



PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

SIXTY SEVENTH REPORT TO THE PARLIAMENT

REPORT ON A LEGISLATIVE FRAMEWORK FOR INDEPENDENT OFFICERS OF PARLIAMENT

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Parliament of Victoria

Public Accounts and Estimates Committee

*Report on a legislative framework for
independent officers of Parliament*

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CONTENTS

PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE MEMBERSHIP – 55TH PARLIAMENT	1
PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE MEMBERSHIP – 54TH PARLIAMENT	2
DUTIES OF THE COMMITTEE	3
CHAIR’S INTRODUCTION	5
EXECUTIVE SUMMARY	7
RECOMMENDATIONS	13
CHAPTER 1: OFFICERS OF PARLIAMENT INQUIRY	19
1.1 Introduction	19
1.2 Background to the inquiry	19
1.3 Postponement of the inquiry	20
CHAPTER 2: CHARACTERISTICS OF INDEPENDENT OFFICERS OF PARLIAMENT	23
2.1 Introduction	23
2.1.1 The origins of the officer of Parliament concept	23
2.1.2 The constitutional officers of Parliament.....	24
(a) Auditor-General – functions and operational arrangements.....	24
(b) Ombudsman – functions and operational arrangements	27
(c) Electoral Commissioner – functions and operational arrangements.....	29
(d) Conclusion	30
(e) Other statutory watchdogs	30
2.1.3 Criteria for defining an officer of Parliament	30
2.1.4 The role of an officer of Parliament	31
CHAPTER 3: OFFICERS OF PARLIAMENT – DEVELOPMENTS IN OTHER JURISDICTIONS	33
3.1 Introduction	33
3.1.1 United Kingdom.....	34
3.1.2 New Zealand	35

3.1.3	Canada.....	37
	(a) Developments in Canada’s provincial legislatures.....	38
	(i) Saskatchewan.....	39
	(ii) Ontario.....	39
	(iii) British Columbia.....	40
	(iv) Alberta.....	43
3.1.4	Australia.....	43
3.2	Conclusion.....	66
CHAPTER 4:	FRAMEWORK TO ENSURE THE ACCOUNTABILITY AND	
	INDEPENDENCE OF OFFICERS OF PARLIAMENT.....	67
4.1	Introduction.....	67
4.1.1	Independence of appointment process.....	68
4.1.2	Process for determining remuneration and allowances.....	69
4.1.3	Tenure.....	71
4.1.4	Dismissal.....	73
4.1.5	Need for a closer relationship to Parliament.....	75
4.1.6	Independence from direction by Parliament or its Committees.....	77
4.1.7	External review process.....	78
4.1.8	Budgetary independence.....	80
4.1.9	Other administrative restrictions relating to staff.....	82
4.1.10	Appointment of long term acting officers of Parliament.....	83
4.1.11	Overarching or specific legislation for each officer of Parliament.....	83
4.1.12	Consultation before officers of Parliament are appointed.....	84
4.1.13	Criteria for appointing an officer of Parliament.....	85
4.1.14	Conclusion.....	85
APPENDIX 1:	LIST OF INDIVIDUALS AND ORGANISATIONS PROVIDING	
	EVIDENCE AND/OR SUBMISSIONS.....	87

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¹ During the 54th Parliament the Committee comprised ten Members of Parliament. The 54th Parliament was prorogued on 5 November 2002

DUTIES OF THE COMMITTEE

The Public Accounts and Estimates Committee is a joint parliamentary committee constituted under the *Parliamentary Committees Act 2003*.

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

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

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

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

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

CHAIR'S INTRODUCTION

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

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

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

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

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

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

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



Hon. Christine Campbell, MP

Chair

EXECUTIVE SUMMARY

Chapter 1: Officers of Parliament inquiry

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

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

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

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

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

Chapter 2: Characteristics of independent officers of Parliament

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

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

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

Chapter 3: Officers of Parliament – developments in other jurisdictions

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

These positions have been created, however, with little attempt made to formulate common principles for their relationship with Parliament, or to find a generic term for them. In Canada, for example, terms used to describe officers of Parliament include

‘constitutional officers’, ‘independent parliamentary agencies’ and ‘legislative officers’, while in Scotland they are referred to as ‘parliamentary officers’.

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

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

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

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

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

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

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

These structural features are very important in determining the nature of the interactions among the three key institutions – the political and administrative executive, Parliament, and officers of Parliament.

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

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

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

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

As previously mentioned, the Auditor-General is appointed for a seven year period. A change to this arrangement would require an amendment to the *Constitution Act 1975* and approval by the majority of electors voting at a referendum. The Public Accounts and Estimates Committee is aware that the term of the current Auditor-General will expire on 19 September 2006, shortly before the state election on 25 November 2006, making it difficult to co-ordinate the Auditor-General's recruitment and appointment process with the mid election cycle of Parliament so as to avoid any perception that the appointment could be politicised in the run-up to the election. The Committee acknowledges the significant legislative impediment to changing the period of the

Auditor-General's appointment, and therefore makes no proposal to amend the current arrangements.

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

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

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

RECOMMENDATIONS

The Committee recommends that:

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

- Recommendation 1:** The legislation relating to each officer of Parliament be amended to provide that both Houses of the Victorian Parliament pass a resolution appointing the Auditor-General, the Ombudsman and the Electoral Commissioner, based on the recommendation of the appropriate parliamentary committee.
- Page 69*
- Recommendation 2:** The legislation relating to each officer of Parliament be amended to provide that the appropriate parliamentary committee be responsible for reviewing and recommending the remuneration and allowances of independent officers of Parliament. The process should be transparent, with the relevant committee reporting to Parliament on the outcomes of its deliberations.
- Page 71*
- Recommendation 3:** The enabling legislation relating to the Ombudsman and the Electoral Commissioner be amended to provide that these officers of Parliament be appointed for an initial period of eight years, with the option of Parliament, or its delegate, extending the appointment if practicable into the middle of the next election cycle.
- Page 73*
- Recommendation 4:** The recruitment and appointment process for officers of Parliament should be finalised well in advance of the state election and, as close to the middle of the election cycle, as practicable.
- Page 73*

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

Page 73

Recommendation 6:

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

Page 75

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

- (a) the Public Accounts and Estimates Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Auditor-General and his/her office;
- (b) the Public Accounts and Estimates Committee, or another designated Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Ombudsman and his/her office; and
- (c) the Electoral Matters Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Electoral Commissioner and his/her office.

Page 77

- Recommendation 8:** **The legislation governing the operations of officers of Parliament explicitly state that Parliament and its parliamentary committees cannot direct these officers of Parliament on operational matters but can request them to undertake specific investigations.**
Page 78
- Recommendation 9:** **The Ombudsman’s and the Electoral Commissioner’s enabling legislation be amended to provide that both officers and their agencies are subject to an independent external performance review every four years and that Parliament, on the recommendation of the appropriate parliamentary committee, appoint an appropriate person to undertake the review and determine the terms and conditions of the appointment.**
Page 79
- Recommendation 10:** **The *Audit Act* 1994 be amended to provide that the independent performance audit of the Victorian Auditor-General’s Office be undertaken every four years, consistent with the provisions recommended for the Ombudsman and the Electoral Commissioner.**
Page 79
- Recommendation 11:** **The costs involved in undertaking performance reviews of the three officers of Parliament be appropriated from the budget of Parliament and reimbursed from the Consolidated Fund.**
Page 79

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

- (a) that the appropriate parliamentary committee has a role in reviewing and advising Parliament of the budget estimates for particular officers of Parliament; and
- (b) the appropriate parliamentary committee table in Parliament its report on the forthcoming appropriation for the relevant officers of Parliament and forward a copy to the Treasurer.

Page 82

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

Page 83

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

Page 83

Recommendation 15:

- (a) The *Constitution Act 1975* specify the independent officers of Parliament and outline the core principles that underpin their operations.
- (b) The enabling legislation for each officer of Parliament detail arrangements for their remuneration, appointment and dismissal, the selection of acting officers of Parliament, staffing and the officer's relationship with Parliament and appropriate parliamentary committees.

