

# E – BRIEF



## NSW Parliamentary Library Research Service

April 2009 E-Brief No 4/09

---

### Oversight of public appointments

by Gareth Griffith

#### 1 Introduction

Debate about the oversight of public appointments has surfaced in recent years in several jurisdictions. Foremost among the many issues concerned are those of the integrity of the system of public appointments and the scope of independent regulation of appointment to public bodies.

This paper looks at recent reforms and proposals for reform, including those in the United Kingdom and Canada, where the oversight of public appointments has been considered in parliamentary and other forms. Note is also made of the current and historical positions in Australia.

#### 2 Public appointments – first principles

In an age of outsourcing, taxpayer support for private companies and public underwriting of bank deposits, identifying where the public sector ends and the private sector begins is not straightforward. The connections are many and varied, with statutory corporations inhabiting a middle ground, as hybrid institutions.

Put simply, the distinction is that, unlike the private sector, the point and purpose of the public sector is not to make a profit but, rather, to assist the government in the delivery of public goods. Appointments to the public sector are to be viewed in this light, as

funded by the public purse for the benefit of the community as a whole.

In the UK, the Northcote-Trevelyan Report of 1854 replaced the 'spoils' or patronage model of appointment. The re-vamped civil service was founded on four interrelated constitutional principles:

- *ministerial accountability to Parliament,*
- *admission by open competition*
- *non-partisanship,* and
- *promotion by ability.*<sup>1</sup>

#### 3 Issues

Many issues arise. It may be that different accountability processes are needed for different types of public appointments, in particular those appointments made by the Governor exercising either prerogative or statutory power on the advice of the responsible Minister. Should such appointments be at large, at the discretion of Ministers, or subject to oversight, parliamentary or otherwise?

A risk is that public scrutiny of appointments of this kind will be turned into a form of political theatre associated with the highly politicised pre-appointment hearings that occur in the US. The US model operates in a system of government where executive appointments are not tied to the doctrine of ministerial responsibility. In the Westminster

system, on the other hand, that doctrine lies at the very core of responsible government.

Nonetheless, public concern about cronyism, patronage and the like remain on the political agenda.

David Pond of the University of Toronto reviewed some of the dilemmas and issues involved in a Canadian context. He explained:

Contemporary debates about the health of democracy in Canada address the problem of the 'democratic deficit', a term signifying the electorate's alienation from the political system and its perceived level of input into the decision-making process. In the lexicon of the democratic deficit traditional political patronage is a particularly offensive term.<sup>2</sup>

Pond continued:

Where patronage was once regarded as an inevitable, if not desirable, by-product of the Westminster model in operation, it is now denounced as an improper impediment to the delivery of administrative justice. Yet it appears that patronage remains as an operational feature of governance. Moreover, in those jurisdictions where it is possible for the legislature to uncover evidence of its exercise, ministers are prepared to defend it. Parliamentary government remains, after all, party government.<sup>3</sup>

#### 4 Public sector employment

The public sector in Australia is a major employer. As at June 2008, the NSW Department of Health alone had a full time equivalent staff of 94,157.<sup>4</sup> For Australia generally, as at May 2007 public sector employment figures were as follows:<sup>5</sup>

	C'wealth '000	State '000	Local '000	Total '000
NSW	54.3	399.2	49.8	503.3
Vic	42.9	277.0	40.1	360.0
Qld	27.7	265.2	41.9	334.8
SA	13.4	103.8	11.6	128.8
WA	14.4	141.1	18.1	173.6
Tas	5.5	36.7	NA	46.7
NT	3.2	20.3	NA	27.1
ACT	69.4	18.7	-	88.1
Australia	230.8	1,262.0	169.5	1,662.3

#### 5 Types of public appointments

Viewed in totality, the number and range of public appointments in NSW is vast. At its broadest, the term 'public appointment' is not confined to the public service, any more than it is limited to appointments to statutory offices, notice of which is given in the Government Gazette. Public appointments include those employed in Parliament,<sup>6</sup> public education,<sup>7</sup> the public health and transport systems, police<sup>8</sup> and local government.<sup>9</sup> In addition to the central government departments there are statutory corporations and other defined statutory offices, including such bodies as the NSW Aboriginal Land Council, the ICAC and the judiciary. The list can be extended to include the direct Crown appointment of the Governor.

