enforcement Commission as an NDPB in the Bankruptcy and Diligence etc (Scotland) Bill to ensure its independence. Do you have any views about the
establishment of Commissions by the Executive and are there alternative models that should be considered and how should budgetary control be exercised?

The Committee has not taken evidence on this issue. However, it suggests that the model used to set up OSCR could perhaps be tailored to suit any new body.

I appreciate that these comments are rather limited. However, I hope that they are of some use to your Committee as it takes forward its inquiry.

Karen Whitefield MSP
Convener, Communities Committee
Submission from the Standards and Public Appointments Committee

**Q** - Do you think there is any confusion or overlaps between the remits and responsibilities of the various commissioners and ombudsman (if appropriate, please give an example)

**A** - In the experience of the Standards and Public Appointments Committee we have no dealings with the commissioners and ombudsman other than the Scottish Parliament Standards Commissioner (Standards Commissioner) and the Commissioner for Public Appointments in Scotland. The post of Commissioner for Public Appointments is relatively new (set up in June 2004). We have no evidence to offer on possible confusion and overlaps between remits and responsibilities of the commissioners and ombudsmen.

**Q** - The total budget for all parliamentary commissioners and ombudsman is around £6m. Do you believe this is too much, too little or just about right?

**A** - As a committee we do not deal directly with the funding of the Standards Commissioner and the Commissioner for Public Appointments in Scotland. We understand that the Finance Committee intends to take evidence from the Scottish Parliament’s Corporate Body on these issues.

**Q** - How can we combine accountability of commissioners and ombudsman to Parliament with operational independence?

**A** – The commissioners must prepare an annual report to be laid before the Parliament. As you have pointed out in your letter the Standards Commissioner acts independently of the Parliament. We understand that the Procedures Committee 2nd Report 2006 ‘Procedures Relating to Crown Appointments’ proposes changes to the reappointment process for commissioners and ombudsmen which will introduce a measure of independent assessment, at the time of writing this report is still to be debated by the Parliament.

If committees use the annual reports from the commissioners and ombudsmen as a vehicle for serious questioning, that will allow members to raise issues that concern them without infringing the independence of the commissioners and ombudsmen.

**Q** - Should Parliament or its Committees be able to influence the policy or work programme of commissioners or ombudsman or should this be a matter for the commissioners and ombudsman themselves?

**A** – The Standards Commissioner’s work programme is mainly complaints focused and given his independent role it would be inappropriate for the Standards and Public Appointments Committee to attempt to influence the work of the Commissioner. The Standards Commissioner’s legislation makes it clear that the Standards Commissioner has no policy making role. The functions of the Standards Commissioner is to investigate and report on complaints. With regard
to the Commissioner for Public Appointments her post is still relatively new and this makes it difficult for us to comment at this time.

Q - Should there be an identical model of accountability for all commissioners and ombudsmen? If so, would you favour common budgetary controls as a key feature of such a model?

A - It is hard to envisage an identical model of accountability for all commissioners and ombudsmen given the independent role of the Standards Commissioner and the divergent nature of the work carried out by the commissioners and ombudsmen. The Committee would require further information from the Finance Committee on what is being proposed before commenting further on this issue.

Q - What are your views on the adequacy of existing budgetary controls on ombudsmen and commissioners? Is there any alternative to the model of having Commissioners and Ombudsman under the control of the SPCB?

A – As a committee we do not deal directly with the funding and budgetary control of the Standards Commissioner and the Commissioner for Public Appointments in Scotland. We understand that the Finance Committee intends to take evidence from the Scottish Parliament’s Corporate Body on these issues.

Q - Is it possible to implement section B2 of the Paris Principles\(^2\) and retain suitable budgetary controls?

A – We understand that the SPCB made a submission to the Justice 1 Committee as part of its inquiry into the proposed human rights commissioner on this matter.
Submission from the Campaign for Freedom of Information in Scotland

Introduction
The Campaign for Freedom of Information is a NGO working to improve public access to official information and to ensure that the Freedom of Information Acts are implemented effectively. The Campaign was set-up in 1984, played a leading role in securing the passage of FOI legislation and is recognised as a leading independent authority in the field. We provide training both for public authorities implementing the Acts and for users of the legislation. The Campaign has two members of staff in its London office and its Glasgow office is run by three volunteer Co-conveners. The Campaign's director is Maurice Frankel.

The Campaign welcomes the Finance Committee’s Inquiry and would make the following contribution.

Context of Inquiry
This Inquiry takes place at a time of constitutional change which has led to detailed discussions and the implementation of new systems which exist independently of elected government:

- The Human Rights Act 1998 gives individuals the opportunity to argue for their Convention rights in the Scottish and UK courts and tribunals and allows judges to adjudicate directly on Convention issues.
- Duties on public authorities, under Section 6 of the Act, which makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right."
- The establishment of the Scottish Parliament under the Scotland Act 1998 to make government ‘open, accessible and accountable’ (Consultative Steering Group Principles).
- Duties on the devolved Parliament to respect human rights under section 29(2) of the Scotland Act, which permits the Parliament only to pass legislation which is compatible with the European Convention on Human Rights.
- Duties on the devolved Government to respect human rights with Section 57(2) of the Scotland Act providing that a member of the Scottish Executive can only act in a way which is compatible with Convention rights (although there are exceptions relating to the Lord Advocate).
- The forthcoming Commission for Equality and Human Rights (CEHR) for Great Britain will assume the responsibilities of the existing statutory equality bodies such as the Equal Opportunities Commission, the Disability Rights Commission and the Commission for Racial Equality. The CEHR will also have a new role of promoting human rights in relation to reserved issues.
- The Scottish Commissioner for Human Rights Bill, which has yet to be debated at Stage 1, would establish a Scottish Commissioner for Human Rights to promote awareness, understanding and respect for human rights e.g. in the public sector.
• The introduction of the Freedom of Information (Scotland) Act, which gives people the right to access information held by a public authority, enforced by the Scottish Information Commissioner.

In this new constitutional climate, it is inevitable that there will be a growth in the number of independent, regulatory and investigatory bodies and the associated costs. The Campaign is however clear that the right to access information is a key tool in delivering the broader human rights agenda, which is that rights should become an everyday part of law and public services.

It is therefore essential that the independence of the Scottish Information Commissioner is preserved. We believe that it is too early to change what appear to be rigorous checks and balances, just one year after the legislation was effected.

**Overlap in Remits and Responsibilities**

The Finance Committee Inquiry seeks to establish if there are overlaps in the responsibilities of the various Commissioners. We are not aware of any overlap between the functions of the Scottish Information Commissioner and any other Scottish regulatory authority.

The Scottish Information Commissioner (SIC) and the UK Information Commissioner have parallel responsibilities. These reflect the substantial changes in public rights to information, which took effect on January 1 2005. On this date five important new rights to information came into force:

• The Freedom of Information Act 2000
• The Freedom of Information (Scotland) Act 2002
• The Environmental Information Regulations 2004
• The Environmental Information (Scotland) Regulations 2004
• Amendments to the Data Protection Act 1998

Of these laws:

• The Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations apply to Scottish public authorities and are enforced by the Scottish Information Commissioner.
• The FOI Act 2000 and Environmental Information Regulations (EIRs) apply to public authorities in England, Wales and Northern Ireland; to UK government departments and to cross-border bodies. This legislation is enforced by the UK Information Commissioner.
• The Data Protection Act applies to the whole of the UK including Scotland. This is enforced by the UK Information Commissioner.

The separation of remits and responsibilities according to distinctive legislation and regulations is an inevitable consequence of devolved government. Although there are parallel sets of FOI laws and Environmental Information Regulations for
Scotland and the UK any given public authority is subject either to the Scottish legislation or to the UK legislation, but not to both.

The UK Commissioner has an office at 28 Thistle Street in Edinburgh, which handles Data Protection issues relating to Scottish bodies and complaints about cross border bodies under the UK FOI Act. The Scottish and UK Information Commissioners have a Memorandum of Understanding, which aims to avoid unnecessary duplication of work and ensure that complainants are directed to the appropriate office.

The Scottish Information Commissioner

By the beginning of March 2006, the Scottish Information Commissioner had issued over 120 decision notices in response to complaints. New decisions continue to emerge every week demonstrating how the exemptions, public interest test and procedural requirements of the legislation should be applied.

The Campaign’s analysis of the decisions to March 2006 indicates that on almost 60 per cent of the occasions on which the Commissioner considered the validity of an authority’s claim that information was subject to an exemption, the claim had been overturned.

According to the Commissioner’s 2005 annual report, 17 per cent of all FOI complaints to the Commissioner during 2005 were about authorities which had failed to respond to requests at all. For requests for environmental information the failure-to-respond rate rose to 27 per cent.

These statistics suggest that many public authorities are adopting an unnecessarily restrictive approach to the legislation or are unaware of their responsibilities under it. In these circumstances, high levels of complaints to the Commissioner can be expected.

The Commissioner in fact received a much greater volume of requests in the first year of the Act’s operation than had been anticipated. We understand that the SIC estimated the likely volume of complaints made to him on the basis of an international study commissioned by the UK Information Commissioner from the Constitution Unit of University College London. The actual volume of complaints received by the SIC substantially exceeded those predicted on the basis of this study. This suggested that he might receive between 125 and 300 complaints in 2005. In fact his office received 571 complaints, almost double the highest predicted level. (This contrasts with the volume of complaints received by the UK Information Commissioner, which were within the range predicted on the basis of this study.)

This probably reflects the relatively high levels of public awareness and use of the legislation in Scotland. The Commissioner’s research suggests that in the year to November 2005 people’s awareness of the legislation had increased by 64%.

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3 This showed the volume of complaints to FOI Commissioners or their equivalents in Australia, Canada, Ireland, New Zealand and the USA. See: Constitution Unit, “Estimating the likely volumes, sensitivity and complexity of casework for the Information Commissioner under the Freedom of Information Act 2000 and the Environmental Information Regulations”, 2004.
Overseas experience suggests that the volume of FOI requests, and complaints to Commissioners, increases considerably for several years after implementation as public awareness of the legislation grows. The Constitution Unit study suggested that complaints were likely to treble over the first five years following the Act’s implementation.

The success of the FOI legislation depends on the Commissioner having the resources to deal effectively with the complaints he receives. The volume of these complaints, and consequent demands on the SIC’s budget, are largely caused by factors beyond his control. Section 49(1) of the Freedom of Information (Scotland) Act requires the Commissioner to make a decision on all valid complaints made to him under the Act, other than those which are frivolous, vexatious or abandoned. The volume of requests under the Act, and of complaints to the Commissioner, is likely to increase as the Act and the Commissioner’s role become better known. These will partly depend on the extent to which public authorities fail to comply with their legal obligations under the Act. The number of appeals against the Commissioner’s decisions to the Court of Session will also be relevant, as these are likely to be particularly time-consuming. The Commissioner is also required to promote compliance with the Act.

The process for setting and scrutinising the Commissioner’s annual budget must take account of the fact that the Commissioner needs to a certain degree to ‘look into a crystal ball’ to anticipate the level of the work he will face. At this early stage, before trends have been established, this inevitably involves significant uncertainty.

Scottish Information Commissioner – Finance and Accountability
The Campaign believes that the current system for monitoring the financial affairs and holding the Commissioner to account for his work is adequate.

The Scottish Information Commissioner is appointed by Her Majesty on the nomination of the Scottish Parliament. The Commissioner can hold office “for such a period not exceeding five years as the Parliamentary Corporation, at the time of appointment, may determine” (section 42(3)). The Commissioner can be removed from office following a vote in Parliament supported by two thirds of 129 seats (section 42(4) (c)). The Commissioner may be reappointed for another term but only for a third term in ‘special circumstances’ (section 42(5)).

Accountability is a strong obligation under the Act. Schedule 2 provides that the Commissioner (or his designated accountable officer) is answerable to the Parliament for:
The accounts

Ensuring propriety and regularity in the finances of the Commissioner

“Ensuring the resources of the Commissioner are used economically, efficiently and effectively” (Schedule 2, para 4(3))

The Commissioner must send a copy of the annual accounts to the Auditor General for Scotland for auditing (Schedule 2, para 5(2)).

The core issue is how to balance financial control with independence. That can be achieved by separating out the scrutiny functions within the Parliament. The Finance Committee should have a duty to ensure that the Commissioner accounts for expenditure as well as ensuring he is adequately resourced to perform his statutory duties. The efficiency and effectiveness of the functions can be determined by Audit Scotland.

Section 46(1) obliges the Commissioner “to lay annually before the Parliament a general report on the exercise of functions conferred on that officer under this Act.” Section 46(2) requires the Commissioner to “record the number of occasions, during the period covered by the report on which the Commissioner failed to reach a decision on applications under section 47(1) within the period of four months specified in section 49(3)(b).” Both the Corporate Body and the Commissioner will presumably monitor this situation carefully and if a problem is emerging, seek to ensure that remedial steps are taken promptly.

The Campaign believes that the presentation of the Annual Report to Parliament offers the appropriate opportunity for a thorough debate and we believe the Parliament should commit itself to an annual debate on the Commissioner’s report.

The Commissioner can also lay reports before Parliament as appropriate (section 46(3). The Campaign would suggest that will only be possible if the Commissioner has the resources to deliver on that and his other diverse responsibilities, such as promoting the legislation.

Conclusion
The Campaign believes that the Scottish Information Commissioner is delivering across a range of statutory responsibilities. The Commissioner is also issuing reasoned judgements on a wide variety of cases and we note his work is being praised internationally.

The Campaign believes that in law and practice, there are clear lines of accountability of the Commissioner to the Corporate Body and to the Parliament. We believe they strike the right balance between efficiency and accountability whilst ensuring that the Commissioner is, and is perceived to be, independent.

As public use of the FOI legislation and awareness of the Commissioner’s role increases, the demands on the Commissioner’s budget are likely to increase and this is an inevitable consequence of the powers and duties which Parliament bestowed on him. This is likely to continue until we reach the point at which public
authorities are properly complying with their obligations under the legislation and the number of people who appeal against decisions, is reduced.
Finance Committee

14th Meeting 2006, Tuesday 16 May 2006

Accountability and Governance Inquiry - Extracts of reports from other legislatures

1. Members of the Committee have previously requested information on the lines of accountability for commissioners and ombudsman elsewhere. The following reports provide details on existing lines of accountability in other legislatures:

- *Officers of Parliament – the New Zealand Model* by the Office of the Clerk of the New Zealand House of Representatives (available online [here](#)); and
- *A legislative framework for independent officers of Parliament* by the Public Accounts and Estimates Committee, Parliament of Victoria (extract).
PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

SIXTY SEVENTH REPORT TO THE PARLIAMENT

REPORT ON A LEGISLATIVE FRAMEWORK FOR INDEPENDENT OFFICERS OF PARLIAMENT

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Hon. C Campbell, MP (Chair)
Hon. B Forwood, MLC (Deputy Chair)
Hon. B Baxter, MLC
Mr R Clark, MP
Ms D Green, MP
Mr J Merlino, MP
Hon. G Rich-Phillips, MLC
Ms G Romanes, MLC
Mr A Somyurek, MLC

For this inquiry, the Committee was supported by a secretariat comprising:

Executive Officer: Ms M Cornwell
Research Officer: Ms P Toh (prepared exhibit 3.1)
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Hon. R Hallam, MLC (Deputy Chair)
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Mr R Clark, MP
Ms S Davies, MP
Hon. D Davis, MLC
Mr T Holding, MP
Mrs J Maddigan, MP
Hon. G Rich-Phillips, MLC
Hon. T Theophanous, MLC

1 During the 54th Parliament the Committee comprised ten Members of Parliament. The 54th Parliament was prorogued on 5 November 2002
The Public Accounts and Estimates Committee is a joint parliamentary committee constituted under the *Parliamentary Committees Act* 2003.

The Committee comprises nine Members of Parliament drawn from both Houses of Parliament and all political parties.

The Committee carries out investigations and reports to Parliament on matters associated with the financial management of the state. Its functions under the Act are to inquire into, consider and report to the Parliament on:

- any proposal, matter or thing concerned with public administration or public sector finances; and
- the annual estimates or receipts and payments and other budget papers and any supplementary estimates of receipts or payments presented to the Assembly and the Council.

The Committee also has a number of statutory responsibilities in relation to the Office of the Auditor-General. The Committee is required to:

- recommend the appointment of the Auditor-General and the independent performance and financial auditors to review the Victorian Auditor-General’s Office;
- consider the budget estimates for the Victorian Auditor-General’s Office;
- review the Auditor-General’s draft annual plan and, if necessary, provide comments on the plan to the Auditor-General prior to its finalisation and tabling in Parliament;
- have a consultative role in determining the objectives and scope of performance audits by the Auditor-General and identifying any other particular issues that need to be addressed;
- have a consultative role in determining performance audit priorities; and
- exempt, if ever deemed necessary, the Auditor-General from legislative requirements applicable to government agencies on staff employment conditions and financial reporting practices.
CHAIR’S INTRODUCTION

Victoria’s three officers of Parliament – the Auditor-General, the Ombudsman and the Electoral Commissioner – occupy a unique and valued position in the tradition of the Westminster model of democratic governance. They each play an important role in assisting the Parliament in discharging its scrutiny and accountability functions. It is essential, therefore, that the roles of these officers are safeguarded and the discharge of their duties facilitated.

