SECTION IV:

WORKSHOP REPORTS

Parliaments, Executives and Integrity Agencies: Reporting on an international conference on transparency for better governance

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Abstract

The Third Regional International Conference of the International Institute of Administrative Sciences on 'Transparency for Better Governance' was held in Monterrey, Mexico, over the period 16–20 July 2006. While the topics discussed ranged widely over transparency and accountability issues, there was a special concern with what were described as 'agencies for public accountability' such as ombudsmen and supreme audit institutions and how they could be strengthened and improved.

This paper identifies and comments on some issues raised at that conference that connect with the theme of the 28th ASPG Conference held in Wellington, New Zealand, 28–30 September 2006, with a particular focus on problems associated with the relationship between executive governments, legislatures, and bodies established to enhance the integrity, transparency and accountability of government operations. The discussants in Mexico searched for better ways of protecting such bodies, but repeatedly returned to the legislature as the most obvious guarantor of their effectiveness. Yet there was wide concern that legislatures often did not perform this role well. This was recognised as a major transparency and accountability problem deserving much closer study than it has hitherto received, and initiatives in New Zealand and some Australian States leading to the establishment of a category of 'officers of parliament' attracted interest.

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Introduction

There is a strong common thread linking current ASPG interests with an international conference on *Transparency for Better Governance* held by the International Institute of Administrative Sciences (IIAS) in Monterrey, Mexico, in July 2006. At the Monterrey conference, I developed and extended material presented to the 2005 ASPG conference (Wettenhall 2005) as part of a broad discussion of the relationship between executive governments, legislatures, and bodies established to enhance the integrity, transparency and accountability of government operations. This paper initially prepared for the 2006 ASPG conference identifies and comments on some of the relevant issues considered in Mexico.[1]

Pointing to one of the major themes of the Mexico conference, the invitation to participate sought contributions that would explore ways in which 'agencies for public accountability, as for example ombudsmen or state controllers, (could be) strengthened and improved' (IIAS 2006a). Other themes looked at ensuring access and openness in public governance, the need for codes and/or laws for better administrative procedure and conduct by officials, and how best to ensure a free but fair media. There were some good general papers stressing the connection between transparency and democracy, corruption and human rights. But much attention was also given to discussion about these accountability agencies, and about how governments and parliaments interacted in establishing and then dealing with them.

Though 47 countries were represented at the Monterrey conference, I believe I was the only person there from the Australasian region.

A 'Groundswell for Transparency'

Much Enthusiasm

Not surprisingly in a conference about transparency, there were many enthusiasts for transparency. Indeed, I think there was more enthusiasm for a subject here than I have ever experienced before in a long 'career' of participating in national and international conferences.

The notion that there is now a 'groundswell for transparency' was put by a Canadian presenter (Keenan 2006), who explained that a series of financial scandals over the last few years in his country had produced a situation in which 'transparency and accountability' had become the top issue in the electoral manifestos of both major political groups in the recent federal election. Reforms are now under way that may establish an independent parliamentary authority to vet

[1] This is a slightly revised version of a paper presented at the 2006 Annual Conference of the Australasian Study of Parliament Group, held in Wellington, New Zealand, 28–30 September 2006.

budget proposals. The presenter, a public servant, remarked that it was all very exciting, but also very scary for public servants!

The host country, Mexico, also seemed to be pushing transparency very seriously, and this conference attracted and gained significant support (including several personal presentations) from the Governor of Nuevo León, the state in which Monterrey is situated.[2] He had arranged a video presentation from Vincente Fox Quesada, the outgoing Mexican President, who stressed the national determination to be more transparent in governmental affairs. The Governor himself (González Paras 2006) described recent changes: A Federal Institute for Access to Information had recently been established; a State Transparency Commission has just been created by unanimous decision of the Nuevo Léon Congress; other states are moving in a similar direction. Another Mexican presenter (Solana 2006) gave a hard-hitting exposure of Mexican accountability problems, but yet another — formerly a state Governor and a fairly recent international president of IIAS — pointed out that the very fact that a senior official could now present such a 'looking into the mirror' address showed that Mexico had travelled a long way in transparency — 'it could not have happened a generation ago' (Pichardo Pagaza 2006). It was a surprise to me to discover that the chief executive of OECD is now a Mexican: he addressed the conference too, and remarked on a big switch in OECD thinking — like 'a penny dropping experience' — towards transparency, accountability and ethical issues (Gurria Treviño 2006).[3]

For Britain too, we were told that 'openness and transparency' had been 'promoted by a series of important public sector reforms heralded by both government initiatives and legislation between 1991 and 2004' (Liu 2006: 3). But there was also questioning whether the relevant reforms had gone far enough.

The Rapporteur-General for the conference was Jacob Söderman, a former Finnish Ombudsman and first Ombudsman for the European Union. In a review of the history of the ombudsman institution, he noted very properly that New Zealand had introduced the idea to the Anglo-Saxon world (Soderman 2006b). On transparency more generally, he reflected on his own upbringing in the Scandinavian tradition, where, of course, the ombudsman had originated and where there was also a strong tradition of public access to governmental information. He remarked that he had spent all his life in 'an open system', that that was so much easier to work in, and that such a system conveyed the very positive message 'that you are there for the citizen' (Söderman 2006c). In an accompanying paper, he traced movement towards

[2] Mexico is a genuine federation, and the State Governor's role is broadly similar to that of a State Governor in the US.

