

Parliament and Accountability: The role of parliamentary oversight committees

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Executive Summary

The focus of this paper is on parliamentary oversight committees and the role they play as scrutiny mechanisms. It begins with an account of the broader subject of parliamentary accountability, using this as a conceptual and practical context for the discussion of oversight committees. The paper's practical emphasis is on New South Wales (NSW).

While the accountability role played by Parliament is more important than ever, Parliament must consciously share that work with other agencies. As Peter Barberis comments, 'The key is to establish a proper working relationship between Parliament and the extra-parliamentary institutions of accountability'. Parliamentary oversight committees are one response to this challenge, one that places Parliament in a supervisory or monitoring role, maintaining oversight of the intricate web of accountability relationships that have developed in modern times.

At least five types of parliamentary oversight committees can be identified: (i) legislative review committees which scrutinise government and other bills; (ii) Public Accounts Committees concerned with the supervision of public finance; (iii) estimates committees to examine the appropriations of government departments and agencies; (iv) other select or standing committees concerned with the scrutiny of policy and administration; and (v) the more recently established specialised oversight committees for the supervision of independent investigatory bodies. The mandate of the first is to guard against legislative invasion of individual rights, the second to guard the public purse, the third and fourth to stand guard as watchdogs over the Executive, and the fifth to guard the guardians of integrity.

Specialist oversight committees of this last type are now a common feature of the Australian parliamentary landscape. This is especially the case in NSW where

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parliamentary committees supervise most of the independent investigatory agencies. The exception to the rule is the NSW Crime Commission, the oversight of which is not the responsibility of a specific parliamentary committee. At present, the NSW Parliament has four joint standing committees, established by statute, for the oversight of various organisations. These are the: Joint Standing Committee on the Independent Commission Against Corruption (ICAC); Joint Committee on the Office of the Ombudsman and the Police Integrity Commission; Joint Committee on the Health Care Complaints Commission; and the Joint Committee on Children and Young People.

Abbreviations listed by jurisdiction

ACC — Australian Crime Commission (Cth)

NCA — National Crime Commission (Cth)

GPS Committees — General Purpose Standing Committees (NSW)

HCCC — Health Care Complaints Commission (NSW)

ICAC — Independent Commission Against Corruption (NSW)

PAC — Public Accounts Committee (NSW)

PIC — Police Integrity Commission (NSW)

CJC — Criminal Justice Commission (Qld)

CMC — Crime and Misconduct Commission (Qld)

CCC — Corruption and Crime Commission (WA)

1. Introduction

The focus of this paper is on parliamentary oversight committees and the role they play as scrutiny mechanisms. It begins with an account of the broader subject of parliamentary accountability, using this as a conceptual and practical context for the discussion of oversight committees. While the practical emphasis is on New South Wales, developments in other selected jurisdictions are also considered.

The paper is predicated on three central propositions. One is that, with the expansion of the modern state and the exponential growth in bureaucratic activity, the need for Parliament to exercise its accountability or scrutiny functions efficiently and effectively is more pressing than ever. As the NSW Public Accounts Committee asserted in 1996:

The PAC reaffirms in the strongest of terms that the Parliament is the centre of the accountability of the public sector and that it is through its accountability to the parliament that the public sector is ultimately accountable to the people of NSW.¹

¹ Parliament of NSW, Public Accounts Committee, *The Truth, the Whole Truth and Nothing But the Truth? Annual Reporting in the NSW Public Sector*, 1996, p. 54.

The second proposition is that, with the expansion in state activities, Parliament itself cannot hope to perform the vast array of accountability functions required in the modern era. As recognised in the 2001 report of the Hansard Society Commission on Parliamentary Scrutiny, the fact that the modern state is so vast and complex means that it is 'no longer possible for Parliament alone to ensure accountability across the wide range of activities of central departments, let alone the myriad of other public sector bodies'.² In an age when many of the references in the debate on public administration are to 'joined-up', 'holistic' or 'whole-of-government' approaches, the Commission's report sought to place Parliament at 'the apex of the system of scrutiny'. Writing from a UK perspective, it stated:

The Commission believes that the effectiveness of Parliament requires a clarification of its role and its relationship to other mechanisms of accountability. Parliament alone cannot guarantee accountability across the entire range of Government activity. Although new forms of scrutiny and accountability have emerged Parliament has a unique role in making their work relevant. Parliament's role is in disentangling the key political issues from technical scrutiny, interpreting their significance and using this as the basis on which to challenge Government. Parliament should be at the apex of the system of scrutiny.³

The Commission's recommendations have been championed by Adam Tomkins, Professor of Public Law at the University of Glasgow. He writes:

The core recommendation of the report was that Parliament should place itself at the apex of this pyramid of accountability: it should systematically and rigorously draw on the investigations of outside regulators and commissions, thereby on the one hand providing a framework for their activities, so they feel less ad hoc than at present, and on the other hand also drawing on their expertise and resources to enable Parliament more effectively to perform its functions of holding ministers to constitutional account. This recommendation is pushing in exactly the right direction.⁴

Implicit in this argument is the third proposition upon which this paper is based, namely, that Parliament must consciously share the work of accountability with other agencies. As Peter Barberis comments, 'The key is to establish a proper working relationship between Parliament and the extra-parliamentary institutions of accountability'.⁵ Parliamentary oversight committees are indeed one notable response to this challenge, one that places Parliament in a supervisory or monitoring role, maintaining oversight of the intricate web of accountability relationships that

² Report of the Hansard Society Commission on Parliamentary Scrutiny, *The Challenge for Parliament: Making Government Accountable*, Vacher Dod Publishing Ltd 2001, p. 1.

³ *Ibid*, p 11.

⁴ A Tomkins, 'What is Parliament For?' in *Public Law in a Multi-Layered Constitution*, N Bamforth and P Leyland (eds), Hart Publishing 2003, p. 70.

⁵ P Barberis, 'The new public management and a new accountability' (Autumn 1998) 76 *Public Administration* 451 at 464.

have developed in modern times.⁶ In particular, specialist parliamentary committees have been established to oversight what has been called ‘the integrity branch of government’.⁷ As the former NSW Ombudsman, GG Masterman, stated:

The question is often rightly posed ‘Who guards the guardians’. No body, however lofty its aims and objectives, should be placed in a position where it is accountable to no-one.⁸

2. *Issues in the Accountability Debate*

2.1 *Accountability and good governance*

Like ‘governance’, its conceptual stable-mate in many ways, accountability is one of the ‘buzz-words’ of contemporary debate on public policy and administration. As Carol Harlow, Emeritus Professor of Law at the LSE, writes

Unlike the doctrine of ministerial responsibility which, with the notions of legislative supremacy and the rule of law, forms part of our classical constitutional law vocabulary, accountability is not a term of art for lawyers. According to Mulgan, the word was until a few decades ago used ‘only rarely and with relatively restricted meaning. [It] now crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic “governance”’. As the punctuation indicates, ‘governance’ is another semantic interloper, as prevalent as it is imprecise.⁹

The rise to prominence of accountability is tied in with the discussion about the need to promote ‘good governance’, a term used as shorthand for the argument that governments should observe the following principles: openness and transparency; there should be appropriate mechanisms of accountability, whether political, legal, public, or auditing; there should be in place appropriate provisions to maximize the effectiveness of government; and public participation is to be encouraged.¹⁰

For public administration, accountability is about the securing and maintenance of integrity in government, as part of what is now called ‘good governance’, a term that is used to carry accountability and other measures across both the public and private sectors. For the specific purposes of this paper, parliamentary accountability addresses the concern that governments and their agencies should fulfil their

⁶ For an overview of the integrity system in NSW see R Smith (2005), ‘Mapping the NSW public integrity system’ *Australian Journal of Public Administration* 64(2): 54. The whole issue is dedicated to the integrity issue.

⁷ J McMillan (2005), ‘The Ombudsman and the rule of law’ (January) *AIAL Forum* No. 44: 1–16.

⁸ NSW Ombudsman, *Special Report to Parliament*, 10 September 1987, p. 2.

⁹ C Harlow (2003), ‘European Governance and Accountability’ in *Public Law in a Multi-Layered Constitution*, N Bamforth and P Leyland (eds), Hart Publishing, p. 79. For a discussion of the terminology see G Drewry (2004), ‘The Executive: Towards Accountable Government and Elective Governance?’ in J Jowell and D Oliver (eds), *The Changing Constitution*, 5th edn, Oxford University Press, p. 285.

¹⁰ D Oliver (2003), *Constitutional Reform in the UK*, Oxford University Press, p. 47.

responsibilities and, where problems occur or complaints arise, there should be mechanisms available to hold them to account for their actions or omissions.

2.2 *Forms of accountability*

Accountability is referred to as a ‘relational concept’ which operates along four axes: (i) *Who* is accountable? (ii) *For what* is one accountable? (iii) *To whom* is one accountable? and (iv) *How* can that accountability be enforced?¹¹ As Richard Mulgan comments, ‘Accountability is a situational concept in that it needs to be specified in context: *who* is accountable *to whom* and for *what*?’¹² One answer to the question ‘*To whom* is one accountable?’ is found in the work of Dawn Oliver, Professor of Constitutional Law at University College London. Writing in a constitutional context, she distinguishes between four classes of body to whom accountability is owed — the courts, the public, politicians and a range of ‘auditors’.¹³

Taking our cue from Oliver, different forms of accountability can be distinguished in terms of to whom accountability is owed. For the courts, there is *legal* accountability. With the development of administrative law, the decisions and actions of Ministers and public servants can be subject to judicial review. Democratic governments are also held accountable to the *public*, ultimately through the ballot box, as well as to their Party and by the critical scrutiny of the mass media. Accountability is also owed to Parliament or to politicians, a form of accountability that is typically *political* in character and associated with the doctrine of individual ministerial responsibility. Parliament’s role in the accountability process extends beyond the political checks found in that doctrine. The central channel, as Mulgan calls it, of ministerial responsibility is supplemented by a number of other accountability mechanisms.¹⁴ In particular, through committees and other mechanisms, Parliament also plays a role in what is called *administrative* accountability. In this it operates alongside, if not always or exactly in tandem, with such independent watchdogs as the Auditor-General, the Ombudsman and, in NSW, the Independent Commission Against Corruption (ICAC). By such accountability mechanisms, the integrity of the institutions of executive government is subjected to appropriate scrutiny; guards are placed against inefficiency, mal-administration and corruption. As the Blair Government acknowledged in 2002:

An effective system of accountability of the Executive to Parliament, backed up by rigorous processes of audit, reporting and scrutiny, is fundamental to the proper operation of a Parliamentary democracy.¹⁵

¹¹ For an overview see J Cheung (2005), ‘Police accountability’, *The Police Journal* 78(1): 3.

¹² R Mulgan, ‘Accountability issues in the new model of governance’, Discussion Paper No. 91, Technical Report First Semester Seminars, Political Science Program, ANU, 2002, p. 3.

¹³ D Oliver, n 10, p. 49.

¹⁴ R Mulgan, n 12, p. 5.

¹⁵ *Audit and Accountability in Central Government: The Government’s Response to Lord Sharman’s Report ‘Holding to Account’*, Cmd 5456, March 2002, p. 3.

2.3 *Political accountability and ministerial responsibility*

The form of accountability described as *political* in nature operates pre-eminently through the conventions of individual ministerial responsibility. The doctrine is central to the idea of responsible government and forms the lynchpin of the constitutional system of accountability, as formulated by AV Dicey in the 19th century.