Page 84

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

Page 84

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

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

Page 85

CHAPTER 1: OFFICERS OF PARLIAMENT INQUIRY

1.1 Introduction

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

Victoria's Constitution identifies three independent officers of Parliament: the Auditor-General; the Ombudsman; and the Electoral Commissioner.² A number of other independent statutory officers also have a close relationship with Parliament, such as the Public Advocate and the Privacy Commissioner. The Public Accounts and Estimates Committee's inquiry revealed, however, that the term 'officer of Parliament' is ambiguous, and there is no consistent approach to the legislative arrangements that underpin the operations of these independent officers.

1.2 Background to the inquiry

Before the 1999 state election, the Labor Party made an election commitment to Victorians to strengthen the role of the Auditor-General. In particular, it was proposed:³

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

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

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

The Committee is to consider and report on:

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

² Constitution Act 1975, as amended, ss.94B, 94E, 94F

³ Labor, *New Solutions, A Better Government. Integrity in Government*, 1999, paragraph 10.2

- developments in this area in other jurisdictions.

The inquiry was advertised in *The Australian* and *The Age* newspapers. Notification of the inquiry, with a view to seeking a submission, was also forwarded to the following statutory officers and other office-holders:⁴

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

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

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

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

1.3 Postponement of the inquiry

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

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

⁵ See *Audit (Amendment) Act* 1994, as amended, (no.53 of 1999)

to be identified.⁶ The Committee agreed because, at that stage, the Auditor-General was the only independent officer of Parliament.

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

Second, on 8 April 2003 the *Constitution (Parliamentary Reform) Act* 2003 was enacted, which provided that the Ombudsman and the Electoral Commissioner became independent officers of Parliament.⁷

In relation to the Auditor-General, the processes for appointment, tenure, remuneration, suspension and dismissal and discretion in the performance or exercise of the functions and powers of that office are outlined in the Constitution Act and can only be altered if amending legislation is passed by both Houses of Parliament and approved by the majority of electors at a referendum.⁸ This is different to the arrangements applying to the Ombudsman and the Electoral Commissioner. In their case, the Constitution Act only specifies the arrangements relating to their discretion in the performance or exercise of their functions or powers and dismissal arrangements.⁹ All other arrangements are specified in their enabling legislation.¹⁰

At the time the Constitution (Parliamentary Reform) Bill was given its second reading, the Premier stated:¹¹

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

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

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

⁶ Letter, dated 4 December 2000, from Hon. S Bracks, MP, Premier of Victoria

⁷ See Act no.2 of 2003, ss.94E, 94F

⁸ *Constitution Act* 1975, as amended, s.18 (IB)(n)

⁹ *ibid.*, ss.94E, 94F

¹⁰ See *Ombudsman Act* 1973, as amended ss.3-5; *Electoral Act* 2002, as amended, ss.12, 14, 16

¹¹ Constitution (Parliamentary Reform) Bill 2003, Legislative Assembly *Hansard* 27 February 2003, p.162

CHAPTER 2: CHARACTERISTICS OF INDEPENDENT OFFICERS OF PARLIAMENT

Key findings of the Committee:

- 2.1** There has been some confusion about the term ‘officer of Parliament’ but this has now been resolved with the enactment of the *Parliamentary Administration Act 2005*.
- 2.2** The concept of officers of Parliament has developed over the past 30 years and these officers now play a valuable role in assisting Parliament to undertake a more active scrutiny and accountability role.
- 2.3** The Auditor-General was the only independent officer of the Victorian Parliament until 2003, when the Ombudsman and the Electoral Commissioner were also appointed as officers of Parliament.
- 2.4** Other independent watchdogs, such as the Director of Public Prosecutions, the Public Advocate, the Children's Commissioner, the Commissioner for Environmental Sustainability and the Legal Ombudsman exhibit some characteristics of officers of Parliament but do not undertake functions similar to those undertaken by Parliament.
- 2.5** The Ombudsman and the Electoral Commissioner have the key characteristics of the officer of Parliament model, and also have the title enshrined in the Constitution, but they have few formal links to the Victorian Parliament which would ensure their accountability and independence.

2.1 Introduction

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

2.1.1 *The origins of the officer of Parliament concept*

In a number of Westminster style Parliaments, the role of officers of Parliament has developed over the last 30 years, partly because traditional notions of ministerial responsibility have declined, but also because the process of government became more

widespread, complex and difficult for citizens to access. These roles have emerged to assist Parliament undertake more active scrutiny and accountability tasks.¹²

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

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

2.1.2 The constitutional officers of Parliament

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

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

(a) Auditor-General – functions and operational arrangements

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

¹² For further information see UK House of Commons, Parliamentary Library Research Paper 03/77, *Officers of Parliament – A Comparative Perspective*, 20 October 2003

¹³ *Erskine May, Parliamentary Practice*, Twenty-third edition, 2004, p.245

¹⁴ *ibid.*

¹⁵ Also raised by Professor C Clark, transcript of evidence, p.24

¹⁶ *Constitution Act 1975*, as amended, s.18(1B)

to Parliament on the economy, efficiency and effectiveness with which departments and other bodies have used their resources.¹⁷

The Victorian Auditor-General became an independent officer of Parliament under amendments to the Audit Act introduced in 1997.¹⁸ While no specific reference to the practical effects of this action was included in the legislation, the then Premier in the second reading speech stated:¹⁹

The intention behind this is to enshrine the relationship between the Auditor-General and the Parliament as the Auditor-General's principal client.

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

*...the independence of the office (of the Auditor-General) and its special relationship to Parliament is served and highlighted by declaring the Auditor-General to be an Independent Officer of the Parliament, but without any compromise to the functional independence of the office.*²⁰

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

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

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

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

¹⁷ *Audit Act* 1994, as amended, s.15(1)

¹⁸ Act no. 93 of 1997

¹⁹ Hon. J Kennett, MP, Premier, Legislative Assembly *Hansard*, 30 October 1997, p.897

²⁰ Quoted in the submission from Mr W Cameron, Victorian Auditor-General, p.2

²¹ Mr W Cameron, Victorian Auditor-General, submission

²² *Constitution Act* 1975, as amended, ss.94A–94C

- enshrined provisions relating to the appointment, independence and tenure of the Auditor-General in the Victorian Constitution Act. The Auditor-General is appointed for seven years and can be re-appointed;
- restored the discretionary power of the Auditor-General to carry out audits by in-house staff or by contractors as the Auditor-General considers appropriate; and
- strengthened the relationship between the Auditor-General and Parliament, and the accountability of the Auditor-General to Parliament.²³

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

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

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

- recommending to the Governor in Council appointments to the position of Auditor-General;
- providing advice to the Auditor-General on the Victorian Auditor-General's Office (VAGO) annual work plan;
- being consulted on the Auditor-General's budget; and;
- exempting the Auditor-General from any legislative requirements applicable to government agencies concerning financial management and reporting practices and employment conditions where necessary.

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

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

- enhance the independence of the Auditor-General;
- strengthen the accountability arrangements of the VAGO; and

²³ *Audit Act* 1994, as amended, s.7A

²⁴ Hon. S Bracks, MP Premier, Legislative Assembly *Hansard*, 11 November 1999, p.366

²⁵ *Audit Act* 1994, as amended, ss.7A–7D; *Constitution Act* 1975, as amended, s.94A(2)

²⁶ *Audit Act* 1994, as amended, s.7B(1)(c)

- clarify the scope of the Auditor-General's powers, duties and functions.²⁷

Major changes included:²⁸

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

(b) Ombudsman – functions and operational arrangements

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

- investigating freedom of information complaints and other matters under the *Freedom of Information Act* 1982; and
- investigating and overseeing investigations under the *Whistleblower's Protection Act* 2001.