Without claiming to be comprehensive, the following is a breakdown of the main types of positions which, because they are paid for from the public purse, can be classified as State public appointments:

- appointments to the 'Government service'<sup>10</sup> of 'officers' to public service departments and statutory corporations under Chapter 1A of the [Public Sector Employment and Management Act 2002](#);

- as a sub-set of the above, appointments to the 'public service' under Chapter 2 of the the same legislation. Section 19 of that Act mandates 'merit appointment' for the public service, the meaning of which is discussed in the [NSW Government Handbook](#);
- included under the above statutory regime of merit appointment, but not dealt with in the *NSW Government Handbook*, is the Senior Executive Service (SES).<sup>11</sup> Established in 1989, current SES conditions of employment and recruitment are set out in the 2008 [SES Guidelines](#);
- exempted from the operation of the above merit appointment regime is the Chief Executive Service (CES),<sup>12</sup> which include Department Heads and the Chief Executives of such agencies as the Casino Control Authority and the State Rail Authority;<sup>13</sup>
- ministerial staff appointed directly by Ministers are outside the normal public service procedures;
- members of the judiciary are appointed by the Governor on the advice of the government and without reference to public sector recruitment rules and procedures;
- other public office holders, independent of, or at arm's length from, government and not included under either the CES or the SES include the positions of DPP, Ombudsman, the Auditor-General and the Electoral Commissioner. Typically, the Governor makes such appointments. This is case for the office of Valuer-General, to which relevant sections of the

public sector employment conditions do not apply.<sup>14</sup> Meanwhile the staff employed to enable these statutory officers to perform their functions are covered by the normal public sector rules and conditions.

- other statutory positions include the Chairs, deputy chairs and members of various statutory Commissions,<sup>15</sup> Tribunals<sup>16</sup> and Boards<sup>17</sup> Appointments to the Mental Health Review Tribunal, for example, are made by the Governor, with membership being subject to the holding of certain qualifications.<sup>18</sup> Appointment procedures are set out in [Guidelines for NSW Board and Committee Members: Appointments and Remuneration](#), issued by the Premier's Department in 2004.

### 6 Parliamentary oversight of public appointments in NSW

Appointment of a select number of statutory offices is subject to veto by relevant parliamentary committees. The Joint Committee on the Office of the Ombudsman and the Police Integrity Commission is empowered to veto proposed appointments to the offices of Ombudsman, the DPP, the Police Integrity Commissioner and the Inspector of the Police Integrity Commission.<sup>19</sup> The same power is provided to the Public Accounts Committee in respect to the Auditor-General<sup>20</sup> and to the Joint Committee on the ICAC in respect to the ICAC Commissioner.<sup>21</sup>

These are not pre-appointment hearings designed along the US lines. Appointment proceedings are subject to secrecy provisions,<sup>22</sup> with the relevant Second Reading speech stating:

The bill provides that the committee will be required to hear any evidence or consider any documents relating to a recommended appointment in private and to treat such information as confidential. This is aimed at avoiding unnecessary harm to an individual's reputation and the airing in the media of irrelevant details of the person's private life. In addition, it will ensure that the selection procedure for the relevant positions remains confidential and that the committees are not seen as de facto appeal bodies.<sup>23</sup>

The veto provisions were introduced as a result of the Memorandum of Understanding between the Greiner Government and the three Independent Members holding the balance of power in the Legislative Assembly during the 50<sup>th</sup> Parliament.

## 7 NSW Public Service

The old NSW Public Service Board, which operated under the *Public Service Act 1902*, was abolished in 1979. This was at a time when the reform of public administration was on the political agenda, in Australia and internationally. Broadly, the concern was that the public service was not fit to serve changing community needs and that the Public Service Board itself was a stifling bureaucratic organisation ill suited to creating a performance-oriented public sector.