[3] My references are both to the written papers which are available at <www.iias2006.org.mx> and to presentations (commentaries and reports) where I took notes of what I thought were important observations. As far as possible the affiliations of the quoted conference presenters and discussants are shown in the reference list below.

'open governance' in the European Union, where there has been considerable progress but much more to be done (Söderman 2006a).

Explanations but Problems Too

This 'groundswell' towards transparency was attributed to a combination of factors affecting world governance in the later 20th century. The collapse of socialism in Eastern Europe and the Soviet Union produced new states needing to restructure their economies, establish a culture of human rights, and entrench principles of electoral democracy. In the words of one rapporteur, 'a major ideological barrier to a common global discourse and grammar on the role and responsibilities of governments and the manner in which they acquit themselves and execute their functions in relation to the citizenry' was thus removed. In the western democracies too, 'the need to manage budget deficits, improve competitiveness, strengthen public confidence in government, and respond to growing demands for better and more responsive service delivery' provided imperatives for transparency and good governance, which were placed firmly on the global agenda in the post-cold war period. The connections were spelt out in so many statements from international donor agencies, human rights bodies and the like. To give just one example, Resolution 2001/72 adopted by the UN General Assembly at the Millennium Summit attended by heads of state and government identified transparency as one of the key foundations of good governance, itself seen as 'a *sine qua non* for the promotion of human rights including the right to development' (Mxakato-Diseko 2006a).

Transparency International, the international NGO dedicated to this objective, is obviously a major crusader for betterment in this important area of governance. While its *Source Book 2000* (Pope 2000) focuses primarily on the problem of confronting corruption, the connections are clearly spelt out in the Foreword by Nobel Peace Prize Laureate and Costa Rica President Oscar Arias Sánchez (2000: ix–x):

> Corruption will always flourish in the obscurity of totalitarianism, authoritarianism, and dictatorships — regimes that limit power to an unaccountable few ... corruption is [also] often directly linked to human rights violations.
>
> Corruption can only be examined and eradicated in an environment of pluralism, tolerance, freedom of expression, and individual security — an environment that only democracy can guarantee — [and that democracy] must be characterised by transparency, and by dedication to transparency.

And only then will real accountability be achieved!

In a paper that attracted much attention, Dutch Professor Ignace Snellen (2006) extended this area of discussion by directing attention to the work of a Dutch government commission on 'Basic Human Rights in the Digital Age', known as the Franken Commission after its chairman, a professor at Leyden University. The immensely greater information and communication storage capacity that comes with digital technology opens up vast new possibilities; the essential argument is

based on 'a conviction that recognition of transparency as a basic human right might be one of the most important contributions of the information age to the development of democracies'. But a recent Dutch study of a number of European and North American countries had shown that only in Sweden and Belgium was there a *constitutional* recognition of the right of access to government information. The majority of the Franken Commission wanted The Netherlands to join this group, but they were being blocked by a minister who was also a member.

By focusing on information commissioners, data protection authorities and the like, other papers suggested that the rather brief list of accountability agencies given in the conference's call-for-papers was capable of considerable expansion. I return to this point in the following section of this paper. But inevitably such argument led to questioning about the limits of transparency. Snellen saw that the effects of the digital revolution produced threats as well as opportunities, and noted the increased possibilities of constant surveillance (coming from the massive increase and application of government performance indicators as well as from the more obvious security applications) and the greater risk of invasion of personal privacy (running even to loss of control of copyrights, patents and other properties) as real threats. But he complained that at present the threats gain much more attention than the opportunities. Minimising these risks was a matter that certainly needed serious consideration. Nonetheless the main message was: 'transparency could prove to be the cement of a society, instead of a threat'.

But was it possible for the search for transparency to be pushed too far? An important contribution from South Africa suggested that, in all the reforms that followed the closure of the apartheid regime, so many accountability protocols and agencies had been established that it could be speculated that 'reporting and accountability fatigue had replaced total secrecy' (Mxakato-Diseko 2006b). And Rapporteur-General Söderman worried about 'ombudsmania': he argued that the establishment of multiple ombudsmen, one each for a variety of functional areas (as in present-day Sweden), carries the risk that there is no dominant strong office with sufficient authority to do all that is needed (Söderman 2006b).

Other important papers away from the group focusing on the special accountability agencies looked at the relationship between corruption, democracy and levels of inequity and the role of the media in fighting corruption, with special attention to Latin America where social polarisation is considered to be worse than in any other part of the world (eg Kliksberg 2006a and Khan 2006, drawing from surveys conducted by the UN Department of Public Administration and Management, the World Bank, Transparency International, and others); the practice of 'leaking to the press' by public servants, considered to be 'unlimited transparency' (de Vries & de Jong 2006a); developments in codes of conduct for officials in several countries, leading to a concluding observation that 'rule-based thinking gives society a good base for ethical reasoning' (Chiti 2006); and the democratic mission of public broadcasting and TV, which it is asserted has high social and cultural value and

requires protecting against commercialising pressures (de Vries & de Jong 2006b; Gardini 2006).

Notwithstanding the caveats noted above, the conference clearly wanted more transparency. There was much obvious support for Kliksberg's (2006b) late probing question: where there is mostly opaqueness and secrecy, how does a society begin to build a culture of transparency?

How Do We Rate?

