The Speaker

Parliament House Sydney 2000

Phone: 9230 2201 Fax: 9230 2846

3 August 2011

Ms Janice Rafferty
Secretary
Standing Committee on Administration and Procedure
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Ms Rafferty

I refer to the letter dated 19 May 2011, from Speaker Rattenbury inviting submissions to the inquiry currently being undertaken by the Standing Committee on Administration and Procedure into the feasibility of establishing the position of Officer of the Parliament.

The term 'officer of Parliament' is not readily used in legislation in New South Wales to describe statutory officers such as the Auditor-General or Ombudsman. In fact the only officer that is recognised in statute as an 'Officer of Parliament' is the newly created position of Parliamentary Budget Officer. This position was created by the former Government in October 2010. Currently there is no office holder and a Joint Select Committee has been established to inquiry into the role and functions of the office.

However, in New South Wales there is some parliamentary consideration of the appointment of certain statutory officers such as the Auditor-General, Ombudsman etc where committees have the power of veto over such appointments. However, while they may be regarded as independent these position holders are not defined as 'officers of Parliament' and their appointment is made by the Executive.

It should be noted that the New South Wales Parliament does however have the capacity to pass a resolution for the Governor to remove a number of independent statutory officers. Both Houses must agree to the resolution for it to be valid.

The attached submission provides some general comments on the characteristics of an 'Officer of Parliament' and discusses the role of certain statutory officers in New South Wales whose role and functions are directly related to the role of the Parliament and could arguably lend themselves to being 'Officers of Parliament.

The submission also includes more detailed information on the definitions of and role of 'Officers of Parliament' generally and the historical development of 'Officers of Parliament' in a number of jurisdictions, which the Committee may find informative.

In New South Wales the creation of the first statutorily recognised 'Officer of Parliament' was a political decision but could arguably be considered appropriate given the role of the Officer in relation to the Parliament, which is to assist members in providing independent costings of proposed policies and advice on financial and fiscal matters more generally. However, as the attached submission indicates there is probably a case for limiting statutory recognition as officers of Parliament to those bodies that perform functions directly connected with the role of the Parliament, and which are undertaken to some degree on Parliament's behalf.

Should you have any questions in relation to the Legislative Assembly's submission do not hesitate to contact the Clerk of the Legislative Assembly, Mr Russell Grove, on 9230 2222.

Yours sincerely

Shelley Hancock

Shelley Hancock MP
<u>Speaker</u>

NSW Legislative Assembly's submission to the Standing Committee on Administration and Procedure, Legislative Assembly for the ACT

Inquiry into the feasibility of establishing the position of Officer of the Parliament

Introduction

As has been noted by the Standing Committee on Public Accounts of the ACT Legislative Assembly, the term 'Officer of Parliament' is not easily defined. Measures to strengthen the independence of Officers of Parliament from the Executive are generally focussed on securing tenure of office, parliamentary approval of funding levels, direct reporting to Parliament and the establishment of parliamentary oversight committees.

In the New Zealand context, McGee has observed that there is no statutory definition or criteria established to identify an Officer of Parliament, nor is there any specific definition of what being an Officer of Parliament entails in respect of the powers, duties and functions flowing from such status. The latter are gathered from a consideration of the individual statutory provisions applicable to each officer.[1]

The same situation applies in New South Wales, where only the recently established position of Parliamentary Budget Officer is recognised in statute as an officer of Parliament. Section 5 of the *Parliamentary Budget Officer Act 2010* provides that the position is 'an independent officer of Parliament' with the qualification that 'there are no implied rights, obligations or immunities arising from that officer being an independent officer of Parliament'. Nevertheless, in practice the Auditor-General and possibly the Ombudsman also would be regarded as officers of Parliament, despite not having the title in their legislation.

Officers of Parliament may have certain statutory provisions in common, however, these characteristics do not fully denote the meaning of the term. The concept of 'Officers of Parliament' is a traditional one that has developed over time in various jurisdictions and is as much defined by the course of that development and the relationship such officers have with Parliament, than by any strict criteria or reporting and accountability structures.[2]

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[1] Neil Laurie, 'Parliamentary Committees, Commissioners, Independent Commissions – Parliamentary Privilege and Judicial Review of Decisions, Investigations or Reports', *Australasian Parliamentary Review*, Spring 2002, vol. 17(2), pp.217-8; original see David McGee, *Parliamentary Practice in New Zealand*, 2nd edition, Butterworths, London 1994, p.55

[2] The term applies to bodies external to Parliament, as distinct from officers employed by or belonging to the House, such as the Clerks and the elected Presiding Officers. Section 1(4) of the National Audit Act 1983 clarifies that the Comptroller and Auditor General's status as an 'Officer of the House of Commons' should not be confused with the position of the departmental officers of the House, as specified in s.4 of the *House of Commons (Administration) Act 1978* . Erskine May distinguishes between elected officers (i.e. the Speaker and Deputy Speakers); Crown appointed Officers (being the Clerk, Clerk Assistant, Serjeant at Arms, Clerk of the Crown in Chancery); senior staff appointed by the Speaker or House of Commons Commission (eg Speaker's Counsel and Parliamentary Commissioner for Standards) and statutory officers (the Comptroller and Auditor General, and the Parliamentary Commissioner for Administration or Ombudsman). Oonagh Gay, 'Officers of Parliament – A Comparative Perspective', Research Papers 03/77, Parliament and Constitution Centre, House of Commons Library, 20 October 2003, p.7.

