

# CORRECTED TRANSCRIPT

## PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

### Officers of Parliament Subcommittee

#### Inquiry into statutory independent officers of Parliament legislation

Melbourne – 29 March 2001

#### Members

Mr D. McL. Davis

Mrs J. M. Maddigan

Mr P. J. Loney

Mr T. C. Theophanous

Chairman: Mr P. J. Loney

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#### Witness

Dr B. Perry, Ombudsman Victoria.

**The CHAIRMAN** — I welcome Dr Barry Perry to the subcommittee's hearing into the need for independent officers of Parliament legislation. All evidence taken by this subcommittee is taken under the provisions of the Parliamentary Committees Act and is protected from judicial review. However, any comments made outside the precincts of this hearing are not protected by parliamentary privilege. All evidence given today is being recorded by Hansard. As a witness you will be provided with a proof version of the transcript early next week.

Dr Perry, would you care to make a brief opening statement to the subcommittee or will we go straight to questions?

**Dr PERRY** — On this occasion I would rather go straight to questions.

**The CHAIRMAN** — There seems to be a general consensus that the Auditor-General and your own office virtually automatically fall into the category of independent officers of Parliament. Do you have a view about that, and also are there any other officers that you would consider automatically fall into that category?

**Dr PERRY** — I shall do what I suppose we always try to do: demonstrate we have a legal background. I would be starting, firstly, by deciding and defining what is an 'officer of Parliament'. The question of what other agencies and bodies should fall within and outside of it is predetermined by that definition.

Having said that, I certainly would agree very much with the New Zealand view that an officer of Parliament would be primarily one whose focus is on examining the executive actions of government — in other words, government administration. If the body does not have that focus and the responsibility of reporting to Parliament on those issues, I am not sure whether those officers would meet what I would regard theoretically as being officers of Parliament. One would be looking at an instrument of Parliament that had the focus of looking at the executive. If there is a body that perhaps has close links to Parliament but does not have that focus, I would not consider it to have the affinity with Parliament that an officer of Parliament would.

I think the Ombudsman's office — and I can speak with some authority only on the Ombudsman's office — has that focus. That focus of the Ombudsman's role is set out clearly in the legislation. As I have mentioned in the earlier written report that I submitted to the subcommittee, we have that affinity. Firstly, I can be dismissed only with the approval of Parliament, so my tenure is secure, unless Parliament decides for whatever reason that I have misbehaved to such an extent that it is worthy of dismissal; secondly, under section 16 of the Ombudsman Act, Parliament is able to refer to me as Ombudsman matters for investigation. I have no discretion if Parliament constitutionally refers it to me for investigation; it is mandatory that I do it and report back to Parliament.

Again in the proposed whistleblowers legislation it is proposed that the Ombudsman will have an important role: that if the Privileges Committee of Parliament refers a matter to the Ombudsman under that legislation the Ombudsman is obliged to investigate that complaint or the alleged public disclosure against a member of Parliament and report back to the Privileges Committee. So again there is that affinity with Parliament, but that is more Parliament pleasing itself rather than the executive. But again, the Ombudsman is required at least annually to report to Parliament, explaining what he has been doing over the past 12 months. The Ombudsman must table to Parliament a financial statement on the audit of his office. He also has the ability at his discretion to table directly to Parliament — not through any minister — special reports to Parliament where the Ombudsman believes Parliament's attention should be drawn to issues that have been investigated. That has been a regular practice of mine.

We do have these links. The Ombudsman and the deputy ombudsmen take an oath of office which is sworn before the Speaker of the lower house. So there is that affinity with Parliament. The essential part is, firstly, looking at government administration, and secondly, reporting back to Parliament.

**The CHAIRMAN** — I take your point very strongly about the need to define exactly what we want to encompass in the term 'officer of the Parliament'. Perhaps we can just test you with some of the observations that have been expressed to the subcommittee and your response to them. Firstly, it seems widely accepted that officers of Parliament should be acting on behalf of Parliament and carry out a function that the Parliament would otherwise exercise itself; and that they should, in some substantive sense, be acting as a check on the executive. So, as a first criterion, would you tend to agree with that?

**Dr PERRY** — Certainly I would argue that the Ombudsman must still be independent. The powers and the functions he exercises must be done independently. I would draw a very clear distinction between accountability and independence. I am all in favour of the Ombudsman, for example, or an officer of Parliament

being totally accountable to Parliament, but at the same time subject to the condition that it does not impinge on the independence because at the end of the day the Ombudsman has to make certain decisions. At times he becomes very unpopular in the making of those decisions and has all sorts of approaches and pressures placed on him. He must avoid conflicts of interest, and in some situations there could easily be a conflict of interest arise between the Ombudsman and individual members of Parliament.