The Committee’s inquiry revealed that the current legislative framework applying to these officers is inconsistent in a number of areas, for example on issues relating to their appointment, tenure, budgets and accountability arrangements and there are few formal links between the Parliament, the Ombudsman and the Electoral Commissioner.

The government was elected on a mandate to restore the functional independence of key public watchdogs. The first steps have been taken, for example by enshrining these positions in the Constitution. The Committee recommends further reforms. The independence of these office holders and their relationship to Parliament would be strengthened by the development of a framework which would more explicitly establish the characteristics of an officer of Parliament and provide consistency in the arrangements relating to the appointment, operational autonomy and accountability obligations of officers of Parliament.

If the recommendations contained in this report are accepted by government and Parliament, we will be taking another step towards Victoria being a leader in implementing constitutional and parliamentary reform. As a result, individual citizens and the common good of our community will be better served by Parliament.

I would like to thank the Members of the PAEC of the 54th Parliament who undertook the majority of work on this inquiry and also the Members of the current PAEC who have worked diligently to produce this report. The Committee appreciates the work of the staff, led by the Executive Officer, Michele Cornwell, who was primarily responsible for compiling this report.

We have also greatly benefited from the opportunity to discuss these proposed reforms with senior parliamentary officials who have considerable knowledge of parliamentary reforms in other jurisdictions.

I commend the report to Parliament. I urge Members to take an interest not only in this report, but in the work of the officers of Parliament whose future effectiveness will impact on the effectiveness of Parliament.

Hon. Christine Campbell, MP
Chair
Chapter 1: Officers of Parliament inquiry

Following representations from the Auditor-General that his role, functions and powers and his relationship to Parliament be clarified, the Public Accounts and Estimates Committee of the 54th Parliament commenced an inquiry into:

- an appropriate legislative framework for Victorian independent officers of Parliament such as the Ombudsman, the Auditor-General and other statutory office holders, that would recognise the special position of officers of Parliament in terms of their relationship with the Victorian Parliament but which also ensure that their greater autonomy is accompanied by very clear accountability requirements; and

- developments in this area in other jurisdictions.

The inquiry was advertised and the former PAEC made substantial progress, taking evidence from a range of stakeholders. However, in late 1999, the government made substantial changes to the Audit Act 1994 and the Constitution Act 1975 to improve the functional independence of the office of the Auditor-General. In light of these developments, the Premier suggested to the former PAEC that it postpone the inquiry until the commencement of the 55th Parliament to allow sufficient time for the new arrangements to be effected, and any deficiencies to be identified. The former Committee agreed because, at that stage, the Auditor-General was the only independent officer of Parliament.

On 8 April 2003, the Constitution (Parliamentary Reform) Act was enacted which provided that the Ombudsman and the Electoral Commissioner became independent officers of Parliament. These positions, including the Auditor-General, are now enshrined in Victoria’s Constitution. In relation to the Auditor-General, the processes for appointment, tenure, remuneration, suspension, dismissal and discretion in the performance or exercise of the functions and powers of that office, are outlined in the Constitution Act and can only be altered if amending legislation is passed by both Houses of Parliament and approved by the majority of electors at a referendum. This is different to the arrangements applying to the Ombudsman and the Electoral Commissioner. In their case, the Constitution Act only specifies the arrangements relating to their discretion in the performance or exercise of their functions or powers and suspension and dismissal arrangements. All other arrangements are specified in their enabling legislation.

The Public Accounts and Estimates Committee of the 55th Parliament resolved to continue the original inquiry, but decided to let some time elapse to allow the new officers of Parliament time to experience working within the new legislative framework, and then identify any further changes needed to strengthen the functional independence of their offices.
Chapter 2: Characteristics of independent officers of Parliament

The Committee’s review found that the title ‘officer of Parliament’ is ambiguous. Traditionally, it has been applied to employees of the Parliamentary Departments such as the Clerk of the Legislative Assembly and the Clerk of the Legislative Council and other senior officers. The Committee’s inquiry focused on a second set of positions that also fall into the category of independent officers of Parliament. These officers exist to assist Parliament, mainly in relation to its scrutiny and accountability functions, but also to protect the rights of individuals in relation to government information and fair and free elections.

The existing officers of Parliament in Victoria are assigned broad categories of tasks: the Auditor-General has the role of reviewing government spending and related management practices; the Ombudsman investigates complaints relating to the Victorian public sector and police; and the Electoral Commissioner oversees the state elections and by-elections for the Victorian Parliament.

Some witnesses suggested that the list of independent officers of Parliament should be expanded to include other statutory officers such as the Privacy Commissioner, the Director of Public Prosecutions, the Surveyor-General and the Building Commissioner, on the basis that these positions needed to be more independent, or have the appearance of greater independence. After reviewing developments in other jurisdictions, both in Australia and overseas, and after taking evidence from authoritative parliamentary officers, the Committee considers the categorisation of officers of Parliament depends on whether the functions and responsibilities of a particular office-holder are primarily directed to serving the interests of Parliament rather than the executive government. In other words, are the functions and responsibilities of an office-holder concerned with independent review or scrutiny of the implementation of executive government policy on behalf of Parliament, or do they constitute, even with a clear and vital independent status, an inherent element of the policy framework of the government or have a judicial role. The Committee’s review identified that a number of the abovementioned officers had roles which were predominantly regulatory, judicial, advisory or involve advocacy. The Committee considers that these officers do not meet the core criteria for classification as an officer of Parliament.

Chapter 3: Officers of Parliament – developments in other jurisdictions

The concept of independent officers with an institutional relationship with Parliament is found in other Australian Parliaments, and in several Commonwealth countries, such as New Zealand, Canada, and the UK.

These positions have been created, however, with little attempt made to formulate common principles for their relationship with Parliament, or to find a generic term for them. In Canada, for example, terms used to describe officers of Parliament include
‘constitutional officers’, ‘independent parliamentary agencies’ and ‘legislative officers’, while in Scotland they are referred to as ‘parliamentary officers’.

The Committee observed that in the majority of cases, the Auditor-General and the Ombudsman are the core independent officers of Parliament, but in some provinces in Canada, the term has been extended to cover some statutory office-holders, such as the Children’s Commissioner and the Privacy Commissioner who both perform an advocacy role.

Developments in New Zealand were of particular interest to the Committee. The New Zealand Parliament has formalised the arrangements to define, protect and enhance the position of officers of Parliament. That Parliament has adopted a number of recommendations on criteria that apply to the creation of an officer of Parliament and related funding and accountability issues associated with the designated positions.

While no consistent approach to independent officers of Parliament has been adopted by Parliaments either overseas or in Australia, there is a clear trend towards these officers being:

- established in a generally standard way by an Act of Parliament;
- appointed and dismissed with parliamentary involvement;
- oversighted by a statutory parliamentary committee which is also responsible for budget approval; and
- required to report to a specific parliamentary committee.

Chapter 4: Framework to ensure the accountability and independence of officers of Parliament

The Committee considers that there are five structural features that determine the independence and accountability relationships of independent officers of Parliament and their agencies:

- the nature of the mandate of the office/agency, including how it is defined initially and how it is updated periodically;
- the provisions respecting the appointment, tenure and removal of the leadership of the agency;
- the processes for deciding budgets and staffing for the agency;
- whether the agency is free to identify issues for study and whether it can compel the production of information; and
- the reporting requirements for the agency and whether its performance is monitored.
These structural features are very important in determining the nature of the interactions among the three key institutions – the political and administrative executive, Parliament, and officers of Parliament.

The Committee’s review highlighted a number of inconsistencies in the current legislative arrangements regarding the operations of the three independent officers of Parliament in Victoria:

- the period of appointment;
- the process for appointment;
- budgets and staffing;
- reporting arrangements; and
- parliamentary review of the activities of officers of Parliament.

With the exception of direct involvement of Parliament, or its delegate, in determining the remuneration of the Auditor-General and in approving the annual budget for his/her office, all the essential characteristics for the Auditor-General to be an independent officer of Parliament are now reflected in the current Audit Act or in the Constitution Act. This is not the case, however, with the Ombudsman and the Electoral Commissioner both of whom exhibit few of the core characteristics of an officer of Parliament. Further the present legislative framework applying to those officers does not reflect that their primary relationship in terms of responsibility and accountability should be with Parliament. The Committee considers that legislative changes need to be made to recognise and reinforce the primacy of that relationship.

The Committee has made a number of recommendations about the key criteria that should be in place for establishing the legislative framework to apply to all Victorian independent officers of Parliament. By addressing the conspicuous gaps in the current legislative framework, the process of separating these officers from policy direction or influence of the executive government would be complete, and would clearly establish the important and essential link between the office-holder and Parliament. The proposed arrangements would also ensure that the operations of these officers are more accountable and transparent to the Parliament. The Committee considers that this will not compromise the independence or autonomy of the officers of Parliament.

As previously mentioned, the Auditor-General is appointed for a seven year period. A change to this arrangement would require an amendment to the Constitution Act 1975 and approval by the majority of electors voting at a referendum. The Public Accounts and Estimates Committee is aware that the term of the current Auditor-General will expire on 19 September 2006, shortly before the state election on 25 November 2006, making it difficult to co-ordinate the Auditor-General’s recruitment and appointment process with the mid election cycle of Parliament so as to avoid any perception that the appointment could be politicised in the run-up to the election. The Committee acknowledges the significant legislative impediment to changing the period of the
Auditor-General’s appointment, and therefore makes no proposal to amend the current arrangements.

The Committee considers that the Constitution Act should specify those officers that are designated as officers of Parliament, and outline the core principles that underpin their operations. Their enabling legislation should contain detailed information about the arrangements for appointment, tenure, remuneration, suspension and dismissal, reporting responsibilities to Parliament, external review processes, selection of acting officers of Parliament, and staffing.

Finally, the Committee has recommended the following principles should guide the Parliament and the Victorian Government in relation to appointing further officers of Parliament:

- an officer of Parliament must be created only to provide a check on the executive’s use of power;
- an officer of Parliament must discharge only those functions that the Victorian Parliament, if it so wished, might carry out;
- Parliament should consider creating an officer of Parliament only on rare occasions; and
- Parliament should from time to time review the appropriateness of each officer of Parliament’s status.
RECOMMENDATIONS

The Committee recommends that:

Chapter 4: Framework to ensure the accountability and independence of officers of Parliament

Recommendation 1: The legislation relating to each officer of Parliament be amended to provide that both Houses of the Victorian Parliament pass a resolution appointing the Auditor-General, the Ombudsman and the Electoral Commissioner, based on the recommendation of the appropriate parliamentary committee.

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Recommendation 2: The legislation relating to each officer of Parliament be amended to provide that the appropriate parliamentary committee be responsible for reviewing and recommending the remuneration and allowances of independent officers of Parliament. The process should be transparent, with the relevant committee reporting to Parliament on the outcomes of its deliberations.

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Recommendation 3: The enabling legislation relating to the Ombudsman and the Electoral Commissioner be amended to provide that these officers of Parliament be appointed for an initial period of eight years, with the option of Parliament, or its delegate, extending the appointment if practicable into the middle of the next election cycle.

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Recommendation 4: The recruitment and appointment process for officers of Parliament should be finalised well in advance of the state election and, as close to the middle of the election cycle, as practicable.

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Recommendation 5: No officers of Parliament should be eligible to take up a position within the Victorian public sector until after a period of at least two years from the completion of their appointment as an officer of Parliament.

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Recommendation 6:

(a) The legislation relating to the Ombudsman and the Electoral Commissioner be amended to provide consistency with the procedures for removing or dismissing these officers of Parliament and for consultation with the relevant parliamentary committee before any action is taken.

(b) The procedures be based on the arrangements applying to the Auditor-General.

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Recommendation 7: The legislation relating to each officer of Parliament be amended to provide that:

(a) the Public Accounts and Estimates Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Auditor-General and his/her office;

(b) the Public Accounts and Estimates Committee, or another designated Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Ombudsman and his/her office; and

(c) the Electoral Matters Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Electoral Commissioner and his/her office.

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Recommendation 8: The legislation governing the operations of officers of Parliament explicitly state that Parliament and its parliamentary committees cannot direct these officers of Parliament on operational matters but can request them to undertake specific investigations.

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Recommendation 9: The Ombudsman’s and the Electoral Commissioner’s enabling legislation be amended to provide that both officers and their agencies are subject to an independent external performance review every four years and that Parliament, on the recommendation of the appropriate parliamentary committee, appoint an appropriate person to undertake the review and determine the terms and conditions of the appointment.

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Recommendation 10: The Audit Act 1994 be amended to provide that the independent performance audit of the Victorian Auditor-General’s Office be undertaken every four years, consistent with the provisions recommended for the Ombudsman and the Electoral Commissioner.

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Recommendation 11: The costs involved in undertaking performance reviews of the three officers of Parliament be appropriated from the budget of Parliament and reimbursed from the Consolidated Fund.

Page 79
Recommendation 12: The legislation relating to each officer of Parliament be amended to provide:

(a) that the appropriate parliamentary committee has a role in reviewing and advising Parliament of the budget estimates for particular officers of Parliament; and

(b) the appropriate parliamentary committee table in Parliament its report on the forthcoming appropriation for the relevant officers of Parliament and forward a copy to the Treasurer.

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Recommendation 13: The appropriate parliamentary committees be given legislative authority to exempt, if necessary, the Ombudsman and the Electoral Commissioner from any administrative requirement specified in the Public Administration Act.

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Recommendation 14: The legislation relating to each officer of Parliament be amended to provide that the appropriate parliamentary committee be involved in recommending long term acting officers of Parliament.

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Recommendation 15:

(a) The Constitution Act 1975 specify the independent officers of Parliament and outline the core principles that underpin their operations.

(b) The enabling legislation for each officer of Parliament detail arrangements for their remuneration, appointment and dismissal, the selection of acting officers of Parliament, staffing and the officer’s relationship with Parliament and appropriate parliamentary committees.

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Recommendation 16: The Parliament, or the appropriate parliamentary committees, should be consulted before any legislation to create any further officers of Parliament is introduced in Parliament. This will ensure the legislative framework governing the appointment and removal of such officers, their financing and resourcing, and their accountability arrangements and relationship with Parliament are consistent with the expectations of the core criteria for officers of Parliament.

Recommendation 17: The following principles be adopted for the creation of new officers of Parliament:

(a) an officer of Parliament must be created only to provide a check on the executive’s use of power;

(b) an officer of Parliament must discharge only those functions that the Victorian Parliament, if it so wished, might carry out;

(c) Parliament should consider creating an officer of Parliament only on rare occasions; and

(d) Parliament should from time to time review the appropriateness of each officer of Parliament’s status.
CHAPTER 1: OFFICERS OF PARLIAMENT INQUIRY

1.1 Introduction

A fully functioning and successful parliamentary democracy owes much to the accountability mechanisms in place that provide for transparent scrutiny of its operations. Independent officers of Parliament play a key role in the accountability framework by supporting Parliament in its scrutiny of the executive government.

Victoria’s Constitution identifies three independent officers of Parliament: the Auditor-General; the Ombudsman; and the Electoral Commissioner. A number of other independent statutory officers also have a close relationship with Parliament, such as the Public Advocate and the Privacy Commissioner. The Public Accounts and Estimates Committee’s inquiry revealed, however, that the term ‘officer of Parliament’ is ambiguous, and there is no consistent approach to the legislative arrangements that underpin the operations of these independent officers.

1.2 Background to the inquiry

Before the 1999 state election, the Labor Party made an election commitment to Victorians to strengthen the role of the Auditor-General. In particular, it was proposed:

Labor will strengthen our democratic system by restoring the independence of our key public watchdogs.

Prior to the implementation of this proposal, the Auditor-General wrote to the Public Accounts and Estimates Committee of the 54th Parliament, requesting that the roles, powers and functions of the Auditor-General, and the relationship between the Auditor-General and Parliament, be clarified.

On 15 April 2000, following a briefing by the Auditor-General on these issues, the Committee resolved to undertake an inquiry into these matters and adopted the following terms of reference:

The Committee is to consider and report on:

- an appropriate legislative framework for Victorian independent officers of Parliament such as the Ombudsman, the Auditor-General and other statutory office holders, that would recognise the special position of statutory officers of Parliament in terms of their relationship with the Victorian Parliament but which also ensure that their greater autonomy is accompanied by very clear accountability requirements; and

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2 Constitution Act 1975, as amended, ss.94B, 94E, 94F
3 Labor, New Solutions, A Better Government. Integrity in Government, 1999, paragraph 10.2
• developments in this area in other jurisdictions.