Traditionally associated with the positions of Auditor-General and Ombudsman, in recent times a wider range of statutory bodies[3] have come to be regarded as officers of Parliament because of their perceived independence from the executive and closer alignment with Parliament. However, the absence of any clear definition for officers of Parliament, combined with the number of other independent watchdog bodies sharing common characteristics, reporting and accountability systems, may have significant implications for the status of Officers of Parliament.

Defining characteristics

It has been suggested that Officers of Parliament can be recognised by the following common characteristics:

- parliamentary involvement in appointment and dismissal;
- a statutory committee which is responsible for budget approval and oversight;
- a specific select committee to which the Officer is bound to report; and
- staffing independent of the civil service.[4]

However, these characteristics may be shared by a range of bodies that would not normally be considered officers of Parliament but may still perform a public accountability role somewhat independently of the executive. Anti-corruption investigative commissions such as the Independent Commission Against Corruption (ICAC) and the Police Integrity Commission (PIC) are two examples.

For these New South Wales statutory bodies, which form part of the investigative arm of the Executive, reporting and accounting to Parliament serves as a check and balance in respect of the extraordinary covert and coercive powers they exercise, as much as it is a reflection of their independence from the Executive. Consequently, while it may be argued that the ICAC and PIC both perform roles supportive of the NSW Parliament's function to scrutinise the Executive, their reporting and accountability framework needs to be seen in this different context. The powers of the Ombudsman and Auditor-General though significant – they include Royal Commission powers - are more limited in scope. The accountability and reporting framework for ICAC and PIC derives from a different 'tradition' to the framework for the Auditors-General and Ombudsman.

The situation in New South Wales

Application of the concept - The importance of first grappling with the definitional question before conferring the status of an officer of Parliament becomes apparent when the Executive fails to observe the independence and accountability frameworks put in place by Parliament to support watchdog bodies. For instance, developments in New South Wales demonstrate that certain Executive processes have the potential to undermine such frameworks, despite the recognised status of independent statutory officers and the creation of dedicated parliamentary oversight committees.

During the 50th Parliament of New South Wales, the Independent Members of Parliament, who held the balance of power in the Legislative Assembly, obtained agreement of the Government of the day to a Charter of Reforms aimed at increasing Parliament's independence from the Executive. The

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[3] ibid.
[4] ibid, p.8

Charter included several legislative amendments to strengthen the role of watchdog bodies including the Ombudsman and Auditor-General, as follows:

- A requirement that the responsible Minister will respond to a non-compliance report by the Ombudsman (under s.27 of the Ombudsman Act) about a department or agency within their portfolio, within 12 sitting days of the report being tabled by making a statement to Parliament.
- The Ombudsman and Auditor General to have unfettered access to Government documents in the performance of their functions, notwithstanding obligations of secrecy, duties of confidence and laws relating to public interest and legal professional privilege (the exception being Cabinet documents).
- Statutory provision for the Ombudsman and the Auditor General to report direct to the Presiding Officers of Parliament at any time;
- Reports presented to the Presiding Officers by the Ombudsman and Auditor General to be tabled in the relevant House on the first sitting day following receipt and be subject to debate or if Parliament is not sitting, be released forthwith;
- Parliamentary Committee approval (with provision for minority reports) of Cabinet nominations for the Auditor General, Commissioner of ICAC, Ombudsman and DPP[5].

Some of the Independents' proposals were given legislative effect, while others were not. For instance, the Ombudsman and Auditor General can report direct to the Presiding Officers, at anytime, and their reports are tabled on the next sitting day or published forthwith but there is no dedicated debate on the reports. Similarly, Parliamentary Committees were given a limited role in the appointment of such officers: they may exercise a veto power over certain statutory appointments, including those of the Auditor General, Ombudsman, ICAC Commissioner, PIC Commissioner, PIC Inspector and the Director of Public Prosecutions. The parliamentary veto power over statutory appointments also has been shown to be vulnerable to Executive decision-making. For instance, despite the confidentiality provisions applicable to this process, the Executive has on previous occasions announced proposed appointments before making a referral to the Committee. In such circumstances, the role of the Committee seems to be more akin to a confirmation hearing than an outright veto power. As measures to strengthen the Ombudsman and Auditor General's independence from the Executive, these reforms fall significantly short of the UK and New Zealand Officer of Parliament models.