Above all else the linchpin of the Ombudsman's office is independence in the exercise of his operational powers. I would argue that in the Ombudsman's case that independence would not be the consideration, but certainly accountability and reporting back to Parliament. I would say that any officer of Parliament must be accountable to Parliament.

**The CHAIRMAN** — Yes. In relation to the independence of your own office and that of the Auditor-General, does that come as much as anything through the fact that you are able to operate and investigate autonomously and have significant powers that back up your ability to investigate, and also that in reporting to Parliament you have an unfettered right to report there without having to go through any filtering mechanism?

**Dr PERRY** — Exactly, yes. I think one of the advantages in the current system is that the Ombudsman reports directly to Parliament, not through a minister, and at his discretion, except once a year when he must report on his performance and functions in the preceding year.

**The CHAIRMAN** — One point made in the New Zealand criteria is that the creation of an independent officer of Parliament should be rare.

**Dr PERRY** — Yes. In my definition I would say probably in Victoria there would be only two officers that would clearly qualify for that definition: the Auditor-General and the Ombudsman's office. On the definition I propose, which I concede is a very narrow one, I think they are the only two officers that would fall within that.

**The CHAIRMAN** — As I said at the outset, I think generally the submissions the subcommittee has received say that clearly there are two officers who would fall into that category and then there are others that may require independence but do not require to be an officer of the Parliament, so there is some ordering of the hierarchy, if you like. But some of the other things that have been put to us have been that an independent officer of the Parliament should deal widely across government and not be operating in a single specific area; that an independent officer of Parliament should not be exercising an advocacy role on behalf of any particular interest or whatever — that would be another important criterion in looking at that; and that the independent officer should not be a body that actually makes determinations in a judicial or quasi-judicial manner.

They are the sorts of things being put to the subcommittee. It has been put to us that, rather, officers of Parliament should investigate, perhaps make a finding, and report to Parliament with recommendations about what should occur out of that.

**Dr PERRY** — Yes, I agree with all of that, except I still think the overarching condition is that that body not be one that is performing essentially an executive function. Most independent statutory bodies that I am aware of exercise functions on behalf of the government or independently of government but through government direction in the sense that they may be a regulatory body. But in my opinion that is an executive function, not a legislative function. Parliament is primarily looking at the constitutional and legislative aspects and not the executive aspects, but through the constitution it has some degree of responsibility over and certainly an interest in a very broad sense in how the executive functions.

**The CHAIRMAN** — Yes, I take that point. In some ways it takes us back to the very first point we talked about, which is that it should be acting on behalf of Parliament as an entity and as a check on the executive, not acting as or being a replacement for an executive power.

**Dr PERRY** — Yes, and most of the independent statutory bodies, although they may be legislatively independent from government, still perform what I would call an executive function, not a legislative one. It seems to me that there is that very clear distinction of power between the legislation and the executive function.

**The CHAIRMAN** — Do you have a view about a process for determining the salary and budget of designated independent officers of Parliament?

**Dr PERRY** — Yes. If it were decided as a matter of policy to introduce officers of Parliament what I would see as a mechanism for setting it up would be to have a general officers of Parliament act. That act would

define ‘officer of Parliament’, so you would not have to clearly set out in the act who the officers of Parliament are, but it is simply that if a body that is created falls within the definition automatically that office is an officer of Parliament. The act could set out in very general terms how officers of Parliament are to be appointed, the nature and term of their tenure, the bases for termination of their tenure, how salaries are to be calculated or by whom they are to be appointed.

I would have thought the link of the officer of Parliament to Parliament would be along the lines of, for example, the provisions of the Ombudsman Act, where the Ombudsman can be dismissed only for specific reason and only with the consent of Parliament. One can add to that to say that, although they may be selected and appointed by Governor in Council, officers of Parliament must be approved by Parliament. So it gives you that link into Parliament, so Parliament does have an input into who is appointed as an officer of Parliament, again setting out salaries similarly as you would now do with any act.

You would not set out, for example, that an officer of Parliament’s salary should be x, y, or z; you would simply say, ‘It is to be determined in the following manner’. So each time there is a review of salaries you do not have to amend your act — you would simply set out the mechanism for calculating the salary. For example, judges have a remuneration tribunal. So if a body is there to set up and determine the remuneration for officers of Parliament, all of that can be done.