In this context, accountability and responsibility have been used as interchangeable terms. However, some argue that accountability needs to be disentangled from the uncertain doctrine of individual ministerial responsibility, to which distinctly political considerations apply. In 1994 Sir Robin Butler told the Scott Inquiry into the Selling of Arms to Iraq:

I am using ‘accountability’ to mean that the minister must always answer questions and give an account to Parliament for the actions of his department whether he is ‘responsible’ in the sense of attracting personal criticism himself, or not. So I am using accountability, as it were, to leave out the blame element.¹⁶

This has led some commentators to distinguish between accountability and responsibility in this context. For Matthew Flinders, the difference between them is that responsibility involves the added criteria of culpability. He explains, ‘Whereas accountability involves the obligation “to give a reckoning or account” responsibility also involves the “liability to be blamed for loss or failure”’.¹⁷ Flinders defines *accountability* as ‘the condition of having to answer to an individual or body for one’s actions’. He defines *responsibility* accordingly as ‘the condition of having to provide an account to an individual or body for one’s actions with the possibility of personal blame and/or sanctions for the content of that account’.¹⁸ The distinction is between ‘providing an answer’ (accountability) and ‘liability’ (responsibility).¹⁹

This debate is a reflection of the fact that the conduct of government has grown so complex and the need for ministerial delegation has become so great as ‘to render unreal the attaching of blame to a minister simply because something has gone wrong’ in his department.²⁰ The dilemma is that, on one side, Ministers cannot be expected to know everything that is done on their behalf; on the other, they are ‘accountable to Parliament for the policies, decisions and actions of their departments and agencies’.²¹

¹⁶ M Flinders, *The Politics of Accountability in the Modern State*, Ashgate 2001, p. 12.

¹⁷ *Ibid.*, pp. 11–12.

¹⁸ *Ibid.*, p. 13.

¹⁹ P Barberis, n 5, p. 452.

²⁰ A Tomkins (1998), *The Constitution After Scott: Government Unwrapped*, Clarendon Press, p. 50.

²¹ *Ibid.*, p. 51. Cited is the *Questions of Procedure for Ministers*, as revised by the Major Government in 1995.

2.4 *The 'agentification' of government*

Over the past two decades or so enormous changes have occurred in the public sector, altering the way services are delivered and the very nature of the public service itself. All of these developments impact upon the accountability process, including the move to employ senior public servants on a temporary, contractual basis. In this way the traditional relationships that underscore the doctrine of ministerial responsibility are themselves changing, as the public service evolves away from its Westminster origins towards an American style of operation. This was how the NSW Auditor-General, Bob Sendt, framed the issue in a speech in 2002. He said that his Office

... found that the conventions of Ministerial responsibility, frank and fearless advice from Chief Executives and a politically neutral public service had become seriously eroded ... In particular, the growing influence of non-accountable political advisors was a major concern, as was the trend towards the dismissal of chief executive officers for reasons other than performance.²²

Another challenge to the conventions of the Westminster doctrine of responsibility comes from the development of what the Hansard Society Commission calls the 'agentification' of government, a reference to the proliferation in recent times of the use of arms-length agencies to either advise or deliver government services. While still formally accountable to the Minister, the host of statutory bodies that have been created over the past few decades tend to operate as quasi-autonomous institutions, at one remove from departmental oversight. In the UK many of these semi-independent executive agencies are themselves regulators, overseeing such newly privatised utilities as water, gas, railways, electricity and telecommunications. The House of Lords Constitution Committee, chaired by Lord Norton, recently published the findings of its inquiry into these non-parliamentary regulatory bodies, where it found a shortfall in their democratic accountability. One recommendation the Blair Government has not supported is for the creation of a parliamentary committee to scrutinise these regulatory bodies.²³

Similar issues were canvassed at the Commonwealth level in Australia by the 2003 Uhrig *Review of the Corporate Governance of Statutory Authorities and Office Holders*, dealing with statutory agencies as diverse as the Reserve Bank of Australia, the Australian National Audit Office whose task is to monitor other government bodies, and such regulatory bodies as the Australian Securities Commission. Among its recommendations touching on the central question of accountability was for the creation of an Inspector-General of Regulation to investigate procedures used by regulatory authorities, a recommendation that was

²² B Sendt, NSW Auditor-General, 'Governance and accountability in the public sector', Keynote Address, PNG Institute of Accountants Conference, 21 February 2002.

²³ N Gerrard and S Hinton-Smith (2004), 'Regulation and the legislative process — improving scrutiny and accountability', in *Parliament, Politics and Law Making*, A Brazier (ed.), Hansard Society, pp. 94–100; House of Lords Committee on the Constitution, *The Regulatory State: Ensuring its Accountability* (2003–04) HL68-1.

rejected by the Howard Government.²⁴ To help bridge the gap between statutory authorities and departments, a regulatory and accountability role was also envisaged for departmental secretaries. This recommendation has been criticised in some quarters. For example, Ian Holland, a Committee Secretary in the Department of the Senate, has argued that scrutiny of statutory agencies should be the task of the Parliament, stating ‘departmental secretaries shouldn’t routinely be in the business of looking over the shoulder of the statutory agencies. That is Parliament’s job’.²⁵ Another criticism of the Uhrig report was that it ignored the scrutiny of statutory agencies through the Senate Estimates process.²⁶ In effect, a major concern was that the report undervalued the central accountability role that is to be played by Parliament in this context.²⁷

2.5 *The ‘contracting out’ of government*

Developing public-private relationships pose further hard questions about the part Parliament is to play in the accountability process. Increasingly governments are privatising, corporatising, contracting out and engaging in various forms of partnership with the private sector. For many commentators, the net result is an overall reduction in accountability. The Auditor-General of Victoria, Wayne Cameron, states that this ‘is most obvious when mistakes occur and members of the public seek remedies from the government’. He comments that ‘In the case of provision of services by a private contractor, the minister may at times be powerless to act — particularly if appropriate safeguards were not included in the contractual arrangements’.²⁸

From a UK perspective, Diana Woodhouse offers a different and somewhat more positive perspective on these developments, writing:

The patterns of accountability in Westminster systems of government are of necessity changing to reflect the diversification of government responsibilities through privatisation, contracting out, public-private agreements, and the creation of partnerships across and beyond government departments and agencies. Thus while ministerial responsibility remains a dominant feature of the accountability landscape, the political accountability it embodies is supplemented, even supplanted, by managerial accountability, where the focus on performance is

²⁴ This account is based on R Grant, *The Uhrig Review and the Future of Statutory Authorities*, Department of Parliamentary Services, Research Note No. 50, 2004–05

²⁵ I Holland, ‘The review of the corporate governance of statutory authorities and office holders’, *Public Administration Today*, September–November 2004, pp. 64–6.

²⁶ A Fels and F Brenchley, ‘Chance missed to give regulators more teeth’, *Australian Financial Review*, 13 August 2004, p. 63.

²⁷ For a detailed critical account see R Wettenhall, ‘Parliamentary Oversight of Statutory Authorities: A Post-Uhrig Perspective’, Paper Presented at the ASPG Conference, Sydney 6–8 October 2005.

²⁸ W Cameron, Auditor-General Victoria, ‘Public accountability: effectiveness, equity, ethics’, Paper presented at the Monash Conference, Towards Public Value? Management and Employment for Outcomes, 25 November 2003.

resulting in the increased visibility and accountability of civil servants and the use of accountability mechanisms which operate outside Parliament.²⁹

This trend towards public-private partnerships and the increased outsourcing of service delivery to the private and non-government sector has also led to significant changes for watchdog bodies themselves. The NSW Ombudsman's Office now exercises certain areas of its jurisdiction in relation to the private and non-government sector.³⁰ For example, in 1998 the Ombudsman was given jurisdiction in respect to child abuse allegations arising in non-government agencies, thereby extending its jurisdictions beyond both the public sector and what is strictly 'administrative conduct'.³¹

What is clear is that, as the work of government grows in size and complexity, and as the provision of public service becomes more varied, patterns of accountability are themselves becoming increasingly complex and diverse. Striking a less positive note in her conclusion, Woodhouse comments:

Managerialism and joined-up government has also resulted in 'thicker government — more management layers, more networks, more processes, more shared positions' and this has 'reduced accountability more than any shortcomings of ministerial responsibility'. There is, additionally, a 'risk of accountability arrangements by-passing Parliament in a welter of auditors, watchdogs, ombudsmen, inspectors and charters' and thus of accountability being detached from the political process.³²

The challenge is for Parliament to supervise these ever expanding and more complex administrative arrangements in a meaningful and comprehensive way. If accountability is to be attached to the processes and institutions of representative democracy, Parliament's supervisory task is as necessary as it is large, difficult and multi-faceted.

2.6 *Parliament and the integrity branch of government*

As governmental and quasi-governmental activity has become more varied and complex, so the work of monitoring its accountability has grown. An array of independent statutory agencies has been established for this purpose, a list that includes Auditors-General, ombudsmen, crime commissions and anti-corruption commissions. Effective integrity agencies of this kind require at least five key elements: Independence — is the agency beholden to the Minister or government, politically or financially?; powers — is the process complaint driven or can the

²⁹ D Woodhouse, 'Changing patterns of accountability in Westminster systems: a UK perspective' — http://www.apo.org.au/linkboard/results.chtml?filename_num=02206

³⁰ In conversation with Helen Minnican, Director, Committee on the Office of the Ombudsman and the PIC.

³¹ B Barbour (2005), 'The Ombudsman and the rule of law' *AIAL Forum*, No. 44: 17–25, (January).

³² D Woodhouse, 'Changing patterns of accountability in Westminster systems: a UK perspective', n 29.

agency audit relevant activities as it sees fit?; information — does the agency have ready access to all relevant information?; resources — are there enough?; and reporting — does the reporting mechanism put the issues in the public domain?³³

The functions discharged by the integrity agencies embrace the supervision of legal compliance, good decision-making and improved public administration among governmental institutions. However, the shared focus of the independent statutory agencies goes further to embrace the maintenance of institutional integrity, including fidelity to the public values and purposes that government institutions were established to serve in the first place. With the advent of these independent statutory agencies, Chief Justice Spigelman of the NSW Supreme Court has proposed that we should recognise ‘an integrity branch of government as a fourth branch, equivalent to the legislative, executive and judicial branches’.³⁴

Is a separation of powers intended? The point to make is that the integrity agencies must be both independent and accountable. Specifically, this branch of government must be directly accountable to Parliament. In many jurisdictions specialised parliamentary oversight committees have been established for this purpose, having as their chief concern the supervision of the watchdog agencies. Such committees have been described as ‘primary accountability and coordination mechanisms between integrity “watchdogs” and parliaments’.³⁵ Broadly, their function is to review and report upon the powers, processes and structures of the integrity agencies, to guard against abuses and to encourage best practices — to guard the guardians.

2.7 *Accountability and access to information*

Central to any effective accountability mechanism is the provision of adequate and relevant information. According to the former Queensland’s Parliamentary Criminal Justice Committee:

‘Accountability’ may be defined as operating where a relationship exists in which an individual or body, and the performance of tasks or functions conferred upon that individual or body, are subject to another’s oversight, direction or request that they provide information on their actions or justify those actions.³⁶

³³ K Hammond (2005), Speech delivered at the Institute of Public Administration Australia, WA Division, 27.5.2005 — <http://www.wa.ipaa.org.au/ipaa/docs/Speech.doc>

³⁴ JJ Spigelman, ‘The Integrity Branch of Government’, First Lecture in the 2004 National Lecture Series of the Australian Institute of Administrative Law — http://www.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/spigelman_290404 — quoted in J McMillan, n 7, pp. 11–12.

³⁵ AJ Brown et al (2004), *Chaos and Coherence: Strengths, Challenges and Opportunities for Australia’s National Integrity Systems, National Integrity System Assessment Draft Report* — Executive Summary (November), p. 12.

³⁶ Legislative Assembly of Queensland (1997), Parliamentary Criminal Justice Committee, *Report on the Accountability of the CJC to the PCJC*, Report No. 38, p. 1 (May).

