

PARLIAMENT OF VICTORIA

PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

**Subcommittee on a Legislative Framework
for Statutory Independent Officers of Parliament**

Melbourne - Monday, 9 October 2000

Members Present:

The Hon. Peter Loney (Chairman)

Ms Judy Madigan, MP

The Hon. David Davis

Ms Michele Cornwell, Executive Officer

CHAIR - I declare open this meeting of the Public Accounts and Estimates Committee subcommittee on Officers of Parliament Legislation, and I welcome Mr Peter Salway, commissioner for public employment, to this public hearing on the need for officers of parliament legislation.

All evidence taken by this subcommittee is taken under the provisions of the Parliamentary Committees Act and is protected from judicial review. However, any comments made outside the precincts of this hearing are not protected by parliamentary privilege. All evidence given today is being recorded by Hansard. Witnesses will be provided with proof versions of the transcript early next week.

Mr Salway, before going on to questions, would you like to make a brief opening?

Mr Salway - Thank you, Mr Chairman. When I was originally invited to make a submission I considered the issue, and because I have not been involved in this area to any great extent, I did not take up that offer. Having seen the material that was provided to me before 5 October, I think probably the best thing is to proceed by focusing directly on the issues that you have identified.

CHAIR - Yes, good.

Mr Salway - On the basis of reading the New Zealand material, which I have read, I focussed my attention on the criteria for selecting or determining what sort of officers should be officers of parliament legislation. I am inclined to think that the New Zealand paper provides a very good basis for going forward. When you look at those criteria then it seems that the answer to the first question is clearly that the Auditor-General appears to fall within that category.

CHAIR - Would you consider that any others naturally fall into that?

Mr Salway - Again, I have turned my mind to it, I have to confess, briefly in the time since having seen those guidelines and, no, I would say none would fall in naturally. If you look at the one that, as I understand, is currently included, the DPP, it does not really fit that guideline. I suspect that

other officers, like the Legal Ombudsman, Regulator-General and others equally will fit into that guideline because they are not in that position that Parliament - well, I would have thought that naturally fit will follow.

CHAIR - Yes. The main issue, I guess, that arises out of it and is particularly pertinent to your role is the issue of setting up remuneration for an officer of parliament. I wonder if you have given some thought to the mechanisms for that, what might be the correct mechanisms and whether that should be legislated in some way?

Mr Salway - Yes, I have given it some thought and, again, I would say there are probably three broad models. One, if I could describe it as such, would be the Victorian parliamentary model, where you link it to some other person or bodies, e.g. the federal Auditor-General or the (indistinct) or some other proportion, depending upon how you see the value and the two ways of comparing. So, in effect, this is the contracting out or subcontracting option, because it means that you are relying on the Commonwealth or some other body to establish the benchmark which you will meet. But nevertheless, that would provide for both a degree of independence and also a method of keeping up to date.

The other extreme is to actually put it into the legislation, where you might nominate a figure, but then you would need to provide for some indexation. I do not think, without looking at it in much greater detail, I would be enthusiastic for that option. It would be more difficult to vary if you vary the work of one of those officers of parliament. I think work value does change and you need to be able to address that, which may be a similar problem with the first option.

The third, of course, is to actually have some form of independent body setting remuneration for such officers. I think the issue there would be around a critical mass or economies of scale. It would seem to be a fairly heavy or intensive approach to have a body like the New South Wales model, the statutory officers remuneration tribunal, for only one or two officers of parliament.

I think the current arrangement which is with me giving advice to the Premier does not come too close to the independence you might want.

CHAIR - The other issues that I think were raised with you for consideration today were review mechanisms of the office and efficiency and effectiveness of the (indistinct), and there are a number of mechanisms that are in place at the moment, there is some future in the new Act that has been brought in, so things like the annual requirement to present a work plan and discussion on performance, all those sorts of things. Do you have a view about those matters?

Mr Salway - I think that, broadly the model that has been applied in Victoria with respect to senior public service roles could apply. Where there is agreement on what the directions are, what the outputs that are going to be produced are, you then have a basis for establishing the budget and reporting performance and then the reviewing performance annually. I think that sort of structure is what is best for any supervisory governance role. The real issue is, who does it, and with the Auditor-General in a sense it is probably more logical that it goes to a committee of parliament. It then begs the question of how that applies with the ombudsman or others.

CHAIR - Which is the issue I was going to go to and ask you that question. Do you see that there is a difference between those two, particularly, in the way the review might take place because of the nature of the work?

Mr Salway - It is one thing to identify the issue, it is another thing to provide the alternative. I have to say that I identified an issue, but when it comes to alternatives I think that probably it does require a bit more thought. It could be the Presiding Officers, whether they want it is another issue. But, yes, I think any governance arrangement does bring the question of who does carry out that task and clearly there does need to be some sort of accountability arrangement and I do not have an answer on that.

MS MADDIGAN - What about this committee, is that --?

Mr Salway - I think this is an issue for parliament. If parliament could determine any one arrangement I would imagine it could undertake that.

MR DAVIES - What is your view?

Mr Salway - I do not have a well formed one. I thought that what it always goes to in these things is having a person or a group who have an understanding of the nature of the work and whether that is a legal or quasi-legal unit compared to something else is the sort of issue that needs to be addressed. But I do not have a well formed view on that. I think one of the other issues with parliament is just creating one centre for all these reporting entities whatever the variety.

MR DAVIES - To pick up Judy's suggestion, would you have any objection to this committee forming --?

Mr Salway - My own view is that if the processes are open and transparent, then I do not think it matters terribly much. The critical thing is the transparency of the process and due process because --

MR DAVIES - So you wouldn't?

Mr Salway - No, I would not, no. Arguably it begs the question as to whether it has to be parliament if you have got quite transparent processes, too, because I hope that you have a high standard of independence and probity in the whole raft of statutory office holders, not just the officers of parliament. That was one of the reasons why I did not opt to make a submission because if you actually have officers of parliament and other statutory officers, are you establishing some different pecking order in terms of expectations about the degree of probity and independence that they bring to their roles? I think, arguably, you would expect a high degree of independence when it comes to the statutory roles of commissioners of public employment, for legal ombudsmen and regulator generals.

So once you start on that track, where do you stop, other than for symbolic reasons? I think that is where the New Zealand model is quite strong, in that there are a couple that are really

acting virtually as extensions of parliament, if you do not undertake that job.