Essentially that should be the general act, but you would still not interfere with the individual acts. Again to cite the example of the Ombudsman Act, the act itself contains most of what I have just outlined to the subcommittee, but also you have the important additional parts of the act that set the Ombudsman’s functions and powers. That should be retained in the individual act. However, it is the general act that really sets out what Parliament is on about. I expect that Parliament’s concern is about who is appointed and if people are being dismissed by the executive government for reasons other than those set out in the act. If I were advising anybody on how to set up the structure that would be the approach.

**The CHAIRMAN** — Recent legislation gives the committee significant responsibilities and legislative relationships with the Auditor-General, including commenting to government on the appropriateness of the budget and the resourcing of that office. Would you see a similar relationship to Parliament through a committee as something that should be inherent for each officer?

**Dr PERRY** — Again, as I said earlier, I am all in favour of accountability, and that would certainly add to the accountability. On that aspect I would be all in favour of it. However, as Ombudsman there are two aspects that I would be very concerned about. First and foremost, if the whistleblowers legislation is accepted in its present form, a conflict of interest could easily arise for the Ombudsman and for members of Parliament.

Above all else the Ombudsman must never be in a conflict of interest situation. For example, if the Privileges Committee passed to the Ombudsman an investigation concerning a member of Parliament, a disclosure against that member, and if that member happened to be a member of a committee to which the Ombudsman was accountable or with which he was closely associated, it could be perceived that the Ombudsman had a conflict of interest. If the committee was the committee from whom the Ombudsman sought resources, his budget and changes to legislation, it could be argued that there was a conflict — you scratch my back and I’ll scratch yours. I would never say that situation would arise, but there is certainly the potential for it and there is a perception of it.

As Ombudsman, day in and day out I am continually criticised for having bias and for lacking objectivity by people who come to my office seeking an investigation. They are unhappy with the results of that investigation and say that I am biased towards the agency against whom the complaint was made. That is not the situation, but it is often an allegation made against an ombudsman. In most of the issues that an ombudsman deals with there is no conflict of interest. If you place an ombudsman where there is a conflict of interest, not only can that allegation easily be made but it is a very hard one to defend. That is the first aspect.

The second aspect is that the Ombudsman has a close affinity to all members of Parliament. Members of Parliament are able to complain directly to the Ombudsman. In those circumstances if a member of the committee was to go to the Ombudsman with a personal complaint it could be said that there is a conflict of interest. If a member of Parliament goes to the Ombudsman on behalf of a constituent and that member is a member of a committee to which the Ombudsman is accountable, there is a conflict of interest.

I highlight that as a path that needs a great deal of consideration. From my point of view it could create far more problems than it could solve. The independence is the linchpin of the office, and that could be attacked and sullied,

and quite correctly. At the moment the independence preserves the way in which the Ombudsman goes about his task without fear or favour.

**Mrs MADDIGAN** — Would you see an external review of your office to examine efficiency and effectiveness as having the same problems?

**Dr PERRY** — I already am — my office was recently subjected to an external review and I reported to Parliament on that either in my last annual report or the previous one.

**Mrs MADDIGAN** — Do you see that as a problem in view of what you were saying?

**Dr PERRY** — Again, I would see that as a conflict because the people who might come to the Ombudsman as one of the parties to a dispute which the Ombudsman investigates might be involved in looking at the efficiency and management. For example, if a member of Parliament came to the Ombudsman with a complaint and the Ombudsman found that the complaint was not substantiated, then subsequently if that member was a committee member reviewing the efficiency of the Ombudsman's office the committee member is placed in the invidious position where if he or she is critical of the way the Ombudsman goes about his tasks the allegation might be that the decision was made simply because the Ombudsman did not find in the member's favour.

**Mrs MADDIGAN** — Is there some other form of external reform, otherwise you are saying an office of Parliament can never be examined by an independent body to see if it is effective and efficient?

**Dr PERRY** — Not at all, that is not the point. That is the independent aspect, but there is also the accountability aspect, and the Ombudsman should be accountable. You could have an external body.

**Mrs MADDIGAN** — Such as, for example?

**Dr PERRY** — Pricewaterhousecoopers.

**Mrs MADDIGAN** — You would let a tender to a private organisation?

**Dr PERRY** — That has been done.

**Mrs MADDIGAN** — What organisation would be responsible for advertising the contract and letting the tender?

**Dr PERRY** — It very easily could be a parliamentary committee, but it is done by an external body. I would suggest to avoid this conflict, as occurs currently, that body should report directly to the Ombudsman and then the Ombudsman reports to Parliament.

**The CHAIRMAN** — I do not say this is an issue of independence, but I refer you to something Sir Brian Elwood put to us when we were speaking to him about the issue of independence. He suggested an important aspect was that an independent officer of the Parliament must retain full authority over the employment of staff underneath him.