The Committee continued:

The provision of information is central to ensuring accountability. An individual or body can only truly be held accountable to those who have access to relevant information on *all* aspects of their operation.³⁷

3. Defining Accountability in Relation to Parliamentary Committees

3.1 Defining accountability

Accountability is acknowledged to be ‘a notoriously imprecise term’.³⁸ The relevant academic literature typically spends some time explaining both what it is and what it is not. As to what it is, as good a starting point as any is the approach adopted in the 2001 Sharman Report, *Holding to Account: The Review of Audit and Accountability for Central Government*. It divides the notion of accountability into four aspects:

- *giving an explanation* — through which the main stakeholders (for example Parliament) are advised about what is happening, perhaps through an annual report, outlining performance and capacity;
- *providing further information when required* — where those accountable may be asked to account further, perhaps by providing information (eg to a select committee) on performance, beyond accounts already given;
- *reviewing, and if necessary revising* — where those accountable respond by examining performance, systems or practices, and if necessary, making changes to meet the expectations of stakeholders; and
- *granting redress or imposing sanctions* — if a mechanism to impose sanctions exists, stakeholders might enforce their rights on those accountable to effect changes.³⁹

3.2 Parliamentary committees as accountability mechanisms

The Sharman Report argues that not every accountability mechanism will be equally suited to achieving all four aspects of accountability. It maintains that different accountability practices ‘are best suited to different purposes’, stating:

Thus, published annual reports work well as structured explanations by departments of achievement and progress, but do not have an interactive quality that allows the reader to ask further questions or seek explanations. Parliamentary

³⁷ Ibid.

³⁸ R Mulgan (2000), ‘Comparing accountability in the public and private sectors’, *Australian Journal of Public Administration* 59(1): 87.

³⁹ Lord Sharman (2001), *Holding to Account: The Review of Audit and Accountability for Central Government*, para 3.5 (February).

questions, on the other hand, are ways of seeking specific additional information or eliciting it in different formats. Committee hearings (where those responsible for decisions are actually present) are well suited to seeking justifications and explanations for actions, as well as obtaining agreement to correct or refine practices.⁴⁰

This points to fact that parliamentary committees are potentially effective and powerful accountability mechanisms. In terms of the Sharman Report's four-dimensional approach to accountability, parliamentary committees are well placed in relation to the first three aspects, that is, to receive explanations and further information, as well as for the reviewing and revision of performance and practice. As for the fourth aspect, while parliamentary committees may obtain agreement to correct or refine practices, the actual imposition of sanctions or the granting of redress belongs more appropriately to Ministers or the courts. That is not to say that Parliament itself should not seek to influence outcomes, including by means of parliamentary committees making recommendations for action or reform. The Hansard Society Commission commented in this respect:

Accountability requires Parliament not only to secure explanations from ministers but also to influence Government decisions. This might take a variety of forms, ranging from a ministerial commitment to review an administrative error or direct remedial action.⁴¹

The Hansard Society Commission continued:

Effective scrutiny is achieved when the activity of ministers and civil servants is conditioned by the knowledge of a vigilant Parliament, willing and able to use the powers at its disposal.⁴²

3.3 *Typology of parliamentary oversight committees*

An effective committee system is one means by which Parliament can retain its central supervisory position in the increasingly intricate web of accountability processes. Not all parliamentary committees fit this model. For example, 'House' committees are concerned with the management of such parliamentary services as the library and building services, whereas the Standing Orders Committees deal with the business of the respective Houses. Similarly, privileges committees focus their attention on the Parliament itself. The concern of this paper, on the other hand, is with a narrower band of committees of inquiry that have as their rationale the scrutiny of the Executive. All these are oversight committees of one sort or another. However, some distinctions can be made. Broadly and without suggesting a too categorical typology, at least five types of parliamentary oversight committees can be identified: (i) legislative review committees which scrutinise government and other bills; (ii) Public Accounts Committees concerned with the supervision of public

⁴⁰ Sharman Report, n 39, para 3.8.

⁴¹ *Report of the Hansard Society Commission on Parliamentary Scrutiny*, n 2, p. 2.

⁴² *Ibid.*

finance; (iii) estimates committees to examine the appropriations of government departments and agencies; (iv) other select or standing committees concerned with the scrutiny of policy and administration; and (v) the more recently established specialised oversight committees for the supervision of independent investigatory bodies. The mandate of the first is to guard against legislative invasion of individual rights, the second to guard the public purse, the third and fourth to stand guard as watchdogs over the Executive, and the fifth to guard the guardians of integrity.

Legislative review committees are not considered further in this paper. Nor is special mention made of estimates committees which, in NSW at present, are subsumed under the Legislative Council General Purpose Standing Committees. Discussion is restricted to the other three categories of parliamentary committees.

4. *Guarding the Public Purse — Accountability and the Oversight of Public Finance*⁴³

4.1 The NSW Public Accounts Committee

According to Jones and Jacobs:

after more than twenty years of reforms designed to make the public sector more like the private sector, one of the most powerful accountability mechanisms remains the system of parliamentary public accounts committees.⁴⁴

Public Accounts Committees are a feature of Westminster style Parliaments. Behind them lies the principle of parliamentary approval of spending, the rationale for which is that, by controlling the purse strings, Parliament will be best placed to prevent encroachments by the Executive. The history of Public Accounts Committees dates back to 1861 when Gladstone, then Chancellor of the Exchequer, engineered the appointment of a Parliamentary Select Committee of Public Accounts by the House of Commons. There followed in 1867 the establishment of a Committee of Public Accounts by the Canadian House of Commons. Australia's first such committee was established in Victoria in 1895, a lead that was followed in NSW in 1902 under the *Audit Act* of that year. The NSW Public Accounts Committee consisted of five members, none of them ministers and all of them drawn from the Legislative Assembly. In contrast, a decade later the Commonwealth established a Joint Committee of Public Accounts.

The prevailing Australian experience of Public Accounts Committees for much of the 20th century was that they were to play a minor and intermittent role in the accountability process. The Commonwealth Joint Committee of Public Accounts

⁴³ This account is based on Parliament of NSW, Legislative Assembly, Public Accounts Committee, *History of the Committee 1902–2002*, Report No 1/53, September 2003.

⁴⁴ K Jones and K Jacobs (2005), 'Governing the Government: The paradoxical place of the public accounts committee', paper presented at the ASPG Conference, Sydney 6–8 October, p. 2.

was abolished as an economy measure in 1932, during the Depression. The same year the Victorian PAC was disbanded and a new committee was not appointed until 1955. While its NSW counterpart has a continuous history, it was only in the 1980s that it started to realise its potential as a guardian of the public purse, as its powers were increased and for the first time it was given the support of a permanent secretariat. As a former Treasury official observed of the NSW Committee: ‘What had been created was a tame tiger and until its reform in the 1980s its reports are hardly worth a glance’.⁴⁵

Before then its main responsibility was to inquire into expenditure made in excess of parliamentary appropriation under section 16(1)(b) of the *Audit Act 1902* (NSW). The committee faced the dual limitation of an inability to initiate its own inquiries and a lack of willingness from the Parliament and the Auditor-General to refer matters to it for investigation. This was to change. The *Public Finance and Audit Act 1983* (NSW) incorporated, with very minor alterations, changes to the powers of the Committee that had been made in the previous year. At that time the PAC was given the specific power both to investigate the accounts of statutory bodies and to examine the reports of the Auditor-General transmitted with the public accounts or laid before the Legislative Assembly with the accounts of an authority of the State. Under section 57 of the Act the PAC’s primary functions are to examine the public accounts transmitted to the Assembly by the Treasurer; to examine the accounts of authorities audited by the Auditor-General; and to examine the opinions and reports of the Auditor-General.

Important limits to the PAC’s powers remain. Its official history records that, while its functions include reporting to the Assembly on issues relating to public finance:

the functions of the committee could only extend to an examination of Government policy if, and only if, the matter had been specifically referred to the committee by the Legislative Assembly or a Minister of the Crown. The functions of the committee also did not extend to an examination of the estimates of any proposed expenditure by the State or by an authority of the State.⁴⁶

There is no legislative requirement for the Government to implement committee recommendations. However, as the same PAC report notes

there is a requirement under a Premier’s Memorandum issued in 1996 for Ministers to consider them and provide a formal response within six months. This memorandum was updated in 1998 to instruct Ministers to respond to any follow up questions the committee might have around 18 months after a report about the progress in implementing recommendations.⁴⁷

⁴⁵ Public Accounts Committee, *History of the Committee 1902–2002*, n 43, p. 24.

⁴⁶ *Ibid.*, p. 32.

⁴⁷ *Ibid.*, p. 47.

While the PAC has certainly been more active since the 1980s, assessing its recent performance by objective standards is by no means straightforward. The difficulties involved were recognised by the Committee itself, which nonetheless concluded:

In the past twenty years the committee has contributed to improvements in public administration. It has worked with the Auditor-General to investigate particular issues and it has undertaken its own investigations on a variety of areas.⁴⁸

A former PAC chairman described the Committee in these terms:

The Public Accounts Committee is a watchdog. Its fundamental objectives are to increase the efficiency and effectiveness with which Government policy is implemented; to increase the public sector's awareness of the need to be efficient and effective, and to be accountable for its operations; and to increase the awareness and understanding of parliamentarians and members of the public of the financial and related operations of government.⁴⁹

4.2 *The NSW Auditor-General*

Along with Public Accounts Committees, the office of Auditor-General is an established feature of Westminster style parliaments. From a Western Australian perspective, the Royal Commission into Commercial Activities of Government and Other Matters described the Auditor-General as the 'public's first check and best window on the conduct of government', saying:

The office of the Auditor General provides a critical link in the accountability chain between the public sector, and the Parliament and the community. It alone subjects the practical conduct and operations of the public sector as a whole to regular, independent investigations and review ... The Auditor General is the Parliament's principal informant on the performance of the administrative system.⁵⁰

This independent statutory office forms an additional arm to Parliament's monitoring of expenditure by the Executive, operating alongside the PAC. Reflecting this relationship, in New Zealand and at the Commonwealth level in Australia the Auditor-General is expressly defined to be an 'officer of the Parliament',⁵¹ whereas in the UK he is an officer of the House of Commons.⁵² In NSW the position is more anomalous. Under the *Audit Act 1902* the Auditor-General was appointed by the Governor. This remains the position today, with the

⁴⁸ Ibid, p. 50.

⁴⁹ P Smiles (1990), 'The Public Accounts Committee', in Parliament of NSW, Legislative Assembly, Public Accounts Committee, *Parliamentary Scrutiny of Performance, Seminar Papers*, November, pp. 57–62.

⁵⁰ Quoted in 'K O'Neil and P Wilkins (2004), 'Auditing the enforcers: the role of Auditors-General', in *Appraising the Performance of Regulatory Agencies*, papers presented at the 2002 National Administrative Law Forum, AIAL, pp. 36–52

⁵¹ *Public Audit Act 2001* (NZ) see PA Joseph (2001), *Constitutional and Administrative Law in New Zealand*, 2nd edn, Brookers, pp. 368–9; *Auditor-General Act 1997* (Cth), section 8 — the reference is to 'an independent officer of the Parliament'.

⁵² *National Audit Act 1983* (UK), section 1(2).

proviso that since 1992 the PAC can veto an appointment, a power it has not exercised to date. In effect, the Auditor-General is an independent statutory officer, reporting directly to Parliament. His statutory functions include the provision of any particular audit or audit-related service to Parliament at the joint request of both Houses of Parliament; and to report to Parliament as required or authorised by law.

