

Legislative Assembly for the ACT
Standing Committee on Administration and Procedure

INQUIRY INTO THE FEASIBILITY OF ESTABLISHING THE
 POSITION OF OFFICER OF PARLIAMENT

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Introductory

I make this submission in support of all those who have worked, over the past couple of decades, towards the formal establishment and appropriate recognition of a select number of 'officer of parliament' positions in appropriate areas of our administrative systems. I have followed this development with much interest, and in this submission want to recognise particularly the good work of

- people associated with the Legislative Assembly and its committees, and
- others already established in statutory positions in the ACT that can be seen as candidates for 'officer of parliament' status.

In the first main section, the submission notes and seeks to explain the rising interest in 'integrity agencies'. In the second, it notes similar rising interest in the connected notion of 'officers of parliament', with special comment on the contribution of the Legislative Assembly's standing committees. I would be happy to be involved in subsequent discussions if this proposition takes off seriously in the ACT.

The submission notes that the Standing Committee's present inquiry is consistent with both

- the commitment to 'strong oversight institutions' (to be seen as 'the emerging fourth branch of government') included in the Parliamentary Agreement between the ALP and the Greens for the 7th Legislative Assembly (Stanhope & Hunter 2008: Appendix 1 (1.2(d)); and
- the recommendation of the Hawke Report on *Governing the City State* that the number and role of statutory office holders in the ACT should be reviewed (Hawke 2011: 102-104).

Rising interest in 'integrity agencies'

My own serious research interest in this area has focused on the generality of non-departmental public bodies (NDPBs, often in this connection called 'agencies'), with statutory authorities as a leading form of NDPB demonstrating a long history of use in Australia and elsewhere. I have not conducted close research into the kinds of NDPBs with which this submission is particularly concerned. Almost inevitably, however, people with this sort of general interest have been drawn into the discourse about a 'national integrity system' generated over the past couple of decades by the work of the NGO Transparency International and, especially for Australians, by the report of

Queensland's Fitzgerald Commission on corruption (1987-89) and its aftermath. This discourse recognises the need for a subset of NDPBs with special responsibility for the encouragement, establishment, protection and maintenance of integrity systems, and constituents of this set have come to be described as 'integrity agencies'. A few have long existed, but around the world their number has been increasing rapidly. Most often cited as examples are auditors-general, ombudsman, anti-corruption bodies and human rights commissions, though there is also interest in extending the list.¹

As UC Adjunct Professor Ian Thynne has pointed out, a variety of alignments is to be found within the statutory body sector:

- Where the organisation is given a managerial or executive function 'as an executive agent of government', it must be closely attuned to the powers and responsibilities of government itself.
- If it has a quasi-judicial role as an administrative tribunal, it needs to be associated closely with the exercise of judicial power by the courts.
- And if, like an ombudsman or audit office, it has a checking role on government itself, 'it will need to be structured and equipped to relate well to the legislature, ... at some distance from the government' (Thynne 2006: 173).

Obviously integrity agencies fall into this third category, and their relationships with the executive government and the legislature need to be designed very carefully to ensure that they are able to carry out their checking role effectively.

The related literature contains many statements pointing to the essential problem with them, with terms like 'window-dressing', 'paper tigers' and 'tokenism' frequently used. Governments like to draw attention to them as accountability devices, but in the performance of their work they will inevitably conflict with or embarrass governments from time to time. There is a temptation to starve them of funds or otherwise weaken them, so ensuring that their threat potential is much diminished. It is important, therefore, that measures be put in place to protect THEM as they perform their duties. The appendix to this submission contains a few examples of such reasoning.

This rising interest has been marked by conferences and publications in many parts of the world. Thus what were then described as 'TAI agencies' (transparency, accountability, integrity) were featured in a major conference organised in Mexico by the International Institute of Administrative Sciences in July 2006² and, much closer to home, we held a workshop on integrity agencies at the University of Canberra in 2009.³

Several people from the ACT and Commonwealth integrity agency communities participated in the UC workshop and, as indicated in my introductory note, the Legislative Assembly's own committees have been sharing in this rising interest. Major contributions have been/are:

- the Standing Committee on Administration and Procedure's earlier inquiry into implementation of the Latimer House Principles in the governance of the ACT (SCAP 2000);
- the Standing Committee on Public Accounts inquiry into the ACT Auditor-General Act 1996 (SCPA 2011); and
- the currently-proceeding inquiry on electoral matters by the Standing Committee on Justice and Community Safety.