Parliamentary Budget Officer – This position was created in 2010 with the role of providing independent costings of election promises and, during non-election periods, independent costings of proposed policies of members of Parliament. In his second reading speech on the Bill, the Minister for Finance noted that, 'The Parliamentary Budget Office [PBO] will be a truly independent arm of the Legislature and will serve this Parliament and the people of New South Wales well'.

The process for appointment to the position involves a recommendation from a panel of three other statutory officers to the Presiding Officers, who make the final appointment (s.6). The first appointee

[5] 'Memorandum of understanding between the Honourable Nicholas Greiner MP Premier, for and on behalf of the Liberal/National party Government (the Government) and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP (the Independent Members)', items 1(vii) and 6D. http://www.clovermoore.com/idx.htm?http://www.clovermoore.com/web/search/

was to have a term of nine years. The PBO also is to report to a nominated parliamentary committee of each House, which may monitor the Office's operations[6], and its operational plan is submitted to the Presiding Officers. The role of the PBO was likened to international counterparts that had been established to enhance Parliament's technical capacity to analyse the budget and engage with budgetary implementation.[7]

On 23 June 2011 a joint select committee was appointed to inquire into the PBO, its role and functions, structures and operations.

Attached is information on the historical development of 'Officers of Parliament' in a number of jurisdictions. This include more detailed consideration of the definition of and role of 'Officers of Parliament.'

[6] S.15.

[7] NSW Legislative Assembly Parliamentary Debates, Parliamentary Budget Officer Bill 2010, 19 October 2010, p.26229.

Attachment – Historical development of Officers of Parliament

The development of a unique relationship with Parliament

Closer examination of the development of the role performed by officers of Parliament indicates that the term denotes more than the common characteristics of: parliamentary involvement in appointment and dismissal; a statutory committee which is responsible for budget approval and oversight; a specific select committee to which the Officer is bound to report; and staffing independent of the civil service. In this respect, the development of the relationship between each 'Officer' and their respective Parliament is critical to their status. For example, the United Kingdom Comptroller and Auditor General and the Ombudsman (also known as the Parliamentary Commissioner for Administration) have been historically linked to Parliament through their respective roles in examining expenditure by the Executive and addressing individual grievances. These roles have developed over time in specific circumstances.

The case of the UK Comptroller and Auditor General (the original Officer of Parliament) - The Comptroller and Auditor General in the United Kingdom was the first non-parliamentary body considered to be an officer of Parliament and formally recognised as such in the *National Audit Act 1983*. This Act gave statutory recognition to the long-established relationship between the UK Parliament and the Comptroller and Auditor General, whereby the latter was seen to be a body that carried out functions on behalf of the Parliament.

That role dates to 1866, when the then Chancellor of the Exchequer, Gladstone, introduced legislation to reform public finance and strengthen parliamentary control and scrutiny of public spending,[8] thereby increasing the level of parliamentary accountability for expenditure by government departments. The *Exchequer and Audit Departments Act 1866*[9] invested the dual functions of controlling the issue of public monies (according to Parliamentary appropriation) and auditing expenditure, in the amalgamated position of Comptroller and Auditor General.[10]

The significance of the relationship between the Comptroller and Auditor General and the Parliament at this time is evident in the provisions of the *Exchequer and Audit Departments Act 1866*, the comments of Members during debate on the Bill, and the transcripts of evidence relating to the committal of the Bill to the Public Accounts Committee[11]. Section 3 of the Act provided that the Crown (Her Majesty) would nominate and appoint the Comptroller and Auditor General and an Assistant Comptroller and Auditor, both of whom would hold office 'during good behaviour', subject to their removal by the Crown on address from both Houses of Parliament. The Comptroller and Auditor General would examine and certify departmental appropriations, and report upon the

[8] http://www.nao.org.uk/about/history.htm; Parliament authorised expenditure and the Comptroller retained control of the issue of public monies to government, as authorised by Parliament, but there was no efficient auditing system to determine that the funds once issued had been properly spent. The Committee of Public Accounts established in 1860 reviewed the audited accounts of the previous year's expenditure. However, a large portion of expenditure of public monies was not subject to audit: some expenditure was audited by the Audit Board and some by Treasury. Second reading, Exchequer and Audit Departments Bill, Hansard's Parliamentary Debates, 3rd Series, Commons, 1866, volume 181 (1st February – 9th March 1866), pp. 275, pp.1369-1370, 1372.

[9] UK Statutes 1866 - 28° and 30° VICTORIAE c.25, pp. 424-433 (assented to 28/6/1866).

[10] First reading, Exchequer and Audit Departments Bill, Hansard's Parliamentary Debates, 3rd Series, Commons, 1866, volume 181 (1st February – 9th March 1866), p.275.

[11] First reading, Exchequer and Audit Departments Bill, Hansard's Parliamentary Debates, 3rd Series, Commons, 1866, volume 181 (1st February – 9th March 1866), pp.275-6; Second reading, volume 181, p.1368; committed to the Committee of Public Accounts on 1st March 1866, volume 181, p.1375.

appropriation accounts, with reference to the Acts of Parliament that authorised the issues from the Consolidated Fund. His reports would be laid before the House of Commons, within a specified timeframe (ss.21-22).