The Auditor-General is to have regard to whether there has been any wastage of public resources, or any lack of probity or financial prudence in their management or application. Conversely, he is not in a position to question the merits of Government policy.⁵³ It might be said of the Auditor-General, as of the PAC itself, that the effective scrutiny of Government policy is outside their direct mandate. Formally, both are concerned more with the *what* than *why* of public finance and administration. Of course, the distinction can be hard to maintain, especially in the area of performance audits. In 2000 the PAC noted its ‘particular concern that performance audits over the years had lost sight of the distinction between government policy and assessments of the efficiency and effectiveness of management practices within government’.⁵⁴ Speaking in 2004, Chief Justice Spigelman of the NSW Supreme Court commented:

Audit offices have, particularly over recent decades, expanded the scope of their activities into performance auditing, designed to achieve the ‘three E’s’: economy, efficiency and effectiveness of governmental programmes. A performance audit bears more of a characteristic of an executive function and is designed to ensure the quality of actual decisions. It is concerned with merits rather than with probity.⁵⁵

The office of the NSW Auditor-General dates from 1824, more than 30 years prior to the establishment of responsible government. In theory, between 1902 and 1982 the PAC had the opportunity to act in concert with the Auditor-General in the scrutiny of the public accounts. With the Auditor-General reluctant to refer matters to the PAC, this potential was not achieved in practice. As suggested above, the situation has changed in more recent times. Indeed, the PAC’s 1990 report on the Auditor-General’s Office must be counted among its foremost achievements. In that case, the PAC’s inquiry was initiated by concerns expressed by the Auditor-General that he was ‘fulfilling neither Parliament’s expectations nor the modern role of an Auditor-General’. In consequence, the PAC noted that ‘one Parliamentary “watchdog” resolved to undertake this review of another Parliamentary “watchdog”’,⁵⁶ a process that resulted in the restructuring of the Audit Office and the modernisation of public sector auditing. Thirty of the committee’s forty recommendations were accepted by the Treasurer, among them that the Auditor-General be able to carry out performance audits into economy, efficiency and

⁵³ *Public Finance and Audit Act 1983* (NSW), section 27B.

⁵⁴ Parliament of NSW (2000), PAC, *Review of the Audit Office of NSW under section 48A of the Public Finance and Audit Act 1983*, Report No. 2/52 — 120, Chairman’s Foreword (February).

⁵⁵ JJ Spigelman, n 34.

⁵⁶ Parliament of NSW, Public Accounts Committee, *Report on the NSW Auditor-General’s Office*, Report No. 49, July 1990, p. ix.

effectiveness. In 1993 the Auditor-General's special auditing function was reviewed by the PAC, when it was concluded that the Office be provided with continued funds for special audit work.

4.3 *The relationship between the PAC and the Auditor-General*

A major difference between the PAC and the specialised oversight committees discussed later is that, for historical and other reasons, the former was not established primarily to supervise the Office of the Auditor-General. Its reference is broader than the specialised committees, which are more recent in origin and which take as their *raison d'être* the oversight of the investigatory powers at the disposal of such agencies as the ICAC.

To some extent the PAC and the office of Auditor-General can be seen as complimentary bodies in Parliament's monitoring of public finance, as two watchdogs with different oversight functions over the same broad subject area. Compared to the specialised committees, the PAC does not oversee the Auditor-General in a direct or concerted sense. In particular, the Auditor-General is not required to appear before the PAC to account for the activities of his Office. It is the case, however, that the PAC scrutinises the Auditor-General's reports and, under section 48A of the *Public Finance and Audit Act 1983*, the Committee is charged with organising a triennial peer review of the Auditor-General's Office. The reviewer is to be appointed by the PAC and the report is to be presented, first to the Auditor-General for comment, and then by the Committee Chair to the Legislative Assembly.

If something of a partnership exists in the public finance field, it is also the case that tensions can appear in that relationship, when the PAC can assert a more hierarchical, oversight stance towards the Auditor-General. A specific instance was the Committee's 2001 inquiry into the collapse of the NSW Grains Board. There the PAC was critical of several facets of the Auditor-General's work, including: the use made of legislative secrecy provisions to preclude him providing relevant documents to the Committee; the overly technical nature of certain reports; and inadequate reporting.⁵⁷ The relationship can change therefore, according to circumstance and by the play of different personalities.

⁵⁷ Parliament of NSW (2001), PAC, *Inquiry into the Collapse of the NSW Grains Board*, Report No 10/52 — 128, p. xi–xiii (May).

5. *Standing Guard over the Executive — Accountability and the Oversight of Policy and Administration*

5.1 *Fault lines in parliamentary accountability*

If the oversight of public finance by the Auditor-General and the PAC is a partnership of sorts, it is between two very different bodies, one headed by a statutory officer whose terms of appointment cannot be extended beyond the initial seven year period, the other by a Chairman who, to date in NSW, has always been a member of the party in Government. This points to the fact that one of several fault lines in parliamentary accountability is that of party politics. Adam Tomkins comments:

what we have come to mean when we say that the government is accountable to Parliament is that the government is accountable to a group of politicians the majority of whom are members of the same political party as that which forms the government.⁵⁸

In terms of the effective scrutiny of the Executive, there is an obvious paradox here, one that can be said to apply to Parliament generally, in that the institution is expected to both supply and maintain the government while also holding it to account.⁵⁹ A more immediate fault line for those parliamentary committees where Government members are in a majority, is that the chairmanship may be seen as a stepping stone to ministerial preferment, a consideration that may further compromise the performance of its scrutiny function. This may be particularly relevant to smaller Parliaments where it is harder to provide career structures within Parliament itself that are independent of the Executive.

5.2 *Differing experiences*

The depth to which the fault lines in parliamentary accountability go can vary from one Parliament to another, as well as for a particular Parliament across different time periods. For example, comments about the fault lines created by the influence of party politics may not apply with equal force to present day New Zealand where the unicameral Parliament is elected by a mixed member system of proportional representation which places any assumption about a Government majority in doubt. The remarks made by Tomkins relate to the British House of Commons where, party influence notwithstanding, the departmental select committee system introduced in 1979 has added a large new dimension to the scrutiny activity of Parliament. Still, the system has had its limitations, as highlighted by various reports showing too much control by the Whips, not enough opportunities for calling attention to their reports in the House and inadequate powers to insist on

⁵⁸ A Tomkins, *Public Law*, Oxford University Press 1983, p. 164.

⁵⁹ *Ibid*, p. 92.

Ministers giving evidence.⁶⁰ A report of the House of Commons Liaison Committee from 2000 included the recommendation that appointment and nomination ought to be taken out of the hands of the Whips, a proposal that was rejected by the House in May 2002. On the other hand, a recommendation that committee chairs ought to be remunerated so as to create a career structure within Parliament that is independent of ministerial preferment was adopted.⁶¹ For the Hansard Society Commission, the main considerations were to improve scrutiny by focusing the work of the select committees on issues of political significance, leaving more technical matters to others, and ensuring accountability by monitoring the impact made by committee recommendations.⁶² In summary, while the debate in Britain takes account of the influence of party politics on Parliament's key accountability mechanisms, as reflected in concerns about the role played by the Whips, the level of party discipline does not seem to preclude completely critical scrutiny of the Executive.

The extent to which the same might apply to Australian parliamentary committees is debatable. What can be said is that the impact made by party politics on accountability can vary within Australia's bicameral Parliaments, where differing electoral systems tend to give rise to two Houses with contrasting political compositions. Until the most recent federal election, this was true of the Commonwealth Parliament, in which the political composition and performance of the House of Representatives contrasted markedly with that of the Senate where the balance of power lay in the hands of the minor parties. That remains the contemporary situation in NSW where the Government controls the Legislative Assembly, whereas in the Legislative Council no Government has been in a majority since 1988. There was a 'hung' Parliament in the Assembly between 1991–95, but this can be discounted as an anomaly (albeit a very important one) for the present discussion. The general point to make is that the Council has witnessed a major revival of committee work in recent times, in circumstances where it cannot be assumed that either the Chair or the majority of members will be drawn from the Government side of the House. The result has been a revival in the scrutiny and inquiry functions of the Upper House, and with this the accountability of the Executive to Parliament has taken on a new and more meaningful lease of life.

5.3 *The NSW Legislative Council's committee system*

This is not the place to offer a comprehensive account of the committee system that has evolved in the Legislative Council over the past 20 years or so.⁶³ It is enough to say that alongside the five select committees appointed between 1995–2003, none of which were Government controlled, the Council has in addition three Standing

⁶⁰ P Seaward and P Silk (2003), 'The House of Commons', in *The British Constitution in the Twentieth Century*, V Bogdanor (ed.), Oxford University Press, p. 170.

⁶¹ A Tomkins, n 58, pp. 166–7.

⁶² Report of the Hansard Society Commission on Parliamentary Scrutiny, n 2, pp. 29–45.

⁶³ For an overview see G Griffith and S Srinivasan, *State Upper Houses in Australia*, NSW Parliamentary Library Background Paper No 1/2001, pp. 104–10.

Committees of inquiry⁶⁴ and, since 1997, five General Purpose Standing Committees (**GPS Committees**). One major difference between these is that the Standing Committees have been under Government control, whereas the GPS Committees have not: of seven members, four (including the Chair) are drawn from either the Opposition or the crossbenches. Another is that, while the Standing Committees can initiate inquiries into matters arising in annual reports, in practice the power is rarely used, whereas the self-referencing power of the GPS Committees has become a major source for initiating inquiries, making these Committees the most dynamic mechanisms in the Parliament for overseeing the management, structure and business of government. Their work includes the oversight of budget estimates. While they were originally conceived as ‘troubleshooting’ committees, inquiring into issues of immediate political concern, they have in practice cast a wide net over policy and public administration.

Notable among the inquiries undertaken by the GPS Committees was one into Olympic budgeting and ticketing (GPS Committee No 1) and another into policing in Cabramatta (GPS Committee No. 3). A more recent example, exemplifying the controversial nature of such inquiries, is the 2004 report of GPS Committee No 4 into the Designer Outlets Centre in Liverpool, in Sydney’s Western suburbs. The Centre was opened in November 2003 and was subject in the following year to a successful legal challenge by Westfield concerning the legality of the consent provided by Liverpool City Council to allow a warehouse outlet to operate on the site. In the light of the decision, the Council sought to rezone the land, an application that was refused by the Assistant Minister for Infrastructure and Planning, the Hon Diane Beamer, MP. The Centre closed on 25 August 2004 with the loss of around 400 jobs. The Committee inquiry canvassed a wide range of politically sensitive issues, including the content of meetings held between the representatives of Westfield and the Premier and any subsequent directions received by Ms Beamer. Concluding its findings, the Committee stated that the Premier, his Chief of Staff, Ms Beamer, the Planning Minister Mr Knowles and representatives of Westfield ‘conspired to cover up their involvement’ in the affair. The Committee noted: ‘These matters are currently before the ICAC which has the power to make findings as to whether such behaviour could be construed as corrupt conduct’.⁶⁵ Further, the inquiry was notable in that, for the first time since the Upper House Standing Committees were established in 1988, it summoned a ministerial advisor to give evidence. This occurred despite a convention between the major parties that ministerial staff are not called as witnesses.

⁶⁴ The three Legislative Council Standing Committees are: State Development; Social Issues; and Law and Justice and there is in addition a Legislative Council Standing Committee on Parliamentary Privilege and Ethics.

⁶⁵ Parliament of NSW (2004), Legislative Council, General Purpose Standing Committee No. 4, *The Designer Outlets Centre, Liverpool*, Report No. 11, p. xiv (December). In its report handed down on 11 August 2005 the ICAC made no findings of corrupt conduct — <http://www.icac.nsw.gov.au/index.cfm?objectid=9EE90B82-0C27-7AD1-AA7C7A884B706691>

As accountability mechanisms, these GPS Committees are subject to limitations of various kinds. For example, a weakness of a practical sort is that, when acting as estimates committees, Ministers often take questions on notice, but the time taken typically to respond to these may limit their value when the questions at issue are of immediate political concern. To date no Minister based in the Assembly has refused to appear before a GPS Committee, yet it remains the case that such committees do not have the power to summon Ministers from the Assembly,⁶⁶ or for that matter to require Lower House Ministers to answer questions when they do appear. Also, until recently there was no formal requirement for the Government to respond to a GPS Committee report in any set time frame. This contrasted with the Standing Committees of the Upper House, in relation to which the Government was required to respond to a committee report within six months. In fact, since May 2004 the Standing Orders have required the Government to respond within six months to any Upper House committee report which recommends that action be taken by the Government. Further, GPS Committees are in a position to require attendance by public servants; and, if a GPS Committee is dissatisfied with a Government's response, then it can use its self-referencing powers to reconvene and continue the scrutiny process by establishing a new inquiry.