So this conference registered a significant rise in interest in transparency as a force for good governance over the recent period, and from the reports received it does seem that there has been positive movement in this direction in places like Mexico, Canada, Eastern Europe and South Africa. However this has to be set against the recognition, apparent in Kliksberg's question, that there is still much 'opaqueness and secrecy'. When I ask myself how we rate in this part of the world, I have to say that I think we have not, at the official level, been much infected by this mood for greater transparency. I should let New Zealanders speak for themselves. For Australia, I simply observe that *Canberra Times* editorialist Jack Waterford's answer (2006) to John Howard's claim that his government is Australia's most accountable government since federation seems pretty persuasive to me. Waterford suggests that, for us in Australia, 'the high-watermark of formal accountability' came in the 1980s with the acceptance of the Scandinavian-style administrative law package (judicial review, Administrative Appeals Tribunal, Ombudsman, freedom-of-information legislation), financial management reforms, and a widened scope for audit and parliamentary committee review. Since then, we have mostly been back-pedalling, so that today, in Waterford's words, 'more and more actions and services of government ... are pulled behind an almost impenetrable screen'.

Of course the security environment comes to government's aid, but we are left with a huge question: how can we balance the need for governmental power to deal with the threat of terrorism against the equally compelling need for more transparency in government operations? And, especially for us in this ASPG Conference, another crucial question: do we really expect parliament to be an effective check on governmental power? If we think this way — and I certainly do — then parliament needs massive supports to enable it to carry out that role. So we come to the issue of creating and protecting those transparency and accountability agencies noted for special attention in the call-for-papers for the Monterrey conference.

Though the call-for-papers did not specifically use the term 'integrity agencies' I add it to the others here, taking a lead both from the TI *Source Book* mentioned

above and from a related Australian National Integrity System Assessment reported in the June 2005 issue of *Australian Journal of Public Administration.*[4]

Parliaments, Executives and Transparency-Accountability-Integrity Agencies

A Former Ombudsman Speaks

When Dennis Pearce returned to his law chair in the Australian National University after a spell as Commonwealth Ombudsman, he wrote this:

> To have an Ombudsman makes a government look good. To underfund the office ensures that it is not too troublesome.
>
> After three years as Commonwealth Ombudsman I realised that no matter how strong a case for increased resource was put by the Ombudsman's Office, nothing would be coming from those who manage the Commonwealth's money. Why should the Executive finance a body that is going to call it to account as a result of complaints from members of the public affected by the Executive's decisions?
>
> Governments like to point to the fact that an independent person is available to review their decisions but they do not want that review body to be too powerful or too well known lest citizens be inclined to take frequent advantage of the office (Pearce 1992).

This puts a major problem with these transparency-accountability-integrity agencies (hereafter TAI agencies) in a nutshell, and it is a problem that emerged again and again in the discussions in Monterrey.

I had the advantage that the editor of a new international journal on *Regulation and Governance*[5] had just drawn my attention to a paper on some relevant Mexican agencies presented at the 2006 Congress of the Latin American Studies Association. The author noted a significant increase through the world of developing and transitional countries in 'autonomous public institutions (with) delegated authority over a core element of the liberal democratic order'. But he asserted that too many of them were deliberately intended by their creating governments to be 'lame-duck' bodies. He presented case studies of three Mexican examples: the Federal Electoral

[4] The Australian National Integrity System Assessment was a collaborative Australian Research Council-funded program drawing on researchers in several Australian universities, supported by the Australian branch of Transparency International, and basically exploring the functioning and effectiveness in Australia of the proposed 12 'institutional pillars' of a national integrity system identified in TI's *Source Book 2000*. Three of these 'pillars' were auditors-general, ombudsmen and anti-corruption bodies (or other watchdog agencies) were among these pillars. The others were the elected legislature, the executive, the independent judicial system, the public service to serve the public, local government, an independent and free media, civil society, the private corporate sector, and international actors and mechanisms. For discussion of the Australian program, see symposium edited by Brown & Head 2005.

[5] Dr David Levi-Faur of the University of Haifa, Israel.

Institute, National Human Rights Commission and Superior Federal Auditor, and praised particularly the first, the electoral administrator. He reported that it performed with such a high degree of independence that it had earned a legitimacy surpassing that of government itself — it now possessed the quality of 'empowered autonomy', and so had rescued itself from its earlier 'window-dressing' character (Ackerman 2006: 2, 10–12, 18). It was, of course, severely tested in the very contested 2006 presidential election, and at this point we await a fresh verdict on whether it performed well in that situation. But awareness of this study both enabled me to connect better with my Mexican hosts and helped me push my argument that the kinds of bodies we are concerned with range beyond just the ombudsman and audit offices that gain most attention in our present context.

My research background in the study of statutory authorities and corporations, government-owned companies and executive agencies leads me to see these transparency/accountability/integrity agencies as constituting a special group of such non-departmental public bodies (NDPBs).[6] Parliaments have a very significant role in relation to all statutory authorities and corporations, for their statutes create them and serve as their governing charters, spelling out their duties and obligations, detailing how their governing bodies are to be appointed and provided with supporting staff and finance, and prescribing how they are to relate to ministers and other parts of the public sectors to which they belong.[7] My paper to the 2005 ASPG Conference in Sydney (Wettenhall 2005) referred generally to the statutory bodies of the Australian Commonwealth public sector, being concerned to show that the recently released Uhrig Report was so influenced by ministerial wishes and the influence of private-sector corporate governance models that it virtually ignored that part of its terms of reference that required it to look at the parliamentary relationship (Uhrig 2003). Extending this perspective at the Mexico conference, I looked particularly at statutory bodies that were inevitably drawn into conflict with their funding governments from time to time if they were doing their jobs properly (like ombudsmen, audit offices and anti-corruption bodies), and posed the question whether parliament was able to provide the necessary protections.