Under s.27 of the Act every appropriation account was to be examined by the Comptroller and Auditor General 'on behalf of the House of Commons'. The purpose of the examination by the Comptroller and Auditor General clearly supported Parliament's role in granting authorisation for expenditure of public funds. Every appropriation account was checked to ascertain if the payments charged by each department to the grants were supported by proof of payment, and whether the money expended was applied to the purpose for which the grant was intended. In the event that Treasury elected not to sanction any unauthorised expenditure reported to it by the Comptroller and Auditor General, the expenditure would 'be regarded as being not properly chargeable to a Parliamentary Grant' and would be reported by the Comptroller and Auditor General to the House of Commons. If the Treasury did not present the Comptroller and Auditor General's appropriation account reports to the House of Commons within the prescribed timeframe, the Comptroller and Auditor General also was authorised to present the report to the House forthwith. Under the terms of the Act, the Comptroller and Auditor General was being 'directed' to report 'for the information of the House of Commons' (s.32).

During the debate on the Exchequer and Audit Departments Bill, it was emphasised that the legislation was 'a matter which really lay at the root of the functions of the House of Commons – namely, the granting of money'.[12] The Comptroller's control of issuing public monies was a constitutional control and the extension of appropriation audits to all branches of the public service would 'effectually prevent the intentions of Parliament being contravened'.[13]

The connection between the role of the Comptroller and Auditor General and the functions of the Parliament also is apparent in the transcripts of the evidence taken by the Committee of Public Accounts, to which the Exchequer and Audit Departments Bill was committed. Committee Members were concerned that the Bill should expressly state that the functions to be carried out by the Comptroller and Audit General were being undertaken at the direction, and on behalf of, the Parliament.[14]

The functional relationship between the Comptroller and Auditor General and the UK Parliament was recognised further in statute through the *National Audit Act 1983*, which enacted reforms to modernise the public audit system in the United Kingdom and to re-establish the Comptroller and Audit General as an 'officer of the House of Commons' (s.1(2)). The proponents of this legislation stated that they were seeking to re-enact Gladstone's 1866 reforms. They claimed that the Comptroller and Auditor General and the Exchequer and Audit Department both had come to be dominated by the Treasury and Executive: Treasury provided the Comptroller from its senior staff

[12] Second reading, Exchequer and Audit Departments Bill, Hansard's Parliamentary Debates, 3rd Series, Commons, 1866, volume 181 (1st February – 9th March 1866), pp. 275, p.1370.
[13] Ibid, p.1375, Mr Childers (Secretary to the Treasury).
[14] Special Report from the Committee of Public Accounts on the Exchequer and Audit Departments Bill, dated 15 March 1866, *Reports from Committees*, Session 1st February – 10th August 1866, volume 7, 1866, pp. 536-543: Minutes of Evidence taken before the Committee of Public Accounts on 9 March 1866, pp.14-21; in particular paras. 182, 214, 216, 218, 220, 222, 224-225.

(nominated by the Executive); fixed the number and grades of Exchequer and Audit Department staff; and also determined the force of accounts to be audited.[15]

Under the National Audit Act, provision was made for the Comptroller and Audit General to report to Parliament at his discretion (s.1(3) & s.9)[16]. The legislation amended the 1866 legislation by providing that the Crown appointment of the Comptroller and Auditor General was exercisable on an address presented by the House of Commons, and that no motion for such an address could be made except by the Prime Minister, acting with the agreement of the Chairman of the Committee of Public Accounts (s.1(1)). (Significantly, an Opposition Member usually with previous experience as a Treasury Minister, holds the Chairman's position.[17])

The Private Member who introduced the Bill, Mr St. John-Stevas, stated that the proposed legislation asserted 'the historic rights and duties of the House of Commons on taxation and expenditure.'[18] In defining the purpose of the legislation, he emphasised the long-standing nature of the relationship between the Comptroller and Auditor General and the Parliament:

> The Bill has three purposes. The first is to establish that the appointment of the Comptroller and Auditor General should be made by Her Majesty on behalf of the House, and not of the Government. Since the office was set up by Mr Gladstone in 1866, it has been recognised that the CAG acts on behalf of Parliament. The Bill will make him again in principle what he has long been in practice, a great Officer of the House.
> Secondly, the Bill recognises the principle that Parliament has the right to follow public money wherever it goes. It embodies the principle of parliamentary accountability for moneys voted by the House. ...
> Thirdly, the Bill would set up a National Audit Office and brings parliamentary and other arrangements for audit up to date.[19]

Therefore, the role performed by the Comptroller and Auditor General is grounded in the UK constitution and, from a broader perspective, it reflects Parliament's claim to subject the executive to limitations and controls, protect individual citizens against arbitrary use of power, ensure that taxes have the support of the legislature, and that expenditure is properly accounted for.[20]