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

²⁷ Hon. J Brumby, MP, Treasurer, Legislative Assembly *Hansard*, 1 May 2003, p.1300

²⁸ *Audit Act* 1994, as amended, ss.16AB,7A(5), 16G, 28, 3A, 3, 16E, 16G

²⁹ The Ombudsman Victoria, *2003-04 Annual Report*, p.2

³⁰ *ibid.*, p.8

Several commentators have argued that it is necessary for an Ombudsman to have the utmost level of independence, free from external executive influence.³¹ Although the *Constitution Act 1975* provides that the Ombudsman is an independent officer of Parliament, no aspects of the selection or appointment process are the responsibility of Parliament. The Ombudsman Act provides that the Governor in Council (in effect the government) appoints the Ombudsman, but is silent on the selection process.³²

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

The Victorian Ombudsman assured the Committee that there had been no difficulties in obtaining funding and resources from the Department of Premier and Cabinet.³⁴ Several submissions and witnesses³⁵ pointed out to the Committee a potential conflict of interest, however, as the department that provides funding to the Ombudsman was in fact the subject of investigations by the Ombudsman in relation to freedom of information requests and other complaints.³⁶

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

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

³¹ See for example the article, *The Commonwealth Ombudsman. Time for Independence?*; Mr T Walter, Office of the Tasmanian Ombudsman, submission; Tasmanian Ombudsman 2004-05 Annual Report, p.8

³² *Ombudsman Act 1973*, as amended, s.3(2)

³³ *ibid.*, s.3(4)

³⁴ Dr B Perry, former Victorian Ombudsman, transcript of evidence, p.32; Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.6

³⁵ For example, Dr B Perry, transcript of evidence, p.49; briefing by Mr R McLeod, Commonwealth Ombudsman; Mr H Evans, Clerk of the Senate; Sir B Elwood, Chief Ombudsman New Zealand; Mr T Walter, Office of the Tasmanian Ombudsman, submission

³⁶ *Review of the Freedom of Information Act – Discussion Paper*, Victorian Ombudsman Office May 2005, p.5

³⁷ Mr T Walter, Office of the Tasmanian Ombudsman, submission

The Committee heard from some witnesses that it was essential that the Ombudsman be given the legislative framework that would provide an appropriate balance in ensuring his independence and accountability to Parliament.³⁸ The previous Ombudsman acknowledged that the legislative framework for his Office needed to not only ensure his independence but the perception of independence.³⁹

(c) Electoral Commissioner – functions and operational arrangements

The Office of the Electoral Commissioner was established in 1988 with the passage of the *Constitution Act Amendment (Electoral Reform) Act* 1988. The purpose of this legislation was to ensure that the conduct of elections was under the control of an independent officer, rather than a public servant subject to a Minister's direction. The Constitution Act was amended in 2003 to provide that the Electoral Commissioner became an independent officer of Parliament.⁴⁰

The Electoral Act does not require Parliament or the Leader of the Opposition to be consulted prior to recommending an appointment to the Governor in Council. The Commissioner is appointed for ten years and may be re-appointed.⁴¹ The budget for the Electoral Commission is provided as part of the budget allocation of the Department of Justice.

The then Electoral Commissioner advised the Committee that:⁴²

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

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

³⁸ Briefing by Mr R McLeod, Commonwealth Ombudsman; Sir B Elwood, Chief Ombudsman New Zealand; Dr B Perry, transcript of evidence, p.47; Mr T Walter, Office of the Tasmanian Ombudsman, submission, pp.2–7

³⁹ Dr B Perry, former Victorian Ombudsman, transcript of evidence, p.49

⁴⁰ *Constitution Act* 1985, as amended, s.94F

⁴¹ *Electoral Act* 2002, as amended, s.12(2)

⁴² Mr C A Barry, Electoral Commissioner, submission, p.3

Successive Attorneys-General have accepted the convention that, whilst they have responsibilities to Parliament for the Act, it is the Electoral Commissioner who is responsible for the conduct and administration of elections and for the day to day decision making at the Victorian Electoral Commission.

(d) Conclusion

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

(e) Other statutory watchdogs

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

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

2.1.3 Criteria for defining an officer of Parliament

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

⁴³ See for example correspondence, dated 6 and 12 September 2002, from Hon. D Davis, MLC, forwarding correspondence from Mr M Malouf, Chief Executive Officer, City of Melbourne; Mr J Ross, Director Physical Services; Mr A Middleton; Mr B Hill; Mr M Toll, Managing Director, Land Management Surveys (Shepparton) P/L; C E Middleton; Mr D Mitchell, Lecturer, Department of Geospatial Science, RMIT University; Mr M Croxford, Building Control Commissioner

⁴⁴ *Constitution Act 1975*, as amended, s.87AE

⁴⁵ Quoted in a paper presented by Mr A Beattie, at the Australasian Study of Parliament Group Conference, Sydney, 2005, p.1; New Zealand Finance and Expenditure Committee 1989 *Report on the Inquiry into officers of Parliament*, pp.5, 6

- an officer of Parliament must only be created to provide a check on the use of power by the Executive;
- an officer of Parliament must only be discharging functions which the House of Representatives itself, if it so wished, might carry out;
- Parliament should consider creating an officer of the Parliament only rarely;
- the House of Representatives should from time to time review the appropriateness of each officer of Parliament's status; and
- each officer of Parliament should be created in separate legislation principally devoted to that position.

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

2.1.4 The role of an officer of Parliament

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

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

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

⁴⁶ Briefing by Mr H Evans, Clerk of the Senate; Mr D McGee, Clerk of the New Zealand House of Representatives; Rt. Hon. J Hunt, Chairman of the New Zealand Officers of Parliament Select Committee

⁴⁷ Briefing by Mr D McGee, Clerk of the New Zealand House of Representatives

⁴⁸ Building Control Commission, *2003-04 Annual Report*; Surveyor-General *2003-04 Annual Report*;

⁴⁹ Public Advocate, *2003-04 Annual Report*

CHAPTER 3: OFFICERS OF PARLIAMENT – DEVELOPMENTS IN OTHER JURISDICTIONS

Key findings of the Committee:

- 3.1 Officers of Parliament need to be contributing to Parliament's core functions, scrutinising the operations of government and enhancing accountability of the executive government to the Parliament.**
- 3.2 The key characteristics of the officer of Parliament model are:**
- **established in a generally standard way by an Act of Parliament;**
 - **parliamentary involvement in appointment and dismissal;**
 - **a statutory parliamentary committee responsible for budget approval and oversight of officers of Parliament;**
 - **a specific parliamentary committee to whom the officer of Parliament is required to report.**

3.1 Introduction

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

The Committee's research revealed that officers of Parliament have been given various forms of institutional frameworks. As these positions have been created, little attempt has been made to develop common principles for their relationship with Parliament or to find a generic term for them. In Canada, for example, terms used to describe officers of Parliament include 'constitutional officers', 'independent parliamentary agencies' and 'legislative officers'. In Scotland these officers are referred to as 'parliamentary officers'.⁵⁰

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

3.1.1 *United Kingdom*

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

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

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

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

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

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

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

⁵¹ *Erskine May, Parliamentary Practice*, Twenty-third edition, 2004, p.245–246

⁵² National Audit Office, *2003 Annual Report*, p.1

⁵³ *Erskine May, Parliamentary Practice*, Twenty-third edition, 2004, p.245–246; UK House of Commons, Parliamentary Library Research Paper 03/77, *Officers of Parliament – A Comparative Perspective*, 20 October 2003, pp.8–11

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ Public Administration Select Committee – Ombudsman Issues, (Third Report), p.1

more members of Parliament to be consulted. Each Commissioner is appointed for a maximum of ten years.⁵⁷

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

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

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

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

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

3.1.2 New Zealand

In 1989 an Officers of Parliament Committee was appointed to manage Parliament's relationship with the following three officers of Parliament:⁶²

- the Comptroller and Auditor-General
- the Ombudsman
- the Environment Commissioner

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ *Erskine May, Parliamentary Practice*, Twenty-third edition, 2004, pp.245–247

⁶¹ *ibid.*

⁶² Briefing by the New Zealand Officers of Parliament Select Committee; Mr D McGee, Clerk of the New Zealand House of Representatives

The Officers of Parliament Committee is responsible for:⁶³

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

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

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

The Officers of Parliament Committee is aware of the importance of fixing funding levels for officers at levels that maintain their independence. It is chaired by the Speaker and there is no government majority as a matter of principle.⁶⁴

These officers can only be dismissed by resolution of Parliament. The Committee was informed that Parliament has taken a cautious line in recommending the creation of additional officers.⁶⁵ A report from the Finance and Expenditure Committee in 1989 found that officers had been created on an ad hoc basis to date and proposed some guiding principles for the creation of new officers (see section 2.1.3).⁶⁶