CHAIR - It is also interesting in the New Zealand Medical Group, of course, that they indicate that some of those appointments could be subject to change, not so much in (indistinct) the auditor and the ombudsman, but they particularly talk about the probity admission.

Mr Salway - Yes, one (indistinct) whatever.

CHAIR - Yes, and at the time it was formed it may have been appropriate, but at the time that they were considering the review they felt that it was not, and there has been some suggestion that some of those things may be --

MR DAVIES - (indistinct).

CHAIR - Yes, exactly.

Mr Salway - Yes, I agree with that. I think that is one of the issues always, with fixing too much certainty in the legislation unless you are quite sure that that is going to last for a long period.

CHAIR - That takes me to one other point with the legislation that should there be. If there were a separate piece of legislation that identified in back offices of the parliament, should it nominate those people or should it be done by laying out the parameters, and, perhaps, a schedule for each appointment, something of that nature. Have you a view on that?

Mr Salway - My view on that would be in general, because I would apply it to a number of other things. My preference would be very much more establishing the criteria and the processes to be followed, rather than actually nominate an exact role, which goes to the issue we were just discussing. I think that would apply to quite a raft of things in the modern public sector because times change and the focus of government or a system would change.

CHAIR - I think just the final area that I would like to explore, others may have some other questions, but the role of the parliament in the recruitment and appointment of the officer I think is one that we are interested in, just what that role should be,

and within that do you have a view about term of appointment and eligibility for reappointment? Various jurisdictions have taken different attitudes, for instance, the New Zealand model is similar to ours and that is for an extended period and reappointment. The Canadian auditor general has a 10-year appointment, not eligible for reappointment. Do you see that as a guarantee of independence?

Mr Salway - I think this is one of those cases of matching independence and varying needs over time. If you think that how you might manage and operate it could vary over time then you would go for a shorter period of appointment, with the capacity for reappointment to match the changing requirements. If you want to emphasise independence, then the longer term with ineligibility for reappointment is the way you would go.

When it comes to Auditors-General and Ombudsmen, I think that would come right down to our own personal view. I probably would err on the side of a longer appointment and not being eligible for reappointment. That would be what would distinguish it from other statutory officers, where you might want to re-appoint. But I might say that I have not sat down and examined that in great detail, if I did, I might have a different view.

CHAIR - We have not raised them and I think I do not think I specifically said it to you either, but the removal of an independent officer of parliament, the current mechanisms do not allow it. Do you have a comment to make about that?

Mr Salway - I think the provision that requires the vote of both houses of parliament is one that is a very strong provision in a democracy like ours. Just going through that sort of process could create so much debate and discussion around the issues, none of us enter into it lightly, and therefore I think it gives a degree of certainty to appointments. You are quite right to focus on the ending of the appointment, I think the appointment or selection process is one where I would advocate the sort of approach that I would like to apply throughout the public service: a strong reliance on good process, clearly establishing the selection criteria and

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having people without bias involved in the selection process.

CHAIR - Thank you, I have nothing further. That was interesting. Thank you, Mr Salway, for attending, it has been quite useful for us, I think, and we appreciate your contribution.

Witness withdrew

CHAIR - Can I welcome Dr Wayne Chamley from the management group of the Purple Sage Project to this public hearing on the need for officers of parliament legislation.

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Before we go to questions, Dr Chamley, would you like to make a brief opening statement to the committee?

Dr Chamley - First, let me thank the committee for this opportunity to appear before you.

As you recall, Mary Crooks and myself prepared the submission on behalf of the Purple Sage Project, and in the covering letter we pointed out that all members of the Victorian parliament had previously been provided with a copy of the Purple Sage document, which really described and set out the first stage. We are now into the second stage, which will start to unfold over the coming years of a series of campaigns. Democracy will be one of the major campaigns. The people who participated in the project, some six thousand of them over two years, identified certain major issues that they believed needed some attention in Victoria.

They expressed a common view, people from the age of 16 to people in their 80s, that some of the directions in which Victoria was being taken by governments, not just the government that was prior to this one, some of the things that actually were set in train before that in some areas were not the direction they believed, in the long-term, was in the good of most of Victoria's citizens.

The concern about the state of some of the state's democratic institutions, I can tell you, was absolutely palpable and when we addressed the meetings, as we did some 17 meetings in country Victoria and about nine in the metropolitan, when

we announced that we had come to hear people's view and give them a chance to express their concerns, we often got standing ovations. People had not seen warriors come out of the mist, so to speak, and say, "Well, we are here to listen to you, not to tell you what is good for you," for years. Particularly up through the La Trobe Valley it was absolutely palpable. So we were very pleased to see that this term of reference had been picked up by this committee, and I hope that what I want to say today in response to your questions will be of benefit.

I remind you that our submission started with a quote from Charles de Gaulle, that nothing strengthens authority so much as silence. The people that we represent believe that there has been too much silence and that there needs to be changes in the way that parliament works in some of its standing orders, etcetera, that allow the community to interact with parliamentarians much more than is currently happening. It was pleasing to see a group of schoolgirls in the foyer as I walked in, no doubt every day there is hundreds of children who come. But there is a lot of other people, apart from school children, who do want to interact with the parliament, and in order for that to occur we hope that the members will surrender their party allegiances to some extent, in terms of working out what ought to be best for Victoria. I hope that the committee might take that on board.

CHAIR - Thank you. Can I commence then in relation to the independent officers? You are aware of the New Zealand criteria for establishing independent officers? Do you have any comment in relation to the criteria that has been developed and how you would see that criteria?

Dr Chamley - I did prepare some notes which I wanted to develop more fully and I will formally send them through the secretariat, but we actually have a different view to some of the statements in that report to the New Zealand parliament. The one that we are really in difference with, because we believe that by accepting what New Zealand is saying, it will immediately put a block in front of this opportunity for the parliament to interact more with Victorians and it is a committee recommendation one, that an officer of the parliament must only be created - and only is the

key word - to provide a check on the (indistinct) use of the power of the executive.