Assessment of the performance of the Public Service Board varies. According to Richard Alaba:

Under the Board's firm control of the service since the turn of the century, the administration had evolved 'anachronistic' structures that had 'over decades produced an inbred service'.<sup>24</sup>

In arriving at this view Alaba purports to rely on the work of RS Parker. In

fact, on careful reading, Parker offers a more positive assessment, describing the NSW Public Service Board as 'long the most powerful and probably the most effective body of its kind in Australia'.<sup>25</sup> He explains the Board's rationale partly in these terms:

An authority outside party politics is needed to maintain a non-party bureaucracy by controlling recruitment, advancement and discipline in all government employment.<sup>26</sup>

Within its jurisdiction, the Public Service Board exercised centralised control of most facets of public administration, including appointments at all levels. Parker explains that by the 1970s around two-thirds of State employees, including teachers, were excluded from the Board's direct jurisdiction. This trend started with the creation in 1900 of the Sydney Harbour Trust as a statutory corporation. Parker wrote of this trend:

what it has done is to open a wide field of political patronage for appointments to the governing boards, most of whose members are specifically exempted from the provisions of the Public Service Act, even when their staff are not. This field has been exploited shamelessly.<sup>27</sup>

Under the *Public Service Act 1979*, the powers of the Public Service Board were curtailed. In particular, the Act placed greater responsibility and accountability on departments for self-management, bringing to an end the Board's control over senior public sector appointments. This left the revamped Board with more broadly based policy functions.

These new arrangements were themselves the subject of intense

political debate, which led to a further round of reform under the Greiner Government. The Public Service Board was abolished altogether under the *Public Sector Management Act 1988* and, a year later, the Chief and Senior Executive Services were established.<sup>28</sup> Alaba writes that, during the campaign for the 1988 election, Greiner

Portrayed NSW administration as overly politicised, lacking integrity, poorly structured, distant from community needs, and controlled by 'trade union bosses' who were responsible for 'nineteenth century management practices'.<sup>29</sup>

Greiner's response was to apply managerial principles and market disciplines to the public service, which was made subject to contracting out and performance targets. Permanency was abolished for the SES, which was placed on contracts of up to five years. The turnover of departmental heads and other chief executives led to charges of 'politicisation' at the top of the public service.<sup>30</sup> So, too, did the increase in ministerial advisers, described by Laffin as 'strictly speaking temporary public servants' serving 'at the pleasure of their ministers'.<sup>31</sup> According to Laffin:

under the Coalition Government the conventions on the respective roles of ministers and top public servants moved further away from the traditional model.<sup>32</sup>

The NSW public service has certainly moved away from:

the old line departments dominated by professionals, for example main roads departments run by engineers and health departments by medical practitioners.<sup>33</sup>

In outline, the revamped public sector that emerged from Greiner's managerial reforms remains in place today. There is no equivalent of the old Public Service Board. In terms of oversight, for the Government Service generally there is a Director of Public Employment, a position that is held by the Director-General of the Premier's Department.<sup>34</sup> The position's functions include:

Monitoring recruitment, appointment and promotion practices in the public sector and, in particular, compliance with requirements relating to appointment and promotion on merit.<sup>35</sup>

Barry O'Farrell has committed the NSW Opposition to 'establishing a Public Service Commission', as part of a package of reforms intended to 're-create a world class public service'.<sup>36</sup>

## 8 Australian Public Service

As part of the reforms identified with the 'new public administration', the Commonwealth public service also underwent major structural change in the last decades of the 20<sup>th</sup> century.

Under the [Public Service Act 1999](#) (Cth) provision is made for a Senior Executive Service, the functions of which include the provision of high-level professional expertise, policy advice and management.<sup>37</sup>

Provision is also made for Secretaries of Departments, to be appointed by the Prime Minister for periods of up to five years. By ss 58(2) and (3) of the Act:

Before making an appointment of the Secretary of the Prime Minister's Department, the Prime Minister must have received a report about the vacancy from the [Public Service] Commissioner.