However, the Act also placed the Comptroller and Auditor General apart from not only the Executive but also the Parliament: in no way was the position to function as a mere agent of the Parliament. The Comptroller and Auditor General was to have 'complete discretion' in the discharge of his functions, particularly, with regard to determining whether to conduct economy, efficiency and effectiveness examinations, and the manner in which such examinations would be undertaken. In making such determinations, he was to 'take into account' any proposals made by the Committee of

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[15] Second reading debate, Parliamentary Control of Expenditure (Reform) Bill, *Parliamentary Debates (Hansard)*, sixth series, volume 35, House of Commons, Session 1982-1983, pp. 1150-1214, in particular pp.1162-5.
[16] http://www.nao.org.uk/about/history.htm; Part I: s.1(1)-(4), National Audit Act 1983 in *The Public General Acts and General Synod Measures 1983*, Part II, Chapter 44, London, HMSO 1984, pp.1041- 1053. NB Originally introduced into the House of Commons as the Parliamentary Control of Expenditure (Reform) Bill 1983 and later changed to the National Audit Bill at the Committal of Bills stage.
[17] http://www.parliament.uk/parliamentary_committees/committee_of_public_accounts.cfm
[18] Second reading speech, Parliamentary Control of Expenditure (Reform) Bill, *Parliamentary Debates (Hansard)*, sixth series, volume 35, House of Commons, Session 1982-1983, p.1154.
[19] ibid, p.1150.
[20] ibid, p.1154.

Public Accounts (s.1(3)). In this respect, the autonomy given to the Comptroller and Auditor General in the performance of his statutory role exceeded that which would be afforded an 'agent' of the Parliament: the Committee could provide only advice not directions.

The independent status of the Comptroller and Auditor General was enhanced through the funding arrangements for the National Audit Office (NAO). Under s.4 of the Act, the NAO's expenses were to be defrayed from moneys provided by Parliament, following a process in which the Public Accounts Commission would lay before the House of Commons the estimates prepared by the Comptroller and Auditor General of the NAO's expenses (with any changes the Commission thought fit). The Committee of Public Accounts and Treasury had an advisory role in respect of the Commission's consideration of NAO funding (s.4(3)). The Public Accounts Commission also appointed the accounting officer and an auditor for the NAO.[21]

Parliamentary Ombudsmen - The position of Ombudsmen as officers of Parliament is less clear cut than is the case of the UK Comptroller and Auditor General, with the exception of Ombudsmen in jurisdictions such as New Zealand and Britain. In these jurisdictions, the relevant statutory provisions establish the independence of the office and the functional connection with Parliament is clearly evident and formally recognised.

The view of the Ombudsman as a traditional officer of Parliament is grounded in the position's long-standing relationship with Parliament and the nature of ombudsman functions. The role of Ombudsman emerged from Sweden where the Justitieombudsman (Ombudsman for Justice) was originally a representative of Parliament, elected by it to represent the legislature in supervising the Executive. In the Swedish model, the Ombudsman was mainly a prosecutor with the duty of supervising the way laws and regulations were implemented by public officials (including judges, civil and military) and prosecuting neglect or fault in the performance of these duties.[22] The nature of the relationship between Ombudsmen and Parliaments within countries with a Westminster style of governments is significantly different, reflecting the focus of the office on complaints of maladministration and its development as an administrative review mechanism within common law jurisdictions.[23]

<u>The New Zealand model</u> – In 1989 the House of Representatives Finance and Expenditure Committee reported on its inquiry into officers of Parliament.[24] The terms of reference for the Committee's inquiry included investigating the measures necessary or desirable to 'define, protect and enhance the status and identity of the position of Office of Parliament within the constitutional framework'[25]. The Committee concluded that the primary function of an Officer of Parliament

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[21] Public Accounts Commission, *Twelfth Report*, 17 January 2005, p.4 at http://www.publications.parliament.uk/pa/cm200405/cmpacomm/216/216.pdf

[22] Ulf Lundvik, 'The New Zealand Ombudsman', Occasional Paper 7, Revised April 1981, International Ombudsman Institute, pp.2 & 15-16.

[23] Ibid, pp.1-3; David Clark, *Principles of Australian Public Law*, LexisNexis Butterworths, Sydney 2003, pp.256-7.

[24] NZ House of Representatives, Report of the Finance and Expenditure Committee 1989, *Report on the Inquiry into Officers of Parliament*, First Session, Forty-Second Parliament. The officers of Parliament formally accorded the title in their enabling legislation included: the Ombudsmen, the Wanganui Computer Centre Privacy Commissioner and the Parliamentary Commissioner for the Environment. One of the questions before the Committee was whether the Controller and Auditor-General and the Audit Department should be placed on the same constitutional footing as the Officers of Parliament.

'should be as a check on the Executive, as part of Parliament's constitutional role of ensuring accountability of the Executive'.