This question was taken up in several papers, with the proposition that governments often have a vested interest in keeping such bodies weak and ineffective resonating with much other discussion at the conference. There was, as far as I could detect, no disagreement about the relevance and importance of the desirable role of parliament as a balancing force.

[6] Often called quangos today, and state-owned enterprises and crown entities in New Zealand.

[7] As I have argued elsewhere (Wettenhall 1993, 2001), the parliamentary connection is more remote in relation to the other types of NDPBs, where executive governments can take the creating and closing initiatives without reference to the legislature, and can similarly determine the missions and operating conditions.

The Essential Argument

The argument can be simply stated (Wettenhall 2006a, restated in Mxakato-Diseko 2006a: 13–14). It runs as follows:

> Many of these TAI agencies are given NDPB status as statutory bodies because it is recognised that they need a measure of real independence from government. However they depend on government financial and other supports and, since they are themselves supervisors/regulators of departments and agencies of the same government and so are necessarily sometimes in conflict with it (or parts of it) if they are performing their allocated tasks satisfactorily, not surprisingly government often seeks to curtail their autonomy or otherwise restrict them. So it becomes a major issue of governance to ensure that they are not so weak that they simply capitulate. The question arises: What defences do they have, how are they to be protected against actions by government designed to reduce their effectiveness? Since parliament has usually created and empowered them through its legislation, the easy answer is that it is the parliament that should defend them. But parliament is itself often weakly placed in its relationships with the executive government. So can parliament be strengthened to ensure that it can provide the needed protection? Or are other means available to us to strengthen and improve the work of these agencies?

Of course these agencies also need to be accountable, so it is important to establish arrangements for checking that they do perform their allotted tasks satisfactorily. This also directs attention to the importance of the parliamentary role, for it is not appropriate that the executive government should make these judgments.

Bringing to bear the NDPB perspective has the effect of widening the range of agencies whose operations need to be considered in this light, and that widening has the further effect of making it possible to develop a classificatory system for dealing with such agencies. In a further spelling out of the sorts of bodies the Monterrey conference organisers had in mind, 'councils on ethical standards,... data protection authorities and bodies to promote race and sex equality, or the rights of children' were added to the initial ombudsmen and state controllers/supreme audit institutions (IIAS 2006b). This obviously embraced human rights commissions, and the inclusion of anti-corruption bodies was implicit if not explicit — the already-noted Transparency International *Source Book* rated the latter, along with auditors-general and ombudsmen, among the 12 'institutional pillars' of its proposed National Integrity System (Pope 2000).[8] Other Monterrey conference presenters had no trouble in seeing the new UK Information Commissioner; ombudsman variants (eg public protectors, people's defenders and citizen's advocates); and public service commissions that are specifically mandated to ensure that a public service is accountable and transparent, and public broadcasters,[9] as presenting similar issues.

[8] For these 'institutional pillars', see note 4 above.

[9] In some cases, of course, the national broadcaster is simply a propaganda instrument for the incumbent government, and organised as an integral part of that government. Obviously comments in this paper about national broadcasting services do not apply in such cases.

The important Mexican study I have already referred to brought electoral institutes (commissions) clearly into range of vision. And my Monterrey paper presented argument, and some supporting evidence, that appeals tribunals, state police, public prosecutor's offices, even statistical services, taxation offices, national museums and public research bodies grappling with environmental issues, were similarly placed (Wettenhall 2006a: 9).[10]

Sorting the TAI agencies

There are several ways of sorting these agencies, and a possible basis for classification is spelt out in the Appendix. Briefly: There is a self-evident *functional* basis for classification. *Breadth of vision* provides a second basis, separating agencies whose missions require them to monitor *only* the activities of other public agencies from those with broader missions but which sometimes find themselves monitoring also the activities of public bodies. And *extent of power* provides a third basis, separating according to whether they just report or whether they have power to act as well as to report.

A final classificatory issue is whether the agencies, in their public sector monitoring, are focused just on the activities of the officials of departments and other agencies (from whom the politicians can fairly easily disassociate themselves), or on the activities of the politicians as well. Here the cases of the NSW Independent Commission Against Corruption and the Queensland Criminal Justice Commission are instructive. Of course both officials and politicians may come within an agency's remit; but what the parliamentary creators of these two bodies failed to see was that their creations would soon be directing very unwelcome attention to the misuse of travel entitlements by the parliamentarians themselves, and to deals done in the face of declared contrary principle to confer electoral advantage on incumbent governments. One such ICAC report cost a NSW head of government his job, and before long there was a state of war between the Queensland parliament and its CJC (see Lewis and Fleming 2003).