5.4 *Comment*

The actual impact the reports of the GPS Committees have on Government policy is sure to vary. There will be times when the Government will refuse to accept any recommendation that does not accord very firmly with its own policy and agenda. On the other hand, both the inquiry into Cabramatta policing and that into Olympic budgeting and ticketing are examples of where the Government was prompted to address many of the problems concerned, even before the inquiries had ended. The publicity generated by these inquiries made it impossible for the Government to ignore them. Further, even when the Government does not accept their recommendations, committees can still perform a valuable role in publicly discussing contentious issues at hearings where important information can be revealed. It may be that the committee system is not a panacea for all the fault lines that affect parliamentary accountability. At the same time their significance as accountability mechanisms, ranging across policy and administration, should not be underestimated. The key to their continuing significance lies in these Committees remaining outside Government control.

⁶⁶ Parliament of NSW, Legislative Council, *General Purpose Standing Committees: Manual for Budget Estimates Hearings*, June 2000. This limitation is not peculiar to these committees. Rather, it is a reflection of the customary arrangements that apply between the two Houses of Parliament in the Westminster system.

6. *Guarding the Guardians — Parliamentary Oversight of Investigatory and Watchdog Bodies*

6.1 *Parliament and investigatory bodies*

The PAC and other select or standing committees of inquiry are a general and traditional feature of Westminster Parliaments. More innovative and recent in origin are the parliamentary committees specifically designed to oversight those investigative and watchdog agencies that constitute ‘the integrity branch of government’. A defining characteristic of such agencies is that they operate as independent but not autonomous institutions. They remain accountable, both for the general conduct of their work and for the particular powers of investigation granted to them. They are accountable to a parliamentary committee, the committee to the Parliament and the Parliament to the people.

The relationship these integrity watchdog agencies have with Parliament does vary. As with the Auditor-General, the New Zealand Ombudsman is expressly defined to be an ‘officer of the Parliament’, whereas in NSW no such statutory definition is in place. Whatever the formal legal position, it is the case that the Ombudsman has taken on much of the ‘grievance’ role that once belonged exclusively to members of Parliament and can be seen, in a practical sense, as discharging quasi-parliamentary functions. In the lead up to the establishment of the Joint Committee, the then NSW Ombudsman David Landa commented:

The need to firmly establish the independence from the executive of the Office of the Ombudsman is long overdue. The only way to guarantee true independence is by making the concept of the Ombudsman as an officer of the Parliament a reality, and by making the Ombudsman, with suitable protections, accountable directly to Parliament.⁶⁷

Whether the same close relationship can be made with other investigatory bodies is not so clear.⁶⁸ For example, the Police Integrity Commission (PIC) has been described as an investigatory arm of the Executive.⁶⁹ On the other hand, both PIC and the Independent Commission Against Corruption (ICAC) perform investigative roles that set them apart from departments and agencies, roles that can be said to complement and assist Parliament’s function of holding the Executive accountable. Adding to the complexity, the ICAC can also investigate allegations of corrupt

⁶⁷ Parliament of NSW (1993), Joint Committee on the Office of the Ombudsman, *Inquiry into the adequacy of the funds and resources available to the Ombudsman, Companion Volume*, p. 26 (September).

⁶⁸ This account is based on P Breen, ‘Appendix B — Striking a balance: essentials of police accountability and parliamentary oversight’, in Parliament of Western Australia, Joint Standing Committee on the Anti-Corruption Commission, *National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies 2003*, Report No. 7, pp. 7–29.

⁶⁹ Parliament of NSW (2003), Committee of the Office of the Ombudsman and the PIC, *Fifth General Meeting with the Inspector of the PIC*, Report No 1/53 — p. 5 (September).

conduct made against parliamentarians, making it to that extent a watchdog over both Parliament and the Executive.

6.2 *Criteria for effective parliamentary oversight committees*

A minimal checklist of elements needed for an effective parliamentary oversight committee includes:

- Independent/Bipartisan — is the committee able to function independently of both the government and the agency it oversees?
- Powers — does it have the appropriate powers to call for and examine witnesses and papers?
- Information — does it have access to the information needed to render the agency accountable?
- Resources — are they commensurate with the functions the Committee is required to perform?
- Implementation — to what extent are its recommendations for reform acted upon by the government and/or the agency in question? Are governments required to at least respond to committee reports in a timely manner? Can a committee initiate follow up inquiries?
- A related issue concerns the influence parliamentary committees have on the structures and processes at work in the independent agencies they oversight.

6.3 *Advantages of parliamentary oversight committees*

In its 1997 *Report on the Accountability of the CJC to the PCJC*, the Queensland Parliament's Parliamentary Criminal Justice Committee commented that

in theory, parliamentary oversight of anti-corruption and law enforcement bodies through a small, specialist, bi-partisan Parliamentary committee, which is properly resourced and is provided with sufficient powers of review, has several perceived advantages.⁷⁰

These perceived advantages were listed as follows:

- Direct link — committees provide a direct link to Parliament which operates as a forum in which all aspects of public administration including the administration of criminal justice can be raised and debated;
- Secrecy requirements — committees provide an appropriate means of ensuring effective accountability of an agency without compromising any ongoing operations or other confidential information that may be provided by an agency. The sensitive and confidential nature of the issues involved and the security of

⁷⁰ Legislative Assembly of Queensland (1997), Parliamentary Criminal Justice Committee, *Report on the Accountability of the CJC to the PCJC*, Report No. 38, p. 101 (May).

information provided by such agencies necessarily precludes the scrutiny by the whole Parliament. Under appropriate and sufficient arrangements however, a parliamentary committee can be provided with sufficient information to allow it to effectively discharge its functions;

- Democratic link — committees comprising elected representatives charged with the task of scrutinising the use of special powers by anti-corruption and law enforcement agencies arguably provide the most appropriate vehicle to ensure that the activities of an agency strike an appropriate balance between the safeguard of a citizen's rights and the wider public interest. Members of Parliament having daily contact with the community are more in tune with current community attitudes and concerns;
- Educational — committees provide an opportunity for a wider understanding and support by both parliamentarians and the public for agency's role and functions;
- Reminder — committees provide a reminder to the agency they oversee that they are subject to the Parliament and therefore to the people;
- Transparency — committees provide and promote a forum for public debate. A parliamentary committee is able to seek out public views through a range of mechanisms including conducting public hearings and receiving public submissions;
- Expertise — committees provide their members with an opportunity to develop knowledge and expertise which can lead to more informed government administration and policy making;
- Arms length accountability — accountability to a committee, as opposed to a single person, ensures that the 'watchdog' does not get too close to the agency. There is a real danger in providing for accountability to a single person watchdog in that that person might get too close to the agency such that they are not able to independently recognise the weaknesses and shortcomings of the agency; and
- Cost effective — committees arguably provide the most cost-effective means of ensuring accountability of an anti-corruption or law enforcement body.

6.4 *Limits of parliamentary oversight committees*

The same 1997 *Report on the Accountability of the CJC to the PCJC* listed the possible limits of parliamentary oversight committees as follows:

- Bipartisan — the bipartisan nature of such committees can be illusory, or flawed at best. On the other side, the potential for decisions to be made along party political lines can be countered by requiring unanimous or majority decisions on committees that have a multi-party membership.

- Confidentiality or secrecy provisions — an agency may seek to misuse such provisions by preventing a committee access to sensitive information, thereby compromising the accountability process.
- Time commitment — such committees may require a greater time commitment from MPs than other committees. The task of ensuring on-going scrutiny of the activities of investigatory agencies can be onerous.
- Changes in membership — frequent turnover in committee membership may weaken its ability to monitor the investigatory agency effectively, as expertise is lost or never really acquired.
- Complex nature of agency's activities — the legal and other issues raised by investigatory agencies may lie outside the expertise of committee members. These committees are, however, serviced by a permanent secretariat. Whether such resources are adequate is always a moot point.
- Implementation — if the implementation of committee recommendations is one yardstick by which to measure performance, it is often the case that committee reports make little impact, at least in the short term. Government responses can be inadequate, late or hostile. By an assertion of independence, a committee can, however, keep the issues in the public eye by reporting on the government's record of responding to its recommendations.

7. *Commonwealth Parliamentary Oversight Committees*

7.1 *Parliamentary Joint Committee on the Australian Crime Commission*

For the genesis of parliamentary oversight committees in Australia we must look to the Commonwealth. At present a number of such committees operate in the Commonwealth Parliament. One is the Parliamentary Joint Committee on ASIO, ASIS and DSD, first appointed in March 2002 and replacing the former Parliamentary Joint Committee on ASIO that was first appointed in August 1988.⁷¹ Another is the Parliamentary Joint Committee on the Australian Crime Commission (ACC), the successor to the Parliamentary Joint Committee on the National Crime Authority (NCA). In January 2003 the NCA was incorporated into the ACC and the Joint Committee was duly renamed. In addition, the Australian Securities and Investment Commission (ASIC) is overseen by the Joint Committee on Corporations and Financial Services,⁷² as the Commonwealth Auditor-General, who is defined to be an 'independent officer of the Parliament',⁷³ is overseen by the

⁷¹ For an account see M Swieringa, 'Intelligence Oversight and the War on Terrorism', p. 137 this volume.

⁷² A Marinac and J Curtis, 'The Scrutiny of Government Agencies by Parliamentary Joint Committees', p. 120 this volume.

⁷³ *Auditor-General Act 1997* (Cth), section 8.

Joint Committee of Public Accounts and Audit. There is no dedicated parliamentary committee to oversight the Commonwealth Ombudsman.

The Joint Committee on the NCA was the template for the oversight committees later established in NSW. The NCA, and with it the Joint Committee, was established under the *National Crime Authority Act 1984* (Cth), as an independent statutory authority to combat organized criminal activity of national importance. While it was the creation of a federal Act of Parliament, it was empowered by complementary legislation in the States and Territories to operate within their jurisdictions. Broadly the same arrangements apply to the ACC, the establishment of which implemented the Howard Government's promise to enhance the 'national framework to deal with terrorism and transnational crime'.⁷⁴ In the exercise of their functions the NCA and now the ACC were granted coercive powers, to the extent that the last has been described as a 'standing Royal Commission'.⁷⁵ It was in the light of the powers granted to the NCA that the original Joint Committee was proposed by Senator Don Chipp who said the Committee could be

a vehicle to receive complaints from people outside to the effect that the Authority is not doing its job, has not pursued a particular investigation, or has disregarded evidence of criminal behaviour which it should have regarded. Further, if somebody has his or her civil liberties infringed, it could be a vehicle to receive complaints of that sort.⁷⁶

At its inception in 1984 the Joint Committee consisted of five members from each House, an arrangement that remains in place today. From the relevant parliamentary debates it was assumed that the Joint Committee would meet regularly with the NCA and be briefed on the general areas the Authority was investigating and the procedures it employed. The Committee's duties included monitoring and reviewing the NCA's performance; reporting to Parliament, including on matters arising from annual reports; examining trends in criminal activities and suggesting reforms to the NCA; and conducting inquiries referred to it by Parliament.

Conversely, the Joint Committee did not have the power to investigate a criminal matter itself or to reconsider the findings of the NCA in respect to a particular investigation. The Joint Committee was not designed therefore as a hands on vehicle for criminal investigation, nor yet as a court or tribunal to reconsider or re-examine particular cases. Rather, it was to serve as a watchdog over the NCA, examining complaints that it was not performing its functions and receiving complaints that the Authority had infringed civil liberties.⁷⁷ The same applies today to the Parliamentary Joint Committee on the Australian Crime Commission. It is

⁷⁴ Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on the NCA, *Australian Crime Commission Establishment Bill 2002*, November 2002, p. 1.

⁷⁵ *Ibid*, p. 21.

⁷⁶ *Commonwealth Parliamentary Debates (Senate)*, 6.6.1984, p. 2649.