The inquiry was advertised in *The Australian* and *The Age* newspapers. Notification of the inquiry, with a view to seeking a submission, was also forwarded to the following statutory officers and other office-holders:

- the Victorian Auditor-General
- the Building Control Commissioner
- the Electoral Commissioner
- the Commissioner for Public Employment
- the Legal Ombudsman
- the Mining Warden
- the Victorian Ombudsman
- the Public Advocate
- the Director of Public Prosecutions
- the Regulator-General (now the Essential Services Commissioner)
- the Presiding Officers of Parliament.

The Committee received 11 written submissions. Appendix 1 lists the submissions received and provides details of individuals and organisations that gave evidence or provided additional material.

In preparing this report, the Committee has drawn heavily on the material and views presented through submissions, public hearings and private briefings. The Committee is grateful for this valuable input. It is also grateful for the advice received from persons with expertise in the areas reviewed.

The cost of this inquiry is estimated at $40,233.

### 1.3 Postponement of the inquiry

A number of developments resulted in the postponement of this inquiry. First, in late 1999, the government made significant changes to the *Audit Act* 1994 and the *Constitution Act* 1975,\(^5\) which gave greater functional authority to the Auditor-General. In light of these developments, the Premier suggested to the former Committee that it delay its inquiry until the commencement of the 55th Parliament, allowing sufficient time for the new arrangements to be effected and any deficiencies

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4. Letter, dated 18 April 2000, from Mr P Loney, MP, Chair of the Public Accounts and Estimates Committee of the 54th Parliament

5. See *Audit (Amendment) Act* 1994, as amended, (no.53 of 1999)
to be identified. The Committee agreed because, at that stage, the Auditor-General was the only independent officer of Parliament.

After the appointment of members to the Public Accounts and Estimates Committee of the 55th Parliament on 27 March 2003, the Committee resolved to continue with the inquiry.

Second, on 8 April 2003 the Constitution (Parliamentary Reform) Act 2003 was enacted, which provided that the Ombudsman and the Electoral Commissioner became independent officers of Parliament.

In relation to the Auditor-General, the processes for appointment, tenure, remuneration, suspension and dismissal and discretion in the performance or exercise of the functions and powers of that office are outlined in the Constitution Act and can only be altered if amending legislation is passed by both Houses of Parliament and approved by the majority of electors at a referendum. This is different to the arrangements applying to the Ombudsman and the Electoral Commissioner. In their case, the Constitution Act only specifies the arrangements relating to their discretion in the performance or exercise of their functions or powers and dismissal arrangements. All other arrangements are specified in their enabling legislation.

At the time the Constitution (Parliamentary Reform) Bill was given its second reading, the Premier stated:

_This means these important office-holders will be responsible to the Parliament, not the government, and can only be dismissed by the Parliament._

Third, Dr Barry Perry (then Ombudsman) fell ill in April 2003 and Mr Robert Seamer was appointed as Acting Ombudsman for almost a year. Mr George Brouwer (the current Ombudsman) was appointed in March 2004. Given that 2003-04 was a time of significant organisational and legislative changes for the office of the Ombudsman, the Committee deferred taking evidence from Mr Brouwer until February 2005. This timing gave him an opportunity to experience working within the legislative framework and made it possible to identify any changes needed to strengthen the functional independence of that office.

The structure of this report reflects the terms of reference for the Committee’s inquiry.

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6 Letter, dated 4 December 2000, from Hon. S Bracks, MP, Premier of Victoria
7 See Act no.2 of 2003, ss.94E, 94F
8 Constitution Act 1975, as amended, s.18 (IB)(n)
9 ibid., ss.94E, 94F
10 See Ombudsman Act 1973, as amended ss.3–5; Electoral Act 2002, as amended, ss.12, 14, 16
11 Constitution (Parliamentary Reform) Bill 2003, Legislative Assembly Hansard 27 February 2003, p.162
CHAPTER 2: CHARACTERISTICS OF INDEPENDENT OFFICERS OF PARLIAMENT

Key findings of the Committee:

2.1 There has been some confusion about the term ‘officer of Parliament’ but this has now been resolved with the enactment of the Parliamentary Administration Act 2005.

2.2 The concept of officers of Parliament has developed over the past 30 years and these officers now play a valuable role in assisting Parliament to undertake a more active scrutiny and accountability role.

2.3 The Auditor-General was the only independent officer of the Victorian Parliament until 2003, when the Ombudsman and the Electoral Commissioner were also appointed as officers of Parliament.

2.4 Other independent watchdogs, such as the Director of Public Prosecutions, the Public Advocate, the Children's Commissioner, the Commissioner for Environmental Sustainability and the Legal Ombudsman exhibit some characteristics of officers of Parliament but do not undertake functions similar to those undertaken by Parliament.

2.5 The Ombudsman and the Electoral Commissioner have the key characteristics of the officer of Parliament model, and also have the title enshrined in the Constitution, but they have few formal links to the Victorian Parliament which would ensure their accountability and independence.

2.1 Introduction

This chapter explains the concept of officers of Parliament and outlines the current arrangements applying to Victorian officers of Parliament.

2.1.1 The origins of the officer of Parliament concept

In a number of Westminster style Parliaments, the role of officers of Parliament has developed over the last 30 years, partly because traditional notions of ministerial responsibility have declined, but also because the process of government became more
widespread, complex and difficult for citizens to access. These roles have emerged to assist Parliament undertake more active scrutiny and accountability tasks.\textsuperscript{12}

The term officer of Parliament rarely appears in legislation and has never been subject to judicial interpretation. Its origin is linked to the UK Parliament, and the authoritative guide to parliamentary procedure and practice, Erskine May, gives the fullest description of the applicability of the term, but does not offer a definition.\textsuperscript{13} The term is used as a means to denote that some statutory office holders have a special relationship with Parliament and to emphasise those officers’ independence from the executive government.\textsuperscript{14} Historically, auditors-general and ombudsmen have been regarded as the core officers of Parliament, with the main role of investigating the actions of the executive government and, in some cases, protecting the various rights of individual citizens. Recently, Electoral Commissioners have been included in this category, on the basis that their office protects fairness in elections on behalf of Parliament and its electors.

The Committee’s research revealed that the term ‘officer of Parliament’ is imprecise and can be confused with employees of the parliamentary departments, who were defined as ‘officers of Parliament’ in section 3 of the \emph{Parliamentary Officers Act} 1975.\textsuperscript{15} The Committee is aware that the \emph{Parliamentary Administration Act} 2005, which the Victorian Parliament recently passed, repealed the Parliamentary Officers Act, therefore making it clear that the term ‘officer of Parliament’ does not refer to the staff of the Parliamentary Departments.

\section*{2.1.2 The constitutional officers of Parliament}

At present, only three constitutional positions (two of which are commonly referred to as ‘watchdogs’) are formally classified as independent officers of Parliament. Only a referendum can change the provisions contained in the Constitution Act relating to these three independent officers of Parliament.\textsuperscript{16}

As the following information shows these three officers have quite different functions and arrangements regarding their accountability and independence.

\subsection*{(a) Auditor-General – functions and operational arrangements}

The Auditor-General scrutinises public spending on behalf of Parliament. He/she certifies the financial accounts of all government departments and a wide range of other public sector bodies. The Auditor-General also has a statutory mandate to report

\begin{itemize}
  \item For further information see \textit{UK House of Commons, Parliamentary Library Research Paper 03/77, Officers of Parliament – A Comparative Perspective}, 20 October 2003
  \item \textit{Erskine May, Parliamentary Practice}, Twenty-third edition, 2004, p.245
  \item ibid.
  \item Also raised by Professor C Clark, transcript of evidence, p.24
  \item \textit{Constitution Act} 1975, as amended, s.18(1B)
\end{itemize}
to Parliament on the economy, efficiency and effectiveness with which departments and other bodies have used their resources.\textsuperscript{17}

The Victorian Auditor-General became an independent officer of Parliament under amendments to the Audit Act introduced in 1997.\textsuperscript{18} While no specific reference to the practical effects of this action was included in the legislation, the then Premier in the second reading speech stated: \textsuperscript{19}

\begin{quote}
\textit{The intention behind this is to enshrine the relationship between the Auditor-General and the Parliament as the Auditor-General’s principal client.}
\end{quote}

The 1997 legislative amendments dealing with the independence of the Auditor-General followed the approach taken by the Commonwealth Government in its \textit{Auditor-General Act 1997}. The explanatory notes accompanying this legislation identified that:

\begin{quote}
\textit{...the independence of the office (of the Auditor-General) and its special relationship to Parliament is served and highlighted by declaring the Auditor-General to be an Independent Officer of the Parliament, but without any compromise to the functional independence of the office.}\textsuperscript{20}
\end{quote}

One immediate benefit of the 1997 legislative changes in Victoria was that the Auditor-General’s Office was no longer linked to the Department of Premier and Cabinet for budgetary and administrative matters. Since then, the Office has been assigned its own appropriation within the parliamentary framework and its budget estimates are included in the annual Appropriation (Parliament) Act.

The Auditor-General advised the Committee that these new arrangements did little to strengthen the independence of the Office: \textsuperscript{21}

\begin{quote}
\textit{While designation as an officer of Parliament under the 1997 amendments could be viewed as enhancing the perceived independence of the Victorian Auditor-General, it did little by itself to increase the actual independence of the position or reinforce, in a practical sense, the relationship of the position with the Parliament.}
\end{quote}

However, the legislative amendments which took effect from 1 January 2000 brought about major changes. These changes have:\textsuperscript{22}

\textsuperscript{17} \textit{Audit Act} 1994, as amended, s.15(1)
\textsuperscript{18} Act no. 93 of 1997
\textsuperscript{19} Hon. J Kennett, MP, Premier, Legislative Assembly \textit{Hansard}, 30 October 1997, p.897
\textsuperscript{20} Quoted in the submission from Mr W Cameron, Victorian Auditor-General, p.2
\textsuperscript{21} Mr W Cameron, Victorian Auditor-General, submission
\textsuperscript{22} \textit{Constitution Act} 1975, as amended, ss.94A–94C
• enshrined provisions relating to the appointment, independence and tenure of the Auditor-General in the Victorian Constitution Act. The Auditor-General is appointed for seven years and can be re-appointed;

• restored the discretionary power of the Auditor-General to carry out audits by in-house staff or by contractors as the Auditor-General considers appropriate; and

• strengthened the relationship between the Auditor-General and Parliament, and the accountability of the Auditor-General to Parliament.23

The changes within the latter category generally broaden the role of the Public Accounts and Estimates Committee on matters relating to the Auditor-General and the operations of the Office. In the second reading speech to the Audit (Amendment) Bill, the Premier stated that:24

“These changes strengthen the accountability of the Auditor-General to the Parliament and enhance the power of the Parliament over the Executive.

Under the amendments, the Public Accounts and Estimates Committee has been assigned a specific role in:25

• recommending to the Governor in Council appointments to the position of Auditor-General;

• providing advice to the Auditor-General on the Victorian Auditor-General's Office (VAGO) annual work plan;

• being consulted on the Auditor-General’s budget; and;

• exempting the Auditor-General from any legislative requirements applicable to government agencies concerning financial management and reporting practices and employment conditions where necessary.

Amendments to the Audit Act in 1999 also required the Auditor-General to present an annual report on the operations of the VAGO directly to Parliament. Previously, the annual report was presented to Parliament via the Premier, as the designated responsible Minister.26

Further legislative amendments were made to the Audit Act in June 2003 which the government stated would:

• enhance the independence of the Auditor-General;

• strengthen the accountability arrangements of the VAGO; and

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23 Audit Act 1994, as amended, s.7A
24 Hon. S Bracks, MP Premier, Legislative Assembly Hansard, 11 November 1999, p.366
25 Audit Act 1994, as amended, ss.7A–7D; Constitution Act 1975, as amended, s.94A(2)
26 Audit Act 1994, as amended, s.7B(1)(c)
• clarify the scope of the Auditor-General’s powers, duties and functions.\textsuperscript{27}

Major changes included:\textsuperscript{28}

• the Auditor-General can now table audit reports when Parliament is not sitting, avoiding delays in the public disclosure of matters in audit reports;
• the Auditor-General’s mandate now encompasses all entities that the state controls;
• the Auditor-General is explicitly empowered to examine instances of waste, probity or lack of financial prudence in the use of public resources;
• the Auditor-General can now audit the financial statements of a non-public body, if invited, and if the Auditor-General considers it is practical and in the public interest; and
• the Auditor-General must indicate in his annual plan tabled in the Parliament the nature of any changes to the plan suggested by the Public Accounts and Estimates Committee but not adopted by the Auditor-General.

(b) Ombudsman – functions and operational arrangements

The Ombudsman’s Office was established under the \textit{Ombudsman Act} 1973. The Victorian Ombudsman investigates complaints about actions taken and decisions made by a broad range of Victorian government departments, authorities and local councils and Victoria Police. The Ombudsman’s role is not only to review the lawfulness of agencies’ actions or decisions, but also the reasonableness and fairness of these actions in all circumstances.\textsuperscript{29} During the past 30 years, the jurisdiction of the Ombudsman has been extended to include:\textsuperscript{30}

• investigating freedom of information complaints and other matters under the \textit{Freedom of Information Act} 1982; and
• investigating and overseeing investigations under the \textit{Whistleblower’s Protection Act} 2001.

The \textit{Ombudsman Legislation (Police Ombudsman) Act} 2004 replaced the position of Deputy Ombudsman (Police Complaints) with the Police Ombudsman. This legislation enables the Police Ombudsman to initiate investigations and also gave the Police Ombudsman powers comparable to those that can be exercised by a royal commission. Later, the \textit{Major Crime Legislation (Office of Police Integrity) Act} 2004 extended the role of the Ombudsman to include the Director of Police Integrity.

\textsuperscript{27} Hon. J Brumby, MP, Treasurer, Legislative Assembly \textit{Hansard}, 1 May 2003, p.1300
\textsuperscript{28} \textit{Audit Act} 1994, as amended, ss.16AB,7A(5), 16G, 28, 3A, 3, 16E, 16G
\textsuperscript{29} The Ombudsman Victoria, \textit{2003-04 Annual Report}, p.2
\textsuperscript{30} ibid., p.8
Several commentators have argued that it is necessary for an Ombudsman to have the utmost level of independence, free from external executive influence.\textsuperscript{31} Although the Constitution Act 1975 provides that the Ombudsman is an independent officer of Parliament, no aspects of the selection or appointment process are the responsibility of Parliament. The Ombudsman Act provides that the Governor in Council (in effect the government) appoints the Ombudsman, but is silent on the selection process.\textsuperscript{32}

The Ombudsman is appointed for a term of ten years, and there are no provisions in the Ombudsman Act to provide for re-appointment.\textsuperscript{33} Section 5(1) of the Ombudsman Act 1973 provides that the salary for the Ombudsman is determined by the Governor in Council and appropriated from the consolidated fund. However, the budget for the Ombudsman’s staff and office requirements are considered to be part of the output funding arrangements for the Department of Premier and Cabinet and are subject to the usual departmental budgetary processes.

The Victorian Ombudsman assured the Committee that there had been no difficulties in obtaining funding and resources from the Department of Premier and Cabinet.\textsuperscript{34} Several submissions and witnesses\textsuperscript{35} pointed out to the Committee a potential conflict of interest, however, as the department that provides funding to the Ombudsman was in fact the subject of investigations by the Ombudsman in relation to freedom of information requests and other complaints.\textsuperscript{36}

This arrangement is not unique to Victoria but also applies in some other jurisdictions such as the Commonwealth. The Tasmanian Ombudsman’s Office drew the Committee’s attention to the following views of Mr David McGee, Clerk of the New Zealand House of Representatives:\textsuperscript{37}

\textit{It cannot be said that the credibility of the Ombudsman office has ever been affected by the improper influence of executive government. Indeed, executive governments... have shown by their actions that they have respected its independence. The point is, however, the potential for interference was always there and, for the public’s confidence in the impartiality of the Office, it has to be seen to be independent.}

\textsuperscript{31} See for example the article, The Commonwealth Ombudsman. Time for Independence?; Mr T Walter, Office of the Tasmanian Ombudsman, submission; Tasmanian Ombudsman 2004-05 Annual Report, p.8
\textsuperscript{32} Ombudsman Act 1973, as amended, s.3(2)
\textsuperscript{33} ibid., s.3(4)
\textsuperscript{34} Dr B Perry, former Victorian Ombudsman, transcript of evidence, p.32; Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.6
\textsuperscript{35} For example, Dr B Perry, transcript of evidence, p.49; briefing by Mr R McLeod, Commonwealth Ombudsman; Mr H Evans, Clerk of the Senate; Sir B Elwood, Chief Ombudsman New Zealand; Mr T Walter, Office of the Tasmanian Ombudsman, submission
\textsuperscript{37} Mr T Walter, Office of the Tasmanian Ombudsman, submission
The Committee heard from some witnesses that it was essential that the Ombudsman be given the legislative framework that would provide an appropriate balance in ensuring his independence and accountability to Parliament. The previous Ombudsman acknowledged that the legislative framework for his Office needed to not only ensure his independence but the perception of independence.