However, the Committee observed that a number of other officers, for example, the Police Complaints Authority, perform the same function but are not classed as officers of Parliament. In examining this issue, the Committee had regard to the submission of the Clerk of the House that 'an Officer must be discharging functions which the House itself might appropriately undertake'. On this basis an Officer of Parliament that performed a 'purely judicial role' was excluded from an Office of Parliament as the House is not a judicial body but has legislative and investigatory functions. The Clerk considered the role of the Police Complaints Authority to be 'of a judicial nature' which did not include quasi-parliamentary duties or functions akin to the legislative and investigatory functions of the House. Similarly, bodies with executive responsibilities also should not be classified as Officers of Parliament.[26]

This submission grapples with the problem of trying to formulate some definitional criteria for Officers of Parliament, reflective of the nature of the role they perform and their place in each jurisdiction's constitutional framework. The emphasis placed upon the judicial role of the Police Complaints Authority appears to be a reference to the Authority's responsibility to determine specific allegations of police misconduct and establish the facts of critical incidents involving police, through a formal information gathering and hearing process, where witnesses may be represented and examined in inquisitorial 'court-like' proceedings. Such activities are common to investigative commissions, which are often considered to be part of the investigative arm of the Executive. This role seems more closely aligned to quasi-judicial bodies such as ad hoc or standing Royal Commissions. (On this point it is relevant to note that the *Ombudsman Act 1975* (NZ) refers to the Ombudsmen as 'officers of Parliament and Commissioners for Investigations' (s.3(1)).[27])

The Finance and Expenditure Committee proposed a legislative framework to secure the independence and accountability of the Officers of Parliament. It recommended that:

1. An Officer of Parliament must only be created to provide a check on the arbitrary use of power by the Executive.
2. An Officer of Parliament must only be discharging functions which the House of Representatives itself, if it so wished, might carry out.
3. Parliament should consider creating an Officer of Parliament only rarely.
4. Parliament review from time to time the appropriateness of each Officer of Parliament's status as an Officer of Parliament.[28]

On the question of measures to protect and enhance the position of Officers of Parliament within the constitutional framework, the Committee recommended:

- each Officer of Parliament be created in separate legislation principally devoted to that office (rather than amending the constitution to include provision for them);

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[25] ibid, p.3.
[26] ibid, p.5.
[27] As occurs in other jurisdictions, the Ombudsman was originally called the Parliamentary Commissioner for Investigations when established in 1962. ibid, p.4.
[28] ibid, pp.5-6.

- Officers of Parliament be funded by individual Annual Vote, subject to Parliamentary approval by the Estimates process;
- the establishment of a Parliamentary Officers Select Committee.

The New Zealand's Ombudsmen are appointed by the Governor-General on the recommendation of the House of Representatives, customarily on a unanimous and bi-partisan basis. The Officers of Parliament Select Committee conducts the recruitment and selection process undertaken to appoint an Ombudsman and reports their recommendation to the House.[29] The relevant statute also secures financial independence from the Executive in a separate appropriation and budget estimates for Officers of Parliament are considered by a parliamentary committee, which recommends an allocation to the House. The Vote for each Officer of Parliament is the responsibility of the Speaker[30]. The House of Representatives appoints an auditor to audit the Ombudsman's Office[31], and has the discretionary power to make general rules for the guidance of the Ombudsmen in the exercise of their functions. At any time the House may revoke or vary any such rules[32].

The United Kingdom model – Although the UK Ombudsman's enabling legislation does not refer to the term 'officer of Parliament' the formal title of Parliamentary Commissioner for Administration indicates the office's close relationship with the Parliament and the Ombudsman. Complaints to the Ombudsman in this jurisdiction originally had to be received and made through Members of Parliament: a process known as the 'MP filter.' Although removal of the MP filter has been a point of contention,[33] its existence and the previous parliamentary debate in favour of its retention, show the extent to which the Ombudsman's role to investigate maladministration was seen as having a direct nexus with the role of a member in making representations on behalf of constituents about administrative decision-making.

When the proposals for a Parliamentary Commissioner for Administration were put forward in 1965, the then Government's White Paper clearly envisaged the proposed office would function as an extension of the role of Members of Parliament in representing their constituents:

> We do not want to create any new institution which would erode the functions of Members of Parliament. ... nor to replace remedies which the British Constitution already provides. Our proposal is to develop those remedies still further. We shall give Members of Parliament

[29] A fuller account of the process observed by the committee is set out in the *Report on the procedures for the appointment of an Officer of Parliament, I.15A*, dated November 2002. The committee invited the Minister of Justice, or his delegate, to participate in the recruitment process (a member of the committee, represented the Minister). It appointed a recruitment adviser to assist with the advertising and interviewing of prospective candidates, and short-listing for interview. A sub committee of four members was formed and interviewed the short-listed candidates. The sub-committee considered and deliberated on an appointment recommendation and presented its report to the committee. The report was received and the recommendation adopted. http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/opappoint04.pdf

[30] see the *Public Finance Act 1989* at http://www.legislation.govt.nz and *Report of the Chief Ombudsman, Sir John Robertson KCMG, CBE on leaving office*, dated 5 December 1994, House of Representatives, Wellington New Zealand, p.6.