There will be, we believe, some officers who do have to perform that role, but a more visionary arrangement would have some officers who do not exist at the moment, in terms of the level of statute, who would not be watchdogs, they would be giving opinions. They would be recognising the busy lives of parliamentarians and they would be doing the footwork on behalf of committees, etcetera. So we would want the concept expanded beyond this idea of, well, we only have the sort of watchdog people appointed as these statutory officers of the parliament.

CHAIR - Could you give an example of what you are thinking there?

Dr Chamley - It has always amazed me that we have not had a technology commissioner within the precincts of the parliament. I mean, not a day goes by that you do not have metres of print media and electronic media talking about the impact of technology and new developments (indistinct) and I just suggest to you that parliamentarians, given the life they lead, cannot keep up with that sort of stuff. They get be a bit here and a bit there, but we are of the view that a new position called the technology commission, or whatever that might be, but that position would be there to provide opinions to the parliament.

Let me clarify what I see as an essential thing with these statutory officers, and that is that they are there to provide to the parliament or the parliamentarians opinions rather than advice. I know that is a bit of a grey difference, but whereas the presiding officers of the parliament, if there is a constitutional issue, actually provide advice to the speaker or advice to the leader in opposition, and the speaker would be pretty stupid not to heed the advice given to them with the 20 or 30 years of experience of the presiding officer.

Some of these statutory officers provide opinion, that is, they are looking at the external landscape outside of Victoria, world trends, or whatever it might be, and matching that into the current state of affairs in Victoria and the state

of affairs that the MPs have to deal with. They provide an opinion, well it may unfold this way or it may unfold that way, but at least someone is looking over the hill on what might unfold. I think there would be major benefits with that sort of an office.

CHAIR - The question that flows from that then, I guess, is, why would that person in that sort of position require the same statutory protections and authorities as, say, the auditor general?

Dr Chamley - Let me describe what I would see as the person in that position covering. They would cover technology developments, they would cover the social impact of those technology developments, be it in medical science or computing, whatever it is, and they would cover intellectual property. By the very nature of it, it would come into, sort of, privacy and secrecy provisions by the very nature of some of the things they are dealing with, and I believe that because of those things they would need the protection of the parliament. All right, it is not the hard end of it so much as the social impact, and particularly there is opportunities of litigation about copyright and intellectual property and those sorts of things.

Let me give an example. We have in Victoria and the United States groups of vice chancellors. Vice chancellors have a common policy about intellectual property. From my reading of it and experience of it, it is actually inhibiting technology development. But there is nowhere at the moment for anyone of standing to actually take them on about that. So as you say, well, these rules and regulations that you impose on, say, post-graduate students who might discover a cure for cancer or whatever actually are dampening down their enthusiasm to keep going with it because the world has changed and there are commercial businesses who would be able to accelerate that much quicker, were the person to move out of your environment and into their environment, and those sorts of things are just not challenged.

MS MADDIGAN - If the government has departmental advisers and ministerial advisers, one would assume that they would get that information, so why would you - I still do not see why you actually need an independent officer for that?

Dr Chamley - Let me give you an example of just how good the advice is. Within the current agriculture part of natural resources and environment, recently there has been a fair bit of internal toing and froing about genetically modified products. I do not know whether it was a minister asking or an adviser, but somebody asked what records have you got in place about the number of trials that are going on in Victoria. I am told the department has six, but in fact there is 27 trials going on. So the current systems that are in place within the public service are pretty risky and there is no-one in place to drive it harder and make sure they become less risky, and so there may be an audit role for that sort of person.

MR DAVIES - I just have a few concerns about that suggestion and I see that would potentially considerably impede the freedoms and privilege of MPs to go about their business. What I mean by that is that one of the things I think we need to be very careful in doing is not surrounding MPs with sources of advice and inputs, whether intentionally politically or unintentionally that force them to make decisions other than what they would normally do, and they would do that for political reasons when boxed in by officers who may be performing a very slight public function. But, you see, I think it is always a question of weighing the benefits and the costs and in this case I see the benefits might be small, but I am interested in your response to what I am saying by way of inquiry, but see that there are some considerable risks in having somebody out there who could, as you say, interact with the department of natural resources, for example. Now, there may be all sorts of political implications to that, that may not actually be in the public interest.

Dr Chamley - Let me respond. I did say that persons of this (indistinct) would provide opinions and not advice, and no government or opposition member has to accept that opinion.

MR DAVIES - The political reality is that opinions are public utterances that have political implications. So the question is, do we want to hand over such a role? I am just fleshing this through with you and I am curious as to your view of what I see could be a concerning area?

Dr Chamley - Yes. The big benefit, as I see it, is that there has to be some attempt made by the department to quieten down the community's concern about technology. We pick up colossal unease about certain things and people see new technology linked to job displacement and these sort of things. The fact is, all these developments will take place.

MR DAVIES - Would a technological spruiker, as it were, assist that process? This is exactly the point I am making, you may actually put in place an advocate who was untouchable, yet may have their own strong views about the importance of technology and may be prepared to, for example, push that at a pace that the community is unhappy with, that is politically unacceptable in the community. How do you guard against that?

Dr Chamley - He or she may also provide opinions that sound out caution in some areas. I mean, it is the nature of the person and their breadth of experience. I would see this sort of person as a wise head. Let me give you an example; say, in the use of antibiotics in intensive animal farming, (indistinct) whatever, a common practice, but now the study has shown that the resistance to antibodies is actually being mutated, so that --

MR DAVIES - So there is a legitimate scientific argument and policy argument about how they should be used?

Dr Chamley - Yes.

MR DAVIES - But how does the imposition of an independent officer who is accountable, perhaps, to no-one in the final analysis, how does that advance the cause of public policy in that specific instance?

Dr Chamley - Because the current signals from the professional veterinarians in the employ of the government is that this is the way to go. Now, it may be the way to go, but the parliamentarian needs to be aware that there are these other effects possible, and that it may be that it then comes down to some re-look at the regulation of veterinary drugs and that certain classes of drugs are permissible and others are not. It is a precautionary principle.

MR DAVIES - I understand your point and I accept that there is a legitimate policy argument about that issue, it is just not clear to me how having that person in place actually leads to a better public policy outcome?

Dr Chamley - Can I go back to the GM crop one? The conservation groups would be asking, and they are asking, well, how come there are 27 trials of different GM crops going on and various projects going on in Victoria, and the agency that is supposed to have a regulatory role knew about six of them?