The New Zealand Parliament conformed to these principles in a recent private member's Bill that attempted to upgrade the existing Children's Commissioner to an officer.⁶⁷ In addition, Mr David McGee, Clerk of the House of Representatives,

⁶³ Quoted in a paper presented by Mr A Beattie, on *Officers of Parliament – the New Zealand Model*, at the Australasian Study of Parliament Group Conference, Sydney 2005, p.4

⁶⁴ *ibid.*

⁶⁵ Briefing by Mr D McGee, Clerk of the New Zealand House of Representatives

⁶⁶ NZ Finance and Expenditure Committee 1989, *Report on the Inquiry into officers of Parliament*, pp.5, 6

⁶⁷ NZ Social Services Committee, *Report on Parliamentary Commissioner for Children Bill*, p.5

advised against the creation of a new officer during a parliamentary committee hearing of a Bill dealing with energy supply reform.⁶⁸

3.1.3 Canada

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

The federal officers of Parliament are:⁷⁰

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

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

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

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

⁶⁸ Briefing by Mr D McGee, Clerk of the New Zealand House of Representatives

⁶⁹ For further information see UK House of Commons, Parliamentary Library Research Paper 03/77, *Officers of Parliament – A Comparative Perspective*, 20 October 2003, pp.22–26

⁷⁰ *ibid.*

The Chief Electoral Officer has a close relationship with Parliament, appearing before a number of committees.

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

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

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

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

The core officers are:⁷¹

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

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

⁷¹ *ibid.*, pp.22–28

(i) Saskatchewan

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

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

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

(ii) Ontario

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

The statutory officers are:⁷³

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

⁷² *ibid.*, pp.32–33

⁷³ *ibid.*

(iii) British Columbia

Statutory officers of the British Columbia Legislature include:⁷⁴

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

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

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

The following principles have been adopted:⁷⁶

Legislated mandate and authority

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

⁷⁴ *ibid.*, pp.28–29

⁷⁵ Ombudsman of British Columbia *Statutory Officers of the British Columbia Legislature – Fundamental Operating Principles and Related Legislation*, Special Report No. 21, May 1998, p.5

⁷⁶ *ibid.*, pp.6–20

Accountability

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

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

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

Independence

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

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

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

Managerial independence

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

Officers of the Legislature should have sufficient independence from government administrative controls to ensure that they can organise, staff and manage their offices, and engage outside expertise, as they see

fit. These activities should be done within their budgets and within the provisions of legislation designed to protect the rights of public servants.

Reporting

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

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

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

Access to Information

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

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

Confidentiality

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

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

The budget for each office is reviewed by the Select Standing Committee on Finance and Government Services. The standing committee comprises backbenchers and, while having considerable overlap in membership with the Public Accounts Committee, is not chaired by an Opposition member. The officers must appear in public session before the standing committee to justify their budget plans.

The role and functions of the Auditor-General have been regulated in the province's *Auditor-General Act 2003*. The Act gives the Legislative Assembly statutory authority to recommend the appointment to the Lieutenant-Governor, following a unanimous recommendation from a special committee of the Assembly. The Act also gives the Auditor-General power to appoint staff and to report to the Public Accounts Committee. There is no explicit statutory authority for the role of the standing committee in overseeing the budget and expenditure of the Auditor-General.

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

(iv) Alberta

Alberta has the following legislative officers:⁷⁷

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

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

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

3.1.4 Australia

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

⁷⁷ Canadian Parliamentary Review, Article, *Appointment of Officers by the Alberta Legislative Assembly*, Vol.23, No.3, 2000, p.2

found in the UK and elsewhere. Amendments to the Auditor-General Act have recognised the independence of the Auditor-General by declaring the position as a officer of Parliament. While the Ombudsman is recognised as an independent officer, the statute establishing the office does not use the term – officer of Parliament.

Exhibit 3.1: Officers of Parliament in Australian jurisdictions

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Victoria								
Auditor-General	Yes (a)	Seven years Eligible for re-appointment (a)	The Governor in Council, (a) on recommendation of the Parliamentary Committee (b)	The Governor in Council may suspend the Auditor-General any time when the Parliament is not in session (the Minister must present a statement to both Houses of Parliament within 7 sitting days). The Auditor-General may be removed on an address by both Houses of Parliament. (a)	Determined by the Governor in Council, and paid from the Consolidated Fund. (a)	Budget determined in consultation with the Parliamentary Committee.(b)	Both Houses of Parliament on the recommendation of the Public Accounts and Estimates Committee: <ul style="list-style-type: none"> • appoint a independent auditor to carry out financial audit of the Audit Office (b) • appoint a suitable qualified person to carry out performance audit of the Audit Office (b) Performance audit is required (at least once every three years). (b)	<i>Constitution Act</i> 1958, as amended (a) <i>Audit Act</i> 1994, as amended (b)

Note: (a) enshrined in the Constitution Act and amendments need to be passed by the Legislative Assembly and the Legislative Council and approved by the majority of the electors voting at a referendum

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Victoria – <i>continued</i>								
Ombudsman	Yes (a)	Ten years Not eligible for re-appointment (b)	The Governor in Council (b)	When Parliament is not sitting the Governor in Council may at any time suspend the Ombudsman (a statement shall be presented to both Houses of Parliament). The legislation does not specify the person responsible for presenting the statement. (b) The Ombudsman may be removed on an address by both Houses of Parliament.	Determined by the Governor in Council, and paid out of the Consolidated Fund. (b)	The Ombudsman's Office is an output within the Department of Premier and Cabinet.	Not mentioned in the Ombudsman Act	<i>Constitution Act 1975, as amended</i> (a) <i>Ombudsman Act 1973, as amended</i> (b)

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

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Victoria – continued								
Electoral Commissioner	Yes (a)	Ten years Eligible for re-appointment, for a term not exceeding ten years (b)	The Governor in Council (b)	The Governor in Council may suspend the Electoral Commissioner (the Minister must notify the Speaker, the President and the leaders of each political party in both Houses of Parliament in writing, within 2 hours). When Parliament is not sitting, the Parliament must be summoned to meet after petitions from Members of each House objecting to the suspension are presented to the Speaker and the President. (b)	The Governor in Council may fix the terms and conditions of employment. (b)	The Electoral Commissioner's Office is an output within the Department of Justice budget.	Not mentioned in the Electoral Act	<i>Constitution Act</i> 1975, as amended (a) <i>Electoral Act</i> 2002, as amended (b)

Note: (a) enshrined in the Constitution Act and amendments need to be passed by the Legislative Assembly and the Legislative Council and approved by the majority of the electors voting at a referendum

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Australian Capital Territory (ACT)								
Auditor-General	No	Seven years Not eligible for re-appointment	The Executive The Minister must refer appointment to the Public Accounts Committee (PAC). PAC can veto the proposed appointment.	The Executive may retire the Auditor-General. The Executive may remove the Auditor-General on a resolution from the Legislative Assembly. The Executive may remove the Auditor-General on other grounds.	Determined by the Remuneration Tribunal (paid from the Consolidated Revenue Fund).	The PAC advises the Treasurer of proposed appropriation and provides the Treasurer with the Auditor-General's draft budget. The Auditor-General to advise the PAC if the appropriation for the year is insufficient to conduct special financial audits and performance audits.	The Minister appoints an independent auditor to audit the Auditor-General's annual financial statement. The PAC appoints an independent auditor to conduct a performance audit of the operations of the Auditor-General.	<i>Auditor-General Act 1996</i> <i>Remuneration Tribunal Act 1995</i>
Ombudsman <i>(Note: Commonwealth Ombudsman fulfils the role of ACT Ombudsman under a memorandum of understanding)</i>	See Commonwealth Ombudsman	See Commonwealth Ombudsman	See Commonwealth Ombudsman	See Commonwealth Ombudsman	See Commonwealth Ombudsman	See Commonwealth Ombudsman	See Commonwealth Ombudsman	