[31] The Officers of Parliament Committee recommends to the House the auditors for each Officer of Parliament. http://www.clerk.parliament.govt.nz//content/27/opaudit.pdf .

[32] http://www.legislation.govt.nz; the Officers of Parliament Committee has produced a code of conduct for the Auditor General in relation to the provision by this Officer of assistance to members of Parliament and parliamentary Committees – Report of the Officers of Parliament Committee, *Code of practice for the provision of assistance by the Auditor-General to select committees and members of Parliament*, 46th parliament 2002, http://www.clerk.parliament.govt.nz//content/719/i15a.pdf

[33] See the UK Cabinet Office Consultation Paper on the Review of the Public Sector Ombudsmen in England, June 2000, pp.9-10. previous Committee Reports: and evidence by the Ombudsman to the Parliamentary Committee.

a better instrument which they can use to protect the citizen, namely the services of a Parliamentary Commissioner for Administration.[34]

As the Select Committee on the Ombudsman reported in its 1995 review of the powers, work and jurisdiction of the Ombudsman, Parliament would remain the place where citizen's grievances could be ventilated and the MP filter was intended to allay fears that 'the Ombudsman system would detract from the traditional constitutional role of Parliament in its scrutiny of the Executive'.[35] Originally proposed on a trial basis, the MP filter was incorporated permanently into the Bill 'on grounds of constitutional principle'.[36]

The closeness of the relationship between the Ombudsman and the Parliament in the United Kingdom, also was demonstrated in earlier Parliaments by the attention given to the implementation of the Ombudsman's recommendations. For instance, by convention Ministers were required to table a Government response to recommendations made by the Ombudsman. There are notable instances of cases where the previous Parliamentary Committee to which the Ombudsman was accountable, the Select Committee on the Parliamentary Commissioner for Administration, took evidence from Departmental officers on cases where Government Departments have failed to implement the Ombudsman's recommendations, e.g. the 1995 investigations into the Child Support Agency, and the Channel Tunnel Rail Link and blight.[37] It was the practice of the Select Committee to have the Parliamentary Commissioner attend proceedings and outline the case before the Committee examined departmental officials.

Officers of Parliament in Australia

Auditors General and Ombudsman within Australia may be looked upon as Officers of Parliament, or termed such in legislation. However, the development of their relationship with Parliament is quite distinct from the United Kingdom experience, depending on the historical development of local legislatures and the individual statutory bodies. One key determinant of the Officer of Parliament concept in Australia is the lack of financial autonomy of local legislatures. Legislatures here exercise less control over the appointment and funding processes for statutory bodies such as the Auditor General and Ombudsman: a reflection of their own lack of financial independence as they negotiate with the Executive on the extent of their own funds and resources.

Local debate on the development of the offices of the Auditor General and Ombudsman tends to centre upon strengthening the statutory or administrative frameworks in place to support their independence and accountability, and the standard often used to evaluate the frameworks derives from the United Kingdom and New Zealand Officer of Parliament schemes.[38] Critical provisions

[34] Government White paper 'Parliamentary Commissioner for Administration' 1965, para 4, in Select Committee on the Parliamentary Commissioner for Administration, *The Powers, Work and Jurisdiction of the Ombudsman*, First Report, volume 1, House of Commons, London HMSO, 23 November 1993, p.xvi.

[35] Select Committee on the Parliamentary Commissioner for Administration, *The Powers, Work and Jurisdiction of the Ombudsman*, First Report, volume 1, House of Commons, London HMSO, 23 November 1993, p.xvi.

[36] ibid.

[37] Parliamentary Commissioner for Administration, *The Channel Tunnel Rail Link and Blight: Investigation of complaints against the Department of Transport*, Fifth Report – Session 1994-95, London HMSO, 8 February 1995 and *Investigation of complaints against the Child Support Agency*, Third Report – Session 1994-95, London HMSO, 18 January 1995; Select Committee on the Parliamentary Commissioner for Administration, Sixth report, *The Channel Tunnel Rail Link and Exceptional Hardship*, London HMSO, 19 July 1995 and *The Child Support Agency*, Third Report, London HMSO, 15 March 1995.

[38] Colin Clark and Michael De Martinis, 'A Framework for Reforming the Independence and Accountability of Statutory Officers of Parliament: A Case Study of Victoria', *Australian Journal of Public Administration*, March 2003, 62(1): 32-42.

include those dealing with appointment, term of office, funding arrangements, removal from office, submission of an annual work plan, powers, staffing, reporting direct to Parliament, oversight.[39] However, the existence of such frameworks does not guarantee independence or accountability for Officers of Parliament. Moreover, the debate about the legislative and administrative measures to support officers of Parliament also seems to occur in the absence of defining criteria as to how to identify an officer of Parliament[40].