MS MADDIGAN - Doesn't that remain a practical problem, which is the position that worries me? If a technology commissioner is going to be looking into detail into each departmental use of technology or future trends, aren't we talking about a huge support of staff and advisers to assist the commissioner?

Dr Chamley - I would hope not, no. I think you would need to get the right sort of person. These are wise heads. They are not careerists, they are people who have been around for a long time and have worked in these areas. You may need one covering biotechnology and biological (indistinct) and the other covering information technology. It might get down to one or two people because the cost to the community of making a mistake are enormous, and for the sake of a person or persons who are totally servicing the parliament on these sorts of things - and I'll talk later about the education roles for these sort of persons - and putting that out in the public arena where it is heading in Victoria, I just think that it would be a benefit rather than a (indistinct).

CHAIR - Can I just stop you there? If we accept the model, some practical considerations plainly flow from that. Firstly, how would you see that person, that commissioner, pursuing a matter? Would it be on a reference from the parliament, would they raise their own inquiry? How would they operate and who would they respond to and be responsible to?

Dr Chamley - We suggested in our submission that certain statutory officers would be attached to one or even more committees of the parliament and they would take references as you suggest. If that sort of

arrangement was in place, from time to time, if they were operating directly, they would actually bring the committee a matter and simply ask the committee to go back into the parliament and give the green light for, first, a preliminary look at something.

Let me give you an example. The influenza outbreak in Hong Kong that resulted in every chicken in Hong Kong being slaughtered, six people died and we went within a whisker of a major influenza epidemic. If there had been more people and some of them happened to get on an aeroplane and were heading to Melbourne, that could have got away. When those sort of events happen, and thankfully they do not happen often, but I would see this sort of person saying, "Do you realise parliamentarians that this was five minutes to midnight," and I think they ought to just have a look at how the response to an epidemic response system is set up, given that it is not a (indistinct) we have not had an epidemic for a long time, but is it actually in place so that we could respond quickly. There has been changes in Fairfield with infectious diseases and whatever and how is it set up?

MR DAVIES - Just let me get this clear. We have actually had the potential of a recent epidemic in the last 20 years with the growth of the number of people with HIV and quite a rapid rate --

Dr Chamley - Yes.

MR DAVIES - That was handled quite maturely by our public health authorities. I am just asking from you how the impact of this sort officer would have improved that process of handling the public health aspect of it. I mean, you have flagged that as an example. I would see a danger that such an officer could actually disrupt the public health effort by, as you say, just simply statements and opinions that may or may not be well grounded. You know, it is just not clear to me how superimposing that on the efforts of the health minister in the public health division would achieve a better public policy outcome?

Dr Chamley - I stand corrected, we did have a successful response to HIV. We also had the case of the Dandenong Hospital with an active TB patient put in

a ward with other patients and as it turned out there was no notification procedure. So, again, these things just need to be rechecked every now again. We do not see that this is being checked and we think that is part of the community's concern. I mean, we had active TB with, primarily, south east Asian people coming in, who had not been picked up in screening, presenting at the hospital with coughs and whatever, they were put in a ward, two other persons were infected, but something like 30 people had to be tracked down and given (indistinct) and screening and whatever. When the head of the nursing was confronted by Graham Ranch there were no procedures in the Dandenong Hospital to screen active TB.

MR DAVIES - What I am saying is, how would that situation be improved by this officer? I think Graham Ranch is actually an exemplary person to pick on. I mean, I actually have a bit more faith in this instance in that officer and the department, than an officer who is not expert in that particular area necessarily, and I see that there is an aspect of danger in the superimposition.

Dr Chamley - Yes, I see what you are saying. Anyway, it is something to take on board.

CHAIR - Yes it is very interesting and a different argument than what has been submitted to us by anyone else and I think we will look forward to reading the brief when you provide it to the committee.

Dr Chamley - Can I just say there were two other officers who are current who we thought if there was to be statutory officers of the parliament that might be considered. I know that one would be the Solicitor-General and that might create problems because of the current role of the Solicitor-General. But it seems that the person in that role - I suppose it is a question of whether they would displace the legal constitutional-type committee.

CHAIR - Can I just ask you, you are, in fact, using the term Solicitor-General, are you in fact saying the Solicitor-General or are you suggesting something like a counsel in the parliament?

Dr Chamley - You do have a parliamentary counsel, don't you?

CHAIR - Yes, but I think that is different to what you are saying. I think that is a draft view of legislation, that is not what you have --?

Dr Chamley - No, no. Although I am talking about the Labor group at the council.

CHAIR - You are not talking about a Solicitor-General in the terms of the current meaning of Solicitor-General?

Dr Chamley - No.

CHAIR - The other position was?

Dr Chamley - The other was, if this and future governments are going to continue in fairly extensive asset sales and those sort of things, one wonders about the valuer. It may be that that position is a role within the auditor general's office, but it seems to me that --

MS MADDIGAN - The valuer is the Department of Conservation and Environment.

Dr Chamley - At the moment I think it is the land valuer.

MR DAVIES - There is a land monitor.

MS MADDIGAN - This government is not going to sell off a whole lot of assets, so.

CHAIR - Just taking you to that point, I just put it up for your comment, with the privatisation projects the auditor general produced a report on privatisation on which he commented on whether he believed value could be maintained. So with that in mind, what would an independent valuer general be doing differently to what the auditor general may have reported about value?

Dr Chamley - In that context that office would not be doing anything different. We would hope that government agencies that were involved in asset management and sale and whatever in a big way, involved that office to the full extent. I am not convinced that that did go on for a period of time with things like the sale of government houses and those sorts of things. I think there were elements of fire sale activities there and that can be avoided by the (indistinct) influence.

MR DAVIES - Can I just ask one further general question? I just want your views on, perhaps, something a little bit more theoretical. You have sort of suggested the movement of a number of positions out as independent officers and it was a sort of a prospect that - I am not sure whether you are familiar with any of the public choice theorists, who would argue that individuals in positions may act in their own interests in many cases, whether they are in the public sector or the private sector and, I wonder, do you see that there is any danger that an individual who could be put out as an independent officer is actually then out and will act not always in the public interest, but, on occasions, in their own interests, as those theorists might suggest, and that this may actually produce some policy results that we are not happy with? How do you respond to that?