Important contributions relating to these inquiries have also come from several of the ACT's own statutory offices/officers in potential 'officer of parliament' roles, notably the Auditor-General, Ombudsman, Human Rights Commission, Commissioner for Sustainability and the Environment, and Electoral Commission (ACAP 2009: 8; and especially Electoral Commissioner Phillip Green [2009]⁴ and former Auditor-General Tu Pham [reported in SCPA 2011]).

The related notion of 'officers of parliament' has been receiving increasing prominence as this discourse about integrity agencies has proceeded and, as will be noted in the next section, parliamentary committees elsewhere – notably New Zealand and Victoria – have made important and indeed innovative contributions to this important development in our understanding of how administrative systems currently work and could be made to work better. As noted, the ACT Legislative Assembly committees and associated statutory officers have extended this discourse significantly in the recent period.

The notion of 'officers of parliament'⁵

Here New Zealand has been a significant innovator, just as it was when it introduced the Scandinavian notion of the ombudsman to the Anglo-Saxon world in 1962. The NZ Ombudsman, or Commissioner for Complaints, was seen from the beginning as an 'officer of parliament', though that was not a formal title. During the 1970s and '80s, two other commissioner-like positions created by special statute (though not yet the Controller and Auditor-General) were accorded a similar status, though what made them different from other statutory creations was unclear. Then, in 1989, the Finance and Expenditure Committee of the NZ parliament sought to systematise practice in this area (NZFEC 1989), and its effort gained acceptance of a process for establishing a small number of positions to be formally defined as 'officers of parliament', with a special Officers of Parliament Committee to monitor the system. This monitoring includes pre-budget approval of applications for funding, recommending appointments, and developing codes of practice.

There is also an agreed list of criteria for creating these offices: the system can be used only to provide a check on arbitrary use of power by the executive; an officer of parliament can only discharge functions which the parliament itself might carry out if it so wished; such an office can be created only rarely; the appropriateness of the status should be reviewed from time to time; and there should be separate legislation devoted to each position. In 2006 the system applied to three positions: Ombudsman, Parliamentary Commissioner for the Environment, and Controller and Auditor-General. As ex officio chair of the Officers of Parliament Committee, the Speaker is effectively 'responsible Minister for the Officers of Parliament' (Beattie 2006: 143-145).

In the Australian Commonwealth system, recognition that the Auditor-General is an 'independent officer of parliament' came in the rewritten Auditor-General Act 1997, after two hard-hitting reports by the parliament's Joint Committee of Public Accounts, the committee gaining important rights in relation to appointment and funding (JCPA 1989, 1996; English & Guthrie 2000). In the states, movement has been most notable in Victoria as a reaction to the destructive (to the public sector) policies of the Kennett conservative government which, among other things, sought to contract out much public sector auditing

activity to private auditors and to subject the Auditor-General to a statutory board subservient to the government.

The Bracks Labor government was elected in 1999 to replace Kennett on a mandate which included restoration of the independence of 'key public watchdogs' (Campbell 2006). Believing that other integrity agencies could be similarly endangered, the parliament's Public Accounts and Estimates Committee began an inquiry in 2000 into 'an appropriate legislative framework for ... independent officers of Parliament such as the Ombudsman, the Auditor-General and other statutory office holders'. It wanted to clarify their relationship with parliament in such a way that their autonomy would be respected but also that very clear accountability requirements would be established (VICPAEC 2006: 7).

The new government was already taking some relevant action, and asked the Committee to delay its inquiry to allow sufficient time for gains and losses to be identified. It was therefore a protracted affair, and the report issued in February 2006 contained a vast amount of information on the antecedents and development of the idea of the officer of parliament over a number of governance systems in the Anglo-Saxon tradition (VIC 2006). This report had great educative value.

It made 17 recommendations, to which the Victorian government produced a fairly disappointing response (VG 2006). Of course it could say that, in many respects, it was in general agreement and that its own actions were moving the system in the direction the Committee favoured. Perhaps it was too much to expect a government, so busy on so many fronts, to match the careful scholarship and reasoned argumentation abundantly demonstrated in the Committee report. But that report was unusually comprehensive, and it is therefore appropriate to note some of the valuable insights contained in it – this is done in Appendix 2.