⁷⁷ Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on the NCA, *Third Evaluation of the NCA*, April 1998, p. 161.

expressly prohibited from undertaking an intelligence operation or investigation, or from investigating a relevant criminal activity. It is further prevented from reconsidering the findings in respect to a particular ACC operation or investigation.⁷⁸

The Joint Committee's powers are determined by a resolution of both Houses, as is the composition of its membership. In keeping with the bi-partisan nature of oversight committees, the latest resolution divides membership equally between government and non-government members. The resolution further provides that in carrying out its duties the Joint Committee must ensure that the operational methods and results of investigations of law enforcement agencies, as far as possible, be protected from disclosure where that would be against the public interest.⁷⁹ 'Oversight hearings' are held examining the ACC's Annual Report. These are said to 'involve close questioning of ACC officers by all members of the Committee and result in a high level of real scrutiny of the ACC's Annual Report'.⁸⁰

The establishment of the Joint Committee on the NCA (as it then was) came about by an amendment to the National Crime Authority Bill of 1983 in the Senate. Before then, the Senate Standing Committee on Constitutional and Legal Affairs had not recommended a parliamentary oversight mechanism. That Committee commented:

Given the complexity of the Authority's operations and the difficulty of members of Parliament finding sufficient time to be continually available for the task, there is a possibility that an illusion — in this case, of continuous awareness of the Authority's activities — may be created. Further, there is a danger that such a committee might become too close to the Authority.⁸¹

In fact, in successive statements the Joint Committee reported an uneasy relationship over accountability issues with the NCA. In its first report in 1985 the Joint Committee revealed tensions between itself and the Authority over the interpretation of section 55(2) of the National Crime Authority Act 1984 (Cth) which prohibited the Committee from investigating a matter relating to a relevant criminal activity or from reconsidering the findings of the Authority in respect to a particular investigation. A legal opinion obtained by the Committee suggested that it had the power to seek information from the Authority concerning a decision whether or not to investigate particular matters as well as reasons for these decisions, the progress of investigations and the likely outcome of these investigations. The Authority, armed with a contrary legal opinion, argued for a narrower interpretation of section 55(2). The issue was returned to in the Committee's 1991 report *Who is to guard the guards?* and again in 1998 when it

⁷⁸ *Australian Crime Commission Act 2002* (Cth), section 55(2).

⁷⁹ *Commonwealth Parliamentary Debates (Senate)*, 18.11.2004, pp. 93–4.

⁸⁰ Marinac and Curtis, n 72, p. 124.

⁸¹ Senate Standing Committee on Constitutional and Legal Affairs, *The National Crime Authority Bill 1983*, Report No. 30, 1984, p. 94.

undertook a major evaluation of the NCA. Suggesting a more hands on role for the Committee, the 1998 report also recommended that an Office of Inspector-General of the NCA be created, subject to direction and oversight by the Committee, to investigate any aspect of the NCA's operations. The Parliamentary Joint Committee commented:

Information is the lifeblood of accountability. Accordingly, the PJC must be given the capacity to be able to obtain from the NCA such information of substance as it requires to serve as a basis for the monitoring and review role required of it by the Parliament...*The PJC wants to make it clear that the status quo is unacceptable. It must either go forward to a position of genuine scrutiny of the operations of the NCA or it may as well cease to function.*⁸² (original emphasis)

The Joint Committee continues to function, albeit under a different name and without statutory enhancement of its powers. It is one component of a complex structure of external accountability bodies established under the *Australian Crime Commission Act 2002* (Cth). The Committee operates alongside an ACC Board and an Inter-Governmental Committee, which also has the task of monitoring the ACC. A 1996 report of the Australian Law Reform Commission recommended the establishment of a new body called the National Integrity and Investigations Commission to act as an external complaints and anti-corruption authority for the NCA.⁸³ The idea has been resurrected recently, with a proposal foreshadowed to establish an Australian Commission for Law Enforcement Integrity.⁸⁴

7.2 Comment

From its inception the Joint Committee raised several salient questions that beset oversight committees. Would it become a captive of the organisation it was supposed to monitor? Would it create the appearance of supervision over a body whose activities were too complex to be monitored meaningfully by busy parliamentarians? Would sufficient information be made available to the Committee to allow it to perform its oversight function? Should it have a more 'hands-on' mandate to initiate inquiries? Would the accountability network deliver real oversight or are the current arrangements more akin to what a former Chair of the NCA (Mr Broome) described as a 'five legged camel' — unmanageable, unaccountable and doomed to failure?⁸⁵ The general question is how the accountability of powerful investigatory bodies is to be combined and reconciled with their independence and effectiveness.

⁸² Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on the NCA, *Third Evaluation of the NCA*, April 1998, p. 169.

⁸³ ALRC, *Integrity: but not by trust alone*, Report No. 82, November 1996, p. 133.

⁸⁴ Australian Government, Attorney-General, 'Budget 2005 — Law and Justice Overview', *Media Release*, 10.5.2005. Note that an Inspector-General has oversighted Australia's intelligence and securities agencies since 1986. A similar position was created in New Zealand in 1996.

⁸⁵ Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on the NCA, *Australian Crime Commission Establishment Bill 2002*, November 2002, p. 9.

Tensions between the Joint Committee and the former NCA emphasise the point that parliamentary oversight committees and the agencies they are established to supervise do not necessarily operate as ‘partners’ in a common enterprise. In a real sense, the mandate of the specialised parliamentary committees is to ask hard questions about investigatory agencies. In terms of the definition of accountability adopted earlier, it is to require explanations, to seek further information and to call for practices to be revised. This is not to say that the relationship between parliamentary oversight committees and their respective investigatory agencies need, or must, be driven by conflict. It is only to say that parliamentary oversight committees are not designed to enjoy a cosy relationship with the bodies they supervise.

8. *NSW Parliamentary Oversight Committees*

Oversight committees are now a common feature of the Australian parliamentary landscape. This is especially the case in NSW where parliamentary committees supervise most of the independent investigatory agencies. The scope of this coverage was largely the product of the 50th Parliament of 1991–95 when, in the context of a Legislative Assembly where the balance of power was held by the Independents, a determined attempt was made to strengthen Parliamentary scrutiny of the Executive.⁸⁶ The exception to the rule is the NSW Crime Commission, the oversight of which is not the responsibility of a specific parliamentary committee.

At present, the NSW Parliament has four joint standing committees, established by statute, for the oversight of various organisations.⁸⁷ These are the Joint Standing Committee on the ICAC; Joint Committee on the Office of the Ombudsman and the Police Integrity Commission; Joint Committee on the Health Care Complaints Commission; and the Joint Committee on Children and Young People.

While the Houses determine the membership of each committee, in all cases the Government is in a majority. Both the ICAC Committee and the Committee on Children and Young People have 11 members, the former with a Government majority of 6 to 5, the latter with a Government majority of 7 to 4. In the case of the ICAC Committee 8 members are from the Legislative Assembly, 3 from the Legislative Council; whereas in the case of the Committee on Children and Young People the split is 6 to 5. The other two committees consist of 7 members, 4 from the Lower and the 3 from the Upper House, and with a 4 to 3 Government majority in each instance. In all cases the Chair is held by a Government member.

The extent to which the Commission for Children and Young People operates as a truly independent and investigatory agency is in some doubt. The Commission has

⁸⁶ In conversation with Helen Minnican, Director, Committee on the Office of the Ombudsman and the PIC.

⁸⁷ The Joint Committee on the Office of the Valuer General was also established by statute in 2003. It is constituted to operate for the life of the 53rd Parliament until 2007.

the power to conduct special inquiries, by which hearings may be conducted and demands made for the provision of documents and evidence. On the other hand, these special inquiries are subject to the Minister's discretion and the Commission does not have the power to investigate individual complaints. Where the Commission may exercise more intrusive powers is in relation to its functions under the child-related employment screening scheme, in which respect it acts as an agent of the Executive. It can raise difficult issues for the Government, for instance in the work it does on the Child Death Review Team, but this is more of a research than an investigatory function. In brief, the Commission operates more in an advocacy, research and monitoring role than as an independent investigatory body.⁸⁸

The main independent investigatory bodies overlooked, therefore, are the ICAC, the Ombudsman, the PIC and the Health Care Complaints Commission. In those cases, a statutory power is granted to the relevant parliamentary committee to veto the proposed appointment of the heads of the watchdog agencies — the Ombudsman,⁸⁹ the Commissioner for the PIC,⁹⁰ the Commissioner for the ICAC,⁹¹ and the Health Care Complaints Commissioner.⁹² Again, the model does not fit the Commissioner for Children and Young People.

8.1 *The ICAC Committee*

Basically, the statutory frameworks and *modus operandi* of the oversight committees in question are similar, based on the ICAC Committee, the first model in the field in NSW. Established under the *ICAC Act 1988*, the ICAC's main function is to investigate allegations of 'corrupt conduct'. The ICAC also has an educational role to play, to which end it has traditionally conducted hearings in public. Its coercive powers are extensive, including such covert powers as the use of controlled operations, telecommunications interception and assumed identities. It is in this respect closer to the PIC investigatory model than the Ombudsman who does not have covert powers of this kind at his disposal. It has been observed that the possession of such powers call for the highest level of oversight and accountability. In recommending the establishment of a Commission to investigate police corruption in NSW, Justice Wood said that, for this reason,

it is important that there be a 'watchdog' which is able to respond quickly and effectively to complaints of misconduct and abuse of power, without risking secrecy of operations, or confidentiality of informants and witnesses.⁹³

⁸⁸ For a commentary see G Griffith, *Child Protection in NSW: A Review of Oversight and Supervisory Agencies*, NSW Parliamentary Library Briefing Paper No 16/2001.

⁸⁹ *Ombudsman Act 1974*, sections 6A and 31BA.

⁹⁰ *Ombudsman Act 1974*, section 31BA. The same applies in respect to the Inspector of the PIC.

⁹¹ *ICAC Act 1988*, sections 5A and 64A.

⁹² *Health Care Complaints Act 1993*, section 66.

⁹³ Royal Commission into the NSW Police Service, *Interim Report*, 1996, p. 95.

Reform of the ICAC accountability model has been undertaken recently, bringing it more into line with that operating for the PIC. This reform was the result of a report by the ICAC Committee published in 2000, *The ICAC: Accounting for Extraordinary Powers*. It recommended that, as in the case of the PIC, there should be an Inspector of the ICAC. Legislation to this effect was passed in 2005.⁹⁴ It is said that the Inspector is 'needed to address a gap in the accountability of ICAC. Although the parliamentary joint committee is responsible for monitoring and reviewing the exercise of ICAC's functions, it is prohibited from examining particular decisions made by ICAC'.⁹⁵ The Inspector is to operate in addition to the Joint Committee and the Operations Review Committee, which serves as a consultative mechanism, providing advice to the ICAC Commissioner on whether complaints of corruption should be investigated. Judicial accountability is also available in respect to the ICAC, to correct breaches of natural justice and procedural fairness.

As noted, the functions of the ICAC Committee, and by extension those of the other oversight committees in NSW, are modelled on the Commonwealth Parliament's supervision of the NCA. By section 64 of the *ICAC Act* the functions of the ICAC Committee are to monitor and review the exercise by the ICAC of its functions; report to both Houses of Parliament on any matter, relating to the ICAC's exercise of its functions, the Committee thinks should be brought to the Parliament's attention; examine trends and changes in corrupt conduct and related matters and to report any changes the Joint Committee considers desirable to the functions, structures and procedures of the ICAC; and undertake inquiries referred to the Joint Committee by the both Houses of Parliament, and report to both Houses on that question.

Consistent with the NCA model, the ICAC Committee is excluded from undertaking investigations on its own account, or to reconsider either operational decisions or findings on particular cases. The same exclusions apply to all the parliamentary oversight committees in NSW. This reflects the intention that these committees perform a general monitoring and review role, rather than serving as an appeal mechanism for complainants who are dissatisfied with the ICAC's decisions, or as an alternative investigatory agency. The ICAC Committee has said it supports these statutory exclusions, noting

Committee Members have neither the qualifications nor the expertise to conduct investigations, nor does the Committee have the resources to serve as an appeal mechanism for individuals dissatisfied with the decisions and findings of the Commission.⁹⁶

In terms of the relationship between the ICAC and the Committee, some tensions have existed over the years, including where the Commission had undertaken

⁹⁴ *ICAC Amendment Act 2005* (NSW), Part 5A.