Dr Chamley - That risk does exist. I think there can be certain methods by just the application of a very thorough selection process, bipartisan. Let me give you an example. When Sir Henry Bolte appointed Sam (indistinct) as the first Chairman of the Land Conservation - you may know this story.

MR DAVIES - I do.

Dr Chamley - Sir Henry was (indistinct) and he said there to somebody there, "What am I going to do about these willy wagtails?" I actually was told this story was by Claude Austin, "We have got to get someone to sort this out." I think he was asking Claude, "Who would you suggest?" and Claude just pointed and said, "There is your man, there." Sam (indistinct) did not know the first thing about trees or leaves or anything, but he was a superb Chairman of the (indistinct) Conservation Council, he was untouchable, and he just left such a mark that that process continued for so long, we did not have any of the forestry laws --

MR DAVIES - This selection process would not have met any of the normal criteria, let us put it that way.

Dr Chamley - No, it was just getting the right person.

CHAIR - I take it you are not necessarily advocating that that should be the selection process?

Dr Chamley - No, we suggested there has got to be a public involvement in that process. But there was just that fortuitous insight, I think, by Claude Austin that this is the guy that will get this working for the government, not just this government, but for governments to come.

MR DAVIES - People in certain positions will often build bureaucracies and empires around them and the theorists I referred to, or common experience, dictates that that is often the case. The independent officers who are out there that are in your model, how do we prevent that situation occurring?

Dr Chamley - It seems to me that the parliament, they can only build - if they are actually news ones or changes of circumstance, those individuals, the parliament is supporting the concept of that office, there is a problem in who is the person that fills that hole and it seems to me that parliament can control the empire builders, etcetera, through appropriations and those sorts of mechanisms. He or she might believe that they should have half the staff of the auditor general or whatever, but their role is different to that. They are not there as watchdogs on the government, they are there as officers to back up and enhance the workings of the parliament. I mean, I see there is two levels there. There had to be the sort of watchdogs, the ombudsman, the auditor general, but these others, certainly the technology commission is not a watchdog, it is an office that is there to assist parliamentary committees and parliamentarians and to just then be looking externally more. The parliamentarians can look internally in terms of their (indistinct) constituents and what have you, but it is looking externally.

CHAIR - Thank you, Dr Chamley. Thank you for coming in today and presenting this and, in fact, raising something completely different to that which has been raised in other submissions. It has given us something else to think about and, as I said before, we look forward to the material that you --

Dr Chamley - All of those points will be answered. It might be about two or three weeks because I have to be away for a couple of weeks.

PROOF VERSION ONLY

CHAIR - That is fine. Thank you.

Witness withdrew

CHAIR - I welcome Professor Colin Clark, deputy dean, faculty of business and law and head of the public sector research unit, and Mr Michael De Martinis, lecturer with the school of accounting and finance of the Victoria University of Technology, to this public hearing on the need for officers of parliament legislation.

All evidence taken by this subcommittee is taken under the provisions of the Parliamentary Committees Act and is protected from judicial review. However, any comments made outside the precincts of this hearing are not protected by parliamentary privilege. All evidence given today is being recorded by Hansard and, as witnesses, you will be provided with proof versions of the transcript early next week.

Professor Clark or Mr De Martinis, would you care to make a brief opening statement before the committee asks you questions?

Prof. Clark - What we have endeavoured to do in our research, as part of responding to this inquiry, was to consider the provisions that might be contained within legislation that operate to provide independence of the officers of the parliament and at the same time provisions which ensure accountability of that office to the parliament.

We have given much less attention to the question of who it is that should be an officer of the parliament. Today I do not seek to make a great deal of comment about that particular aspect of the inquiry.

In approaching our task, we looked at legislative provisions in relation to those who may, on the surface, be considered candidates for recognition as officers of the parliament; that is, the Auditor-General, and in the case of the Auditor-General we looked at the Victorian legislation and the legislation in each of other states and territories and the Commonwealth of Australia. In respect of other officers in Victoria, we looked at, as well as the Victorian Auditor-General, the Ombudsman, Regulator-General and Director of Public Prosecutions.

We have further in respect of the Auditor-General, but not as part of our submission, looked at some of the changes in Victorian legislation over time. We have also looked at the legislation relating to Auditors-General in overseas jurisdictions; Auditors-General or those who perform similar functions, in the case of Canada, USA, UK and New Zealand in terms of the present legislation but also the bill which is presently before the New Zealand Parliament.

In examining that legislation, we looked at the auditing literature that deals with independence and from that literature we adopted a model by English and Guthrie and applied that to those various Acts. The issues that were examined in the legislation, that together provide for independence and at the same time an accountability of that office, ranged over matters dealing with the powers of the parliament in respect of terms of appointment, removal, remuneration and so on; the funding of the office; the mandate of the office holder - that is, the powers that are granted to the office holder and the enshrinement of those powers; and the independence of that office in respect of the extent to which they are subject to direction from the parliament or its committees.

From that review, we have presented a comparative analysis across those various jurisdictions and within Victoria across those various offices and out of that we have presented some recommendations that might be seen as representing what might be described as best practice.

CHAIR - Perhaps I can commence, firstly, with a few things on your submission. I was interested in the submission effectively assuming four officers of the parliament in Victoria. While the committee and I have virtually no argument around the Auditor-General and the Ombudsman and their status, there is considerable debate about the others. The issue I wanted to go to was the assumption of the Regulator-General. I wonder if you can explain why, within the submission, you do make that assumption of the Regulator-General as an officer of the parliament?

Prof. Clark - Perhaps before responding to the question, I might say that we have subsequently prepared

responses to the specific questions which we received last week. If you wish, Chair, I would table that set of responses.

CHAIR - Yes, that would be helpful. Thank you.

Prof. Clark - Secondly, I would point out that the accounting professional body, CPA Australia, provided endorsement of the recommendations of our report and subsequently I have received a message asking that we in fact represent CPA Australia at this hearing. I table that message, if you wish.

CHAIR - Thank you.

Prof. Clark - Now to your question about the Regulator-General.

CHAIR - Yes, the Regulator-General particularly. There are also certain issues around the Director of Public Prosecutions, too, and some arguments there that tend to make it a little less clear whether the DPP should be an officer of the parliament under the current understanding of an officer of the parliament. But the Regulator-General particularly was one I was seeking some clarification on.