Victoria has taken some important steps in the direction advocated by VICPAEC. In the event, however, this significant report was 'trumped' when another Victorian Labor government under new Premier Brumby set up an inquiry to be conducted by two top-level officials rather than parliamentarians, with a wider remit to review the efficiency and effectiveness of the whole state 'integrity and anti-corruption system'. Its report (Proust & Allen 2010) recommended establishment of several new agencies, notably:

- a Victorian Integrity and Anti-Corruption Commission (VIACC) to comprise three of the independent officers of parliament, a new Public Service Integrity Commissioner (PSIC) as its chair, and several others;
- a Parliamentary Integrity Commissioner;
- an Integrity Coordination Board to include the Ombudsman, the Auditor-General, the PSIC and others; and,
- here returning to the notion of an inclusive parliamentary committee, an all-party Parliamentary Committee to monitor the powers and functions of the VIACC.

This fairly complex scheme came to be known as 'the Proust Model' after inquiry chairwoman Elizabeth Proust, and it attracted considerable interest. However Brumby suffered electoral defeat in December 2010, before he could do much about implementing the scheme. So there was a new government to take another look.

There have been some moves towards a clearer identification and protection of independent officers of parliament in some other Australian state legislatures, but to the best of my knowledge there has so far been no serious comparative research to shed light on these issues. It would be useful to commission such a survey.

What the ACT Legislative Assembly Standing Committees and their Associates have said

In its Report 2 of 2009 this Committee (*Standing Committee on Administration and Procedure*) noted that, in December 2008, the Legislative Assembly had endorsed the adoption of the Latimer House Principles on the Accountability of and the Relationship between the three Branches of Government (parliament, executive and judiciary), and it included the Principles themselves and major associated documents in its own report (SCAP 2009: 1 and appendices). The Principles are therefore familiar to Legislative Assembly members, and need noting here only to the extent that they deal particularly with the sort of arrangements I have described as integrity agencies and officers of parliament.

Neither the Principles nor the Committee report used these precise terms, but the ideas they represent have been well in evidence. After discussing the necessary independence of the judiciary, the Principles speak briefly (without clear identification) of 'public office holders', for whom 'merit and proven integrity' should be the criteria of eligibility for appointment (Objective V). The identification comes in Objective IX, which deals with the 'establishment of scrutiny bodies and mechanisms to oversee Government', with 'Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions' nominated – 'they can play a key role in enhancing public awareness of good governance and rule of law issues' (McKinnon 2004).

In giving general support to the Principles, the Committee endorsed the proposal spelt out in the 2008 *Edinburgh Plan of Action* (SCAP 2009: Appendix B) that there should be regular inspection and reporting in each jurisdiction, and recommended that there should be triennial independent assessments of the performance of the three arms of ACT government measured against the Latimer House Principles (in SCAP 2009: 7-11). Effectively expanding the list of scrutiny bodies, the Edinburgh Plan had laid down that there must be 'an independent and autonomous electoral commission with powers and security of tenure guaranteed by statute' (in SCAP 2009: 22-23).

In dealing with the 'oversight function', the related Commonwealth Parliamentary Association's *Benchmarks for Democratic Legislatures* added this injunction: 'There shall be an independent, non-partisan Supreme or National Audit Office whose reports are tabled in the legislature in a timely manner. (It) shall be provided with adequate resources and legal authority to conduct audits in a timely manner' (in SCAP 2009: Appendix C, para. 7.2.4/5). The importance of such independent auditing has been registered in a great many serious works taught in disciplines like accounting, economics and public administration over many generations, but (as far as I am aware) the similar need in electoral administration has received much less attention. It is therefore especially noteworthy that Australian electoral administrators have been seeking to fill

this gap, and the submission to this Committee's Latimer House inquiry by ACT Electoral Commissioner Phillip Green deserves particular notice (Green 2009).