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Australian Capital Territory (ACT) – <i>continued</i>								
Electoral Commissioner	No	Not longer than five years Eligible for re-appointment	The Executive must consult with: (a) each parliamentary party leader in the Legislative Assembly (b) all members of the Legislative Assembly who are not members of such party.	The Executive may suspend the Commissioner (the Minister must present a statement to the Legislative Assembly). The Executive can end the appointment.	Determined by the Minister. In practice, remuneration is determined by a remuneration tribunal, which also covers ACT Members of Parliament. Remuneration and allowances determined by the Remuneration Tribunal and paid from the Consolidated Revenue Fund.	Part of usual departmental budget process.	Not subject to periodic review.	<i>Electoral Act 1992</i> <i>Remuneration Tribunal Act 1995</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Commonwealth								
Auditor-General	Yes	Ten years Not eligible for re-appointment	The Governor-General The Minister must consult with the Joint Committee of Public Accounts and Audit (JCPAA) on the appointment of the person. The JCPAA must approve the proposal.	The Governor-General may remove the Auditor-General on an address from each House of Parliament in the same session of Parliament. The Governor-General may remove the Auditor-General on other grounds, including bankruptcy.	Remuneration is determined by a remuneration tribunal, subject to the <i>Remuneration Tribunal Act 1973</i> and paid from the Consolidated Fund. If no determination of the tribunal is in operation, the remuneration shall be as prescribed by the regulations. Allowances are prescribed by regulations, subject to the <i>Remuneration Tribunal Act 1973</i> , and paid from the Consolidated Fund.	The JCPAA makes a recommendation to both Houses of Parliament, and to the relevant Minister, on the draft estimates for the Audit Office. Any net appropriation agreement made by the Finance Minister in relation to the Audit Office must be made with the Auditor-General. The consent of the Auditor-General is required where the Finance Minister cancels or varies a net appropriation agreement.	The Governor-General (on recommendation from the Minister) appoints an independent auditor. The Minister must consult with the JCPAA on the appointment of the independent auditor. The JCPAA must approve the proposed appointment. The independent auditor conducts an audit of the annual financial statements of the Audit Office and a performance audit of the Audit Office.	<i>Auditor-General Act 1997</i> <i>Public Accounts and Audit Committee Act 1951</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Commonwealth – <i>continued</i>								
Ombudsman	No	Not exceeding seven years Eligible for re-appointment	The Governor-General	The Governor-General may retire the Ombudsman. The Governor-General may suspend the Ombudsman (the Minister must present a statement before each House of Parliament). The Governor-General may remove the Ombudsman on an address by each House of Parliament in the same session of Parliament. The Governor-General may remove the Ombudsman on other grounds, such as, bankruptcy.	Remuneration is determined by the Remuneration Tribunal, subject to the <i>Remuneration Tribunal Act 1973</i> . Allowances are as prescribed, subject to the <i>Remuneration Tribunal Act 1973</i> .	Part of Department of Prime Minister and Cabinet budget process	Not subject to independent review	<i>Ombudsman Act 1976</i> <i>Remuneration Tribunal Act 1973</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Commonwealth – <i>continued</i>								
Electoral Commissioner	No	Not exceeding seven years Eligible for re-appointment	The Governor-General	The Governor-General may terminate the appointment of the Electoral Commissioner.	Remuneration is determined by the Remuneration Tribunal, subject to the <i>Remuneration Tribunal Act 1973</i> . If no determination of the tribunal is in operation, the remuneration shall be as prescribed. Allowances are as prescribed, subject to the <i>Remuneration Tribunal Act 1973</i> .	Part of usual departmental budget process	Not subject to independent review	<i>Commonwealth Electoral Act 1918</i> <i>Remuneration Tribunal Act 1973</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
New South Wales								
Auditor-General	No	Seven years, or at 65 years of age, whichever occurs first Not eligible for re-appointment.	The Governor must refer the appointment to the Public Accounts Committee. The Public Accounts Committee can veto a proposed appointment.	The Governor may suspend the Auditor-General (the Minister must present a statement to each House of Parliament). The Governor may remove the Auditor-General on the address of both Houses of the Legislature.	Determined by the Statutory and Other Offices Remuneration Tribunal and paid from the Consolidated Fund.	Part of usual budget process	The Governor appoints an independent auditor to inspect and audit the books and accounts relating to the administration of the Audit Office. A review of the Audit Office to be conducted at least once every three years to examine: (a) auditing practices and standards of the Auditor-General (b) whether the Auditor-General is complying with those practices and standards. The PAC appoints the independent reviewer and gives directions on conducting the review.	<i>Public Finance and Audit Act 1983</i> <i>Statutory and Other Officers Remuneration Act 1975</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