The Main Issues

The 'main recurring factors' in the Monterrey conference papers and the general literature about these agencies were identified by the rapporteur of the 'workshop'

[10] In a controversial case suggesting that appeals bodies raise similar issues, a recent Australian press item reported a conflict developing between the NSW government and that state's Workers' Compensation Commission, which had just reinstated a compensation award for psychological injury to a teacher in the public school system (AAP 2006). In yet other cases, budget-funded agencies with tasks directed only to non-governmental actions and events will nevertheless feel compelled to protest when budgets are cut or they suffer other government-imposed constraints that prevent them, in their view, from performing those tasks adequately. However the argument in this paper is directed to cases where conflict arises virtually inevitably from the particular functions allocated to an NDPB.

in which most of the agency-specific papers were presented (Mxakato-Diseko 2006a: 10) as: their degree of independence; their impartiality, 'lack of fear or favour' in their work; and their accountability.

Their performance, she also reported, was necessarily influenced by the primacy of the rule of law within the country concerned, the existence of relevant norms and regulatory frameworks, the character of the creating legal instrument, the clarity of the mandates and jurisdiction established in that instrument, and three operational factors: how the agencies' incumbents were appointed; how they were funded and resourced; and their technical competence.

While there was cause for satisfaction in the increasing spread of these agencies — the International Ombudsman Institute has reported a dramatic growth in the number of countries with ombudsmen-like offices at national government level to about 120 in 2004 (IOI 2006) — in many cases the operating conditions were not such as to persuade that they were contributing much to the cause of better transparency and accountability. The South African case appears to be encouraging — it was suggested that the parliament has a deliberative vote on the budgets of these agencies (Mxakato-Diseko 2006a: 8–9) — but elsewhere in Africa executive governments dominate the relevant processes. In Cameroon, for example, the ombudsman-like office lacks independence because it is attached to the Office of the President in what the country report describes as 'the paradox of capture': it was in fact established by presidential decree, it does not hold public hearings, and it has to function in an environment where the is no code of public service ethics, where application of the rule of law is arbitrary, and where professional bodies and public service unions are weak. In Tanzania too, the public complaints office is housed within the president's office — this is done to demonstrate its importance, but independence is a resulting casualty. In Nigeria there are a number of TAI agencies, but they are weak because the constitution grants immunity from prosecution to the president, governors and deputies, the opposition is weak, the National Assembly 'is a pliant tool in the hands of the executive', there is no independent private sector, and no laws exist to guarantee a free independent media. The result is that there is no public confidence in these agencies (Gemandze 2006, Mutahaba & Masson 2006, Okafor 2006).

The impression given is that, while it is possible to boast about the increase in the number of ombudsman-type institutions, practice in establishing and resourcing them varies widely, and many are a long way from coming near best practice in the field. Obviously some countries are more advanced in these matters than others. But it is not only in Africa that such debilitating circumstances exist: thus there are several ombudsman agencies through the Brazilian federal system, but in each case these 'regulators' are appointed by the chief of the relevant executive branch (Saravia 2006). A contribution from France, which must surely be considered to have a very mature administrative system, asserts that government has such full control that it is 'a contradiction in terms' to speak of 'an independent administrative authority' (Gunod 2006). Even in the case of the new British

Information Commissioner, where the stated intention is to advance transparency, ministerial right of appointment and ministerial retention of vital approval rights largely vitiate any gain achieved (Liu 2006).

We will not get far unless there is respect for the rule of law, a preparedness to adopt codes of conduct for public officials, and a sufficiency of pluralist institutions such as a free press and an influential private sector able to establish an environment where criticism of government is acceptable. But that is not enough to ensure that the processes of government are transparent, and that there are effective accountability mechanisms and access mechanisms to ensure that citizens have opportunities to gain redress where government actions affect them unfairly. So there is wide agreement that 'oversight of governments by legislatures and ... the judiciary' is an essential requirement (Mxakato-Diseko 2006a: 6). Inevitably we come again to the role of parliament,[11] and here we are immediately struck by the reality, for so many countries, of the observation made about Britain by the British Director-General of IIAS: parliament is so effectively controlled by the executive government that it seems pointless to pursue the notion that it might offer the sorts of supports we are looking for (Duggett 2006).

The desire that parliaments should stand up and be counted in these matters, and the belief that they so often fail, was so strong that there were suggestions that would surprise many constitutionalists. One observed that we needed separate institutions '*over and above parliaments*' to provide the needed securities (Mxakato-Diseko 2006a: 6). And a speculation, offered seriously by the senior Swiss bureaucrat who chaired the session in which I made my presentation, was that perhaps what was needed to ensure proper balance was *a fourth governance power that stood over executive, legislature and judiciary alike* (Hofmeister 2006).

What to Do about Parliament?

Sixty years ago, Australia's first professor of public administration suggested that there might be an administrative tribunal or council to determine questions arising from heavy political intervention in the affairs of properly constituted NDPBs (Bland 1945). To be sure, he was mostly concerned with the bodies charged with the management of Australia's then-large network of public enterprises, whose efforts to run those enterprises on efficient business lines were so often subverted by the actions of their ministers. But the argument is relevant to a consideration of relationships between ministers and TAI agencies. It suggests that it may be possible to create an institution more specialised than the courts that is, in its decision-making capacity, superior not only to the various NDPBs established within a particular jurisdiction but also to the ministers within whose portfolios they

[11] Generalisations that appear to have universal validity are of course highly problematic. Thus, notoriously, even in the modern world some states from time to time have not had legislatures. However the Conference I am reporting on assumed that any modern state approaching transparency in government would have a legislature, and this paper shares that assumption.

fall, and so is able to adjudicate between them. But it is likely that only constitutional action could produce such an institution.