This submission does the valuable service of drawing attention to some specialist Australian and international literature relating to electoral commissions and their need for independence. The issue of autonomy/independence gets much attention in the study of non-departmental bodies ('agencies') but, as indicated, electoral administrations rarely feature. A University of Canberra team has conducted a survey of Commonwealth and ACT bodies as part of an international survey based on the Catholic University of Leuven in Belgium, and we are aware of much of the relevant international discourse (Aulich et al 2010). In my view, the central issue has rarely been presented as clearly as it was in a contribution by Australian Electoral Commission official Paul Dacey (2005), noted and extended in Green's submission (pp.2-4). Dacey made the eminently sensible observation that 'independence' is not an absolute, rather that there is a continuum ranging from low to high, and that where a particular body falls on the continuum depends on 'a number of different dimensions'. An International Institute for Democracy and Electoral Assistance has spelt out a number of these dimensions, and Green applied this thinking to the ACT condition.⁶ While the arrangements for the Electoral Commission satisfy many of the suggested criteria and while the independence of the Commission 'is relatively well established', there are aspects of the coverage of the Public Sector Management Act 1994 and the Financial Management Act 1996 which fall short of providing a high degree of independence (Green 2009: 3-8). The Committee noted these reservations, thought the same concerns might apply to other statutory officeholders, and recommended that a consideration of them should be part of the proposed triennial independent assessment (SCAP 2009: 11-12).

The *Standing Committee on Public Accounts* continued with this sort of reasoning in its Report 15 on its Inquiry into the ACT Auditor-General Act 1996 (SCPA 2011)—I'm reckoning a degree of cross-fertilization can be assumed! The term 'officer of parliament' is now used unambiguously, the Committee having taken much note of the history I have outlined above, having carefully digested (among other materials) the relevant reports of the New Zealand and Victorian parliamentary committees, and noted some of the academic and practitioner discussion. It has to be said that this was another excellent committee report in the tradition of those precursors, in my view bringing much credit on the institution of the parliamentary committee system. In its current inquiry into the Electoral Commission's Report on the 2008 ACT General Election and related matters, the *Standing Committee on Justice and Community Safety* will be certain to cover much similar ground.⁷

The Public Accounts Committee's report was, in these matters, especially rich. The Committee and its supporting staff had immersed themselves in the background to the 'officer of parliament' idea more-or-less as discussed in this submission, and presented a very well-informed account. The current position of the ACT Auditor-General was also carefully considered, with reference to differing about views the extent of independence actually enjoyed by that office -- discussed in the light of academic writings about audit offices generally that notes that independence can be substantive or unconditional, or conditional or qualified (SCPA 2011: 35-40).

The Committee was clear in its recommendation that the Auditor-General Act should be amended to designate the Auditor-General as an 'officer of parliament', and that the

Administration and Procedure Committee should investigate the merit of establishing a framework to formally identify such officers and regulate their relationship with the Assembly and the executive (recs 2, 3) – this current inquiry is of course the outcome of that recommendation.⁸ There was also discussion about other possible officers of parliament: The Committee saw the Ombudsman and Electoral Commissioner as likely candidates, but stressed its view that the role is to serve the interests of the parliament and not those of the executive government -- so that many other statutory office-holders would not qualify.⁹ It also saw oversight by a parliamentary committee as 'one of the defining characteristics of an Officer of Parliament', performing the necessary function of providing such officers both with protection against executive interference and a mechanism to ensure that they are themselves accountable (pp. 23,27,36).¹⁰ Whether there should be one committee to cover all 'officers of parliament', or one for each such officer, is a matter to be decided.

Towards a framework for 'officers of parliament'

The Public Accounts Committee suggested further that 'any revision of the *Auditor-General Act 1996* should have regard to the New Zealand 'Officers of Parliament' system' (SCPAC 2011: 3). Since that is at the same time the pioneer 'officers of parliament' system in Westminster-style countries of the kind we relate to and the most mature system operating in these countries, I suggest that it has model value for a framework for the establishment of a set of ACT 'officers of parliament'. I suggest further that it would be appropriate to begin drafting a framework document along these lines (with any adaptations needed meet the ACT's constitutional position) to embrace the Auditor-General, the Ombudsman and the Electoral Commissioner, and that consideration should then be given (and only then – when the principles are well established) to embracing also other statutory officer positions with features that link them with the legislature rather than the executive government.

I believe also that the present statutes establishing those positions will need to be completely rewritten to conform to the status of 'officer of parliament' being conferred. As was apparent in the serious study the Auditor-General Act received in the Public Accounts Committee inquiry, that Act has developed from the original through a series of amendments which have left it seeming to be clumsily constructed and in some areas fairly incoherent (SCPA 2011: 5-10). Each creating statute needs to open with the declaration that an officer of parliament position is being established, and include an easily comprehensible reference to the officer of parliament framework. Then the details of functions, method of appointment, tenure, financing, office structure, relationships (especially with the overseeing legislative committee), and so on can follow, carefully designed to suit the mission of the particular position.