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

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Northern Territory								
Auditor-General	No	Seven years Not eligible for re-appointment	Administrator of the Northern Territory	The Administrator may suspend the Auditor-General (the Chief Minister must table a statement in the Legislative Assembly). The Administrator may retire the Auditor-General.	Determined by the Administrator of the Northern Territory	Part of usual departmental budget process	Strategic reviews of the Audit Office undertaken not less than once every three years. The Administrator appoints the reviewer and determines terms of reference. The Minister must consult with the Public Accounts Committee and the Auditor-General about appointment of reviewer and terms of reference. The Administrator appoints an independent auditor to audit the accounts of the Audit Office and audit the accounts of an agency (where the Auditor-General has declared a conflict of interest).	<i>Audit Act 2002</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Northern Territory – <i>continued</i>								
Ombudsman	Yes	Not exceeding five years Eligible for re-appointment Maximum age limit of 65 years The draft Bill recommends appointment for five years, with a further appointment for five years, but no longer.	The Administrator of the Northern Territory (on the recommendation of the Legislative Assembly)	The Administrator may suspend the Ombudsman (the Minister must present a statement to the Legislative Assembly). The Administrator may remove the Ombudsman. The Minister may retire the Ombudsman.	Determined by the Administrator of the Northern Territory	The budget is determined by the Government, the responsible Minister is the Chief Minister.	Not subject to independent review	<i>Ombudsman (Northern Territory) Act 2004</i>
Electoral Commissioner	No	Not exceeding five years Eligible for re-appointment	The Administrator of the Northern Territory. The Minister must consult with: (a) parliamentary party leaders represented in the Legislative Assembly (b) all members who are also not members of a political party represented in the Legislative Assembly.	The Administrator may suspend the Commissioner (the Minister must present a statement to the Legislative Assembly). The Administrator may terminate the appointment of the Commissioner.	Determined by the Administrator of the Northern Territory. In practice, remuneration is linked to public sector executive pay scales (as per agency heads).	Part of usual budget process	Not subject to periodic review	<i>Electoral Act 2004</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Queensland								
Auditor-General	Yes	Not longer than seven years Not eligible for re-appointment	The Governor in Council. The vacancy must be advertised. The Minister must consult with the parliamentary committee about the selection process and appointment.	The Governor in Council may suspend the Auditor-General on an address from the Legislative Assembly. The Premier must consult with the parliamentary committee about the motion. When the Legislative Assembly is not sitting, the Governor in Council may suspend the Auditor-General, but only if the Premier has presented a statement to the Auditor-General and has considered the response. The Premier must present the statement, and the Auditor-General's response, to the Legislative Assembly. The Governor may remove the Auditor-General on an address from the Legislative Assembly. The Premier must consult with the parliamentary committee about the motion.	Determined by Governor in Council (in consultation with the Public Accounts Committee) and paid from the public accounts.	The Auditor-General must prepare estimates of proposed receipts and expenditure for the Audit Office and provide these estimates to the Treasurer. Treasurer must consult with parliamentary committee in developing the proposed budget of the Audit Office.	Governor in Council appoints independent reviewer to conduct an audit of the Audit Office. Strategic review undertaken at least every five years to examine the Auditor-General's functions and performance of those functions. The Governor in Council appoints an independent reviewer and determines the terms of reference. Minister must consult with the parliamentary committee and the Auditor-General on the appointment of the reviewer and terms of reference.	<i>Public Administration and Audit Act 1977</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Queensland – <i>continued</i>								
Ombudsman	Yes	Not more than five years Eligible for re-appointment Must not be reappointed if the total terms of appointment are greater than ten years.	The Governor in Council The vacancy must be advertised. The Minister must consult with the parliamentary committee about the selection process and appointment. Does not apply to re-appointments.	The Governor may suspend the Ombudsman on an address from the Legislative Assembly. The Premier must consult with the parliamentary committee about the motion. When the Legislative Assembly is not sitting, the Governor in Council may suspend the Ombudsman, but only if the Premier has presented a statement to the Ombudsman and has considered the response. The Premier must present the statement, and the Ombudsman's response, to the Assembly. The Governor may remove the Ombudsman on an address from the Legislative Assembly. The Premier must consult with the parliamentary committee about the motion.	Determined by the Governor in Council. In practical terms the Ombudsman is aligned with the chief executive officer position of a state department and remunerated according to that determination.	The budget submission by the Office of the Ombudsman is considered by the Cabinet Budget Review Committee and then determined as part of the overall budget process of the Government. The responsible Minister is the Premier.	Strategic review conducted at least every five years to examine the ombudsman's functions and performance of those functions. The Governor in Council appoints an independent reviewer and determines the terms of reference. The Minister must consult with the parliamentary committee and the Ombudsman on the appointment of the reviewer and terms of reference.	<i>Ombudsman Act 2001</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Queensland – <i>continued</i>								
Electoral Commissioner	No	Not longer than seven years	<p>The Governor in Council</p> <p>The vacancy must be advertised in the print media.</p> <p>The Minister must consult with each party leader in the Legislative Assembly.</p> <p>The Minister must consult with the parliamentary committee about the selection process and appointment.</p> <p>Does not apply to re-appointments.</p>	The Governor in Council may terminate the appointment.	Determined by the Governor in Council and reviewed by the Attorney-General based on internal and external benchmarks.	Considered by the Cabinet Budget Review Committee and then determined as part of the overall budget process of the Government.	No	<i>Electoral Act 1992</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
South Australia								
Auditor-General	No	Until the age of 65 years	The Governor	The Governor may suspend the Auditor-General (the Governor must present a statement to the President of the Legislative Council and the Speaker of the House of Assembly, to be laid before both Houses of Parliament).	Determined by the Governor and paid from the Consolidated Fund.	Part of usual budget process	The Governor appoints an independent auditor to audit the accounts of the Audit Office.	<i>Public Finance and Audit Act 1987</i>
Ombudsman	Yes	Until the age of 65 years	The Governor, on a resolution of both Houses of Parliament. On a vacancy arising, the matter (of inquiring into and reporting on a suitable person for appointment to the vacant office) is referred to the Statutory Officers Committee of Parliament.	The Governor may suspend the Ombudsman (a statement must be presented to both Houses of Parliament). The Governor may remove the Ombudsman on an address from both Houses of Parliament.	Determined by the Governor, on the recommendation of the Remuneration Tribunal, and paid from the general revenue of the state.	Budget determined by negotiation with the Government through the Attorney-General.	Not subject to independent review	<i>Ombudsman Act 1972</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
South Australia – <i>continued</i>								
Electoral Commissioner	No	Until the age of 65 years	The Governor, on a resolution of both Houses of Parliament. On a vacancy arising, the matter (of inquiring into and reporting on a suitable person for appointment to the vacant office) is referred to the Statutory Officers Committee of Parliament.	The Governor may suspend the Electoral Commissioner (a statement must be presented to Parliament). The Governor may remove the Electoral Commissioner on an address from both Houses of Parliament.	Determined by the Remuneration Tribunal	Budget determined by negotiation with the Department of Treasury and Finance through the Justice portfolio.	Not subject to periodic review	<i>Electoral Act 1985</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Tasmania								
Auditor-General	No	Not less than five years, or until retirement	The Governor	The Governor may suspend the Auditor-General (the Governor must present a statement to each House of Parliament). The Auditor-General may be removed by a resolution of both Houses of Parliament.	The Auditor-General's salary is the average of the rates of salary of the auditors-general of South Australia and Western Australia, paid from the Consolidated Fund. Allowances are determined by the Governor and paid from the Consolidated Fund. If the Governor does not make a determination, the Auditor-General is entitled to the same allowances as those of a head of a state service agency.	Part of usual budget process	The Governor appoints an independent auditor to conduct an audit of the financial statements of the Audit Office.	<i>Financial Management and Audit Act 1990</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Tasmania – <i>continued</i>								
Ombudsman	Yes	Not exceeding five years Eligible for re-appointment for a period not exceeding five years Maximum age limit of 65 years	The Governor	The Governor may suspend the Auditor-General (a statement must be presented to each House of Parliament). The Governor may remove the Auditor-General on an address by both Houses of Parliament.	Determined by the Governor	Allocation from the Department of Justice (the Ombudsman's Office is not a stand-alone entity, but is part of the Justice Department).	Not subject to independent review	<i>Ombudsman Act 1978</i>
Electoral Commissioner	No	Up to seven years Eligible for re-appointment	The Governor The Minister must consult with the leader of each parliamentary party represented in the Legislative Assembly, and the President of the Legislative Council.	The Governor may suspend the Electoral Commissioner (a statement must be presented to each House of Parliament). The Governor may remove the Electoral Commissioner on an address from both Houses of Parliament.	As per conditions specified in the instrument of appointment. In practice, pay rates are linked to those of public service executives. Remuneration of Electoral Commissioner is paid from the Consolidated Fund.	A standing appropriation is received directly from the Consolidated Fund, but funding for the operations of the office are part of the budget process.	Not subject to periodic review	<i>Electoral Act 2004</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

	Officer of Parliament	Period of appointment	Method of appointment	Suspension and dismissal	Remuneration and allowances	Budget	Review	Legislation
Western Australia								
Auditor-General	No	Up to the age of 65 years At age 65, the Auditor-General can be reappointed for a further period not exceeding 12 months.	The Governor	The Governor may suspend the Auditor-General (the Treasurer must present a statement to both Houses of Parliament).	Determined by the Salaries and Allowances Tribunal and paid from the Consolidated Fund.	Part of usual budget process	The Governor appoints an independent auditor to audit the accounts of the Audit Office.	<i>Financial Administration and Audit Act 1985</i>
Parliamentary Commissioner for Administrative Investigations	Yes	Five years The term of the Ombudsman has been extended on some occasions, whereas on others, the position has been advertised at the end of the incumbent's five year term.	The Governor	The Governor may suspend or remove the Ombudsman on an address from both Houses of Parliament. The Governor may suspend the Ombudsman (a statement must be presented to each House of Parliament). Legislation did not specify the person responsible for presenting the statement.	Determined by the Governor and paid from the Consolidated Fund. Note: The Salaries and Allowances Tribunal is responsible for determining and recommending rates of remuneration for the officers of Parliament, including the Ombudsman.	Expenses incurred in administering the <i>Parliamentary Commissioner Act 1971</i> are provided for under s32 of the Act and paid from the Consolidated Fund.	Not subject to independent review	<i>Parliamentary Commissioner Act 1971</i>

Exhibit 3.1: Officers of Parliament in Australian jurisdictions (*continued*)

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

3.2 Conclusion

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

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

CHAPTER 4: FRAMEWORK TO ENSURE THE ACCOUNTABILITY AND INDEPENDENCE OF OFFICERS OF PARLIAMENT

Key findings of the Committee:

- 4.1 The processes for the appointment, remuneration, tenure, resourcing and dismissal of independent officers of Parliament need to be clarified and standardised.**
- 4.2 A balance is needed between ensuring officers of Parliament are independent from the executive and operationally independent of Parliament, and ensuring those officers have an appropriate measure of accountability to Parliament for their performance.**

4.1 Introduction

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

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

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

These structural features are very important in determining the nature of the interactions among the three key institutions – the political and administrative executive government, Parliament, and officers of Parliament.

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

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

4.1.1 Independence of appointment process

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

**Exhibit 4.1: Officers of Parliament
Method of appointment**

Officer of Parliament	Method of appointment
Auditor-General	Governor in Council (on the recommendation of the Parliamentary Committee) (a) (b)
Ombudsman	Governor in Council (c)
Electoral Commissioner	Governor in Council (d)

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

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

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

Accordingly, the Committee recommends that:

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

4.1.2 *Process for determining remuneration and allowances*

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

**Exhibit 4.2: Officers of Parliament
Remuneration and allowances**

Officer of Parliament	Process for determining remuneration and allowances
Auditor-General	Determined by Governor in Council (paid out of the Consolidated Fund) (a)
Ombudsman	Determined by the Governor in Council (paid out of the Consolidated Fund) (b)
Electoral Commissioner	Governor in Council may fix the terms and conditions of employment (c)

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

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

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

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

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

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

⁷⁹ Mr W Cameron, Victorian Auditor-General, submission

⁸⁰ Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.6; Mr W Cameron, Victorian Auditor-General, submission, p.5

Through its delegated Committee, Parliament could annually consider representations from the officers of Parliament on an appropriate level of remuneration, benchmark the case against developments elsewhere, seek input from the government, and then make a recommendation to Parliament.