**Dr PERRY** — That is certainly the current situation in Victoria. Apart from my own appointment and the appointment of the deputy ombudsman for police complaints, the Ombudsman is responsible for appointing staff. I think that is desirable from the Ombudsman's point of view, because the Ombudsman is independent, and it cannot be suggested, unless the Ombudsman is not the person he should be, that there are any problems in the appointment or again that any favours are being shown.

**Mrs MADDIGAN** — Do you think there should be a code of practice in place between officers of Parliament and their relationship with individual members of Parliament and the Parliament as a whole? Are there conflicts in members of Parliament dealing with you?

**Dr PERRY** — Not at the moment, because it is individual members. The Ombudsman is responsible to Parliament as a whole and not a particular member. That was my concern with independence. Once it becomes particular, I think the conflict of interest arises. If it is to Parliament generally and it is publicly available to Parliament, there are a number of what I would call governance or codes of conduct presently — that is, that the Ombudsman, for example, must report to Parliament. Complaints that members of Parliament place before the Ombudsman are simply the same type of complaint and are subject to the same conditions of the act as those of

citizens. There is no favour shown to individual members of Parliament. They have the same privileges as the ordinary citizen.

The safeguard always is that if you had an officers of Parliament act, the Parliament would have an input and could say if it thought anybody was not suitable for appointment. If the Ombudsman or the officer of Parliament were to be dismissed by the executive government, for whatever reason, the Parliament, as is the case at the moment, can say it agrees or disagrees. If it disagrees, the Ombudsman does not lose his tenure. It provides that parliamentary input that is already enshrined in the Ombudsman's legislation with the affinity with Parliament. To make the Ombudsman, for example, an officer of Parliament binds and adds to that affinity.

**The CHAIRMAN** — Do you see any distinction between the creation of an office of Parliament and officer of Parliament?

**Dr PERRY** — Yes. One can define any word as one chooses. An office of Parliament seems to be more in structure, whereas officer is more personal. An officer is a personal appointment. An office is more an impersonal or an abstract position that a person may occupy. Many years ago I argued before the Administrative Appeals Tribunal whether there was a difference between the office of the Ombudsman and the Ombudsman.

**The CHAIRMAN** — Is it necessary, in your view, to do both? For example, should you be declared an officer of the Parliament and the Ombudsman's office be declared an office of the Parliament?

**Dr PERRY** — I would see no problem with that. One is abstract and one is personal, and it is not a contradiction. An officer of Parliament could occupy an office of Parliament, and there is no contradiction in that. I am not sure that that adds to anything, but from a structural point of view it may. Again, I draw a vast distinction between an office of Parliament and a department of Parliament.

**The CHAIRMAN** — Perhaps the committee is looking at enhancing the public perception of a separation from the government in the way in which the office and the officer are created.

**Dr PERRY** — That would certainly raise one of the problems and dilemmas that the Ombudsman has in Victoria. While one does not have jurisdiction over ministers, one does have jurisdiction over minister's departments. The Premier is responsible for the Ombudsman's legislation. The Minister for Police and Emergency Services is responsible for the Police Regulation Act, under which the deputy ombudsman for police complaints operates.

From time to time I investigate the administration of the Department of Premier and Cabinet, and I also at times investigate complaints against the Justice department. The Ombudsman is appointed by the Governor-in-Council and the resources of the Ombudsman come through Treasury from the budget, but after consultation with the Department of Premier and Cabinet, so for administrative purposes there is an alignment between the Ombudsman and the Department of Premier and Cabinet. That is always argued as being somewhat dependent on the executive. To make an office such as mine an office of Parliament, or the Ombudsman an officer of Parliament, just removes it that one step away.

Indeed, in Western Australia and in Queensland the Ombudsman is the parliamentary commissioner for investigations, whereas in Victoria the Ombudsman is simply the commissioner for administrative investigations but is not a parliamentary commissioner. In some of the states the full title or appropriate title of the Ombudsman is the parliamentary commissioner for administrative investigations. If one were looking at that, it may be that that is a far better way to describe the Victorian Ombudsman, especially if there were a closer affinity with Parliament, and indeed if he did become an officer of Parliament.

**The CHAIRMAN** — Was there anything further you wished to add, Dr Perry?

**Dr PERRY** — No. The only point I wish to make is that the Ombudsman must be open to accountability, but at the same time treat his independence precious.

**The CHAIRMAN** — Dr Perry, thank you for your time today. It has been useful for the committee. This will be the final public hearing, and we expect to finalise a report and table it in the not-too-distant future.

**Committee adjourned.**