I believe this is an important administrative reform issue, and express my happiness that it is being taken very seriously by the Legislative Assembly and its standing committees. As indicated in this submission, I believe that, in their consideration of and reporting on this issue, they deserve much credit for making a significant contribution to the rising national and international discourse about 'officer of parliament' systems.

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Notes:

1. The best Australian treatment of the subject is probably that to be found in Head et al 2008.
2. I participated in this conference, and reported on it to the late 2006 conference of the Australasian Study of Parliament Group: Wettenhall 2006, 2007.
3. Some papers beginning life at this Workshop will soon appear as a special issue of the journal *Policy Studies* (Aulich, Head, Thynne, Wettenhall, all forthcoming)
4. Sections of the Electoral Commission Report on the 2008 ACT Legislative Assembly Election are also relevant and useful for present purposes: ACTEC 2009: 76-82.
5. The next few paragraphs, and the material in Appendix 2, are based on my article in a forthcoming issue of the journal *Policy Studies*, itself based on my paper to the workshop on integrity agencies at the University of Canberra in 2009: Wettenhall forthcoming.
6. As will be noted below, the ACT's Standing Committee on Public Accounts has noted some literature on audit independence that, in fairly similar fashion, notes substantive independence and conditional independence as end-points on another continuum of independence arrangements.
7. The 'officer of parliament' issue is referred to in a submission from the ANZSOG Institute for Governance (Wettenhall & Aulich 2011).
8. There were other recommendations (41 in all) for specific changes to the Act, to its own powers and functions as the instrument providing the 'nexus' (SCPA 2011: 27) between the Auditor-General and the legislature, etc.
9. Human Rights Commissions often appear as other candidates for 'officer of parliament' status. Thus the ACT Human Rights Commission features in Aulich's forthcoming article in *Policy Studies*.
10. Instituting a system of regular independent evaluations of the work of the office of the 'officer of parliament', as with the ACT Auditor-General's Office, is another important accountability measure. The overseeing committee will play an important role in decisions about budget matters, so that work on developing the 'officer of parliament' framework should proceed in close connection with work on the need to establish a parliamentary budget office.

References:

- ACTEC (ACT Election Commission) 2009. *Report on the ACT Legislative Assembly Election 2008*, ACT Election Commission, Canberra.
- Aulich, Chris forthcoming. 'Autonomy and Control in Three Act-based Integrity Agencies', *Policy Studies*, (2011 or 2012).
- , Batainah, Heba & Wettenhall, Roger 2010. 'Autonomy and Control in Australian Agencies: Data and Preliminary Findings from a Cross-National Empirical Study', *Australian Journal of Public Administration*, 69(2): 214-228.
- Beattie, Andrew, 2006. 'Officers of Parliament: the New Zealand Model'. *Australasian Parliamentary Review*, 21(1), 143-156.

Campbell, Hon. Christine, 2006. Chair's introduction. In: VICPAEC 2006.

Dacey, Paul 2005. 'What do "Impartiality", Independence" and "Transparency" Mean? -- Some Thoughts from Australia', paper to Conference of Commonwealth Chief Election Officers, New Delhi.

Green, Phillip 2009. *Submission by the ACT Electoral Commission to the Standing Committee on Administration and Procedure Inquiry into the Appropriate Mechanisms to Coordinate and Evaluate the Implementation of the Latimer House Principles in the Governance of the ACT*, ACT Electoral Commission, Canberra.

Hawke, Allan 2011. *Governing the City State: One ACT Government – One ACT Public Service*, Chief Minister's Dept, Canberra.

Head, Brian forthcoming. 'The Contribution of Integrity Agencies to Good Governance', *Policy Studies* (2011 or 2012).

---, Brown, AJ & and Connors, Carmel (eds) 2008. *Promoting Integrity: Evaluating and Improving Public Institutions*, Ashgate, Farnham (England).

Heilbrunn, John R 2006. 'Anti-corruption Commissions', In Rick Stapenhurst, Niall Johnston & Riccardo Pellizo (eds), *The Role of Parliament in Curbing Corruption*, The World Bank, Washington, 135-148.

JCPA (Joint Committee of Public Accounts, Australian Commonwealth Parliament), 1989. *The Auditor-General: Ally of the People and Parliament* (Report 296), AGPS, Canberra.

---1996. *Guarding the Independence of the Auditor-General* (Report 346), AGPS, Canberra.

McKinnon, Rt Hon. Don (Commonwealth Secretary-General) 2004. *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*, Commonwealth Secretariat, London.