(c) Electoral Commissioner – functions and operational arrangements

The Office of the Electoral Commissioner was established in 1988 with the passage of the Constitution Act Amendment (Electoral Reform) Act 1988. The purpose of this legislation was to ensure that the conduct of elections was under the control of an independent officer, rather than a public servant subject to a Minister’s direction. The Constitution Act was amended in 2003 to provide that the Electoral Commissioner became an independent officer of Parliament.

The Electoral Act does not require Parliament or the Leader of the Opposition to be consulted prior to recommending an appointment to the Governor in Council. The Commissioner is appointed for ten years and may be re-appointed. The budget for the Electoral Commission is provided as part of the budget allocation of the Department of Justice.

The then Electoral Commissioner advised the Committee that:

The Electoral Commissioner has considerable independence in the exercise of statutory duties including the maintenance of electoral rolls, the preparation for elections, the conduct of elections, and the day to day management of the Victorian Electoral Commission.

The level of independence is clearly understood, respected and observed by all of the key stakeholders in Victoria’s elections. During my time as Electoral Commissioner, and in my former position as Deputy Electoral Commissioner, I am able to comment that, without exception, Victorian Governments have never attempted to interfere with the independent decision making of the Electoral Commissioner. There is a well accepted convention that in order for Victoria to have fair and impartial elections, the Electoral Commissioner must be able to operate and be seen to operate without any influence from the Executive.

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38 Briefing by Mr R McLeod, Commonwealth Ombudsman; Sir B Elwood, Chief Ombudsman New Zealand; Dr B Perry, transcript of evidence, p.47; Mr T Walter, Office of the Tasmanian Ombudsman, submission, pp.2–7
39 Dr B Perry, former Victorian Ombudsman, transcript of evidence, p.49
40 Constitution Act 1985, as amended, s.94F
41 Electoral Act 2002, as amended, s.12(2)
42 Mr C A Barry, Electoral Commissioner, submission, p.3
Successive Attorneys-General have accepted the convention that, whilst they have responsibilities to Parliament for the Act, it is the Electoral Commissioner who is responsible for the conduct and administration of elections and for the day to day decision making at the Victorian Electoral Commission.

(d) Conclusion

There are considerable inconsistencies in the legislation appointing independent officers of Parliament and in providing for the operations of the respective offices. To ensure their independence and accountability, the Committee considers that common principles need to be developed and included in legislation.

(e) Other statutory watchdogs

The Committee received evidence that several other officers such as the Building Control Commissioner and the Surveyor General, should be appointed as officers of Parliament.43

The Committee's research identified a number of bodies which have some characteristics of the officer of Parliament model, without having been accorded the title in legislation or by convention. Some of these bodies have been established in statute and have constitutional safeguards (such as restrictions on dismissal, or the right to report to Parliament) but do not have enough characteristics to be described as officers of Parliament, for example the Director of Public Prosecutions.44

2.1.3 Criteria for defining an officer of Parliament

The Committee’s research revealed that with the exception of New Zealand, no Australian jurisdiction or the overseas countries that the Committee reviewed, had developed a consistent set of principles to define an officer of Parliament (see chapter 3). In 1989 the Finance and Expenditure Committee of the New Zealand Parliament developed five criteria for creating an officer of Parliament:45

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43 See for example correspondence, dated 6 and 12 September 2002, from Hon. D Davis, MLC, forwarding correspondence from Mr M Malouf, Chief Executive Officer, City of Melbourne; Mr J Ross, Director Physical Services; Mr A Middleton; Mr B Hill; Mr M Toll, Managing Director, Land Management Surveys (Shepparton) P/L; C E Middleton; Mr D Mitchell, Lecturer, Department of Geopatial Science, RMIT University; Mr M Croxford, Building Control Commissioner
44 Constitution Act 1975, as amended, s.87AE
• an officer of Parliament must only be created to provide a check on the use of power by the Executive;
• an officer of Parliament must only be discharging functions which the House of Representatives itself, if it so wished, might carry out;
• Parliament should consider creating an officer of the Parliament only rarely;
• the House of Representatives should from time to time review the appropriateness of each officer of Parliament’s status; and
• each officer of Parliament should be created in separate legislation principally devoted to that position.

The reasoning behind the second criteria was that statutory office holders with judicial powers would not be appropriate as officers of Parliament, since Parliament itself does not have these powers.

2.1.4 The role of an officer of Parliament

Evidence received by the Committee confirms that an officer of Parliament’s primary function is to act as a check on executive government, as part of Parliament’s constitutional role of ensuring the executive’s accountability.\textsuperscript{46} The Clerk of the New Zealand House of Representatives advised the Committee that an officer of Parliament must undertake functions that Parliament itself would undertake. He emphasised that this rules out a purely judicial role for an officer of Parliament, because the Parliament has legislative and investigative functions, not judicial functions.\textsuperscript{47}

The Committee noted that the roles of some independent statutory office holders have a judicial function, for example the Director of Public Prosecutions, or have executive responsibilities to perform, for example the Building Control Commissioner and the Surveyor-General,\textsuperscript{48} or a regulatory role, such as the Essential Services Commissioner, or an advocacy and advisory role such as, the Public Advocate,\textsuperscript{49} rather than having to investigate the actions of the executive. The Committee considers that these positions primarily serve the interests of executive government even though they require autonomy and independence to effectively carry out their responsibilities.

For the purposes of this inquiry, the Committee has focused on the three constitutional independent officers of Parliament – the Auditor-General, the Ombudsman, and the Electoral Commissioner, who primarily serve the interests of Parliament.

\textsuperscript{46} Briefing by Mr H Evans, Clerk of the Senate; Mr D McGee, Clerk of the New Zealand House of Representatives; Rt. Hon. J Hunt, Chairman of the New Zealand Officers of Parliament Select Committee
\textsuperscript{47} Briefing by Mr D McGee, Clerk of the New Zealand House of Representatives
\textsuperscript{49} Public Advocate, 2003-04 Annual Report
CHAPTER 3: OFFICERS OF PARLIAMENT – DEVELOPMENTS IN OTHER JURISDICTIONS

Key findings of the Committee:

3.1 Officers of Parliament need to be contributing to Parliament's core functions, scrutinising the operations of government and enhancing accountability of the executive government to the Parliament.

3.2 The key characteristics of the officer of Parliament model are:
   - established in a generally standard way by an Act of Parliament;
   - parliamentary involvement in appointment and dismissal;
   - a statutory parliamentary committee responsible for budget approval and oversight of officers of Parliament;
   - a specific parliamentary committee to whom the officer of Parliament is required to report.

3.1 Introduction

The second of the inquiry’s term of reference requires the Committee to consider and report on developments with officers of Parliament in other jurisdictions.

The Committee's research revealed that officers of Parliament have been given various forms of institutional frameworks. As these positions have been created, little attempt has been made to develop common principles for their relationship with Parliament or to find a generic term for them. In Canada, for example, terms used to describe officers of Parliament include ‘constitutional officers’, ‘independent parliamentary agencies’ and ‘legislative officers’. In Scotland these officers are referred to as ‘parliamentary officers’.

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50 For further information see UK House of Commons, Parliamentary Library Research Paper 03/77, Officers of Parliament – A Comparative Perspective, 20 October 2003
3.1.1 United Kingdom

There are three constitutional officers of Parliament in the UK:51

- the Comptroller and Auditor General
- the Electoral Commissioner
- the Parliamentary Commissioner for Administration

The Comptroller and Auditor-General is an Officer of the House of Commons, who is appointed by the Queen on an address proposed by the Prime Minister after consultation with the Chairman of the Public Accounts Committee, an opposition backbencher.52 Dismissal can only occur if a petition to the Crown was preceded by a resolution of both Houses. A statutory Public Accounts Commission oversees the budget of the National Audit Office and appoints the independent financial auditor who audits the National Audit Office. The Commission consists of the Chairman of the Public Accounts Committee, the Leader of the House (a Cabinet Minister) and seven other Members of Parliament, none of whom can be Ministers.53

The Comptroller and Auditor-General is not appointed on a fixed term basis, but holds office until retirement.54

Structurally, the Electoral Commissioner is closely modelled on the Comptroller and Auditor General. The Speaker's Committee for the Electoral Commission is a statutory parliamentary committee responsible for the Commission's budget and for approving its forward planning. The Committee is not directly involved in appointing the Electoral Commissioner.55

The Parliamentary Commissioner for Administration (the Ombudsman) has some of the characteristics of an officer of Parliament but not the statutory basis given to the other two officers. Although the Parliamentary Commissioner for Administration reports to a parliamentary committee, she does not have a separate statutory body, as does the Public Accounts Commission and the Speaker's Committee, to ensure financial independence.56

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

52 National Audit Office, 2003 Annual Report, p.1
54 ibid.
55 ibid.
more members of Parliament to be consulted. Each Commissioner is appointed for a maximum of ten years.\textsuperscript{57}

The statute is silent on re-appointments and on the procedure for subsequent appointments. The first Commission members were appointed in January 2001 for a period of four to five years. The Chairman was appointed for six years. The Commissioners may be dismissed on very limited grounds including absence, bankruptcy and only by an address from the House of Commons.\textsuperscript{58}

The Speaker’s Committee consists of the Home Secretary, the Minister for Local Government, the Chair of the Lord Chancellor’s Department Select Committee and several backbenchers. The Speaker chairs the Committee and selects the members for the duration of Parliament.\textsuperscript{59}

There is nothing in the statute to guarantee independence of the Commission from Parliament or from the Executive, but the absence of reserve powers to direct the Commission is significant.\textsuperscript{60}

The Speaker’s Committee supervises the budget of the Public Accounts Commission but does not otherwise play a role in examining its policy objectives. The Treasury has statutory entitlement to comment on the draft budget.\textsuperscript{61}

The Commission is funded from the parliamentary vote, in the same way as the National Audit Office and the House of Commons.

\section*{3.1.2 \textit{New Zealand}}

In 1989 an Officers of Parliament Committee was appointed to manage Parliament’s relationship with the following three officers of Parliament:\textsuperscript{62}

\begin{itemize}
  \item the Comptroller and Auditor-General
  \item the Ombudsman
  \item the Environment Commissioner
\end{itemize}

\begin{flushleft}
\textsuperscript{57} ibid. \\
\textsuperscript{58} ibid. \\
\textsuperscript{59} ibid. \\
\textsuperscript{60} \textit{Erskine May, Parliamentary Practice}, Twenty-third edition, 2004, pp.245–247 \\
\textsuperscript{61} ibid. \\
\textsuperscript{62} Briefing by the New Zealand Officers of Parliament Select Committee; Mr D McGee, Clerk of the New Zealand House of Representatives
\end{flushleft}
The Officers of Parliament Committee is responsible for:  

- determining the budgets for each officer of Parliament;
- considering any government proposal to create new officers of Parliament;
- appointing auditors to undertake audits of the agencies of the officers of Parliament;
- developing codes of practice for managing the relationship between officers of Parliament and the House of Representatives;
- recommending to the House of Representatives on the appointment of officers of Parliament;
- considering the officers of Parliament operating intentions;
- considering draft regulations and instructions relating to the reporting standards of officers of Parliament.

The scrutiny of each officer of Parliament through the estimates and the financial review process is the responsibility of the Finance and Expenditure Parliamentary Committee.

Each statute creating the officer of Parliament gives details of the appointment process, and the appointment is confirmed by parliamentary resolution. The Officers of Parliament Committee plays a major role in this process and formal resolution is unanimous. There is no tradition of confirmation or appointment hearings.

The Officers of Parliament Committee is aware of the importance of fixing funding levels for officers at levels that maintain their independence. It is chaired by the Speaker and there is no government majority as a matter of principle.

These officers can only be dismissed by resolution of Parliament. The Committee was informed that Parliament has taken a cautious line in recommending the creation of additional officers. A report from the Finance and Expenditure Committee in 1989 found that officers had been created on an ad hoc basis to date and proposed some guiding principles for the creation of new officers (see section 2.1.3).

The New Zealand Parliament conformed to these principles in a recent private member’s Bill that attempted to upgrade the existing Children’s Commissioner to an officer. In addition, Mr David McGee, Clerk of the House of Representatives,

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63 Quoted in a paper presented by Mr A Beattie, on Officers of Parliament – the New Zealand Model, at the Australasian Study of Parliament Group Conference, Sydney 2005, p.4
64 ibid.
65 Briefing by Mr D McGee, Clerk of the New Zealand House of Representatives
67 NZ Social Services Committee, Report on Parliamentary Commissioner for Children Bill, p.5
advised against the creation of a new officer during a parliamentary committee hearing of a Bill dealing with energy supply reform.68

3.1.3 Canada

The term ‘parliamentary officer’, or ‘officer of Parliament’, is in general use and describes both senior Parliament staff and constitutional watchdogs with a parliamentary focus. The term is not defined in federal legislation, but standing order 111 of the House of Commons makes specific reference to the concept.69

The federal officers of Parliament are:70

- the Auditor-General
- the Chief Electoral Officer
- the Privacy and Human Rights Commissioners
- the Access to Information Commissioner
- the Official Languages Commissioner

Canada does not have an Ombudsman for the federal government, although the office exists in several provincial legislatures. With the exception of the Auditor-General, officers are appointed or approved by Parliament, thereby meeting one of the core characteristics of the officer of Parliament model.

The Governor-General appoints the Auditor-General for a ten year term, and other appointments are made by resolution of one or both Houses. The Chief Electoral Officer is appointed by the House of Commons only until retirement. There is no standard term for all officers, but seven year terms are usual, and re-appointment is possible. Suitable candidates are identified within government, with soundings from opposition parties rather than from parliamentary involvement.

All officers are required to make an annual report to Parliament, but the extent of engagement with Parliament varies considerably. The Auditor-General has a close working relationship with the Public Accounts Committee, but this Committee lacks the powers available to equivalent committees in the United Kingdom, Australia, Victoria and New Zealand to have input into the work program of the Auditor-General.

68 Briefing by Mr D McGee, Clerk of the New Zealand House of Representatives
69 For further information see UK House of Commons, Parliamentary Library Research Paper 03/77, Officers of Parliament – A Comparative Perspective, 20 October 2003, pp.22–26
70 ibid.
The Chief Electoral Officer has a close relationship with Parliament, appearing before a number of committees.

More informal contact has also occurred as members of Parliament have become one of the largest users of the *Access to Information Act* 1982. The Official Languages Commissioner is subject to regular reviews by parliamentary committees and has a dedicated committee (the Joint Committee of Official Languages), but the Privacy and Human Rights Commissioners receive little attention.

A 2001 report from the Special Committee on the Modernisation and Improvement of the Procedures of the House recommended that the annual reports of officers be referred to the relevant parliamentary committee. A Commons Committee on Government Operation and Estimates was established to review reports issued by a number of officers of Parliament.

(a) *Developments in Canada’s provincial legislatures*

A number of Canadian provinces have developed more systematic models for assessing the accountability and independence arrangements for their officers. Committee involvement in appointing parliamentary officers is common in Canadian provincial legislatures. The number and type of bodies treated as officers are not uniform, for example, the Children’s Advocate in Saskatchewan is an officer, as is the Police Complaints Commissioner in British Columbia.

The core officers are:71

- the Auditor-General
- the Ombudsman
- the Ethics Commissioner
- the Electoral Officer
- the Information/Privacy Commissioner

This list corresponds to the bodies with characteristics of officers in the United Kingdom, with the addition of Information/Privacy Commissioners. Unlike the United Kingdom, the provinces appear to have little interest in having a separate parliamentary body to oversee the budget of the Auditor-General, or to monitor relations with him/her. This oversight responsibility is perceived as the role of the audit committee of the Legislative Assembly. A number of legislative assemblies (for example, British Columbia, Alberta and Saskatchewan), have however, set up committees to oversee the functions and budgets of all officers.

71 ibid., pp.22–28
(i) Saskatchewan

In 1983, Saskatchewan legislation enhanced the independence of the Auditor-General, and his appointment must now be approved by the (opposition) Chair of the Public Accounts Committee. As a result of concerns raised by the Auditor-General, legislation was enacted in 2000 that resulted in an open appointments procedure conducted by the Public Accounts Committee.\(^\text{72}\)

The Chief Electoral Officer was appointed by open competition, as were the posts of Ombudsman and Children’s Advocate. Other officers, however, were selected by personal approaches, so there is no universal practice. Interview panels are ad hoc, but normally include the Clerk of the Assembly, the Clerk of the Executive Council and a public services representative. It is usual to allow re-appointments.

The budget of the Auditor-General is presented to the Public Accounts Committee, but other officers’ budgets are determined by the Board of Internal Economy. The board is a statutory authority that is responsible for the general administration of the Legislative Assembly. The Public Accounts Committee is an all-party committee chaired by the Speaker and, because there are also two government nominees, is not exclusively a backbench committee.

(ii) Ontario

In Ontario, six officers are generally appointed for five year terms (apart from the Auditor, who serves until retirement age). The officers are required to submit an annual report to the Speaker, and annual estimates to the Board of Internal Economy. In addition, the Standing Committee on Estimates may also decide to review particular estimates.