Prof. Clark - To respond to the question, in choosing those four office holders to examine, we did not in fact give a great deal of attention to the issue of whether or not they should in fact be officers of the parliament, but merely had a look at the legislation to see what provisions were in place that might be considered to provide some independence for that office holder or provide for some accountability on the part of the office holder. These were chosen as high profile figures, rather than arising out of any substantial examination of that question of who it is should be office holders.

In terms of answering the question of who, I think this is a question about identifying office holders who perform a role which is about providing a check on the executive of government.

CHAIR - That is the point I was having difficulty with in relation to the Regulator-General, where I would see the Regulator-General as a compliance, competition and access regulator, operating now

largely in the private sector. I was just wondering where that fits in terms of what we are looking at.

Mr De Martinis - I think the query you raise is the same issue that we had to deal with when we embarked on this comparison. We lacked a definition of an officer of parliament.

MS MADIGAN - We all do. That is the trouble.

Mr De Martinis - Our benchmark was based on officers, however we interpret or define them, with a public profile and also with a role commensurate with providing checks and balances to parliament. There are other officers who could have been included in this comparison; for example, the Solicitor-General may have been another officer that we could have looked at. But then there may be other arguments why that officer should not have been considered in the same light as, say, the Ombudsman or the Auditor-General.

The issues you raise are the ones that we had to grapple with early on in this submission, as to where do we draw the line on what is included as an officer of the parliament. We do state, although it is beyond the scope of our submission, it is an important issue to pursue in terms of defining the boundaries of an officer of parliament.

CHAIR - It is probably the central issue in terms of our inquiry. That is one of the reasons I am interested in why your submission determined the way that it did.

Prof. Clark - We are not recommending those officers, we merely examined their legislation. We moved on or bypassed the question of "who".

Subsequent to providing our submission, we have had a look at the earlier New Zealand report. In respect of the recommendations, I note that they addressed the question of "who" by endeavouring to recognise officers who are discharging functions which the House of Representatives itself, if it so wished, might carry out. I do not find that a particularly helpful or definitive recommendation to contribute towards answering the question of "who".

The other piece of relevant legislation as to "who" is the Parliamentary Officers Act. Of course, that only identifies the staff of the department of the parliament and I am sure that they are not those that are intended to be caught by the legislation presently under consideration.

CHAIR - I think in fact it is a little misleading. That is not the ambit of our inquiry. It is in fact what might be better termed the independent officers of parliament that we have a concept of but have not actually defined, as you were just saying before. The statutory officers of parliament, the clerks, et cetera, are not within the compass of this inquiry at all.

I was just having a quick look at your written responses. The question I was firstly interested in - I do not think it is covered in the written response - is your view on the criteria in the New Zealand parliamentary report.

Prof. Clark - We make a comment that the criteria for identifying those who should be recognised as officers of the parliament has not been particularly helpful or definitive. I must say that I was surprised by the extent to which generally the recommendations of that report which later came to light are consistent with our recommendations more generally.

CHAIR - The major part of the New Zealand recommendations is that an independent officer should be doing work that the parliament would otherwise do itself, and therefore acting directly on behalf of the parliament. That, to me, is one of the central questions. Is that a view that you would broadly concur with?

Prof. Clark - In the time that we have given to thinking about the use of that particular criteria, I am not quite sure that it sufficiently distinguishes the prospective candidates.

MS MADIGAN - It is quite broad.

MR DAVIS - You are unhappy with the New Zealand definition that you referred to?

Prof. Clark - Yes. I do not think that it would assist in focussing in on the handful of potential officers of the parliament.

Mr De Martinis - With all definitions, you have to be careful that you do not provide one that is too narrow and at the same time that you do not provide one that is too broad. It is really a balancing act in terms of defining officers such that you encapsulate the broad commonalities which might be related to oversight and accountability issues, but at the same time you need to acknowledge that each officer may itself serve that accountability role differently.

CHAIR - Yes.

Mr De Martinis - One has to be careful in providing too broad a definition and at the same time you need to be careful about providing one that is too narrow.

CHAIR - I think you are right and I think that the New Zealanders produce theirs from the same sort of considerations, that (a) it must be a check on arbitrary abuse of power by the executive and (b) must discharge a function that the parliament itself would otherwise discharge, so that there is a relationship between acting on behalf of the parliament, if you like, against the executive. That is why I was seeking a comment in relation to that. I take your point about a broad definition. I think if you do go too broad you are probably in danger of devaluing the position of an independent officer of the parliament. So there is a fine line there somewhere. It is getting that fine line right.

Just following through with that, I wanted to go to a couple of specific things in your diagram on page 7 of your submission. It seemed to me that if I were doing that chart I would have a couple of different arrows and a couple of different players. In particular, the arrow between the Auditor-General and parliament I would have as a two-way arrow, and there was no link between the public and the Ombudsman. There is a link shown from the public to parliament but no direct link from the public to the Ombudsman, when in fact the public can go direct to the Ombudsman. There are a couple of things on that.

MR DAVIS - I would add one more to that and that is the link between ministers and parliament. Arguably the most important accountability link, or one of the most important, is that accountability to parliament of ministers.

CHAIR - Again I would expect a link between parliament and the Ombudsman as well. I think there were some arrows missing and some that I would have made two ways as well as a single one, but that is just my comment on my view of the flow in the arrangements.

Prof. Clark - We will not quibble with you. It is not our model.

Mr De Martinis - Our submission does consider an arrow also going from the Auditor-General to Parliament, so we do cover that missing arrow between the Auditor-General and Parliament, the accountability of the Auditor-General to Parliament.

MR DAVIS - This is this other guy Mulgan's model.

Mr De Martinis - Yes. I probably concur with most of the additional arrows that you mentioned. The Auditor-General and Parliament is two-way and we do bring that out in our submission. The Ombudsman and the public, I think that can also be two way. I think the links between Ministers, Parliament and the Ombudsman is probably happening through the public because at the end of the day Parliament represents the public. Whether or not you have those side arrows explicitly shown still results in the same outcome because you have got the links to the public which is being represented by Parliament.

CHAIR - The reason I place some importance on it is that in some senses I think it goes to the heart of the argument as to whether a particular position should be a statutory position or should be an officer of the parliament position. You could have, in terms of the previous conversation we were having, perhaps a commissioner of technology who holds a position as a statutory officer but not necessarily an officer of the parliament. That would give access to the public and would give all those other things, but the relationship with the parliament would be maintained.