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

The Committee recommends that:

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

4.1.3 *Tenure*

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

Exhibit 4.3: Officers of Parliament Tenure Arrangements

Officer of Parliament	Period of Appointment	Eligible for re-appointment
Auditor-General	7 years	Yes (a)
Ombudsman	10 years	No (b)
Electoral Commissioner	10 years	Yes – for a term not exceeding 10 years (c)

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

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

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

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

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

⁸² Section 94A (2) of the *Constitution Act 1975*, as amended

Accordingly, the Committee recommends that:

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

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

The Committee believes that none of the officers should be eligible for appointment within the government in the same jurisdiction within at least two years of stepping down as an officer of Parliament. This is consistent with the governance arrangements introduced by CLERP 9.⁸³ The Committee considers that this arrangement would reinforce the independence of the officers of Parliament.

Accordingly, the Committee recommends that:

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

4.1.4 *Dismissal*

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

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

⁸³ www.asic.gov.au, *CLERP 9: Review of Corporate Reporting and Disclosure Laws*, accessed 7 February 2006

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

Officer of Parliament	Suspension and dismissal
Auditor-General	<ul style="list-style-type: none"> • Governor in Council may suspend the Auditor-General at any time when the Parliament is not in session (Minister must present a statement to each House of Parliament within seven sitting days) • May be removed on an address by both Houses of Parliament (a)
Ombudsman	<ul style="list-style-type: none"> • The Governor in Council may suspend the Ombudsman (a statement shall be presented to each House of Parliament). Legislation did not specify the person responsible for presenting the statement (b) • May be removed on an address by both Houses of Parliament
Electoral Commissioner	<ul style="list-style-type: none"> • Governor in Council may suspend the Commissioner (the Minister must within 2 hours give notice in writing to the Speaker, the President and the leader of each political party in each House of Parliament) • Where the suspension takes place when Parliament is not sitting, the Parliament must be summoned to meet as soon as practicable after a petition from Members of each House objecting to the suspension are presented to the Speaker/ President (c)

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

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

Accordingly, the Committee recommends that:

Recommendation 6:

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

4.1.5 Need for a closer relationship to Parliament

Annual reports are the main form of accountability reporting, ensuring that Parliament is aware of the work of the officers of Parliament. But operational reporting is also an important aspect, since it enables Parliament to follow-up on their work. Evidence to this Committee generally favoured the fostering of a closer relationship between the Parliament, through appropriate parliamentary committees, and the officers of Parliament.⁸⁴ While this already occurs with this Committee and the Auditor-General's Office it does not occur with the other independent officers of Parliament.

Various views were expressed on the matters that such committees should deal with, but none of the proposals envisaged the relationship involving oversight or guidance on areas of priority. Indeed, several witnesses⁸⁵ stressed that it would be undesirable for a parliamentary committee to involve itself in the details of the Ombudsman's work, especially in relation to particular cases. The Ombudsman also drew attention to the possibility of a conflict of interest that could occur in the unlikely event that the Ombudsman was asked to investigate the actions of a Member of Parliament.⁸⁶

After reflecting on this matter and reviewing developments overseas in relation to Ombudsman's offices, the Committee found that the majority of parliamentary committees are not involved in operational matters or oversighting activities, and that their role is largely confined to protecting the officers by ensuring they have sufficient independence to discharge their roles as well as ensuring their accountability to the

⁸⁴ For example: Ms M Crooks, *Purple Sage Project*, submission, p.4; briefing by Mr H Evans, Clerk of the Senate; Dr J Morgan Williams, New Zealand Parliamentary Commissioner for the Environment; Dr B Perry, then Victorian Ombudsman, submission

⁸⁵ Briefing by Sir B Elwood, Chief Ombudsman New Zealand; Mr R McLeod, Commonwealth Ombudsman; Mr T Walter, Office of the Tasmanian Ombudsman, submission p.7; Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.2

⁸⁶ Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.2

Parliament. The Committee believes the benefits of having a closer formal relationship to Parliament far outweigh any perceived disadvantages. The Committee believes any potential conflict issues can be addressed through defining the scope of the relationship in legislation and by respective officers of Parliament and the appropriate parliamentary committees addressing the practicalities in a protocol statement. This is the successful model that has been adopted by the Public Accounts and Estimates Committee and the Auditor-General's Office.

While some witnesses⁸⁷ strongly supported the officers of Parliament having a more formal relationship with the Parliament, in practical terms the involvement needs to be delegated to either a parliamentary committee or to the Presiding Officers or a committee that involves the Presiding Officers, similar to the model used in New Zealand. The Committee believes it is in the best interests of the officers of Parliament and Parliament for the appropriate all-party committees to have this role rather than expecting the Presiding Officers to have a meaningful role in the appointment, budgetary, reviewing and other processes which are essential to ensuring the accountability and independence of the officers of Parliament.

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

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

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

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

Accordingly, the Committee recommends that:

- Recommendation 7:** **The legislation relating to each officer of Parliament be amended to provide that:**
- (a) the Public Accounts and Estimates Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Auditor-General and his/her office;**
 - (b) the Public Accounts and Estimates Committee, or another designated Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Ombudsman and his/her office; and**
 - (c) the Electoral Matters Committee, as the delegate of the Parliament, has the principal responsibility for ensuring the independence and accountability of the Electoral Commissioner and his/her office.**

4.1.6 *Independence from direction by Parliament or its Committees*

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

the review and subsequently reports to the Parliament on the recommendations contained in the report of the independent performance auditor.

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

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

Accordingly, the Committee recommends that:

- Recommendation 9:** **The Ombudsman's and the Electoral Commissioner's enabling legislation be amended to provide that both officers and their agencies are subject to an independent external performance review every four years and that Parliament, on the recommendation of the appropriate parliamentary committee, appoint an appropriate person to undertake the review and determine the terms and conditions of the appointment.**
- Recommendation 10:** **The *Audit Act* 1994 be amended to provide that the independent performance audit of the Victorian Auditor-General's Office be undertaken every four years, consistent with the provisions recommended for the Ombudsman and the Electoral Commissioner.**
- Recommendation 11:** **The costs involved in undertaking performance reviews of the three officers of Parliament be appropriated from the budget of Parliament, and reimbursed from the Consolidated Fund.**

4.1.8 Budgetary independence

Exhibit 4.6 outlines the current arrangements.

Exhibit 4.6: Officers of Parliament Budget arrangements

Officer of Parliament	Budget arrangements
Auditor-General	Budget to be determined in consultation with the Parliamentary Committee (a) (b)
Ombudsman	The Ombudsman's Office is an output within the Department of Premier and Cabinet budget
Electoral Commissioner	The Electoral Commissioner's Office is an output within the Department of Justice budget

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

The Committee heard some arguments that the government's involvement in setting the budgets for officers of Parliament limited or threatened the independence of these officers.⁸⁹ There was strong support for Parliament, or an appropriate parliamentary committee, to have the final say in the matter. The Committee is aware that in the UK and New Zealand, officers of Parliament have statutory protection for their budgets. The Commonwealth Joint Committee on Public Accounts and Audit is responsible for considering and making recommendations to Parliament and the responsible Minister on draft annual funding estimates for the Auditor-General's Office. The Victorian Auditor-General's Office budget is determined in consultation with this Committee. While this Committee has an important consultative role, it does not have the power to approve the budget or recommend its approval to the Parliament.