The statutory officers are:\(^\text{73}\)

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

\(^{72}\) ibid., pp.32–33
\(^{73}\) ibid.
Statutory officers of the British Columbia Legislature include:\(^{74}\)

- the Auditor-General
- the Chief Electoral Officer
- the Child Youth and Family Advocate
- the Conflict of Interest Commissioner
- the Information and Privacy Commissioner
- the Ombudsman
- the Police Complaints Commissioner

In April 1998, the British Columbian officers issued a statement of principles – *Statutory officers of the British Columbia Legislature: fundamental operating principles and related legislation*. The officers wanted inconsistencies resolved in the legislation establishing the respective offices, to incorporate common principles of independence and accountability. The report states: \(^{75}\)

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

The following principles have been adopted: \(^{76}\)

**Legislated mandate and authority**

*Officers of the Legislature should have their mandates and duties set out clearly in legislation, along with the authority needed to discharge their responsibilities. Each officer should be appointed by the Lieutenant-Governor on the recommendation of the Legislative Assembly to carry out particular duties, independent from government. It is essential that the mandate and authority of each officer be incorporated in legislation passed by the Legislative Assembly.*

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\(^{74}\) ibid., pp.28–29


\(^{76}\) ibid., pp.6–20
Chapter 3: Officers of Parliament – developments in other jurisdictions

Accountability

Officers of the Legislature should subscribe to the following recognised standards of public sector conduct: selflessness, integrity, objectivity, accountability, openness, honesty and leadership.

Officers should be directly accountable to the Legislature for carrying out their legislated responsibilities, and for the administration of their offices.

Officers of the Legislature should be subject to independent audits of their offices.

Independence

Officers should have the legislated authority to discharge their duties as and when required, and the ability to report directly to the Legislative Assembly. It is important that this authority be provided in a manner that is as independent as possible from government influence or control. The Legislative Assembly has the responsibility to ensure that the Officers’ independence from government is established clearly in legislation, and is maintained both in fact and in appearance.

Officers should have their remuneration and employment benefits guaranteed in legislation. Compensation for Officers should be in keeping with the senior nature of their responsibilities and, accordingly, be equal to that of the chief judge of the Provincial Court of British Columbia.

Officers of the Legislature should be protected from legal action (by legislation) for exercising their duties in good faith. The Legislative Assembly establishes the role and responsibilities of each of the officers in legislation, therefore, it is appropriate that there be legislated provisions protecting the officers, and any persons appointed, hired or engaged by them, from legal action for exercising those duties in good faith.

Managerial independence

Officers of the Legislature should have the annual estimates of expenditure for their offices reviewed and approved by a committee of the Legislative Assembly before they are presented to the Assembly for approval. It is appropriate for government officials to act in an advisory capacity only during the budget preparation and approval process.

Officers of the Legislature should have sufficient independence from government administrative controls to ensure that they can organise, staff and manage their offices, and engage outside expertise, as they see
fit. These activities should be done within their budgets and within the provisions of legislation designed to protect the rights of public servants.

**Reporting**

Officers of the Legislature should report to the Legislative Assembly at least annually on any matter that they consider should be brought to the attention of the Assembly resulting from work undertaken in the performance of their duties.

Officers of the Legislature should submit their reports directly to the Legislative Assembly through the Speaker because they are Officers of the Legislature.

Officers of the Legislature should issue reports to the Legislative Assembly as frequently as deemed appropriate by the Officers, to ensure that the Legislature receives timely information from them.

**Access to Information**

Officers of the Legislature should have, access to all records, information and explanations needed to carry out their mandated responsibilities, in accordance with their legislative authority.

Officers of the Legislature should have legislated authority to examine persons under oath, since much of the information obtained by officers in conducting their work is acquired through verbal evidence and may not be capable of substantiation by written or other corroborative means. The officers should be commissioners for taking affidavits for British Columbia.

**Confidentiality**

Officers of the Legislature should keep all information obtained in the performance of their work confidential, except where required to perform their mandated duties. Similar constraints should apply to persons appointed, hired or engaged by the officers.

The Freedom of Information and Protection of Privacy Act should not apply to a record that is created for or by, or is in the custody of, an officer of the Legislature that relates to the exercise of that officer’s functions under an Act.

The budget for each office is reviewed by the Select Standing Committee on Finance and Government Services. The standing committee comprises backbenchers and, while having considerable overlap in membership with the Public Accounts Committee, is not chaired by an Opposition member. The officers must appear in public session before the standing committee to justify their budget plans.
The role and functions of the Auditor-General have been regulated in the province’s Auditor-General Act 2003. The Act gives the Legislative Assembly statutory authority to recommend the appointment to the Lieutenant-Governor, following a unanimous recommendation from a special committee of the Assembly. The Act also gives the Auditor-General power to appoint staff and to report to the Public Accounts Committee. There is no explicit statutory authority for the role of the standing committee in overseeing the budget and expenditure of the Auditor-General.

The Auditor-General’s term is six years, with one re-appointment allowed. Appointments are made following an open recruitment process administered by the Assembly. A special committee is appointed for the process, and a report is issued. Appointments are made following unanimous recommendation by a special all-party committee.

(iv) Alberta

Alberta has the following legislative officers:77

- the Auditor General
- the Chief Electoral Officer
- the Ethics Commissioner
- the Ombudsman
- the Information and Privacy Commissioners

The functions of the Committee on Legislative Offices are contained in the various statutes governing the operation of legislative officers, and its membership reflects the political composition of the Assembly.

The mandate of the Committee is to review and approve officers’ budgets and conduct salary reviews. Most recently, it has assessed criteria for awarding achievement bonuses for its officers. The Committee is also empowered to consider requests from officers for changes in their enabling legislation.

3.1.4 Australia

Exhibit 3.1 outlines the situation with officers of Parliament in all other Australian jurisdictions and Victoria. The situation that applies at the Commonwealth level has been adopted in the majority of Australian state and territory parliaments with various modifications, for example, although the Commonwealth Parliament has not developed the concept of officers of Parliament as a distinctive subset of constitutional watchdogs the Auditor-General and the Ombudsman exhibit the core characteristics

77 Canadian Parliamentary Review, Article, Appointment of Officers by the Alberta Legislative Assembly, Vol.23, No.3, 2000, p.2
found in the UK and elsewhere. Amendments to the Auditor-General Act have recognised the independence of the Auditor-General by declaring the position as an officer of Parliament. While the Ombudsman is recognised as an independent officer, the statute establishing the office does not use the term – officer of Parliament.
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Period of appointment</th>
<th>Method of appointment</th>
<th>Suspension and dismissal</th>
<th>Remuneration and allowances</th>
<th>Budget</th>
<th>Review</th>
<th>Legislation</th>
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<td>Victoria</td>
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<td></td>
</tr>
<tr>
<td>Auditor-General</td>
<td>Yes (a)</td>
<td>Seven years Eligible for re-appointment (a)</td>
<td>The Governor in Council, (a) on recommendation of the Parliamentary Committee (b)</td>
<td>The Governor in Council may suspend the Auditor-General any time when the Parliament is not in session (the Minister must present a statement to both Houses of Parliament within 7 sitting days). The Auditor-General may be removed on an address by both Houses of Parliament. (a)</td>
<td>Determined by the Governor in Council, and paid from the Consolidated Fund. (a)</td>
<td>Budget determined in consultation with the Parliamentary Committee. (b)</td>
<td>Both Houses of Parliament on the recommendation of the Public Accounts and Estimates Committee: • appoint a independent auditor to carry out financial audit of the Audit Office (b) • appoint a suitable qualified person to carry out performance audit of the Audit Office (b) Performance audit is required (at least once every three years). (b)</td>
</tr>
</tbody>
</table>

**Note:** (a) enshrined in the Constitution Act and amendments need to be passed by the Legislative Assembly and the Legislative Council and approved by the majority of the electors voting at a referendum
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</tr>
<tr>
<td>Ombudsman</td>
<td>Yes (a)</td>
<td>Ten years</td>
<td>The Governor in Council (b)</td>
<td>When Parliament is not sitting the Governor in Council may at any time suspend the Ombudsman (a statement shall be presented to both Houses of Parliament). The legislation does not specify the person responsible for presenting the statement. (b) The Ombudsman may be removed on an address by both Houses of Parliament.</td>
<td>Determined by the Governor in Council, and paid out of the Consolidated Fund. (b)</td>
<td>The Ombudsman’s Office is an output within the Department of Premier and Cabinet.</td>
<td>Not mentioned in the Ombudsman Act</td>
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</tbody>
</table>

Note:  (a) enshrined in the Constitution Act and amendments need to be passed by the Legislative Assembly and the Legislative Council and approved by the majority of the electors voting at a referendum
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</tr>
</tbody>
</table>
| Electoral Commissioner | Yes (a)              | Ten years Eligible for re-appointment, for a term not exceeding ten years (b) | The Governor in Council (b) | The Governor in Council may suspend the Electoral Commissioner (the Minister must notify the Speaker, the President and the leaders of each political party in both Houses of Parliament in writing, within 2 hours). When Parliament is not sitting, the Parliament must be summoned to meet after petitions from Members of each House objecting to the suspension are presented to the Speaker and the President. (b) | The Governor in Council may fix the terms and conditions of employment. (b) | The Electoral Commissioner’s Office is an output within the Department of Justice budget. | Not mentioned in the Electoral Act | Constitution Act 1975, as amended (a)  
*Electoral Act 2002, as amended (b)* |

**Note:**  (a) enshrined in the Constitution Act and amendments need to be passed by the Legislative Assembly and the Legislative Council and approved by the majority of the electors voting at a referendum
Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
<thead>
<tr>
<th>Australian Capital Territory (ACT)</th>
<th>Auditor-General</th>
<th>Period of appointment</th>
<th>Method of appointment</th>
<th>Suspension and dismissal</th>
<th>Remuneration and allowances</th>
<th>Budget</th>
<th>Review</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>Seven years</td>
<td>The Executive</td>
<td>The Executive</td>
<td>Determined by the</td>
<td>The PAC advises</td>
<td></td>
<td></td>
<td>Auditor-General Act 1996 Remuneration Tribunal Act 1995</td>
</tr>
<tr>
<td></td>
<td>Not eligible for re-appointment</td>
<td>The Minister must refer appointment to the Public Accounts Committee (PAC). PAC can veto the proposed appointment.</td>
<td>The Executive may retire the Auditor-General. The Executive may remove the Auditor-General on a resolution from the Legislative Assembly. The Executive may remove the Auditor-General on other grounds.</td>
<td>The Remuneration Tribunal (paid from the Consolidated Revenue Fund).</td>
<td>The Treasurer of proposed appropriation and provides the Treasurer with the Auditor-General's draft budget. The Auditor-General to advise the PAC if the appropriation for the year is insufficient to conduct special financial audits and performance audits.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Ombudsman
(Note: Commonwealth Ombudsman fulfils the role of ACT Ombudsman under a memorandum of understanding)

|-----------|---------------------------|---------------------------|---------------------------|---------------------------|---------------------------|---------------------------|---------------------------|
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Period of appointment</th>
<th>Method of appointment</th>
<th>Suspension and dismissal</th>
<th>Remuneration and allowances</th>
<th>Budget</th>
<th>Review</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Capital Territory (ACT) – continued</td>
<td>No</td>
<td>Not longer than five years Eligible for re-appointment</td>
<td>The Executive must consult with: (a) each parliamentary party leader in the Legislative Assembly (b) all members of the Legislative Assembly who are not members of such party.</td>
<td>The Executive may suspend the Commissioner (the Minister must present a statement to the Legislative Assembly). The Executive can end the appointment.</td>
<td>Determined by the Minister. In practice, remuneration is determined by a remuneration tribunal, which also covers ACT Members of Parliament. Remuneration and allowances determined by the Remuneration Tribunal and paid from the Consolidated Revenue Fund.</td>
<td>Part of usual departmental budget process.</td>
<td>Not subject to periodic review.</td>
</tr>
</tbody>
</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Period of appointment</th>
<th>Method of appointment</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Auditor-General</td>
<td>Yes</td>
<td>Ten years</td>
<td>The Governor-General</td>
<td>Remuneration is determined by a remuneration tribunal, subject to the Remuneration Tribunal Act 1973 and paid from the Consolidated Fund. If no determination of the tribunal is in operation, the remuneration shall be as prescribed by the regulations.</td>
<td></td>
<td></td>
<td>Auditor-General Act 1997 \nPublic Accounts and Audit Committee Act 1951</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not eligible for re-appointment</td>
<td>The Minister must consult with the Joint Committee of Public Accounts and Audit (JCPAA) on the appointment of the person. The JCPAA must approve the proposal.</td>
<td>Allowances are prescribed by regulations, subject to the Remuneration Tribunal Act 1973, and paid from the Consolidated Fund.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>The Governor-General may remove the Auditor-General on an address from each House of Parliament in the same session of Parliament. The Governor-General may remove the Auditor-General on other grounds, including bankruptcy.</td>
<td>The JCPAA makes a recommendation to both Houses of Parliament, and to the relevant Minister, on the draft estimates for the Audit Office. Any net appropriation agreement made by the Finance Minister in relation to the Audit Office must be made with the Auditor-General. The consent of the Auditor-General is required where the Finance Minister cancels or varies a net appropriation agreement.</td>
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<td></td>
<td></td>
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<td>The JCPAA makes a recommendation to both Houses of Parliament, and to the relevant Minister, on the draft estimates for the Audit Office. Any net appropriation agreement made by the Finance Minister in relation to the Audit Office must be made with the Auditor-General. The consent of the Auditor-General is required where the Finance Minister cancels or varies a net appropriation agreement.</td>
<td></td>
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</table>
### Exhibiit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
<thead>
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<th>Officer of Parliament</th>
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</thead>
<tbody>
<tr>
<td><strong>Commonwealth – continued</strong></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ombudsman</td>
<td>No</td>
<td>Not exceeding seven years&lt;br&gt;Eligible for re-appointment</td>
<td>The Governor-General</td>
<td>Remuneration is determined by the Remuneration Tribunal, subject to the Remuneration Tribunal Act 1973. Allowances are as prescribed, subject to the Remuneration Tribunal Act 1973.</td>
<td>Part of Department of Prime Minister and Cabinet budget process</td>
<td></td>
<td>Ombudsman Act 1976&lt;br&gt;Remuneration Tribunal Act 1973</td>
</tr>
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</table>
## Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Commonwealth – continued</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>No</td>
<td>Not exceeding seven years Eligible for re-appointment</td>
<td>The Governor-General may terminate the appointment of the Electoral Commissioner.</td>
<td>Remuneration is determined by the Remuneration Tribunal, subject to the Remuneration Tribunal Act 1973. If no determination of the tribunal is in operation, the remuneration shall be as prescribed. Allowances are as prescribed, subject to the Remuneration Tribunal Act 1973.</td>
<td>Part of usual departmental budget process</td>
<td>Not subject to independent review</td>
<td>Commonwealth Electoral Act 1918 Remuneration Tribunal Act 1973</td>
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</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