Mr De Martinis - We would agree.

Prof. Clark - What we have done in our submission is move past the question of who should be an officer. In terms of identifying the provisions that should operate, all of those provisions taken collectively are about on the one hand providing independence for that officer and on the other hand providing accountability of that officer to the parliament. Linking that discussion back to the diagram, it really is the notion of the two-way arrow.

Mr De Martinis - I suppose that is why we do not involve the Solicitor-General here, because I do not know whether you necessarily need a double arrow with the Solicitor-General, in the sense that this officer is accountability mechanism of Parliament as well as accountable to Parliament.

CHAIR - I would have to have the debate in my own mind about the Solicitor-General and his role with the executive before forming a view on that.

MS MADIGAN - In terms of accountability and lines of control, there is a direct link between ministers and parliament and the public, in view of the fact that ministers are required to report honestly what is happening to parliament and parliament can take action against them if they think that is not occurring, so there is quite a strong line of accountability, and it does operate fairly frequently.

MR DAVIS - It does happen.

Mr De Martinis - We can contact Mulgan.

CHAIR - They were essentially some observations on the model that it might be worth having a look at it. It does lead particularly into where we were talking about the two-way arrow between parliament and the Auditor-General, to a specific part of your submission that I did want to come to in the recommendation, and that was in relation to your view that the requirement for the Auditor-General to present a work program should not be there. I found that interesting and I would just like some amplification of that. I could not find within the submission itself the basis for that, so I was wondering if you could amplify it.

Prof. Clark - We would see this as a provision that operates only in Victoria and no other jurisdiction within Australia, or in fact to our knowledge any other overseas jurisdiction, although I understand it to be a provision in the Bill that is presently under consideration in New Zealand, but certainly not in the existing legislation.

We see that the notion of providing an annual work plan provides the prospect of the office holder being subject to further direction from the parliament through that mechanism. It is not quite the wording of the existing provision at the present time, so the draft work plan is to be submitted to the Public Accounts and Estimates Committee, in practice, and the Auditor-General is to take note of the views of the committee as to the audit priorities and then is to subsequently report upon his performance against the work plan and the priority of the Parliament, following the completion of that year.

I do not have a problem about the reporting and accountability mechanism that provides, particularly at the end, but in terms of the submission of the draft work plan there is the prospect of that being a mechanism to use to direct this independent officer as to the work. None of the other auditors-general are subject to that and similarly none of these other office holders that we have focused on within Victoria have such a provision operating in respect of their annual work.

CHAIR - To follow that argument through, because I think it is quite a significant argument, I think there are some other considerations that flow from that. They revolve around, if you like, removing the auditor or independent officer's budget from the executive. But if you accept the New Zealand theory that an independent officer should be carrying out work on behalf of the parliament that the parliament would otherwise do itself and if you were going to have a committee structure which advises on the budget, it would seem to me that it also needs to know the work program in order to be assured that the resources being applied are correct; that it is not necessarily a question of direction.

I would note that in the Victorian context it is not possible to direct the auditor. The

auditor always has final call on what he will or will not do. It is that link to the parliament and not acting on behalf of the parliament against the executive, if you like, that I think is fundamental and important and I think that is where that provision is attached to that. It may be that you could make a case that other jurisdictions should adopt it.

Prof. Clark - I am not running that argument, no. I acknowledge that the wording of the Victorian legislation does not create this as a mechanism for explicit direction but it might be seen to provide, by inference, direction of the annual work of the Auditor-General. I acknowledge the difficulty of approaching the budget allocation process without some view about a workload and the resources that might be necessary to deliver that.

The Canadian legislation has an interesting mechanism around funding that responds to this work plan problem at the same time and that is that the Canadian Auditor-General is funded as part of the annual budget process but has within the relevant legislation the opportunity to return to the parliament to seek additional funding and to make his case for that.

CHAIR - The New Zealand model also has a different budget allocation mechanism within it, where the Public Accounts Committee will hold hearings in relation to the funding structure and they will invite the auditors and Treasury and Finance to submit and be questioned about the allocations before it is verified by the parliament. There are some mechanisms and different processes that apply. I was just interested in the conclusion that you came to about the work plan and so on.

The second specific point that I would go to - you referred to Canada, so I will take the Canadian one - is that you came down on the side of a term and eligibility for reappointment. Some jurisdictions have gone the other way, and Canada is one, where they give a longer term of appointment but no eligibility for reappointment and argue that it gives greater underlining of the independence of the auditor. If you would not mind taking us through your thinking in relation to eligibility for reappointment and the term of appointment.

Prof. Clark - Whether we are talking about the question of the work plan or appointment process or salary setting, the same principles underlie the specific provisions, and I think the provisions ought to endeavour to distance the office holder from possible direction and the prospect of endeavouring to play to the government of the day. These are all issues around that same principle.

In terms of the question of term of appointment, across Australia we have the full range of models in place: appointment for life until retirement; appointment for five years, seven years or 10 years without the prospect of reappointment; and then those in the middle, like Victoria, which have a middle band number of years but with the prospect of reappointment. The period of appointment has some attraction at seven years or so. The period of appointment is likely to extend beyond or does extend beyond the term --

CHAIR - It would be beyond one parliament.

Prof. Clark - Beyond one parliament and the office holder does not know who will be the next parliament and who will be making the next reappointment decision.

CHAIR - Did you consider the question of whether there is anything to be gained from not being eligible for reappointment? The answer to that may be academic, but it is just informing that view that they should be eligible for reappointment, whether you looked at the other side of that and dismissed it.

Prof. Clark - These are questions of judgment. On that one, there were really a number of ways to provide the same outcome in the end. Certainly the prospect of potentially a longer term of appointment but with no prospect of reappointment does provide for, prima facie, the prospect of greater independence.

MS MADIGAN - I wonder if that would restrain people who wanted to be Auditor-General, in terms of getting the best person for the job.

Prof. Clark - That is a possibility.

Mr De Martinis - We talk about auditor rotation, and one of the things which is suggested in terms of improving the independence of an auditor is that around seven

or so years, not only should it be rotated in parliament, but in the context of the private sector there is also the argument that an audit firm should be rotated.