The prospectus for the Monterrey Conference saw the courts as the 'fundamental guarantors of the rule of law and respect for rights'; the supreme or high court will probably also be constitutionally founded. But such courts usually depend on writs to be taken out by one of the conflicting parties, and it is not easy for an affected NDPB to sue its 'owning' government or one of its ministers. Within the limits of present realities, we are thus forced back to reflecting on the extent to which a legislature can be expected to provide the needed protections, including evaluations of agency performance in cases where government itself has been found wanting and is therefore itself on the attack. The observations of the first head of the New South Wales ICAC, Ian Temby (1993), become very relevant at this point: the legislature created these bodies and laid down their missions; in carrying out those missions it was inevitable that there would be 'disharmony' from time to time in their relationships with government; then they must be protected and supported by the parent legislature.

But to advance the cause of protecting these agencies by appealing to the parenthood (or suzerainty) of the legislature in this way is fraught with difficulty. To repeat, the executive government so often calls the shots over the legislature. Perhaps that is less true when we have minority governments or governments facing hostile upper houses, but often that is not the case. As noted above, the recent influential Uhrig review of *all* statutory bodies in the Australian Commonwealth jurisdiction (including TAI agencies), appointed by the executive government and driven by increasing security-related rhetoric about the need for a 'whole of government' approach to matters of administrative organisation, was single-minded in seeking to advance the power of government and ministers over all parts of the public sector. It was supremely uninterested either in the interests of parliament as a counter-weight to executive supremacy, or in the needs of particular agencies (Uhrig 2003).

My critique of this review urged parliamentarians to stand up and be counted in these matters, and sought to encourage a serious attack on the problem by specialised parliamentary committees (Wettenhall 2005, also 2004).[12] But how realistic was that? These committees advise parliament, but we have to contend with serious argument that, once parliament has legislated to create these TAI bodies, they become agents of executive government rather than parliament. In Australia there is even some debate about who they actually report to: minister or parliament?

[12] A NSW contribution to the Australian Integrity Project noted above has raised the possibility that agencies charged with improving public sector integrity might actually 'see themselves as competing with parliamentary committees over the same ground' (Smith 2006: 49). It is therefore important that, where committees and agencies have a close relationship, care is taken to see that mission overlaps are avoided. A variant perspective saw these TAI agencies as representing 'an obvious paradox': they are intended to fill the gap caused by the virtual destruction of parliament 'as an institution able to enforce accountability' in Westminster systems (Evans 1999: 87).

(see Wettenhall 2006a: 10). When parliament receives a report critical of relevant actions (or inactions) of the executive, either from one of its committees or from a statutory body in its own report, how does it react? Does it appreciate that it may be called in to defend these authorities against the executive? Unfortunately, there is not much evidence to suggest that it does, and where an authority finds itself in direct conflict with the legislature itself — as in the case of the Queensland CJC noted above — the situation is dire indeed.

On Empowering a Special Group of 'Officers of Parliament'

Reporting on the New Zealand Initiative

The New Zealand initiative in establishing a special group of designated 'officers of parliament', an initiative now copied to some extent by a couple of Australian states, was noted with much interest in the Monterrey conference workshop that focused on these agencies, and was reported in the workshop rapporteur's report to the full conference (Wettenhall 2006a: 10–11; Mxakato-Diseko 2006a: 14–15). The information I presented came mostly from Andrew Beattie's paper to the 2005 ASPG Conference, now published in *Australasian Parliamentary Review* (Beattie 2006). It will be familiar to many at this conference so I will not repeat it here, except to note that there is an Officers of Parliament Committee of the parliament to monitor the system, that its role includes pre-budget approval of applications for funding, recommending appointments to the relevant offices, and developing codes of practice; to list the agreed set of criteria[13] for creating these offices: the system must be used only to provide a check on arbitrary use of power by the executive; an officer of parliament can only discharge functions which the parliament itself might carry out if it so wished; such an office can be created only rarely, and the appropriateness of the status should be reviewed from time to time; and there should be separate legislation devoted to each such position; and to record that it currently applies formally only to the Ombudsman (or Commissioner for Complaints), the Controller and Auditor-General, and the Parliamentary Commissioner for the Environment.

An Important Victorian Inquiry

I also reported[14] on the Victorian experience. In that state, a very informative document became available earlier in 2006 when the parliament's Public Accounts and Estimates Committee reported on a long inquiry directed towards formulating a framework for 'independent officers of parliament' (PAECV 2006). The Committee

[13] Beattie records that these criteria were spelt out by the Finance and Expenditure Committee of the NZ Parliament (FECNZ 1989) and adopted by the government, with the Officers of Parliament Committee created by Standing Order in 1992.

[14] In a supplementary paper (Wettenhall 2006b): the 2006 report of the Victorian Public Accounts and Estimates Committee came to me after I had sent the main paper to the conference organisers.

had surveyed relevant overseas models, observing that New Zealand was the only jurisdiction to have developed a consistent set of principles to define an officer of parliament and govern the operations of such an office — though it has to be said that, in forming that judgment, the Committee looked only at the Anglo systems we usually compare ourselves with. It reported that the concept of 'officers of Parliament' has developed over the past 30 years to reflect both the decline in traditional notions of ministerial responsibility and the fact that the processes of government have become more widespread, complex and difficult for citizens to access. It asserted that these officers now play a valuable role in assisting parliament to undertake a more active scrutiny and accountability role (pp.23–24).