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</thead>
<tbody>
<tr>
<td>New South Wales</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Auditor-General</td>
<td>No</td>
<td>Seven years, or at 65 years of age, whichever occurs first</td>
<td>The Governor may suspend the Auditor-General (the Minister must present a statement to each House of Parliament). The Governor may remove the Auditor-General on the address of both Houses of the Legislature.</td>
<td>Determined by the Statutory and Other Offices Remuneration Tribunal and paid from the Consolidated Fund.</td>
<td>Part of usual budget process</td>
<td>The Governor appoints an independent auditor to inspect and audit the books and accounts relating to the administration of the Audit Office. A review of the Audit Office to be conducted at least once every three years to examine: (a) auditing practices and standards of the Auditor-General (b) whether the Auditor-General is complying with those practices and standards. The PAC appoints the independent reviewer and gives directions on conducting the review.</td>
<td>Public Finance and Audit Act 1983 Statutory and Other Officers Remuneration Act 1975</td>
</tr>
</tbody>
</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
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<tr>
<th>Officer of Parliament</th>
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<th>Review</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ombudsman</td>
<td>Yes</td>
<td>Not exceeding seven years Eligible for re-appointment Not eligible for appointment on attaining 65 years of age</td>
<td>The Governor The Minister (that is, the Premier) must refer the appointment to the Parliamentary Joint Committee (PJC) established to oversee the exercise of the Ombudsman's functions. The Committee can veto a proposed appointment. This process also applies to re-appointments to the position.</td>
<td>The Governor may remove the Ombudsman on an address from both Houses of Parliament. Remuneration is determined by the Statutory Officers Remuneration Tribunal. The Ombudsman's remuneration may change from time to time because the tribunal makes new determinations occasionally (but generally on an annual basis). Remuneration is paid from the Consolidated Fund. Allowances are determined by the Minister.</td>
<td>The budget is determined by Treasury, approved by Cabinet and passed by Parliament.</td>
<td>The Office of the Ombudsman is considered to be a public sector organisation and is therefore within the jurisdiction of other accountability bodies such as the Independent Commission Against Corruption, the Audit Office and the Anti-Discrimination Board.</td>
<td>Ombudsman Act 1974 Statutory and Other Officers Remuneration Act 1975</td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>No</td>
<td>Until 65 years of age Not eligible for re-appointment on attaining 65 years of age</td>
<td>The Governor may suspend the Commissioner. The Governor may remove the Commissioner (the Minister must present a statement in Parliament).</td>
<td>Determined by the Statutory and Other Offices Remuneration Tribunal, and paid from the Consolidated Fund.</td>
<td>The budget is determined by Treasury, approved by Cabinet and passed by Parliament.</td>
<td>No</td>
<td>Parliamentary Electorates and Elections Act 1912 Statutory and Other Officers Remuneration Act 1975</td>
</tr>
</tbody>
</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
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<th>Review</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern Territory</td>
<td></td>
<td>Administrator of the Northern Territory</td>
<td>The Administrator may suspend the Auditor-General (the Chief Minister must table a statement in the Legislative Assembly). The Administrator may retire the Auditor-General.</td>
<td>Determined by the Administrator of the Northern Territory</td>
<td>Part of usual departmental budget process</td>
<td>Strategic reviews of the Audit Office undertaken not less than once every three years. The Administrator appoints the reviewer and determines terms of reference. The Minister must consult with the Public Accounts Committee and the Auditor-General about appointment of reviewer and terms of reference. The Administrator appoints an independent auditor to audit the accounts of the Audit Office and audit the accounts of an agency (where the Auditor-General has declared a conflict of interest).</td>
<td>Audit Act 2002</td>
</tr>
<tr>
<td>Auditor-General</td>
<td>No</td>
<td>Seven years Not eligible for re-appointment</td>
<td>Administrator of the Northern Territory</td>
<td>Administrator of the Northern Territory</td>
<td>Administrator of the Northern Territory</td>
<td>Administrator of the Northern Territory</td>
<td>Administrator of the Northern Territory</td>
</tr>
</tbody>
</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Northern Territory – continued</strong></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ombudsman</td>
<td>Yes</td>
<td>Not exceeding five years Eligible for re-appointment Maximum age limit of 65 years The draft Bill recommends appointment for five years, with a further appointment for five years, but no longer.</td>
<td>The Administrator of the Northern Territory (on the recommendation of the Legislative Assembly) The Administrator may suspend the Ombudsman (the Minister must present a statement to the Legislative Assembly). The Administrator may remove the Ombudsman. The Minister may retire the Ombudsman.</td>
<td>Determined by the Administrator of the Northern Territory</td>
<td>The budget is determined by the Government, the responsible Minister is the Chief Minister.</td>
<td>Not subject to independent review</td>
<td>Ombudsman (Northern Territory) Act 2004</td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>No</td>
<td>Not exceeding five years Eligible for re-appointment</td>
<td>The Administrator of the Northern Territory. The Minister must consult with: (a) parliamentary party leaders represented in the Legislative Assembly (b) all members who are also not members of a political party represented in the Legislative Assembly.</td>
<td>The Administrator may suspend the Commissioner (the Minister must present a statement to the Legislative Assembly). The Administrator may terminate the appointment of the Commissioner.</td>
<td>Determined by the Administrator of the Northern Territory. In practice, remuneration is linked to public sector executive pay scales (as per agency heads).</td>
<td>Part of usual budget process</td>
<td>Not subject to periodic review</td>
</tr>
<tr>
<td>Office of Parliament</td>
<td>Period of appointment</td>
<td>Method of appointment</td>
<td>Suspension and dismissal</td>
<td>Remuneration and allowances</td>
<td>Budget</td>
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<td>------------</td>
</tr>
<tr>
<td>Auditor-General</td>
<td>Not longer than seven years</td>
<td>The Governor in Council. The vacancy must be advertised. The Minister must consult with the parliamentary committee about the selection process and appointment.</td>
<td>The Governor in Council may suspend the Auditor-General on an address from the Legislative Assembly. The Premier must consult with the parliamentary committee about the motion. When the Legislative Assembly is not sitting, the Governor in Council may suspend the Auditor-General, but only if the Premier has presented a statement to the Auditor-General and has considered the response. The Premier must present the statement, and the Auditor-General’s response, to the Legislative Assembly. The Governor may remove the Auditor-General on an address from the Legislative Assembly. The Premier must consult with the parliamentary committee about the motion.</td>
<td>Determined by Governor in Council (in consultation with the Public Accounts Committee) and paid from the public accounts.</td>
<td>The Auditor-General must prepare estimates of proposed receipts and expenditure for the Audit Office and provide these estimates to the Treasurer. Treasurer must consult with parliamentary committee in developing the proposed budget of the Audit Office.</td>
<td>Governor in Council appoints independent reviewer to conduct an audit of the Audit Office. Strategic review undertaken at least every five years to examine the Auditor-General’s functions and performance of those functions. The Governor in Council appoints an independent reviewer and determines the terms of reference. Minister must consult with the parliamentary committee and the Auditor-General on the appointment of the reviewer and terms of reference.</td>
<td>Public Administration and Audit Act 1977</td>
</tr>
</tbody>
</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

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<th>Review</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ombudsman</td>
<td>Yes</td>
<td>Not more than five years Eligible for re-appointment Must not be reappointed if the total terms of appointment are greater than ten years.</td>
<td>The Governor in Council The vacancy must be advertised. The Minister must consult with the parliamentary committee about the selection process and appointment. Does not apply to re-appointments.</td>
<td>The Governor may suspend the Ombudsman on an address from the Legislative Assembly. The Premier must consult with the parliamentary committee about the motion. When the Legislative Assembly is not sitting, the Governor in Council may suspend the Ombudsman, but only if the Premier has presented a statement to the Ombudsman and has considered the response. The Premier must present the statement, and the Ombudsman's response, to the Assembly. The Governor may remove the Ombudsman on an address from the Legislative Assembly. The Premier must consult with the parliamentary committee about the motion.</td>
<td>Determined by the Governor in Council. In practical terms the Ombudsman is aligned with the chief executive officer position of a state department and remunerated according to that determination.</td>
<td>The budget submission by the Office of the Ombudsman is considered by the Cabinet Budget Review Committee and then determined as part of the overall budget process of the Government. The responsible Minister is the Premier.</td>
<td>Strategic review conducted at least every five years to examine the ombudsman’s functions and performance of those functions. The Governor in Council appoints an independent reviewer and determines the terms of reference. The Minister must consult with the parliamentary committee and the Ombudsman on the appointment of the reviewer and terms of reference.</td>
</tr>
</tbody>
</table>

Queensland – continued
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
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<th>Method of appointment</th>
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<tr>
<td>Queensland – continued</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>No</td>
<td>Not longer than seven years</td>
<td>The Governor in Council</td>
<td>The Governor in Council may terminate the appointment.</td>
<td>Determined by the Governor in Council and reviewed by the Attorney-General based on internal and external benchmarks.</td>
<td>Considered by the Cabinet Budget Review Committee and then determined as part of the overall budget process of the Government.</td>
<td>No</td>
</tr>
</tbody>
</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
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<tr>
<th>Officer of Parliament</th>
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<th>Legislation</th>
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</thead>
<tbody>
<tr>
<td>South Australia</td>
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<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Auditor-General</td>
<td>No</td>
<td>Until the age of 65 years</td>
<td>The Governor may suspend the Auditor-General (the Governor must present a statement to the President of the Legislative Council and the Speaker of the House of Assembly, to be laid before both Houses of Parliament).</td>
<td>Determined by the Governor and paid from the Consolidated Fund.</td>
<td>Part of usual budget process</td>
<td>The Governor appoints an independent auditor to audit the accounts of the Audit Office.</td>
<td>Public Finance and Audit Act 1987</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>Yes</td>
<td>Until the age of 65 years</td>
<td>The Governor, on a resolution of both Houses of Parliament. On a vacancy arising, the matter (of inquiring into and reporting on a suitable person for appointment to the vacant office) is referred to the Statutory Officers Committee of Parliament.</td>
<td>The Governor may suspend the Ombudsman (a statement must be presented to both Houses of Parliament). The Governor may remove the Ombudsman on an address from both Houses of Parliament.</td>
<td>Determined by the Governor, on the recommendation of the Remuneration Tribunal, and paid from the general revenue of the state.</td>
<td>Budget determined by negotiation with the Government through the Attorney-General.</td>
<td>Not subject to independent review</td>
</tr>
</tbody>
</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
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</tr>
<tr>
<td>Electoral Commissioner</td>
<td>No</td>
<td>Until the age of 65 years</td>
<td>The Governor, on a resolution of both Houses of Parliament. On a vacancy arising, the matter (of inquiring into and reporting on a suitable person for appointment to the vacant office) is referred to the Statutory Officers Committee of Parliament.</td>
<td>Determined by the Remuneration Tribunal</td>
<td>Budget determined by negotiation with the Department of Treasury and Finance through the Justice portfolio.</td>
<td>Not subject to periodic review</td>
<td>Electoral Act 1985</td>
</tr>
</tbody>
</table>
Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

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<tbody>
<tr>
<td>Tasmania</td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Auditor-General</td>
<td>No</td>
<td>Not less than five years, or until retirement</td>
<td>The Governor may suspend the Auditor-General (the Governor must present a statement to each House of Parliament). The Auditor-General may be removed by a resolution of both Houses of Parliament.</td>
<td>The Auditor-General's salary is the average of the rates of salary of the auditors-general of South Australia and Western Australia, paid from the Consolidated Fund. Allowances are determined by the Governor and paid from the Consolidated Fund. If the Governor does not make a determination, the Auditor-General is entitled to the same allowances as those of a head of a state service agency.</td>
<td>Part of usual budget process</td>
<td>The Governor appoints an independent auditor to conduct an audit of the financial statements of the Audit Office.</td>
<td>Financial Management and Audit Act 1990</td>
</tr>
</tbody>
</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ombudsman</td>
<td>Yes</td>
<td>Not exceeding five years Eligible for re-appointment for a period not exceeding five years Maximum age limit of 65 years</td>
<td>The Governor may suspend the Auditor-General (a statement must be presented to each House of Parliament). The Governor may remove the Auditor-General on an address by both Houses of Parliament.</td>
<td>Determined by the Governor</td>
<td>Allocation from the Department of Justice (the Ombudsman’s Office is not a stand-alone entity, but is part of the Justice Department).</td>
<td>Not subject to independent review</td>
<td>Ombudsman Act 1978</td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>No</td>
<td>Up to seven years Eligible for re-appointment</td>
<td>The Governor may suspend the Electoral Commissioner (a statement must be presented to each House of Parliament). The Governor may remove the Electoral Commissioner on an address from both Houses of Parliament.</td>
<td>As per conditions specified in the instrument of appointment. In practice, pay rates are linked to those of public service executives. Remuneration of Electoral Commissioner is paid from the Consolidated Fund.</td>
<td>A standing appropriation is received directly from the Consolidated Fund, but funding for the operations of the office are part of the budget process.</td>
<td>Not subject to periodic review</td>
<td>Electoral Act 2004</td>
</tr>
</tbody>
</table>
### Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
<thead>
<tr>
<th>Western Australia</th>
<th>Officer of Parliament</th>
<th>Period of appointment</th>
<th>Method of appointment</th>
<th>Suspension and dismissal</th>
<th>Remuneration and allowances</th>
<th>Budget</th>
<th>Review</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Auditor-General</td>
<td>No</td>
<td>Up to the age of 65 years</td>
<td>The Governor may suspend the Auditor-General (the Treasurer must present a statement to both Houses of Parliament).</td>
<td>Determined by the Salaries and Allowances Tribunal and paid from the Consolidated Fund.</td>
<td>Part of usual budget process</td>
<td>The Governor appoints an independent auditor to audit the accounts of the Audit Office.</td>
<td>Financial Administration and Audit Act 1985</td>
</tr>
<tr>
<td></td>
<td>Parliamentary Commissioner for Administrative Investigations</td>
<td>Yes</td>
<td>Five years</td>
<td>The Governor may suspend or remove the Ombudsman on an address from both Houses of Parliament. The Governor may suspend the Ombudsman (a statement must be presented to each House of Parliament). Legislation did not specify the person responsible for presenting the statement.</td>
<td>Determined by the Governor and paid from the Consolidated Fund. Note: The Salaries and Allowances Tribunal is responsible for determining and recommending rates of remuneration for the officers of Parliament, including the Ombudsman.</td>
<td>Expenses incurred in administering the Parliamentary Commissioner Act 1971 are provided for under s32 of the Act and paid from the Consolidated Fund.</td>
<td>Not subject to independent review</td>
<td>Parliamentary Commissioner Act 1971</td>
</tr>
</tbody>
</table>
## Exhibit 3.1: Officers of Parliament in Australian jurisdictions (continued)

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Period of appointment</th>
<th>Method of appointment</th>
<th>Suspension and dismissal</th>
<th>Remuneration and allowances</th>
<th>Budget</th>
<th>Review</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electoral Commissioner</td>
<td>No</td>
<td>Not exceeding nine years Eligible for re-appointment</td>
<td>The Governor, on recommendation of the Premier. The Premier must consult with the leader of each parliamentary party. The Governor may suspend or remove the Electoral Commissioner on an address from both Houses of Parliament. The Governor may suspend the Electoral Commissioner (a statement must be presented to each House of Parliament). Legislation did not specify the person responsible for presenting the statement.</td>
<td>Determined by the Governor, subject to the Salaries and Allowances Act 1975, and paid from the Consolidated Fund. Allowances are determined by the Governor</td>
<td>Part of usual budget process. No standing appropriation.</td>
<td>Not subject to periodic reviews</td>
<td>Electoral Act 1907 Salaries and Allowances Act 1975</td>
</tr>
</tbody>
</table>
3.2 Conclusion

While no consistent approach has been adopted by Parliaments either overseas or in Australia relating to independent officers of Parliament, there is a clear trend towards these officers being:

- established in a generally standard way by an Act of Parliament;
- appointed and dismissed with parliamentary involvement;
- overseen by a statutory parliamentary committee which is also responsible for budget approval; and
- required to report to a specific parliamentary committee.
CHAPTER 4: FRAMEWORK TO ENSURE THE ACCOUNTABILITY AND INDEPENDENCE OF OFFICERS OF PARLIAMENT

Key findings of the Committee:

4.1 The processes for the appointment, remuneration, tenure, resourcing and dismissal of independent officers of Parliament need to be clarified and standardised.

4.2 A balance is needed between ensuring officers of Parliament are independent from the executive and operationally independent of Parliament, and ensuring those officers have an appropriate measure of accountability to Parliament for their performance.

4.1 Introduction

The first term of reference required the Committee to consider and report on an appropriate legislative framework for Victorian independent officers of Parliament such as the Ombudsman and the Auditor-General. This chapter highlights the inconsistencies in the current arrangements and recommends a number of administrative and legislative changes that would strengthen the relationship between an officer of Parliament and Parliament.

The Committee’s review found that five structural features determine the independence and accountability relationships of independent officers of Parliament and their agencies:

- the nature of the mandate of the office/agency, including how it is defined initially and how it is updated periodically;
- the provisions in respect of the appointment, tenure and removal of the leadership of the agency;
- the processes for deciding budgets and staffing for the agency;
- whether the agency is free to identify issues for investigation and whether it can compel the production of information; and
- the reporting requirements for the agency and whether its performance is monitored.

These structural features are very important in determining the nature of the interactions among the three key institutions – the political and administrative executive government, Parliament, and officers of Parliament.
The existing officers of Parliament in Victoria are assigned broad categories of tasks: the Auditor-General has the role of reviewing government spending and related management practices; the Ombudsman investigates complaints relating to the Victorian public sector and Victoria Police; and the Electoral Commissioner oversees the state elections and by-elections for the Victorian Parliament.

To ensure objectivity in audit findings and impartial administration of the law respecting various rights of citizens, it is necessary to make some parts of the operations of officers of Parliament free from both executive and parliamentary interference. This principle does not mean, however, that parliamentary control or supervision over certain administrative matters is inappropriate.

### 4.1.1 Independence of appointment process

Exhibit 4.1 outlines the current arrangements for officers of Parliament in Victoria.

**Exhibit 4.1:**

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Method of appointment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auditor-General</td>
<td>Governor in Council (on the recommendation of the Parliamentary Committee) (a) (b)</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>Governor in Council (c)</td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>Governor in Council (d)</td>
</tr>
</tbody>
</table>

- **Notes:**
  - (a) Constitution Act 1975, as amended, s.94A(2)
  - (b) Audit Act 1994, as amended, s.3 defines ‘Parliamentary Committee’ as the Public Accounts and Estimates Committee
  - (c) Ombudsman Act 1973, as amended, s.3(2)
  - (d) Electoral Act 2002, as amended, s12(1)

All witnesses emphasised that the perception of the independence of officers of Parliament is essential to their effectiveness. As outlined in chapter 3, most jurisdictions have moved to give Parliament, through a parliamentary committee, some involvement in the appointments to these positions. The practical advantage of involving an all party parliamentary committee in the process is to prevent a politically partisan appointment, a situation which has not arisen in the Victorian context. One possible method of excluding the possibility of such an appointment and strengthening the Parliament’s interest in officers of Parliament, would be for the parliamentary committee to have a formal role in the appointment of these office-holders. Under the current arrangements, this Committee is responsible for making a recommendation concerning the Auditor-General, but the Electoral Commissioner and the Ombudsman are both appointed by the Governor in Council on the advice of the executive. Their enabling legislation is silent on the selection process for both these officers.
Chapter 4: Framework to ensure the accountability and independence of officers of Parliament

The Committee favours slightly modifying the process that is provided for in the Constitution Act for the appointment of the Auditor-General. Currently, this Committee makes a recommendation to the Governor in Council, which appoints the Auditor-General. Consistent with the Committee’s view that there should be a formal link between the Ombudsman, the Electoral Commissioner and the Parliament, and that a consistent approach is adopted for the appointment of the three officers, the Committee suggests that appropriate parliamentary committees should be responsible for recommending the appointment of the Ombudsman and the Commissioner. Also, the Parliament should formally agree to the recommendation. This arrangement would ensure bipartisan support for these important appointments. The Committee also believes that it is important that appointees should have the confidence and respect of Parliament.