Before making an appointment of any other Secretary, the Prime Minister must have received a report about the vacancy from the Secretary of the Prime Minister's Department.

Oversighting the APS is the [Public Service Commissioner](#), a position appointed by the Governor-General for a period up to five years.<sup>38</sup> The Commissioner's functions include reporting to the Public Service Minister on any matter relating to the Australian Public Service (APS) and evaluating the extent to which Agencies incorporate and uphold the APS values.<sup>39</sup> As set out under s 10 of the [Public Service Act 1999](#) (Cth), the APS values include:

- the APS is apolitical, performing its functions in an impartial and professional manner;
- the APS is a public service in which employment decisions are based on merit; and
- the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public.

Departmental Secretaries are excluded from the Commonwealth Government's 2008 '[merit and transparency](#)' policy. Introducing that policy, Cabinet Secretary and Special Minister of State John Faulkner stated:

The Government has decided to strengthen transparency and merit based selection when appointing senior public servants. The new arrangements apply to agency heads - other than departmental secretaries - and statutory offices working within or closely with APS agencies. The arrangements cover more than 130 senior positions including 65 agency heads.<sup>40</sup>

**APS statutory office holders and APS agency heads:** Writing in July 2006, Emeritus Professor [Meredith Edwards](#), said that, unlike the UK, Canada and to a lesser extent New Zealand, the Australian Government had:

not shown any interest in reform of appointment processes to its boards. Relatively little is known about the appointment processes that are followed in relation to public sector boards of the Australian Government but what we do know is that appointment processes are not nearly as comprehensive or as systematic as in several other countries.<sup>41</sup>

The position changed with the introduction of the 2008 '[merit and transparency](#)' policy, which applies to APS agency heads and APS statutory office holders. The policy sets out those positions included and excluded from its ambit. The exclusions include office holders equivalent to Departmental Secretaries, among them the Public Service Commissioner and the Auditor-General, and designated agency heads and statutory offices listed on the Government's [website](#). Specific [exclusions](#) are confined to:

- appointments to an elected office, (for example, the Chairperson of the Torres Strait Regional Authority);
- appointments to the Australian Defence Force the Registrars of the Administrative Appeals Tribunal and National Native Title Tribunal (NNTT);
- the chief executive officers of the federal courts, Federal Court of Australia assessors, and the President of the NNTT; and
- the Administrators of the Northern Territory, Christmas

and Cocos (Keeling) Islands, and Norfolk Island.

The same [website](#) lists those agency heads and other statutory offices included in the 'merit and transparency' policy. Among these are offices as diverse as the Human Rights Commissioner, the Chairman of the National Water Commission and members of the Veterans' Review Board.

The Public Service Commissioner is responsible for ensuring that appointment is based on merit. However, it is [explained](#) that:

The Minister remains responsible for making the final recommendation to the Prime Minister.

It is further [explained](#) that:

If the Minister considers special circumstances exist where a full selection process is inappropriate, he or she must write to the Prime Minister seeking approval to fill the position without conducting a full selection process. This letter should be copied to the Commissioner.

Where the Minister decides not to appoint a candidate recommended by the assessment panel, the Minister must write to the Prime Minister outlining the reasons for this decision. These reasons will be included in Cabinet documentation where the Minister's proposed appointment requires Cabinet approval.