Noting that the term 'officer of parliament' was ambiguous, the Victorian Committee stressed the importance of the adjective 'independent'. Parliamentary staffs are not independent in this sense; the concern is with officers who are separate from parliament but 'exist to assist [it] mainly in relation to its scrutiny and accountability functions, but also to protect the rights of individuals in relation to government information and fair and free elections' (p.8). Elsewhere, though occasional documents use the term 'officers of parliament' (e.g. UK HC 2003; *Erskine May* 2004), these officers are variously called 'constitutional officers', 'legislative officers', 'statutory officers', 'parliamentary officers' or 'independent parliamentary agencies'. Britain's three 'constitutional officers' are the Comptroller and Auditor-General, the Electoral Commissioner, and the Parliamentary Commissioner for Administration (or ombudsman), similar to the three that Victoria has now classified as officers of parliament. As noted above, New Zealand as the first regular user of that term applies it to the Environment but not the Electoral Commissioner. In Canada, the relevant applications are wider: they run not only to election administrators but also to offices such as Privacy and Human Rights, Access to Information and Official Languages Commissioners (federal), Integrity and Environmental Commissioners (Ontario), and Child, Youth and Family Advocate and Police Complaints Commissioner (British Columbia). Quite often, across these jurisdictions, there are special parliamentary committees associated with these offices, but not always; and sometimes (as in several Canadian cases) appointments are made or approved by the parliament.

The Victorian Committee considered how widely the concept should be applied, thus addressing my own view that many other NDPBs presented similar issues relating to ministerial *versus* parliamentary control. For it, auditors-general and ombudsmen ranked as the core officers of parliament because their 'main role was investigating the actions of the executive government and, in some cases, protecting the various rights of individual citizens'; electoral commissioners qualified too because 'their office protects fairness in elections on behalf of Parliament and its electors' (p.24). So why not other 'independent statutory office holders' such as

Directors of Public Prosecutions?[15] Its reasoning was that the officer of parliament 'must undertake functions that Parliament itself would undertake'; instead, the others performed judicial, regulatory, advocacy or advisory roles rather than 'having to investigate the actions of the executive'. The Committee considered that such positions 'primarily serve the interests of the executive government even though they require autonomy and independence to effectively carry out their responsibilities' (pp. 8, 31).

My view is that the distinction attempted here is not as clear as the Committee has suggested. But it is likely that it wanted to avoid compromising the argument it was presenting by appearing as a parliamentary empire-builder! So it reserved its recommendations for cases where there was unlikely to be much disagreement that the offices 'should be directly accountable to Parliament for the proper and efficient management of staff and the significant financial resources allocated ..., rather than have any line of accountability directly to the Premier (or other minister or agency of government)' (p.79). This message was very clear, though it is one that people constituting or working for the executive government are likely to find difficult to accept:

> the primary function of an officer of Parliament should be as a check on the Executive, as part of Parliament's constitutional role of ensuring the accountability of the Executive. In other words, an officer of Parliament serves the interests of Parliament rather than the executive. (p.85)

And so the Committee noted with approval that the changes of the late 1990s relating to the Victorian Auditor-General had removed the budgetary and administrative link between that office and the Department of Premier and Cabinet. It was no longer seen as part of the Premier's (or any other) portfolio of the executive government:

> Since then, the Office has been assigned its own appropriation within the parliamentary framework and its budget estimates are included in the annual Appropriation (Parliament) Act. (p.25)

In several places in its report, the Victorian Committee emphasised the importance of perceptions. Whether or not there was evidence that governments had exercised improper influence in relation to these parliamentary offices, 'the potential for interference was always there and, for the public's confidence in the impartiality of the Office, it has to be seen to be independent'. The legislative framework 'needed to not only ensure independence but [also to ensure] the perception of independence' (pp. 28–29, 68). And the Committee wanted a set of principles adopted that would ensure: transparent parliamentary involvement in the appointment and removal process and the determination of terms and conditions of appointment (tenure, remuneration); separation of officers of parliament and their

[15] One commentary on the events surrounding this inquiry included the offices of Director of Public Prosecutions and Regulator-General in a comparison of 'statutory officers of parliament' (Clark & De Martinis 2003).

staffs from the public (government) service; inclusion in the parliamentary budget; and parliamentary involvement in the establishment of any new officers of parliament. It also wanted an appropriate parliamentary committee to defend the independence of these agencies and — importantly because the question 'who guards the guardians?' remains — to ensure their accountability, not least by arranging for four-yearly performance reviews.

More Generally?