Accordingly, the Committee recommends that:

**Recommendation 1:** The legislation relating to each officer of Parliament be amended to provide that both Houses of the Victorian Parliament pass a resolution appointing the Auditor-General, the Ombudsman and the Electoral Commissioner, based on the recommendation of the appropriate parliamentary committee.

**4.1.2 Process for determining remuneration and allowances**

One of the important symbols of independence and an essential part of the template for establishing a constitutional officer of Parliament should be the arrangements for determining the remuneration and allowances of these officers. Legislation currently provides that the remuneration for the three Victorian officers of Parliament is determined by the Governor in Council. In practice, this means that these decisions are made by the government.
Exhibit 4.2: Officers of Parliament
Remuneration and allowances

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Process for determining remuneration and allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auditor-General</td>
<td>Determined by Governor in Council (paid out of the Consolidated Fund) (a)</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>Determined by the Governor in Council (paid out of the Consolidated Fund) (b)</td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>Governor in Council may fix the terms and conditions of employment (c)</td>
</tr>
</tbody>
</table>

Notes:
(a) Constitution Act 1975, as amended, s.94A(3), (6)
(b) Ombudsman Act 1973, as amended, s.5(1), (4)
(c) Electoral Act 2002, as amended, s.12(6)

The Committee is aware that in some jurisdictions, the salaries of these officers are specified in legislation and linked to an appropriate benchmark, for example decisions of a remuneration tribunal, or have a direct nexus with a designated public service or judicial position.\(^{78}\)

The remuneration of the Australian Auditor-General, for example, is subject to determination by the Commonwealth Remuneration Tribunal. Several states and territories have a similar arrangement in place. In Queensland, the Auditor-General’s remuneration and allowances must equal the highest amounts paid to the chief executive of a department.

The Department of Treasury and Finance advised the Victorian Auditor-General’s Office that this could be affected without legislative change and could be implemented administratively as an executive order, subject to approval by the government.\(^ {79}\)

The Committee, however, supports the view that the incorporation of an appropriate yardstick within the enabling legislation would enable Parliament to have a more specific and ongoing mechanism in place for determining the officers’ remuneration. Both the Ombudsman and the Auditor-General have suggested that their positions should be linked to the salary level paid to a designated judicial officer or the head of a government department.\(^ {80}\) Victoria does not have a remuneration tribunal that could make an independent recommendation on this matter, and because the Committee believes this is not a matter that should be left to the administrative discretion of the government, the Committee considers that there are two ways to resolve this issue.

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\(^{78}\) For example the salary of the Auditor-General of Canada must equal that of a puisne judge of the Supreme Court of Canada and in the Province of British Columbia the legislative yardstick is the salary paid to the Chief Judge of the Provincial Court of British Columbia.

\(^{79}\) Mr W Cameron, Victorian Auditor-General, submission

\(^{80}\) Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.6; Mr W Cameron, Victorian Auditor-General, submission, p.5
Through its delegated Committee, Parliament could annually consider representations from the officers of Parliament on an appropriate level of remuneration, benchmark the case against developments elsewhere, seek input from the government, and then make a recommendation to Parliament.

Alternatively, the Committee could recommend that the officers’ salaries be tied to their Commonwealth counterparts after making an adjustment for the level of comparative responsibility, similar to the situation that prevails with Victorian state members of parliament (who are linked to the level of remuneration and allowances determined by the Commonwealth Remuneration Tribunal for federal parliamentarians). Any changes in responsibilities would also need to be provided for, for example, the Victorian Ombudsman now has a much greater range of functions, including those under the Whistleblowers Protection Act, and as Director of Police Integrity. To ensure that there is greater certainty for these officers, the Committee suggests that the legislation relating to each officer of Parliament be amended to provide that an appropriate parliamentary committee should be responsible for determining the remuneration for officers of Parliament. In addition, the Committee considers that the appropriate Committee should be required to table a report in Parliament on the outcomes of its findings to ensure a transparent process.

The Committee recommends that:

**Recommendation 2:** The legislation relating to each officer of Parliament be amended to provide that the appropriate parliamentary committee be responsible for reviewing and recommending the remuneration and allowances of independent officers of Parliament. The process should be transparent, with the relevant committee reporting to Parliament on the outcomes of its deliberations.

### 4.1.3 Tenure

The Committee’s review also indicated that there is inconsistency in the period for which officers of Parliament are appointed and in their eligibility for re-appointment (see exhibit 4.3).
Exhibit 4.3: Officers of Parliament Tenure Arrangements

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Period of Appointment</th>
<th>Eligible for re-appointment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auditor-General</td>
<td>7 years</td>
<td>Yes (a)</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>10 years</td>
<td>No (b)</td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>10 years</td>
<td>Yes – for a term not exceeding 10 years (c)</td>
</tr>
</tbody>
</table>

Notes:  
(a) Constitution Act 1975, as amended, s.94C  
(b) Ombudsman Act 1973, as amended, s.3(4)  
(c) Electoral Act 2002, as amended, s.12(2)

A number of witnesses raised concerns about the inconsistency in the period of appointments.81

The Committee can see that, from an operational standpoint, it is not desirable to appoint an officer of Parliament for a period that is too short to allow for identification and implementation of necessary reforms or initiatives or deter good candidates because of the limited tenure of the position. It is also important that the duration of the appointment period is sufficient to attract and retain enterprising, independent and capable persons to these positions. The Committee suggests that the appointments should be initially for eight years with the option of the Parliament, or its delegate, extending the appointment for a further period that would take it into the middle of the next election cycle. This is consistent with contemporary practice of appointing most statutory officers and heads of government agencies on fixed term contracts.

As mentioned in section 4.1.1, the Governor in Council appoints the Auditor-General on the recommendation of this Committee.82 Unlike the other officers of Parliament, the Auditor-General is appointed for a seven year period. A change to these arrangements would require an amendment to the Constitution Act 1975 and approval by the majority of electors voting at a referendum. The Public Accounts and Estimates Committee is aware that the term of the current Auditor-General will expire on 19 September 2006, shortly before the state election on 25 November 2006, making it difficult to co-ordinate the Auditor-General’s recruitment and appointment process with the mid election cycle of Parliament so as to avoid any perception that the appointment could be politicised in the run-up to the election. The Committee acknowledges the significant legislative impediment to changing the period of the Auditor-General’s appointment, and therefore makes no proposal to amend the current arrangement.

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81 Professor C Clark, Mr M De Martinis, Ms R Kiraka, submission; briefing by Sir B Elwood, Chief Ombudsman New Zealand; Rt. Hon. J Hunt, MP, Chair of the New Zealand Officers of Parliament Select Committee

82 Section 94A (2) of the Constitution Act 1975, as amended
Accordingly, the Committee recommends that:

**Recommendation 3:** The enabling legislation relating to the Ombudsman and the Electoral Commissioner be amended to provide that these officers of Parliament be appointed for an initial period of eight years, with the option of Parliament, or its delegate, extending the appointment if practicable into the middle of the next election cycle.

**Recommendation 4:** The recruitment and appointment process for officers of Parliament should be finalised well in advance of the state election and, as close to the middle of the election cycle, as practicable.

The Committee believes that none of the officers should be eligible for appointment within the government in the same jurisdiction within at least two years of stepping down as an officer of Parliament. This is consistent with the governance arrangements introduced by CLERP 9. The Committee considers that this arrangement would reinforce the independence of the officers of Parliament.

Accordingly, the Committee recommends that:

**Recommendation 5:** No officers of Parliament should be eligible to take up a position within the Victorian public sector until after a period of at least two years from the completion of their appointment as an officer of Parliament.

### 4.1.4 Dismissal

An important aspect of the formal independence of an officer of Parliament, complementing the arrangements for appointment and tenure, is provision for the officer’s removal.

Exhibit 4.4 outlines the arrangements for the three Victorian officers of Parliament.

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### Exhibit 4.4: Officers of Parliament
#### Suspension and dismissal arrangements

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Suspension and dismissal</th>
</tr>
</thead>
</table>
| Auditor-General       | • Governor in Council may suspend the Auditor-General at any time when the Parliament is not in session (Minister must present a statement to each House of Parliament within seven sitting days)  
                        • May be removed on an address by both Houses of Parliament (a) |
| Ombudsman             | • The Governor in Council may suspend the Ombudsman (a statement shall be presented to each House of Parliament). Legislation did not specify the person responsible for presenting the statement (b)  
                        • May be removed on an address by both Houses of Parliament |
| Electoral Commissioner| • Governor in Council may suspend the Commissioner (the Minister must within 2 hours give notice in writing to the Speaker, the President and the leader of each political party in each House of Parliament)  
                        • Where the suspension takes place when Parliament is not sitting, the Parliament must be summoned to meet as soon as practicable after a petition from Members of each House objecting to the suspension are presented to the Speaker/President (c) |

Notes:  
(a) Constitution Act 1975, as amended, ss.94C(2) to (6)  
(b) Ombudsman Act 1973, as amended, ss.3, 4  
(c) Electoral Commissioner Act 2002, as amended, ss.12, 14

To strengthen the independence of an officer of Parliament, the Committee strongly believes that only in extraordinary circumstances should an officer of Parliament be dismissed and it must involve the approval of both Houses of Parliament. The Committee considers that the current legislative arrangements for dismissal or removal from office should be uniform for all officers of Parliament and provide for consultation with the relevant parliamentary committee before any action is taken. The procedures outlined for the Auditor-General should be applicable for all officers of Parliament.
Accordingly, the Committee recommends that:

**Recommendation 6:**

(a) The legislation relating to the Ombudsman and the Electoral Commissioner be amended to provide consistency with the procedures for removing or dismissing these officers of Parliament and for consultation with the relevant parliamentary committee before any action is taken.

(b) The procedures be based on the arrangements applying to the Auditor-General.

### 4.1.5 Need for a closer relationship to Parliament

Annual reports are the main form of accountability reporting, ensuring that Parliament is aware of the work of the officers of Parliament. But operational reporting is also an important aspect, since it enables Parliament to follow-up on their work. Evidence to this Committee generally favoured the fostering of a closer relationship between the Parliament, through appropriate parliamentary committees, and the officers of Parliament. While this already occurs with this Committee and the Auditor-General’s Office it does not occur with the other independent officers of Parliament.

Various views were expressed on the matters that such committees should deal with, but none of the proposals envisaged the relationship involving oversight or guidance on areas of priority. Indeed, several witnesses stressed that it would be undesirable for a parliamentary committee to involve itself in the details of the Ombudsman’s work, especially in relation to particular cases. The Ombudsman also drew attention to the possibility of a conflict of interest that could occur in the unlikely event that the Ombudsman was asked to investigate the actions of a Member of Parliament.

After reflecting on this matter and reviewing developments overseas in relation to Ombudsman’s offices, the Committee found that the majority of parliamentary committees are not involved in operational matters or overseeing activities, and that their role is largely confined to protecting the officers by ensuring they have sufficient independence to discharge their roles as well as ensuring their accountability to the public.
Parliament. The Committee believes the benefits of having a closer formal relationship to Parliament far outweigh any perceived disadvantages. The Committee believes any potential conflict issues can be addressed through defining the scope of the relationship in legislation and by respective officers of Parliament and the appropriate parliamentary committees addressing the practicalities in a protocol statement. This is the successful model that has been adopted by the Public Accounts and Estimates Committee and the Auditor-General’s Office.

While some witnesses strongly supported the officers of Parliament having a more formal relationship with the Parliament, in practical terms the involvement needs to be delegated to either a parliamentary committee or to the Presiding Officers or a committee that involves the Presiding Officers, similar to the model used in New Zealand. The Committee believes it is in the best interests of the officers of Parliament and Parliament for the appropriate all-party committees to have this role rather than expecting the Presiding Officers to have a meaningful role in the appointment, budgetary, reviewing and other processes which are essential to ensuring the accountability and independence of the officers of Parliament.

In terms of which parliamentary committees should have this task, the Committee is of the view that as it has the responsibility for scrutinising public administration and the budget estimates, it may be appropriate for this Committee or another designated parliamentary committee to have a formal role in relation to ensuring the independence and accountability of the Ombudsman.

The Committee considers there would also be merit in having a more systematic review of the reports that are produced by officers of Parliament. As both the Auditor-General and the Ombudsman only have the power to make recommendations, the timely review and subsequent follow-up by a parliamentary committee, as occurs by the Public Accounts and Estimates Committee in relation to reports of the Auditor-General, is important and complements the scrutiny role which the Committee already undertakes in relation to public expenditure and public administration.

The Committee also considers that the Electoral Matters Committee should undertake these roles in relation to the Electoral Commissioner.

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87 Briefing by Mr H Evans, Clerk of the Senate; New Zealand Officers of Parliament Select Committee; Mr D McGee, Clerk of the New Zealand House of Representatives; Ms M Crooks, Purple Sage Project, submission, p.4; Mr T Walter, Office of the Tasmanian Ombudsman, submission, p.7
Accordingly, the Committee recommends that:

**Recommendation 7:** The legislation relating to each officer of Parliament be amended to provide that:

(a) the Public Accounts and Estimates Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Auditor-General and his/her office;

(b) the Public Accounts and Estimates Committee, or another designated Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Ombudsman and his/her office; and

(c) the Electoral Matters Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Electoral Commissioner and his/her office.

### 4.1.6 Independence from direction by Parliament or its Committees

To be effective, the officers of Parliament not only need to be independent from the executive government but also require statutory protection from directions from Parliament and its committees. The Auditor-General, the Ombudsman and the Electoral Commissioner are safeguarded from interference in their functions by sections 94B(6), 94E(6) and 94F(6) of the Constitution Act that provides that they have complete discretion in the performance or exercise of their functions and powers. Further, the Auditor-General is not subject to direction from anyone in relation to audits. This Committee strongly supports this constitutional safeguard and considers that the legislation governing the operations of the officers of Parliament should also explicitly state that the officers cannot be directed by Parliament or its parliamentary committees on operational matters.
The Committee recommends that:

**Recommendation 8:** The legislation governing the operations of officers of Parliament explicitly state that Parliament and its parliamentary committees cannot direct these officers of Parliament on operational matters but can request them to undertake specific investigations.

### 4.1.7 External review process

Exhibit 4.5 outlines the current arrangements relating to officers of Parliament in Victoria.

**Exhibit 4.5:** Officers of Parliament

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Review process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auditor-General</td>
<td>The Legislative Council and the Legislative Assembly (on the recommendations of the Parliamentary Committee) (a) appoints:</td>
</tr>
<tr>
<td></td>
<td>• an independent auditor to carry out financial audits of the Audit Office (b); and</td>
</tr>
<tr>
<td></td>
<td>• a suitably qualified person to conduct a performance audit of the Audit Office (at least once every three years) (b)</td>
</tr>
<tr>
<td></td>
<td>The appointees must comply with directions of the Parliamentary Committee in conducting the performance audit. (b)</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>No mention in the Ombudsman Act (c)</td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>No mention in the Electoral Act (c)</td>
</tr>
</tbody>
</table>

*Notes:*

(a) Audit Act 1994, as amended, s.3 defines ‘Parliamentary Committee’ as the Public Accounts and Estimates Committee

(b) Audit Act 1994, as amended, ss.17–19

(c) The Auditor-General undertakes the financial audits of the Office of the Ombudsman and the Electoral Commission

Several witnesses raised issues about the need to ensure that the independent officers of Parliament are accountable for their overall performance. For example, Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.3; briefing by the New Zealand Officers of Parliament Select Committee; Mr B Charles, MP, Chair of the Joint Committee Public Accounts and Audit Committee

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88 For example, Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.3; briefing by the New Zealand Officers of Parliament Select Committee; Mr B Charles, MP, Chair of the Joint Committee Public Accounts and Audit Committee
the review and subsequently reports to the Parliament on the recommendations contained in the report of the independent performance auditor.