NZFEC (Finance and Expenditure Committee, New Zealand) 1989. *Report on the Inquiry into Officers of Parliament*, Government Printer, Wellington.

Pearce, Dennis (Australian Commonwealth Ombudsman 1988-1991) 1992. 'Keeping an Eye on the Reviewing Process', *Canberra Times*, 4 March.

Proust, Elizabeth & Allan, Peter 2010. *Review of Victoria's Integrity and Anti-Corruption System*, State Services Authority, Melbourne.

SCAP (Standing Committee on Administration and Procedure) 2009. *Latimer House Principles*, Legislative Assembly, Canberra.

SCPA (Standing Committee on Public Accounts) 2011. *Inquiry into the ACT Auditor-General Act 1996*, Legislative Assembly, Canberra.

Stanhope, Jon & Hunter, Meredith 2008. *Parliamentary Agreement for the 7th Legislative Assembly for the ACT*, Legislative Assembly, Canberra.

Temby, Ian 1993. 'Safeguarding Integrity in Government', *Papers on Parliament* (Australian Senate), no.7, 1-10.

Thynne, Ian 2006. 'Statutory Bodies: How Distinctive and in What Way?', *Public Organization Review*, 6(3), 171-184.

--- forthcoming. 'Institutional Maturity and Challenges for Integrity Bodies', *Policy Studies* (2011 or 2012).

VG (Victorian Government), 2006. *Victorian Government Response to Public Accounts and Estimates Committee Report on a Legislative Framework for Independent Officers of Parliament*, Dept of Premier and Cabinet, Melbourne.

VICPAEC (Public Accounts and Estimates Committee, Victorian Parliament) 2006. *Report on a Legislative Framework for Independent Officers of Parliament*, Government Printer for the State of Victoria, Melbourne.

Wettenhall, Roger 2006. 'The Problem of Defending Agencies for Public Accountability that are Sometimes in Conflict with their Funding Governments', paper presented at IIAS Third International Regional Conference, Monterrey, Mexico, 16-20 July 2006.

---- 2007. 'Parliaments, Executives and Integrity Agencies: Reporting on an International Conference on Transparency for Better Governance', *Australasian Parliamentary Review*, 22(1), 115-136.

---- 2010. Submission to Standing Committee on Public Accounts Inquiry into the ACT Auditor-General Act 1996.

---- forthcoming. 'Integrity Agencies: The Significance of the Parliamentary Relationship', *Policy Studies* (2011 or 2012).

---- & Aulich, Chris (for ANZSOG Institute for Governance) 2011. 'Inquiry into Electoral Issues in the ACT', Submission to Standing Committee on Justice and Community Safety, ACT Legislative Assembly.

APPENDIX 1: EXAMPLES OF STATEMENTS ABOUT TOKENISM ETC.

Example 1:

To have an Ombudsman makes a government look good. To underfund the office ensures that it is not too troublesome.

After three years as Commonwealth Ombudsman I realised that no matter how strong a case for increased resource was put by the Ombudsman's Office, nothing would be coming from those who manage the Commonwealth's money. Why should the Executive finance a body that is going to call it to account as a result of complaints from members of the public affected by the Executive's decisions?

Governments like to point to the fact that an independent person is available to review their decisions but they do not want that review body to be too powerful or too well known lest citizens be inclined to take frequent advantage of the office.

[Pearce 1992: Pearce was Commonwealth Ombudsman 1988-1991.]

Example 2:

there will ... be awkwardness caused because an important function of government, whatever it may be, is disclosed as being inadequately performed. It is the need for that demonstration to occur which imposes the requirement of independence. Only a non-partisan body can be authoritative and will enjoy public confidence. Periods of disharmony between government and independent officers are, accordingly, inevitable. If they were never encountered, the only available conclusion would be that the independent officer was not doing his or her job properly.

The fact of that disharmony, the inevitability of it occurring from time to time, of course brings one to Parliament. It is Parliament that creates all of these bodies and it is Parliament which must look after them. When relations between a particular government and an independent officer, say an Ombudsman, become strained, the protection and support must be vouchsafed by Parliament. Why is this so? First, because

parenthood brings responsibilities. Secondly, because those not directly affected can appreciate that the proper performance of functions, simply doing the job laid down by legislation, can involve the making of inconvenient decisions. Thirdly, because the Parliament directly distils and reflects the will of the people in a way that government and the bureaucracy never can and never will... (Temby 1993: 7-8).