In a paper on the relationship between the Ombudsman and the Legislature, Professor Wiltshire gave the following description of a 'model' Ombudsman as an officer of the parliament:

> In my view, if the Ombudsman is an officer of the parliament, a model Ombudsman would have these characteristics: the Ombudsman would be a true officer of the parliament, appointed solely by the parliament, employed by it and capable of being dismissed only by the Parliament. The staff of the Ombudsman's office would be similarly employed by the parliament. The Ombudsman would have complete control over his or her budget, staff and physical resources. The Ombudsman's budget would be part of the parliament's budget to be determined in estimates form by dialogue with the Speaker. The Speaker would represent the equivalent of a minister for the Ombudsman and would pilot all legislation relation to the Ombudsman's office through the parliament, defend the estimates of the Ombudsman's office and protect the independence of the Ombudsman's office. There would be opportunity for a public accounts committee to query the efficiency of the Ombudsman's office. All specific references for investigation from members of parliament would go directly to the Ombudsman perhaps through the Speaker. Questions of jurisdiction for the Ombudsman would be decided in parliament at the Speaker's behest, with the Speaker initiating amendments to the legislation and regulations if necessary to clarify the situation, and there would be a select committee.[41]

Professor Wiltshire further stated that in the modern political context, where procedures for legislative scrutiny have been overloaded, the public relied on officials such as the Ombudsman to provide scrutiny and independent review of government. He commented:

> I believe the ideal model is an active legislature aided by an active Ombudsman . . . But we seem to be presented with the reality of a passive legislature and an active Ombudsman. The problem with this is that an Ombudsman should really go no further than the legislature itself acting as a body would or could if it were carrying out the same functions. The creature cannot exceed the power of its maker. However, the Ombudsman has the decided advantage in the political process. Once having been created, it is very difficult to destroy . . . [42]

These comments are instructive of the political reality of the relationship between Ombudsmen and Parliaments in local jurisdictions, as compared to the British and New Zealand experience, where the Ombudsman perhaps best fulfils such an ideal 'model' officer of Parliament.

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[39] ibid, pp.37-41.
[40] ibid, p. 33.
[41] Professor Kenneth Wiltshire, 'The Ombudsman and the legislature', Paper given at the Fourth International Ombudsman Conference on 26 October 1988, reproduced in *Fourth International Ombudsman Conference: Proceedings* (Canberra 23-27 October 1988), Commonwealth Ombudsman, Canberra, 1989, pp.167-8.
[42] ibid, p.167.

Conclusion

The concept of Officers of Parliament, therefore, has developed more broadly from the original tradition where a close, long-standing relationship existed between Parliament and independent statutory officers performing roles that were regarded as an extension of those performed by Parliament.

Examination of the role of Officers of Parliament suggests that moves to establish statutory officers as Officers of Parliament requires greater emphasis on the functional relationship of the officer concerned with the Parliament. It seems desirable that this functionality should be the primary criteria for defining their status, rather than common characteristics or reporting frameworks.

Also, there may be a case for limiting statutory recognition as officers of Parliament to those bodies that perform functions directly connected with the role of Parliament, and which are undertaken to some degree on Parliament's behalf. These bodies should be clearly delineated from other bodies with a public sector accountability role.

That is not to say that Parliament should give anything less than its fullest support to other independent bodies having a public sector accountability role but significant difficulties remain in giving statutory recognition as officers of Parliament to bodies that, strictly speaking, remain part of the Executive. There also would seem to be a much stronger case for giving statutory recognition to the positions of Auditor-General and Ombudsman as officers of Parliament in view of the close nexus between the functions performed by these independent statutory officers and those undertaken by the Parliament. It is this unique, long-standing relationship that should form the basis for the application of the term to statutory officers.

Within Australia, most bodies regarded as officers of Parliament are vulnerable to the Executive branch of government, which puts forwards the legislative proposals that establish and govern the appointment, jurisdiction and operation of such offices. The Executive also determines funding levels and has the primary role in the appointment process. This highlights the inherent conundrum associated with the officers of Parliament concept. With the possible exception of the United Kingdom Comptroller and Auditor General and the New Zealand Officers of Parliament, the application of the concept is unachievable in ideal terms in most Australian jurisdictions. Independent watchdog bodies here, whether or not they are traditionally regarded as officers of Parliament or are recognised as such in statute, are not completely independent of the Executive.

Widely expanding the use of the term to include statutory officers other than the Auditor-General and the Ombudsman may not be helpful and may have the potential to confuse the types of 'parliamentary' functions that such bodies perform and the application of parliamentary privilege to their activities. It would seem preferable to retain the practice of creating an Officer of Parliament only rarely, making a clear distinction between these officers and the bodies that form part of the wider system of public sector accountability. As the recent legislation for the NSW Parliamentary Budget Officer demonstrates, there also is a need when conferring such titles to clarify issues such as the extent to which parliamentary privilege applies to their activities. Another important issue requiring clarification concerns the extent to which such officers can be directed by Parliament in the performance of their functions.