The Government's intention is for bodies under the [Commonwealth Authorities and Companies Act 1997](#) (Cth) to comply with the 'merit and transparency' policy unless there are special circumstances.<sup>42</sup>

## 9 Politicisation of department secretaries?

In 2007, across three issues of the *Australian Journal of Public Administration*, the effect of the managerial revolution on the upper reaches of the APS was debated. Andrew Podger, Public Service Commissioner from 2002 to 2005 and a former departmental secretary, argued that the ending of tenure for department secretaries and the introduction of three-year contracts, combined with performance pay, had eroded non-partisanship. In his view, the balance had shifted towards 'responsiveness' and away from 'apolitical professionalism and its focus on long-term public interest'. He made the case for a greater involvement for the Public Service Commissioner in the recruitment process at the top level of the APS.<sup>43</sup> Broadening out his argument, Podger concluded:

I see serious problems across Australian jurisdictions that have been facilitated by the sorts of changes that have occurred at the Commonwealth level over the last decade in particular. These, together with such developments as the increasing role of ministerial staff, have I believe significantly shifted the balance between responsiveness, impartiality and professionalism. At the very least, the risks have increased.<sup>44</sup>

Podger's argument was countered by the then Secretary of the Department of the Prime Minister and Cabinet (and a former Public Service Commissioner), Dr Peter Shergold. He wrote:

I see no evidence of any secretaries who have become 'too responsive' or 'too political'. I assert again what Andrew Podger finds unconvincing – integrity is a matter of capability,

competence and character, not contract.<sup>45</sup>

Adding her voice to the debate was Podger's successor as Public Service Commissioner, Lynelle Biggs. In her view 'Most secretaries are pretty robust characters and more than capable of withstanding political pressure...'.<sup>46</sup> For her, a significant change in recent years was the growth in numbers of ministerial office staff – to around 400, which has helped to create 'an impression that the public service has become more politicised'.<sup>47</sup> Casting a wider net, Biggs maintained that balancing responsiveness and apolitical values was a 'constant theme in most western democracies'. She noted:

Interestingly, the UK is currently grappling with the view that its civil service is too independent from government and not responsive enough.<sup>48</sup>

## 10 Other Australian jurisdictions

Issues relevant to senior public sector appointments were canvassed in the 2009 Interim Report of the Tasmanian Legislative Council's [Select Committee on Public Sector Executive Appointments](#). The report commented that:

There is genuine concern within the community that the present system of senior public sector appointments does not safeguard against either; corruption of the State Service Principles;<sup>49</sup> or the unwarranted politicisation of the public sector.<sup>50</sup>

The Select Committee received evidence on systems for public sector executive appointments in New Zealand, South Australia and Western Australia. It recommended the adoption in Tasmania of a system similar to the Western Australian

Public Sector Management regime, which contains the following elements:

- A Public Sector Management Act with universal application to Government and all of its agencies;
- A Public Sector Standards Commissioner administering that Act and reporting directly to Parliament;
- Selection and promotion processes for all public sector executive appointments conducted by the Public Sector Standards Commissioner;
- Shortlists of suitable candidates presented to the relevant Minister by the Public Sector Standards Commissioner;
- The relevant Minister has the power to reject an entire shortlist and ask for a new shortlist;
- If a relevant Minister wishes to appoint someone not appearing on a shortlist prepared by the Public Sector Standards Commissioner, they may do so, provided that the Minister publishes reasons for doing so in the Gazette.<sup>51</sup>

The [Western Australian](#) regime was established in the wake of the 1992 WA Inc Royal Commission. This model was preferred by the Tasmanian Select Committee to that in operation in South Australia where the 'endorsement' of the Commissioner for Public Employment, 'as opposed to advice, is required'. The Select Committee commented:

This Committee does not agree with the South Australian notion that the Public Sector Standards Commissioner's preferred candidate should be the one endorsed by the Executive Government. The Committee believes that such an innovation has two perceived weaknesses, namely; the opportunity for the development of patronage would have the potential



to grow up around the Commissioner; and secondly, such an arrangement could conceivably undermine the concept of ministerial accountability to Parliament. It is the Committee's view that any recommendations from a Public Sector Commissioner should be advisory to a defined Minister.<sup>52</sup>