[Temby 1993: 7-8: Temby was first Commissioner of the NSW Independent Commission against Corruption (ICAC).]

Example 3:

Evidence of dysfunctional anti-corruption commissions is manifest in the numerous agencies that lack independence from the executive, receive inadequate budgetary support from the legislature, have no procedures for forwarding cases of corruption for prosecution by the relevant judicial authorities, and fail to submit regular reports to the legislature. Herein lies the dilemma: whereas it may be desirable to enact policies to reduce corruption, a weak commission leads to a reputation for token reforms, which undermines the political leadership's credibility. Indeed, it is easy to explain why anti-corruption commissions fail in so many places. It is far more difficult to explain why any succeed.

[Heilbrunn 2006: 135: A former public sector reform specialist at the World Bank, Heilbrunn was writing for a World Bank Institute study focusing on the role of parliaments in curbing corruption.]

APPENDIX 2. INSIGHTS DRAWN FROM VICPAEC 2006

- Interest in the idea of 'officers of parliament' had developed over the past 30 years to reflect both the decline in traditional notions of ministerial responsibility and the fact that the processes of government have become more widespread, complex and difficult for citizens to access ... these officers now play a valuable role in assisting parliament to undertake a more active scrutiny and accountability role (VICPAEC 2006: 23-24).
- British, New Zealand and Canadian examples were given to show the ambiguity of the term 'officer of parliament' in general usage; deriving from this, it was important to stress the adjective 'independent'. Parliamentary staffs are not independent in this sense; the concern is with officers who are separate from parliament but 'exist to assist [it] 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' (p.8).
- Quite often across these jurisdictions (especially in some Canadian provinces), there are special parliamentary committees associated with these offices; and sometimes appointments are made or approved by the parliament.
- Consideration was given to how widely the concept should be applied, thus addressing the view that many other NDPBs presented similar issues relating to ministerial versus parliamentary control. For this Committee, auditors-general and ombudsmen ranked as the core officers of parliament because their 'main role [was] investigating the actions of the executive government and, in some cases, protecting the various rights of individual citizens'; electoral commissioners qualified too because 'their office protects fairness in elections on behalf of Parliament and its electors' (p.24). So why not other 'independent statutory office holders' such as Directors of Public Prosecutions? The Committee's reasoning was that the officer of parliament 'must undertake functions that Parliament itself would undertake'; instead, the others performed judicial, regulatory, advocacy or advisory roles rather than 'having to investigate the actions of the executive'. The Committee considered that such positions 'primarily serve the interests of the executive government even though they require autonomy and independence to effectively carry out their responsibilities' (pp. 8, 31).
- So it reserved its recommendations for cases where there was unlikely to be much disagreement that the offices 'should be directly accountable to Parliament for the proper and efficient management of

staff and the significant financial resources allocated..., rather than have any line of accountability directly to the Premier (or other minister or agency of government)' (p.79).

- This message was very clear, though it is one that people constituting or working for the executive government are likely to find difficult to accept: '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' (p.85).
- And so the Committee noted with approval that the changes of the late 1990s relating to the Victorian Auditor-General had removed the budgetary and administrative link between that office and the Department of Premier and Cabinet. It was no longer seen as part of the Premier's (or any other) portfolio of the executive government: 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 (p.25).
- The importance of perceptions was emphasised. Whether or not there was evidence that governments had exercised improper influence in relation to these parliamentary offices, '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'. The legislative framework 'needed to not only ensure independence but [also to ensure] the perception of independence' (pp. 28-29, 68).
- The Committee wanted a set of principles adopted that would ensure transparent parliamentary involvement in the appointment and removal process and the determination of terms and conditions of appointment (tenure, remuneration), separation of officers of parliament and their staffs from the public (government) service, inclusion in the parliamentary budget, and parliamentary involvement in the establishment of any new officers of parliament.
- While it noted with obvious favour the establishment of the overriding Officers of Parliament Committee in New Zealand and saw a trend towards oversight by a 'statutory parliamentary committee', it also wanted the individual officers of parliament reporting in each case to 'a specific parliamentary committee' (pp. 9, 33). These 'specific', 'relevant' or 'appropriate' committees would provide 'statutory protection' for the independence of these agencies and – importantly because the question 'who guards the guardians?' remains – ensure their accountability, not least by arranging for four-yearly performance reviews (pp. 77-79).