When amendments to the Audit Act were being considered by the government in 2001, the Auditor-General suggested that Parliament should have a more decisive role in endorsing the annual budget of his office. The Department of Treasury and Finance advised that the government did not accept this recommendation on the basis that if the government is to be held accountable for the state budget, it must have the ultimate say in determining the budget's composition and make up, prior to submitting the annual Appropriation Bills to Parliament.⁹⁰

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

⁸⁹ Briefing by Mr R McLeod, Commonwealth Ombudsman; Mr T Walter, Office of the Tasmanian Ombudsman, submission, p.7; briefing by Mr J Parkinson, Australasian Council of Auditors-General; Mr D McGee, Clerk of the New Zealand House of Representatives

⁹⁰ Quoted in the submission from Mr W Cameron, Victorian Auditor-General, p.4

important given the crucial and strategic role they both play in scrutinising and reviewing government activities.

The budgetary arrangements for the positions of the Ombudsman and the Electoral Commissioner seem particularly anomalous, given that both offices are business units of government departments and their budgets are considered and determined as part of the usual government review process. The Committee heard no evidence of concern about the level of resourcing of these officers, and the Ombudsman made the point that if he was concerned he always had the option of making a report to Parliament.⁹¹ Experience from overseas shows that there is always the potential for these ‘watchdogs’ to be under-funded, particularly after an adverse report on the operations of the government.

The uneasy relationship that can develop between an Ombudsman and the government is illustrated by the remarks made by the former Saskatchewan Ombudsman, shortly before his retirement:⁹²

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

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

⁹¹ Mr G Brouwer, Victorian Ombudsman, transcript of evidence, p.3

⁹² Quoted in the submission from Mr T Walter, Office of the Tasmanian Ombudsman, p.3

The Committee considers that the arrangements with the Auditor-General's Office have worked well, where the Committee, prior to the government's finalisation of the state budget, seeks advice from the Department of Treasury and Finance on the overall fiscal parameters expected of departments and takes this into account when recommending to government an appropriate level of funding.

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

Accordingly, the Committee recommends that:

- Recommendation 12:** **The legislation relating to each officer of Parliament be amended to provide:**
- (a) that the appropriate parliamentary committee has a role in reviewing and advising Parliament of the budget estimates for particular officers of Parliament; and**
 - (b) the appropriate parliamentary committee table in Parliament its report on the forthcoming appropriation for the relevant officers of Parliament and forward a copy to the Treasurer.**

4.1.9 Other administrative restrictions relating to staff

One way in which an executive government could seek to control an independent officer of Parliament it perceives as recalcitrant or too independent, is by controlling the terms and conditions of, and the appointment of, the staff. The difficulties that this can present were highlighted by the Tasmanian Ombudsman, who is linked for administrative and budgetary purposes with the Tasmanian Department of Justice:⁹³

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

⁹³ Office of the Tasmanian Ombudsman, *2004-05 Annual Report*, August 2005, pp.4-5

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

The Committee recommends that:

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

4.1.10 *Appointment of long term acting officers of Parliament*

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

Accordingly, the Committee recommends that:

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

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

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

⁹⁴ Professor R Wettenhall, additional information, p.1

should contain detailed information about the arrangements for appointment, tenure, remuneration, dismissal, selection of acting officers of Parliament, and staffing and their relationship to Parliament and the appropriate parliamentary committees.

The Committee recommends that:

Recommendation 15:

- (a) The *Constitution Act 1975* specify the independent officers of Parliament and outline the core principles that underpin their operations.**
- (b) The enabling legislation for each officer of Parliament detail arrangements for their remuneration, appointment and dismissal, the selection of acting officers of Parliament, staffing and the officer's relationship with Parliament and appropriate parliamentary committees.**

4.1.12 Consultation before officers of Parliament are appointed

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

Accordingly, the Committee recommends that:

Recommendation 16:

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

4.1.13 Criteria for appointing an officer of Parliament

Various witnesses⁹⁵ emphasised that the primary function of an officer of Parliament should be as a check on the Executive, as part of Parliament's constitutional role of ensuring the accountability of the Executive. In other words, an officer of Parliament serves the interests of Parliament rather than the executive.

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

Accordingly, the Committee recommends that:

- Recommendation 17:** **The following principles be adopted for the creation of new officers of Parliament:**
- (a) an officer of Parliament must be created only to provide a check on the executive's use of power;**
 - (b) an officer of Parliament must discharge only those functions that the Victorian Parliament, if it so wished, might carry out;**
 - (c) Parliament should consider creating an officer of Parliament only on rare occasions; and**
 - (d) Parliament should from time to time review the appropriateness of each officer of Parliament's status.**

4.1.14 Conclusion

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

⁹⁵ Briefing by Mr H Evans, Clerk of the Senate; Mr D McGee, Clerk of the New Zealand House of Representatives; New Zealand Officers of Parliament Select Committee

This is not the situation with the Ombudsman and the Electoral Commissioner, however, which has lagged behind developments in many other jurisdictions. The Committee has made a number of recommendations to protect and enhance the status of these officers of Parliament and considers that these changes are necessary to ensure the accountability and independence of these officers.

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

This report was adopted by the Public Accounts and Estimates Committee at its meeting held on 30 January 2006 in the Legislative Council Committee Room at Parliament House, Melbourne.

APPENDIX 1: LIST OF INDIVIDUALS AND ORGANISATIONS PROVIDING EVIDENCE AND/OR SUBMISSIONS

Evidence

Thursday, 3 August 2000

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

Friday, 4 August 2000

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

Tuesday, 22 August 2000

Mr Wayne Cameron, Victorian Auditor-General
Mr Joe Manders, Assistant Auditor-General, Victorian Auditor-General's Office

Monday, 9 October 2000

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

Tuesday, 10 October 2000

Mr Harry Evans, Clerk of the Senate
Mr John Parkinson, Convenor of the Australasian Council of Auditors-General and A.C.T. Auditor-General
Mr Ron McLeod, Commonwealth Ombudsman

Mr Oliver Winder, Deputy Ombudsman

Mr Bob Charles, MP, Chairman of the Commonwealth Joint Committee of Public Accounts and Audit

Dr Margot Kerley, Secretary to the Commonwealth Joint Committee of Public Accounts and Audit

Dr John Uhr, Senior Fellow, Political Science Program, Research School of Social Sciences, Australian National University

Professor Roger Wettenhall, Visiting Fellow, Research School of Public Sector Management, University of Canberra

Thursday, 29 March 2001

Dr John Tamblyn, Victorian Regulator-General

Dr Barry Perry, Victorian Ombudsman

Monday, 21 February 2005

Mr George Brouwer, Victorian Ombudsman

Mr John Taylor, Deputy Ombudsman, Ombudsman Victoria

Submissions

Submissions were received from the following individuals and agencies:

Mr Max Croxford, Office of the Building Control Commissioner (submission no.1)

Mr Kevin Ryan, State Mining Warden (submission no.2)

Mr Tim Walter, Investigation Officer, Office of the Tasmanian Ombudsman (submission no.3)

Mr C A Barry, Victorian Electoral Commissioner (submission no.4)

Mr Geoff Flatman, QC, Director of Public Prosecutions Victoria (submission no.5)

Ms Mary Crooks, Project Director and Dr Wayne Chamley, Management Group, The Purple Sage Project (submission no.6)

Mr Wayne Cameron, Victorian Auditor-General (submission no.7)

Ms Kate Hamond, Legal Ombudsman (submission no.8)

Professor Colin Clark, Deputy Dean, Faculty of Business and Law and Head – Public Sector Research Unit, Victoria University, Mr Michael De Martinis and Ms Ruth Kiraka, Victoria University (submission no.9)

Dr Barry Perry, Ombudsman, The Ombudsman Victoria (submission no.10)

Mr B Bartl (submission no.11)

Additional material provided by the following individuals and agencies:

Hon. Steve Bracks, MP, Premier of Victoria

Hon. David Davis, MLC, (then) Shadow Minister for Scrutiny of Government

Professor Keith Houghton Fitzgerald, Professor of Accounting, Faculty of Economics and Commerce, University of Melbourne

Professor Roger Wettenhall, visiting Professor, Centre for Research in Public Sector Management, University of Canberra

Mr John Taylor, Victorian Deputy Ombudsman

Professor Colin Clark, Deputy Dean, Faculty of Business and Law and Head Public Sector Research Unit, Victoria University

Mr Ian Mayer, Victorian Division of CPA

Professor Dennis Pearce, Faculty of Law, Australian National University