⁹⁵ P Pearce (2005), 'Parliamentary oversight from Parliament's Perspective', p. 102 this volume.

⁹⁶ Parliament of NSW (2000), Joint Committee on the ICAC, *The ICAC: Accounting for Extraordinary Powers*, Report No 2/52, p. 18 (May).

inquiries into the conduct of parliamentarians, as in the 1998 inquiry into parliamentary travel entitlements. It can also be said that, by way of a general rule, much depends on the personalities involved, in particular the relationship between the Commissioner of the day and the Committee Chair. Broadly, however, for the ICAC Committee as for the other oversight committees, public tensions have been few and far between. Concern has been expressed from time to time about the flow of information between the various integrity agencies and the relevant committees. Prior to the formation of the Ombudsman Committee in 1990 the adequacy of the statutory framework was questioned by the then Ombudsman, David Landa, commenting:

The Ombudsman is concerned, however, that section 69(1) which empowers the Joint Parliamentary Committee to 'send for persons, papers and records', may conflict with section 64(2) and may be inappropriate in relation to the 'secrecy provisions' contained in section 34 [of the] Ombudsman Act.⁹⁷

The *ICAC Act* (section 111) also contains a secrecy provision and the question might be asked whether this would prevent disclosure of information by the Commissioner to the ICAC Committee. In fact the prohibition against disclosure under section 111 is made subject to an exception, by which a person to whom the provision applies may divulge information 'for the purposes of and in accordance with this Act' (section 111(4)). It may be that these purposes would include the inquiry functions of the ICAC Committee. The same interpretation might also apply to the secrecy provisions in both the *Ombudsman Act* and the *PIC Act 1996* (section 56). The issue has not been tested. In practice, the flow of information between the various watchdog bodies and the relevant Joint Committee appears to have operated smoothly enough. Where sensitive matters have arisen, *in camera* meetings have been arranged between the Commissioner and the Committee.

Broadly, the work of the ICAC Committee has involved holding 'general meetings' in the form of public hearings with the Commissioner at regular intervals, dealing with complaints against the ICAC, and undertaking inquiries about the functions of the ICAC. The 2000 report *The ICAC: Accounting for Extraordinary Powers* was part of a three-stage review conducted by the Committee in the 1999–2003 Parliament. The Committee's recommendation for the appointment of an Inspector of the ICAC was initially rejected by the Premier on the basis that sufficient oversight was already available.⁹⁸ That conclusion was later revised. Adding to the ICAC Committee's functions, the Minister said in the Second Reading speech for the *ICAC Amendment Act 2005*, 'The fulfilment of the Inspector's functions will be monitored and reviewed by the parliamentary joint committee on ICAC'.⁹⁹ Paul

⁹⁷ Parliament of NSW (1993), Joint Committee on the Office of the Ombudsman, *Inquiry into the adequacy of the funds and resources available to the Ombudsman, Companion Volume*, p. 25 (September).

⁹⁸ K Yeadon, 'Appendix Four' in Parliament of Western Australia, Joint Standing Committee on the Anti-Corruption Commission, National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies 2003, Report No. 7, pp

⁹⁹ *NSWPD*, 23.2.2005, p. 14134.

Pearce, a current member of the ICAC Committee, confirms that 'In the coming months our committee will be closely observing and reporting on the most major structural change in the oversight of ICAC which is the introduction of an Inspector of ICAC'.¹⁰⁰

8.2 *The Ombudsman and the PIC Committee*

The joint oversight by an Inspector and a parliamentary joint committee is already in place in respect to the PIC. Parliamentary oversight of the PIC was in fact added on to the model recommended by the Wood Royal Commission, with the Minister stating in the relevant Second Reading speech that 'such a powerful body should be the subject of more direct accountability to the Parliament'.¹⁰¹ Under the original Police Corruption Commission Bill 1996, oversight of the PIC was to be given to the ICAC Committee. However, when the legislation was reintroduced in the same year, as the Police Integrity Commission Bill, the responsibility had been devolved upon the Ombudsman Committee. Indeed, the legislation removed the police oversight function from the ICAC, leaving the Ombudsman and the PIC to serve as external watchdogs over police conduct.¹⁰² By section 13(1) of the *PIC Act 1996*, the principal functions of the Commission include the prevention of 'serious police misconduct and other police misconduct', as well as to detect or investigate serious police misconduct. By section 67 of the same Act, 'Category 1' complaints are those which the PIC Commissioner and the Ombudsman have agreed to refer to the PIC. By this means a division of labor has been established between the PIC and the Ombudsman on the 'class or kind' of matters that is to fall within their respective jurisdictions.¹⁰³

As for the Joint Committee, the *Research Report on Trends in Police Corruption*, published in December 2002, is an example of the Committee's work in examining trends or changes in police corruption', as required by section 95(1)(c) of the *PIC Act*. The Committee commented:

Given the Committee's role in overseeing the PIC, which investigates the most serious forms of police corruption, and the Office of the Ombudsman, which oversees NSW Police in dealing with all other complaints about police, the Committee is uniquely placed to examine trends in police corruption. In order to do this effectively, the Committee had to examine the operation of the police oversight system. Indeed, trends in police corruption and the police oversight system are closely linked, as the Wood Royal Commission discovered 'flawed oversight allows corrupt activities to flourish'.¹⁰⁴

¹⁰⁰ P Pearce, n 95.

¹⁰¹ *NSWPD*, 24.4.1996, p. 446.

¹⁰² For an account of this evolving jurisdiction see B Barbour (2005), 'The Ombudsman and the rule of law', *AIAL Forum* No. 44, pp. 17–25 (January).

¹⁰³ Parliament of NSW, Committee on the Office of the Ombudsman and the PIC, *Research Report on Trends in Police Corruption*, December 2002, pp. 42–5.

¹⁰⁴ *Ibid*, p. 1.

An earlier example of the Committee's work from this field was its comprehensive inquiry in 1992 into the police complaints system as it existed at that time. The recommendation contained in the report formed the basis for the legislative package of reforms introduced in the *Police Service (Complaints, Discipline and Appeals) Amendment Act 1993*. A decade later it reported on the review of the PIC Act, based on a general meeting with the PIC Commissioner Terry Griffin, commenting on such issues as the rationalisation of the police oversight system and the employment embargo preventing the PIC from employing NSW police officers. Commenting on this process in 2003, a Committee member, the Hon Peter Breen MLC, said:

The Committee has been critical of instances where it felt discussion of proposed changes to the police accountability system, and to the role and functions of the Ombudsman and the PIC, have not been full and open. For example, it made a number of criticisms about the consultation process undertaken during the review of the PIC Act.¹⁰⁵

As for the Committee's *modus operandi*, the same member commented:

Parliamentary oversight committees in NSW generally conduct their proceedings in public and report to Parliament on their activities. Where necessary, this Committee has conducted proceedings *in camera* but such occurrences are few.¹⁰⁶

In relation to the operations of the Ombudsman, to date the Committee has held 12 General Meetings. In his positive review of the Committee's role and functions, the present NSW Ombudsman Bruce Barbour observed:

General meetings are the usual framework in which the Committee conducts its business with the office. The practice of the Committee is to provide a list of questions on notice several weeks prior to the scheduled meeting. This allows for a large number of questions to be asked covering all aspects of the office's operations and we in turn are able to provide very detailed and well considered responses.

He continued:

Another important accountability aspect of the Committee's meetings is that they are conducted in the open. For an agency like ours, which handles private and sensitive information mostly under strict confidentiality provisions, this is an important part of public accountability. The meetings provide an avenue for members of the public including the media to be present while we answer to the Committee on our work.¹⁰⁷

A particular issue in respect to the Ombudsman is the broadening of that Office's jurisdiction, including into areas of child protection and the provision of community services. The Ombudsman has commented, 'Another by-product of our expansion into different areas is an increasing pressure for greater accountability of our offices

¹⁰⁵ P Breen, 'Appendix B — Striking a balance: essentials of police accountability and parliamentary oversight', n 68, p. 27.

¹⁰⁶ Ibid.

¹⁰⁷ B Barbour, 'Parliamentary oversight from the Ombudsman perspective', pp. 85–6 this volume.

and scrutiny of our work'.¹⁰⁸ The issue was addressed by the Committee in June 2002, reporting on the 10th general meeting with the Ombudsman. In the same year the Committee was provided with the function of conducting, after five years, a review of the relevant legislation. The Committee also reported in 2002 on the FOI and privacy regimes in NSW, in the context of the problems involved in monitoring the complex access to information system that exists in this jurisdiction.

In relation to the PIC, the Committee oversees both the agency itself and the PIC Inspector. In turn, the Committee can refer a matter to the Inspector for inquiry. However, the Committee cannot be said to direct the Inspector in the pursuit of his functions which can also be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint or in response to a reference from any agency, including the Ombudsman, the ICAC and the NSW Crime Commission.

8.3 *The Health Care Complaints Commission Committee*

The Health Care Complaints Commission (**HCCC**), which started work in 1994, resulted from the findings of the Royal Commission into Deep Sleep Therapy (the Chelmsford Inquiry) which recommended the establishment of an independent statutory authority with both a prosecuting and investigating arm, as well as a complaints handling and conciliatory arm. This new body was to have defined powers and be accountable to Parliament. If any of the statutory watchdog authorities are to be truly independent, a critical question concerns their financing. Who pays the piper? It is said of the Health Care Complaints Commission that, while it receives its funding through the health budget, it 'runs largely autonomously'.¹⁰⁹

Unlike the other NSW watchdog bodies surveyed in this paper, the HCCC is both an investigator and prosecutor. In a report published in 2004 the rationale for the HCCC Committee was explained in these terms:

The necessity for a Parliamentary Committee to oversight the functions and operations of the HCCC has been particularly important given the controversial NSW model of combining investigation and prosecution powers into one agency.

This appeared in a Chairman's (Jeff Hunter MP) foreword to a report looking at the Committee's first 10 years in operation. Presented was a brief account of each of the Committee's inquiries and the recommendations arrived at in its reports, among them the 2003 inquiry into the procedures followed during investigations and prosecutions undertaken by the HCCC. The Chairman's foreword to that report was a damning indictment of the HCCC. It started:

¹⁰⁸ B Barbour (2005), 'The Ombudsman and the rule of law', *AIAL Forum*, No. 44, 17 at 23 (January).

¹⁰⁹ Parliament of NSW (2004), Committee on the HCCC, *History and Roles of the Committee on the Health Care Complaints Commission 1994–2004*, Report No. 14, p. 1 (June).

This is not a report which I take great pleasure in handing down. Sadly, however, it is a necessary one. ... In welcoming in a new Commissioner in 2000 the previous Committee had high hopes that some of the ongoing problems at the Commission such as the culture of general suspicion toward health practitioners, lack of clinical expertise, lack of active investigation, lack of robust legal practices and unacceptable delays in investigations would be appropriately addressed. Sadly this has not been the case.¹¹⁰

Reporting on the progress made in reforming the HCCC, following the 10th meeting on the annual report of the HCCC in 2005, a further Chairman's foreword noted that 'very significant' changes had been made in the HCCC in the 2003–04 financial year, many of these in keeping with recommendations made by the Committee. This included a budget enhancement of \$5.7 million allowed for the appointment of additional investigators to concentrate on finalising the Commission's older cases.

The Commission was congratulated for adopting many recommendations from previous Committee reports, including: refocusing the role of the Patient Support Officers; a review of recruitment and training of peer reviewers; and increasing the numbers of internal medical advisors.¹¹¹

8.4 *Comment on performance*

Each of the NSW parliamentary oversight committees can point to significant achievements. They can be said to have initiated reforms in their respective spheres designed to improve the processes and structures of the integrity watchdogs they supervise. In this way they can be said to demonstrate the way Parliament can operate at the apex of the accountability pyramid, as a check on the operation of the integrity branch of government.