There is argument that auditor rotation does promote auditor independence. At the same time there is argument on the other side of the coin that says if you have an auditor who has been around for a significant period of time, there are economies of scale and audit efficiencies to be had, but the trade-off is that you may get complacency in terms of achieving the highest possible level of independence.

I suspect that these arguments could equally apply in terms of the public sector and the auditor-general: that is, if you have a fixed term and non-renewable appointment, then you have got that auditor rotation and you have got, so to speak, new blood coming in, and complacency should not be an issue. At the same time with renewable provisions, you have got the opportunity to reappoint, maybe because the Auditor-General is doing such a great job. So there are two sides to that coin.

I think certainly, as Colin mentioned, that seven years is appropriate in terms of covering at least two terms of Parliament and possibly even, if you are talking about the Commonwealth Auditor-General, seven years might see three terms of Parliament.

CHAIR - On the average, it will.

Mr De Martinis - If I could speak on behalf of Colin, I think the seven years vis-a-vis the two terms of Parliament seems to fit in nicely with the idea that at least you have one Auditor-General over two terms of parliament. I do not know whether we seriously thought about having an Auditor-General who at least covered three terms of parliament. But how many governments have gone beyond three terms anyway, in today's political environment? I think the norm is one or two terms. The three term government seems to be the exception, not the rule, so seven years seems to fit nicely with this idea of having government over a two term parliament.

CHAIR - You have basically said you endorse the current provisions about removal and that you did not have any further comment on the appropriateness of the removal mechanisms for officers of parliament.

Prof. Clark - None, other than we would see this as being a matter for the parliament.

CHAIR - You mean the matter of removal, not the matter of consideration of what the mechanism should be?

Prof. Clark - Sorry, yes. Thank you.

CHAIR - I just wanted to clarify that. Thank you.

MR DAVIS - Just to pick up your comment earlier about the PAEC and an oversight or a discussion role about particular agendas, it seems to me - and I am not sure that you completely followed the point on this - that it may actually act as a bulwark against executive decisions with regard to the budget of the Auditor-General, for example, and other independent officers. Do you see what I am saying?

Prof. Clark - I do, yes.

MR DAVIS - It is quite an important point. If you pull out that oversight or that interaction, you are left with an independent officer out there with the budget alone as a lever from the executive.

Prof. Clark - I understand the question and the importance of the issue. If I could generalise on the issue of budget approval to the relationship more generally between the officer, as a general proposition I think if you were endeavouring to ensure independence, particularly independence from the executive, then as far as possible the relationship should be between the officer and the parliament and the next most preferable level of relationship is between the officer and a parliamentary committee. The least preferred relationship is one that is between the officer and the executive or perhaps presiding officers, who are named as one of the possible relationship levels.

MR DAVIS - I put to you, for example, that on some occasions a parliamentary committee may be able to intersperse or intercede between the executive and an independent officer on the issue of budget and

thereby on some occasions strengthen their independence.

Prof. Clark - That is possible. We spent some considerable time thinking about this issue, but as a general proposition we would say that as far as possible the relationship should be between the officer and the parliament, rather than its committees.

MR DAVIS - Did you consider that specific issue of the fact that some mechanism may operate to protect any undue pressure on independent officers from zealous budget reviews?

Prof. Clark - I have trouble taking that question separately from questions about appointment, salary determination, removal or whatever the issue is. If I was going to any of those other questions, I would say my preferred relationship would be between the officer of parliament and the parliament.

MR DAVIS - I guess where I am heading, and the reason I am persisting with this point, is that it is often looked at in the abstract and in a non-empirical way, in a theoretical way, as I think you need to start, but I think if you insert that point I am making into the equation, you are left with two countervailing forces that may operate, and it is not apparent to me that anyone has quantified the extent of those forces. Do you see what I am saying?

Prof. Clark - Yes. I am not quite sure how you might go about quantifying those forces.

MR DAVIS - You may do it with a case study, for example.

Prof. Clark - I think there are mechanisms to leave the funding question with the parliament that address this issue of ensuring the adequacy of that funding.

MR DAVIS - That is a fair point.

Prof. Clark - For example, leaving the prospect open of that office holder returning to the parliament and making a case for additional funding.

MR DAVIS - That can operate absolutely separately.

CHAIR - I concur with your view that the broad thing is about relationships and I think that is right in what we are talking about, and that is why I was asking you about work programs, because I think we would also see that as a relationship issue, not a direction issue.

I think the difficulty comes when you try to define the relationship and particularly a direct relationship with the parliament that might operate. That is one of the large difficulties. If you say that the independent officer has a direct relationship with the parliament, what in fact does that mean in practice? I think that is why a number of jurisdictions have actually taken it to the parliamentary committee to provide that relationship, if you like. I think it is a very interesting and central point to where we are trying to get within this, and I think the committee to date is seeing it more as a relationship problem than anything else.

Mr De Martinis - I think in the ideal world you would like to have parliament, not a parliamentary committee, but in terms of promoting a relationship then practicality suggests that it has got to go via a parliamentary committee.

CHAIR - The issue becomes who or what is parliament in that relationship. That is the next question you immediately run up against: is it the presiding officer, is it the clerk, is it the entire parliament? Does that relationship have to take place with 132 members, et cetera? I think that is the practical difficulty that you run up against. I do not necessarily wish to get into a prolonged debate about that, I just make the point.

Mr De Martinis - If the parliamentary committee is representing parliament then the two are one and the same. The presiding officers may not be necessarily what is parliament.

MR DAVIS - Practically it may be different in terms of manageability.

Mr De Martinis - In the sense that a parliamentary committee is easier to manage and also better to deal with in a relationship with its independent officers.

CHAIR - This has been a very interesting discussion from our point of view, but I am afraid that a couple of us have to dash to the airport to jump on a plane. I thank you for your time and your effort in putting together the submission and appearing before us and for the discussion we have had this afternoon. Certainly if there is anything we may wish to pursue further or seek clarification on, we will come back to you and ask further, or if there are any points that you consider have arisen out of this discussion that you might wish to further put to us, we would be happy to hear from you.

Prof. Clark - Thank you for the opportunity to meet.

CHAIR - I declare this meeting of the subcommittee closed.

Witnesses withdrew

Committee adjourned at 3.30 p.m.