The Committee understands that the Department of Premier and Cabinet arranged in 2002 for PricewaterhouseCoopers to undertake a review of the Ombudsman's Office and is unaware if such a review has been undertaken of the Electoral Commissioner’s Office. The Committee is of the view that the Ombudsman and the Electoral Commissioner should be directly accountable to Parliament for the proper and efficient management of staff and the significant financial resources allocated to their offices, rather than have any line of accountability directly to the Premier (in the case of the Ombudsman) or the Attorney-General (in the case of the Electoral Commissioner) or to any agency of the government (such as the State Services Commission). The costs involved in undertaking the reviews should be met from the Parliament's budget, with the Parliament to be reimbursed for this expenditure from the Consolidated Fund.

The Committee is also of the view that it would be appropriate for the reviews to be undertaken every four years.

Accordingly, the Committee recommends that:

**Recommendation 9:** The Ombudsman’s and the Electoral Commissioner's enabling legislation be amended to provide that both officers and their agencies are subject to an independent external performance review every four years and that Parliament, on the recommendation of the appropriate parliamentary committee, appoint an appropriate person to undertake the review and determine the terms and conditions of the appointment.

**Recommendation 10:** The *Audit Act* 1994 be amended to provide that the independent performance audit of the Victorian Auditor-General's Office be undertaken every four years, consistent with the provisions recommended for the Ombudsman and the Electoral Commissioner.

**Recommendation 11:** The costs involved in undertaking performance reviews of the three officers of Parliament be appropriated from the budget of Parliament, and reimbursed from the Consolidated Fund.
4.1.8 **Budgetary independence**

Exhibit 4.6 outlines the current arrangements.

**Exhibit 4.6: Officers of Parliament Budget arrangements**

<table>
<thead>
<tr>
<th>Officer of Parliament</th>
<th>Budget arrangements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auditor-General</td>
<td>Budget to be determined in consultation with the Parliamentary Committee (a) (b)</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>The Ombudsman’s Office is an output within the Department of Premier and Cabinet budget</td>
</tr>
<tr>
<td>Electoral Commissioner</td>
<td>The Electoral Commissioner’s Office is an output within the Department of Justice budget</td>
</tr>
</tbody>
</table>

*Note: (a) Audit Act 1994, as amended, s.7D(2)  
(b) Audit Act 1994, as amended, s.3 defines ‘Parliamentary Committee’ as the Public Accounts and Estimates Committee*

The Committee heard some arguments that the government’s involvement in setting the budgets for officers of Parliament limited or threatened the independence of these officers. There was strong support for Parliament, or an appropriate parliamentary committee, to have the final say in the matter. The Committee is aware that in the UK and New Zealand, officers of Parliament have statutory protection for their budgets. The Commonwealth Joint Committee on Public Accounts and Audit is responsible for considering and making recommendations to Parliament and the responsible Minister on draft annual funding estimates for the Auditor-General’s Office. The Victorian Auditor-General’s Office budget is determined in consultation with this Committee. While this Committee has an important consultative role, it does not have the power to approve the budget or recommend its approval to the Parliament.

When amendments to the Audit Act were being considered by the government in 2001, the Auditor-General suggested that Parliament should have a more decisive role in endorsing the annual budget of his office. The Department of Treasury and Finance advised that the government did not accept this recommendation on the basis that if the government is to be held accountable for the state budget, it must have the ultimate say in determining the budget’s composition and make up, prior to submitting the annual Appropriation Bills to Parliament.

This is a complex issue, and the Committee is aware that if officers of Parliament are not adequately resourced, it will impact on the effectiveness of their offices. Safeguarding the budget of the Ombudsman and the Auditor-General is particularly

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89 Briefing by Mr R McLeod, Commonwealth Ombudsman; Mr T Walter, Office of the Tasmanian Ombudsman, submission, p.7; briefing by Mr J Parkinson, Australasian Council of Auditors-General; Mr D McGee, Clerk of the New Zealand House of Representatives
90 Quoted in the submission from Mr W Cameron, Victorian Auditor-General, p.4
important given the crucial and strategic role they both play in scrutinising and reviewing government activities.

The budgetary arrangements for the positions of the Ombudsman and the Electoral Commissioner seem particularly anomalous, given that both offices are business units of government departments and their budgets are considered and determined as part of the usual government review process. The Committee heard no evidence of concern about the level of resourcing of these officers, and the Ombudsman made the point that if he was concerned he always had the option of making a report to Parliament. Experience from overseas shows that there is always the potential for these ‘watchdogs’ to be under-funded, particularly after an adverse report on the operations of the government.

The uneasy relationship that can develop between an Ombudsman and the government is illustrated by the remarks made by the former Saskatchewan Ombudsman, shortly before his retirement:

To some extent it may be inevitable that an Ombudsman who works up to his mandate will have something other than a smooth working relationship with the executive branch of government. The cumulative effect of appearing to be constantly in search of change and remedies for the public, and finding it necessary to air differences with the government in public several times each year, must put this relationship in some jeopardy. Sooner or later, there is a tendency to shoot the messenger when governments don't like the message. It may be because governments, once they settle in, wish to appear infallible and become less tolerant of differing views. It may also be because the Ombudsman is the recipient of only bad news and runs the risk of developing a jaundiced attitude towards government systems. In any event, there is no greater challenge for an Ombudsman than to attempt to maintain a good working relationship with government.

The Committee is mindful that the Ombudsman could be placed in a difficult position because of his responsibilities and is aware that he is currently undertaking an inquiry in relation to the administration of Freedom of Information legislation, where the activities of departments, including the Department of Premier and Cabinet, are being reviewed. After assessing developments elsewhere, the Committee considers that the budgetary arrangements for the Electoral Commissioner and the Ombudsman should be brought into line with arrangements already in place for the Auditor-General’s Office, with an appropriate parliamentary committee involved in reviewing and recommending the annual budget.

91 Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.3
92 Quoted in the submission from Mr T Walter, Office of the Tasmanian Ombudsman, p.3
The Committee considers that the arrangements with the Auditor-General’s Office have worked well, where the Committee, prior to the government’s finalisation of the state budget, seeks advice from the Department of Treasury and Finance on the overall fiscal parameters expected of departments and takes this into account when recommending to government an appropriate level of funding.

The Committee considers there would be merit in making this process more transparent by making its recommendations to Parliament in addition to the Treasurer.

Accordingly, the Committee recommends that:

**Recommendation 12:** The legislation relating to each officer of Parliament be amended to provide:

(a) that the appropriate parliamentary committee has a role in reviewing and advising Parliament of the budget estimates for particular officers of Parliament; and

(b) the appropriate parliamentary committee table in Parliament its report on the forthcoming appropriation for the relevant officers of Parliament and forward a copy to the Treasurer.

**4.1.9 Other administrative restrictions relating to staff**

One way in which an executive government could seek to control an independent officer of Parliament it perceives as recalcitrant or too independent, is by controlling the terms and conditions of, and the appointment of, the staff. The difficulties that this can present were highlighted by the Tasmanian Ombudsman, who is linked for administrative and budgetary purposes with the Tasmanian Department of Justice:

> In the past two to three years, high staff turnover has become a major problem. Half the office staff are on fixed term contracts. A few of the contract appointments are relatively long term as a result of permanent employees taking sustained leave, but in most cases we have been forced into making short term appointments because of lack of guaranteed funding continuity. As a result it is difficult to attract and to retain good staff. I believe that what is needed is a fixed staffing complement for the office which is based on a realistic assessment of statutory functions and which will be responsive to any increase in responsibilities.

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Such restrictions may be more easily invoked in the context of existing legislation governing public instrumentalities generally, for example, the Public Administration Act. The government could effectively undermine the independence of these officers of Parliament unless their offices are declared to be separate administrative units and officers of Parliament have the powers of a permanent head under the Public Administration Act.\(^94\) The Committee noted the legislative approach adopted for the Auditor-General which provides that the Public Accounts and Estimates Committee can exempt that office from any restrictions imposed under the Public Administration Act relating to staffing and conditions of employment.

The Committee recommends that:

**Recommendation 13:** The appropriate parliamentary committees be given legislative authority to exempt, if necessary, the Ombudsman and the Electoral Commissioner from any administrative requirement specified in the Public Administration Act.

### 4.1.10 Appointment of long term acting officers of Parliament

The appointment of an acting officer of Parliament is by the Governor in Council, which is the same process for appointing the officers of Parliament. As events have shown this can involve a long term appointment as occurred when the previous Ombudsman, Dr Perry who fell ill and an acting appointment was made for almost a year. Again this is unsatisfactory because it undermines the fundamental principle that the primary relationship of officers of Parliament is to Parliament, rather than the executive government.

Accordingly, the Committee recommends that:

**Recommendation 14:** The legislation relating to each officer of Parliament be amended to provide that the appropriate parliamentary committee be involved in recommending long term acting officers of Parliament.

### 4.1.11 Overarching or specific legislation for each officer of Parliament

After reviewing developments in other jurisdictions, the Committee considers the Constitution Act should specify who are independent officers of Parliament and outline the core principles that underpin their operations. Their enabling legislation

\(^94\) Professor R Wettenhall, additional information, p.1
should contain detailed information about the arrangements for appointment, tenure, remuneration, dismissal, selection of acting officers of Parliament, and staffing and their relationship to Parliament and the appropriate parliamentary committees.

The Committee recommends that:

Recommendation 15:

(a) The Constitution Act 1975 specify the independent officers of Parliament and outline the core principles that underpin their operations.

(b) The enabling legislation for each officer of Parliament detail arrangements for their remuneration, appointment and dismissal, the selection of acting officers of Parliament, staffing and the officer’s relationship with Parliament and appropriate parliamentary committees.

4.1.12 Consultation before officers of Parliament are appointed

The Committee considers it is essential that Parliament, or its delegate, should be consulted before any further officers of Parliament are appointed to ensure that there is a consistent framework adopted governing their relationship to Parliament and which emphasises their primary responsibility to Parliament.

Accordingly, the Committee recommends that:

Recommendation 16: The Parliament, or the appropriate parliamentary committees, should be consulted before any legislation to create any further officers of Parliament is introduced in Parliament. This will ensure the legislative framework governing the appointment and removal of such officers, their financing and resourcing, and their accountability arrangements and relationship with Parliament are consistent with the expectations of the core criteria for officers of Parliament.
4.1.13 Criteria for appointing an officer of Parliament

Various witnesses emphasised that the primary function of an officer of Parliament should be as a check on the Executive, as part of Parliament’s constitutional role of ensuring the accountability of the Executive. In other words, an officer of Parliament serves the interests of Parliament rather than the executive.

The Committee supports the view that an officer of Parliament must be discharging functions which the Parliament itself might appropriately undertake. This rules out a purely judicial role for an officer of Parliament as the Parliament is not a judicial body but has legislative and investigatory functions. The Committee also considers that it excludes those officers that have a primarily regulatory, advisory or advocacy role.

Accordingly, the Committee recommends that:

**Recommendation 17:** The following principles be adopted for the creation of new officers of Parliament:

(a) an officer of Parliament must be created only to provide a check on the executive’s use of power;
(b) an officer of Parliament must discharge only those functions that the Victorian Parliament, if it so wished, might carry out;
(c) Parliament should consider creating an officer of Parliament only on rare occasions; and
(d) Parliament should from time to time review the appropriateness of each officer of Parliament’s status.

4.1.14 Conclusion

With the exception of the direct involvement of Parliament, or its delegate, in determining the remuneration of the Auditor-General and in approving the annual budget of the Victorian Auditor-General’s Office, all the characteristics traditionally considered to be part of the officer of Parliament model are reflected in the Audit Act or in the Constitution Act.

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95 Briefing by Mr H Evans, Clerk of the Senate; Mr D McGee, Clerk of the New Zealand House of Representatives; New Zealand Officers of Parliament Select Committee
This is not the situation with the Ombudsman and the Electoral Commissioner, however, which has lagged behind developments in many other jurisdictions. The Committee has made a number of recommendations to protect and enhance the status of these officers of Parliament and considers that these changes are necessary to ensure the accountability and independence of these officers.

The Committee has also recommended some principles that should guide the Parliament and the government in relation to appointing further officers of Parliament.

This report was adopted by the Public Accounts and Estimates Committee at its meeting held on 30 January 2006 in the Legislative Council Committee Room at Parliament House, Melbourne.
APPENDIX 1: LIST OF INDIVIDUALS AND ORGANISATIONS PROVIDING EVIDENCE AND/OR SUBMISSIONS

Evidence

Thursday, 3 August 2000
Rt. Hon. Jonathan Hunt, MP, Speaker of the New Zealand House of Representatives and Chair of the New Zealand Officers of Parliament Select Committee
Mr Eric Roy, JP, Assistant Speaker, New Zealand House of Representatives
Mr Keith Locke, MP; Mr Lindsay Tisch, MP; Hon. Marie Hasler, MP; Mr Ross Robertson, MP; Members of the New Zealand Officers of Parliament Select Committee
Mr David McGee, QC, Clerk of the New Zealand House of Representatives
Mr D J D Macdonald, New Zealand Controller and Auditor-General
Mr Robert Buchanan, New Zealand Assistant Auditor-General
Mr Terry O’Loughlin, Head of Parliamentary Section, New Zealand Auditor-General’s Office
Ms Karen Adair, Manager, Science, Transport and Environment, Regulatory and Tax Policy Branch, New Zealand Department of Treasury
Mr Geoff Donovan, Vote Analyst, Regulatory and Tax Policy Branch, New Zealand Department of Treasury
Mr John Martin, Senior Lecturer, Public Policy Group, Victoria University
Sir Brian Elwood, Chief Ombudsman New Zealand

Friday, 4 August 2000
Dr J Morgan Williams, New Zealand Parliamentary Commissioner for the Environment
Ms Helen Beaumont, New Zealand Assistant Parliamentary Commissioner for the Environment
Mr Bob McClymont, Director, Citizens Concerns, New Zealand Office of the Commissioner for the Environment

Tuesday, 22 August 2000
Mr Wayne Cameron, Victorian Auditor-General
Mr Joe Manders, Assistant Auditor-General, Victorian Auditor-General’s Office

Monday, 9 October 2000
Mr Peter Salway, Commissioner for Public Employment, Department of Premier and Cabinet
Dr Wayne Chamley, Management Group, The Purple Sage Project
Professor Colin Clark, Deputy Dean, Faculty of Business and Law and Head of the Public Sector Research Unit, Victoria University of Technology
Mr Michael De Martinis, Lecturer, School of Accounting and Finance, Victoria University of Technology

Tuesday, 10 October 2000
Mr Harry Evans, Clerk of the Senate
Mr John Parkinson, Convenor of the Australasian Council of Auditors-General and A.C.T. Auditor-General
Mr Ron McLeod, Commonwealth Ombudsman
Mr Oliver Winder, Deputy Ombudsman
Mr Bob Charles, MP, Chairman of the Commonwealth Joint Committee of Public Accounts and Audit
Dr Margot Kerley, Secretary to the Commonwealth Joint Committee of Public Accounts and Audit
Dr John Uhr, Senior Fellow, Political Science Program, Research School of Social Sciences, Australian National University
Professor Roger Wettenhall, Visiting Fellow, Research School of Public Sector Management, University of Canberra

Thursday, 29 March 2001

Dr John Tamblyn, Victorian Regulator-General
Dr Barry Perry, Victorian Ombudsman

Monday, 21 February 2005

Mr George Brouwer, Victorian Ombudsman
Mr John Taylor, Deputy Ombudsman, Ombudsman Victoria

Submissions

Submissions were received from the following individuals and agencies:

Mr Max Croxford, Office of the Building Control Commissioner (submission no.1)
Mr Kevin Ryan, State Mining Warden (submission no.2)
Mr Tim Walter, Investigation Officer, Office of the Tasmanian Ombudsman (submission no.3)
Mr C A Barry, Victorian Electoral Commissioner (submission no.4)
Mr Geoff Flatman, QC, Director of Public Prosecutions Victoria (submission no.5)
Ms Mary Crooks, Project Director and Dr Wayne Chamley, Management Group, The Purple Sage Project (submission no.6)
Mr Wayne Cameron, Victorian Auditor-General (submission no.7)
Ms Kate Hamond, Legal Ombudsman (submission no.8)
Professor Colin Clark, Deputy Dean, Faculty of Business and Law and Head – Public Sector Research Unit, Victoria University, Mr Michael De Martinis and Ms Ruth Kiraka, Victoria University (submission no.9)
Dr Barry Perry, Ombudsman, The Ombudsman Victoria (submission no.10)
Mr B Bartl (submission no.11)

Additional material provided by the following individuals and agencies:

Hon. Steve Bracks, MP, Premier of Victoria
Hon. David Davis, MLC, (then) Shadow Minister for Scrutiny of Government
Professor Keith Houghton Fitzgerald, Professor of Accounting, Faculty of Economics and Commerce, University of Melbourne
Professor Roger Wettenhall, visiting Professor, Centre for Research in Public Sector Management, University of Canberra
Mr John Taylor, Victorian Deputy Ombudsman
Professor Colin Clark, Deputy Dean, Faculty of Business and Law and Head Public Sector Research Unit, Victoria University
Mr Ian Mayer, Victorian Division of CPA
Professor Dennis Pearce, Faculty of Law, Australian National University