## 11 Developments in the UK

During the Thatcher years and later the UK civil service underwent major reform. Indeed, since the early 1980s the civil service has experienced a process of more or less continuous managerial and structural change. For example, under the 'Next Steps' programme, new [executive agencies](#) were created operating outside the traditional departmental structure.<sup>53</sup> As in Australia, the Chief Executives of these agencies were generally appointed on fixed-term contracts and most were recruited from outside the civil service. Non-departmental public bodies, NDPBs or QUANGOS (quasi-autonomous non-governmental organisations), have flourished.<sup>54</sup> The civil service has experienced fragmentation and a decline in numbers, from around 750,000<sup>55</sup> in 1979 to [543,000](#) (509,000 on a full-time equivalent basis) in March 2007. As special advisers have made their way into Whitehall, it is argued that the role of the mandarins has been cast in more managerial terms.<sup>56</sup>

**Civil Service Commission:** In certain respects, however, the surviving core of the UK civil service is unchanged. In particular, its political neutrality remains intact, with Bogdanor commenting:

By the end of the twentieth century...the British civil service was almost alone, together with the Canadian, in remaining unpoliticised in its upper reaches.<sup>57</sup>

In the UK, recruitment to the Civil Service is overseen by the Civil Service Commission, as outlined in the [Civil Service Order in Council 1995](#). According to the [Civil Service Commissioners' Guidance on Senior Recruitment](#) of June 2005 this includes appointments to posts at the most senior levels:

The only departure from this general requirement is for appointments of less than twelve months, their exceptional extension up to 24 months and inward secondments of up to 24 months; in these cases, departments and agencies may make appointments, in accordance with the *Recruitment Code*, without the approval of the Commissioners.<sup>58</sup>

The performance, independence and politicisation of the civil service have all come under scrutiny in recent times.<sup>59</sup> This includes the March 2007 report of the House of Commons Public Administration Select Committee (PASC), [Politics and Administration: Ministers and Civil Servants](#). There a new 'public service bargain' was recommended, clarifying the relationship between civil servants and ministers, underpinned by a 'good governance code'. On one side the committee observed:

It remains essential in our view that there should be no entrance into the civil service through ministerial patronage.<sup>60</sup>

However, it was also argued that:

It is possible to guard against patronage without removing all ministerial choice about suitable appointees. Such choice should be exercised only in cases where there is external recruitment to extremely senior posts. There should be no

ministerial involvement in recruitment below the senior civil service, and even at senior civil service level it should be confined to key appointments. In such cases, if a competition produces more than a single candidate who would be suitable for the post on offer, we believe that it is entirely legitimate for ministers to be given an opportunity to meet them, and to be asked to express a preference, as is the case with appointments to NDPBs.<sup>61</sup>

**Office of the Commissioner for Public Appointments (OCPA):** In addition to the Civil Service Commission, there is in the UK a Commissioner for Public Appointments. This position was created in 1995 following the [First Report of the Committee on Standards in Public Life](#) (the Nolan Committee). The Nolan Committee discussed a number of concerns about QUANGOS and recommended there should be an independent [Public Appointments Commissioner](#) to monitor, regulate and approve departmental appointments procedures. The Commissioner published a [Code of Practice for Ministerial Appointments to Public Bodies](#), which operates on the following [seven principles](#) :

- ministerial responsibility;
- merit;
- independent scrutiny;
- equal opportunities;
- probity;
- openness and transparency; and
- proportionality.

Under this system, ultimate responsibility for appointments remains with Ministers. As the Nolan Committee observed, while this leaves Ministers with considerable power of patronage, they cannot 'act with

unfettered discretion'.<sup>62</sup> As for the principle of independent scrutiny, no appointment can be made without first being scrutinised by an independent panel or by a group including membership independent of the department filling the post.