From a different perspective, Smith's recent study of stakeholder views on the effectiveness of parliamentary committees of inquiry and oversight in NSW found a modest level of approval for their work. According to Smith, 'About half of the stakeholders judge their activities to be important, of good quality and timely'.¹¹² As a practitioner, Paul Pearce has also subjected committee performance to critical review. On the question of Parliament's consideration of committee reports, he notes that they 'are usually set down for debate, at least in the Legislative

¹¹⁰ Parliament of NSW (2003), Committee on the HCCC, *Report of the inquiry into procedures followed during investigations and prosecutions undertaken by the HCCC*, Report No. 2/53, p. v (December).

¹¹¹ Parliament of NSW (2005), Committee on the HCCC, *Report on the 10th Meeting on the Annual Report of the HCCC*, Report No 8/53, p. 1 (May).

¹¹² R Smith, 'NSW Parliamentary Committees and Integrity Oversight: Comparing Public Sector Agency, News Media and NGO Perspectives', p 65 this volume. Smith concludes: 'If parliamentarians want to improve the evaluations of committees by stakeholders, this study suggests that they might focus on three things: reducing the negative effects of partisanship, avoiding unnecessary duplication with other integrity agencies, and considering whether they want their committees to pursue roles of fine-grained accountability or broader direction-setting'.

Assembly, at 1 pm on a Thursday when members are going to lunch. There is barely a handful of members present and little spirited debate'. He notes, too, that 'Government responses to these reports in my experience has not been very forthcoming. Our Committee has in the past made various recommendations relating to ICAC which have brought forth no reaction whatever from the Government'. As to the general issue of the value and effectiveness of oversight committees, Pearce suggests a five-yearly audit of their performance by an external body, a process that might also be extended to the full range of parliamentary committees of inquiry.¹¹³

Whether the parliamentary oversight committees could, or should, have done more is always a moot point, as is the question whether their powers are adequate for the accountability role entrusted to them. Such questions point to the fact that different models of parliamentary oversight operate in different Australian jurisdictions.

9. *Queensland Parliamentary Oversight Committees*

The Parliamentary Crime and Misconduct Committee has its origins in the Fitzgerald Report, from which there flowed the *Criminal Justice Act 1989* (Qld) establishing the Criminal Justice Commission (CJC). An independent agency, the CJC was also accountable to the Parliamentary Criminal Justice Committee. Both were replaced in January 2002 when the CJC merged with the Queensland Crime Commission under the *Crime and Misconduct Act 2001* (Qld), establishing the Crime and Misconduct Commission (CMC). That Act also established the Parliamentary Crime and Misconduct Committee, plus the Parliamentary Crime and Misconduct Commissioner. This last office acts as the Parliamentary Committee's agent, a relationship that underlines the difference between the Queensland oversight model and its NSW counterpart. The Parliamentary Commissioner is appointed by the Speaker as an 'officer of the parliamentary service' and cannot be dismissed without the bipartisan support of the Parliamentary Committee.¹¹⁴

In effect, the Queensland version is a more hands on model, in which a majority of the Parliamentary Committee can direct the Parliamentary Commissioner to (among other things): investigate complaints against the CMC and its officers; audit records and operational files of the CMC; verify the CMC's reasons for withholding information from the Parliamentary Committee; and verify the accuracy and completeness of CMC reports to the Committee. In some ways, therefore, the Parliamentary Commissioner is akin to the PIC Inspector in NSW, except that the Inspector is not an agent of the relevant parliamentary committee and can act

¹¹³ P Pearce, n 95.

¹¹⁴ *Crime and Misconduct Act 2001* (Qld), sections 300 and 307.

without direction, on his own motion, or upon complaints received. According to Geoff Wilson MP, Chairman of the Parliamentary Committee in 2003:

In Queensland it is the Committee that undertakes primary responsibility for the handling of complaints against the CMC. The Committee can determine to ask the Parliamentary Commissioner to investigate and report to the Committee. As the Parliamentary Commissioner observed...if matters of concern come to his attention he can write to the Committee recommending action including a possible referral back to the Parliamentary Commissioner for investigation.¹¹⁵

This model arose from a 1997 report of the former Parliamentary Criminal Justice Committee. A Parliamentary Commissioner was first appointed a year later (then known as the Parliamentary Criminal Justice Commissioner). The recommendation was that the Parliamentary Commissioner was to have power to examine detailed and sensitive information, including current operational material. The Parliamentary Commissioner would report first to the Committee and then to Parliament, an arrangement it said was 'consistent with strengthening the role of Parliament in the accountability process'.¹¹⁶

According to Geoff Wilson, at a practical level the Parliamentary Committee monitors and reviews the CMC by: holding weekly Committee meetings; considering confidential bi-monthly reports from the CMC; considering confidential minutes of meetings of the Parliamentary Commission; holding bi-monthly in camera meetings with the Commission; receiving and considering complaints against the CMC and its officers; reviewing CMC reports; referring matters to the Parliamentary Commissioner (or the DPP) for investigation and report; conducting inquiries into matters relating to the CMC; and conducting (either itself or through the Parliamentary Commissioner) audits of registers and files kept by the CMC about the use of its powers.¹¹⁷ By section 300 of the *Crime and Misconduct Act 2001* (Qld), the Committee is to comprise of 7 members, 4 nominated by the Government, 3 by the Opposition.

10. WA Parliamentary Oversight Committees

Recent changes have also occurred in Western Australia. Until January 2004, the only parliamentary oversight committee of the type discussed here was the Joint Committee on the WA Anti-Corruption Commission. While the Commission was established by statute in 1996, the Committee was appointed by resolution of both Houses of Parliament. The catalyst for change was the Kennedy Royal Commission into police corruption, following which the *Corruption and Crime Commission Act 2003* (WA) was passed. Provision for the new Standing Committee on the Corruption and Crime Commission is made under this Act (section 216A). The

¹¹⁵ G Wilson, 'Appendix Six', n 98, p. 46.

¹¹⁶ Legislative Assembly of Queensland (1997), Parliamentary Criminal Justice Committee, *Report on the Accountability of the CJC to the PCJC*, Report No 38, p. 118 (May).

¹¹⁷ G Wilson, 'Appendix Six', n 98, p. 43.

Committee is a statutory committee therefore, but again it is left to the Houses to determine the Committee's powers and functions. This is done under the Legislative Assembly's Standing Order 290, by which the Committee is required to monitor and report to Parliament on both the Commission and the Parliamentary Inspector, as well as to inquire into means by which corruption prevention practices may be enhanced in the public sector. While no requirement is made as to the political affiliation of Committee members, the legislation does provide that the Committee is to comprise of an equal number of members from both Houses.

Blending the PIC model in NSW and the Queensland alternative, there is in addition a Parliamentary Inspector. This Inspector has the power to access all case details and can interview any Commission officer on any matter at any time. Any complaint made to the Commission about the Commission or any of its officers or operations must be reported and handed over to the Parliamentary Inspector for investigation. The Parliamentary Inspector, in turn, reports to the Committee and through this to both Houses of Parliament. Along Queensland lines, the WA Parliamentary Inspector is defined to be 'an officer of Parliament' and is responsible for assisting the Committee in the performance of its functions (section 188(4)). Further, the Inspector's functions may be performed either: on his own initiative; at the request of the Minister; in response to a matter reported to the Inspector; or in response to a reference by either House of Parliament, the Committee or the Commission. Unlike its Queensland equivalent, however, the Committee is not the same kind of hands-on participant in the accountability process. The WA Parliamentary Inspector is not defined to be subject to the Committee's exclusive direction.

As at July 2005, the work of the Committee was still in its formative stages. It has only held two meetings and has issued no reports. No references have been made to the Parliamentary Inspector. The first head of the Corruption and Crime Commission (CCC), Commissioner Kevin Hammond, has commented that the Parliamentary Committee

holds public hearings several times a year in which the Commission can be questioned about its activities although this does not include operational activities, but ultimately and properly the CCC is answerable to the people of the State through Parliament, and of course, it is entirely appropriate that a strong oversight function is built into the system.¹¹⁸

In August 2005 the CCC was itself the focus of investigation when Acting Commissioner Moira Rayner admitted that she had leaked information to a CCC suspect, the former Clerk of the Legislative Council, Laurie Marquet. Rayner resigned and, on 13 October, it was reported that she had been charged with corruption and attempting to pervert the course of justice.¹¹⁹

¹¹⁸ K Hammond, n 33.

¹¹⁹ H Nott and F Shiel, 'Rayner to face charges on leak' *The Age*, 13 October 2005 — <http://www.theage.com.au/text/articles/2005/10/12/1128796587875.html>

11. Conclusion

If the vogue of accountability is of recent origin and integrity agencies a largely modern innovation, this is not to say that the broad issues involved in the scrutiny of the government and the prevention of maladministration, corruption and transgressions against individual rights do not have a long history. What is so different now is the sheer size and complexity of the modern state. How is this unwieldy and many-headed Leviathan to be watched over? Does the proliferation of accountability mechanisms actually make the system more accountable? What role is Parliament to play? What is clear is that the pursuit of integrity in government is a worthwhile goal. Following Tomkins, it has been suggested that Parliament can seek to stand at the apex of the accountability pyramid, using its committee system as the principal means at its disposal for scrutinising the annual reports and other accountability mechanisms relevant to government agencies. Worth restating are the words of the Hansard Society Commission:

Although new forms of scrutiny and accountability have emerged Parliament has a unique role in making their work relevant. Parliament's role is in disentangling the key political issues from technical scrutiny, interpreting their significance and using this as the basis on which to challenge Government.¹²⁰

Within this scheme, the parliamentary oversight committees that supervise the integrity watchdogs themselves perform specialist functions. In Australia different models are in operation, in Queensland a more 'hands on' approach is taken in which the oversight committee engages in more 'technical scrutiny', whereas in NSW the emphasis is more on a general monitoring and review role. This is not to underestimate the role played by the NSW committees. Their purposes are both to guard and to assist the watchdogs in the better performance of their responsibilities, ensuring that powers are not misused and that the relevant legislative and structural regimes are adequate for the task at hand. Whether the parliamentary committees themselves perform their duties to a reasonable standard of efficiency is always open to question. The most potent attribute of these committees is their ability to place matters of concern on the public agenda, acting in this sense as a conduit between Parliament, the media and the people. Through them accountability is enhanced and the principles of representative democracy asserted.

For such a system to thrive, a bipartisan culture of accountability within Parliament itself must flourish, something that will include proper and adequate debate on committee reports. The extent to which these and other committee reports can contribute to 'joined up' government will depend to a large extent on Executive attitudes. The NSW Public Accounts Committee commented in this respect:

In 1995, the Government established a Council on the Cost of Government, one of the functions of which was to co-ordinate Government action on recommendations from watchdog bodies such as the committee. The committee and chairman of the

¹²⁰ Report of the Hansard Society Commission on Parliamentary Scrutiny, n 2, p. 11.

Council met with a view to progressing this several times over the next four years. However, this responsibility was removed when the Council was reconstituted as the Council on the Cost and Quality of Government in 1999. There is no longer a central agency with formal responsibility for advising the Government about implementation of committee recommendations.¹²¹

The impulse to dissemble and to take cover behind institutional façades is as common as it is strong. One response to this is the current debate on accountability and ‘good governance’, informed as these notions are by the principles of ethical practice and transparency. To end with a definition which can also be read as a statement of aims, Dawn Oliver writes:

Accountability has been said to entail being liable to be required to give an account or explanation of actions and, where appropriate, to suffer the consequences, take the blame or undertake to put matters right if it should appear that errors have been made.¹²²



¹²¹ Parliament of NSW (2003), Legislative Assembly, Public Accounts Committee, *History of the Committee 1902-2002*, Report No 1/53, p. 47 (September).

¹²² D Oliver, n 10, p. 48.