At the time of this writing, we await the response of the Bracks Government to the fresh proposals contained in this report; however it certainly documented advances made by that government towards honouring its 1999 election pledge to restore the independence of 'key public watchdogs'. The position in the rest of Australia is patchy. For the Commonwealth, recognition that the Auditor-General is an 'independent officer of parliament' came in the rewritten Auditor-General Act 1997, after two hard-hitting reports by that parliament's Joint Committee of Public Accounts, the committee gaining important rights in relation to appointment and funding (JCPA 1989, 1996; English & Guthrie 2000). In Western Australia, there are statutory officials with some of the characteristics of 'officers of parliament' — Information Commissioner, Commissioner for Public Sector Standards and Electoral Commissioner as well as Auditor-General — and apparently considerable unhappiness was caused recently by a downgrading of salary levels by the Salaries and Allowances Tribunal after consultation with the executive but not with parliament.[16]

It will be apparent that the reflections in the last few paragraphs are all derived from Westminster-style systems. What do we know about other systems? I have to say that, apart from the material I already had on Mexico itself, I got only two hints from the discussions in Monterrey. First, the Director of Administrative Services for the legislature of the German *Land* (state) of Rheinland-Palatinate, Prof. Dr Klaus-Eckart Gebauer, was fairly insistent that his legislature had similar rights in relation to a State Commissioner for Data Protection and possibly other TAI agencies; suggested that other German *Lander* (though probably not the federal government) had similar arrangements; and expressed the hope that exchanges could be developed between his legislature and those in New Zealand and Victoria (Gebauer 2006).

And second, the South African participants suggested that, in the political environment that followed the collapse of the apartheid regime in that country, the legislature was empowered in many ways to strengthen transparency arrangements. A check with the South African Constitution of 1996, which claims in its introduction to be one of the most progressive constitutions in the world, shows that: Chapter 9 is devoted to 'State Institutions Supporting Constitutional

[16] From press reports. For further information on the Western Australian situation, see House 2006.

Democracy'; that chapter covers six 'independent' agencies 'subject only to the Constitution and the law' (Public Protector, equivalent to Ombudsman; Human Rights Commission; Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; Commission for Gender Equality; Auditor-General; Electoral Commission); they are accountable directly to the National Assembly, and 'no person or organ of state' may interfere with their functioning; appointments are made by the President 'on the recommendation of the National Assembly', and any removal must be on a resolution of the Assembly; and a Public Service Commission established in Chapter 10 is in a broadly similar position, with five out of 14 commissioners actually appointed by the National Assembly, and one for each province recommended by a committee of the provincial legislature (South Africa 1996).[17]

Concluding Note

The rationale for TAI agencies of this sort is that they act for the legislature, strengthening its hand through the technical competence they bring to bear in their work. But they do not substitute for the legislature and, to work well, they stand in great need of its close interest and support. And they need this particularly when they get into difficulties with executive government. The legislature stands for the citizenry at large in a way that the executive and its supporting public service never can.

The report on the Mexican TAI agency situation noted earlier in this paper concluded that a state of 'empowered autonomy' had enabled the Federal Electoral Institute to demonstrate the excellence that lifts it above comparable authorities. It was not hampered in its work by inclusion in a vertical control chain apexing in the executive government, but rather flourished in an environment where there was vigorous debate within its own leadership and where its doors were open to the active participation of civil society, both factors stimulating dynamic agency performance, shaking up 'stagnant bureaucratic patterns', and enhancing agency legitimacy in the eyes of the public — because citizens can see how the agency works from within (Ackerman 2006: 9). Obviously a fair amount of legislative support is needed before an agency can begin to operate in this way. Then, when it does, it becomes harder for the executive government to constrain it.

This view will not give much comfort to adherents of traditional approaches to democratic government. But then, by stressing the massive power of government between occasional elections, those approaches have done very little to facilitate transparency in government operations. If that is what we want, we should be

[17] A Broadcasting Authority also established in Ch.9 of the South African Constitution shares some but not all of these attributes. In a quick read I could find no constitutional reference to parliamentary control of the budgeting process for these agencies.

prepared to see that there must be some retreat from executives with total power between elections. It is hard to disagree with Transparency International:

> Democracy must be characterised by transparency, and by dedication to transparency. But the most effective guardianship of transparency must be in the hands of the citizens organised themselves for this purpose (Pope 2000: x).

And the legislative institution must be fashioned or refashioned with that objective in view.

APPENDIX

A BASIS FOR CLASSIFYING TAI AGENCIES

A: *Functionally*, three leading groups (as identified in the TI *Source Book*) are:
(1) auditors-general (elsewhere described as 'state auditors or courts of auditors');
(2) ombudsmen; and
(3) anti-corruption agencies.

And, as discussed, I believe there are others within the NDPB family that also qualify for serious attention. I therefore add a fourth group:

(4) miscellaneous agencies with transparency, accountability and integrity functions: electoral and taxation bodies given autonomy from partisan political controllers to ensure honesty and impartiality in the relevant governance processes will fit here, as will administrative tribunals (or appeals boards) and others further identified below.

B: From the perspective of *breadth of mission*, they fall into two broad groups:

(1) inspectors or regulators established to monitor the activities of other public sector agencies, such as the audit offices, ombudsmen and anti-corruption bodies (which may include police integrity commissions and the like);

(2) those with broader missions such as promoting and protecting the observance of human rights or running a national broadcasting network — the governments and parliaments creating the relevant organisations no doubt intend them to direct their primary attentions to matters non-governmental; to repeat, however, it is likely that, in the proper performance of their functions, they will sometimes find themselves compelled to criticise, act against, or take different positions from ministers, departments and other parts of their own governance system.

C: A third basis for classification is *extent of power*:

(1) some agencies, such as most auditors-general, ombudsmen and anti-crime bodies, have reporting power only, although if it is associated with the authority to publish reports widely it is a fairly effective transparency instrument — without that authority there is no transparency at all;

(2) others have powers to act as well as to report, such as reversing decisions or imposing penalties.

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