The Commissioner does not regulate appointments processes for all public appointments, only those listed in the relevant Public Appointments Order in Council. In 2005 the Committee on Standards in Public Life reported that 'only 11,000 out of about 30,000 public appointments by Ministers are regulated in this way'.<sup>63</sup> Currently, the types of bodies that fall within the Commissioner's remit are:

- executive non-departmental public bodies
- advisory non-departmental public bodies
- health bodies
- public corporations
- public broadcasting authorities; and
- certain utility regulators.<sup>64</sup>

The PASC published the first major parliamentary examination of the new appointments procedures for public bodies in July 2003 – [Government by appointment: opening up the patronage state](#). PASC observed:

The general public still believes that appointments are the preserve of the privileged few, even if not always a 'fix', or the product of 'cronyism' as often alleged by the media. We are satisfied that the Government is genuinely committed to opening up appointments to a wider range of people, and especially to increasing the proportions of women, members of ethnic minorities and people with disabilities on the boards of public bodies. There has been real progress in doing so since 1997, but

appointed members of these boards are still overwhelmingly (in the Commissioner's phrase) 'male, pale and stale'.

Among PASC's recommendations was that a new Public Appointments Commission be established to take over the actual process of appointments from Ministers, along the lines of the existing NHS Appointments Commission. This proposed body was to be fully accountable to Parliament. It was further recommended that, in the case of key posts, select committees should have the power, after a hearing with proposed appointees, to issue a Letter of Reservation which would lead to the re-opening of the competition for a post.

The Government rejected this proposal on the basis that the existing practice of select committees of taking evidence from newly appointed public officials was 'the right approach'.<sup>65</sup>

The PASC returned to the subject in March 2007, in [Politics and Administration: Ministers and Civil Servants](#). While applauding the work of the Commissioner for Public Appointments, the committee recognised that exceptions to the appointments process may apply in relation to 'key posts where ministers feel they wish to have personal knowledge of, and confidence in, the individual at the head of an organisation carrying out their policies'. For this reason, it was recommended that, in exceptional circumstances, 'ministers should have a reserve power to make appointments to public bodies', on the proviso that 'Such cases should be transparent and explicit'.<sup>66</sup>

**Parliamentary oversight.** A further development was the publication in

July 2007 of [The Governance of Britain](#) Green Paper. As well as placing the civil service on a statutory footing for the first time, the Green Paper proposed that pre-appointment hearings should be held by select committees for certain posts, including the National Health Service Ombudsman, the Local Government Ombudsman and the Chief Inspector of Prisons. For 'market sensitive' positions, such as the Governor of the Bank of England, the hearings would take place after appointment but prior to commencement. In neither case could an appointment be vetoed. According to the Government [proposal](#):

The hearing would be non-binding, but in the light of the report from the committee, Ministers would decide whether to proceed. The hearings would cover issues such as the candidate's suitability for the role, his or her key priorities, and the process used in selection. (para 76)

Subsequent developments are outlined in a House of Commons Research Paper, [Parliamentary Involvement in Public Appointments](#), written by Lucinda Maer in April 2008 and [updated](#) in June 2008.<sup>67</sup>

In January 2008 the PASC revisited the subject in its report [Parliament and Public Appointments: Pre-appointment hearings by select committees](#). PASC welcomed the Government's proposal. This was despite reservations expressed by the Commissioner for Public Appointments about the impact hearings would have on the application of the merit principle and the possibility that hearings would be open to legal challenge. As explained by [Maer](#), the PASC argued that pre-appointment hearings could not be for the purpose of accountability: a person could not be held accountable for the

performance of an organisation to which they had not been appointed. Instead, the Committee believed that pre-appointment hearings must be about the selection of the candidate. The role of select committees in the selection of candidates should be:

... in informing the final ministerial decision, not in influencing the impartial process that precedes that decision. Select committees should only become involved once every part of the interview and selection process has been completed except for this final decision.

The Committee stated that pre-appointment hearings must add some value to the appointments process. Their report stated:

The value that committees can add over and above that provided by a rigorous selection process is to expose a candidate to parliamentary and public scrutiny. It follows that hearings should normally apply only to posts for which accountability to Parliament and the public are an important part of the role.

In a second line of development, in January 2008 the Liaison Committee was asked to respond to the Government's list of proposed appointments. In March 2008 the [Liaison Committee](#) published its own list, to which the Government then responded in June 2008.<sup>68</sup> A list of 60 posts was proposed. Basically, the Government said hearings should focus on posts which exercise statutory or other powers in relation to protecting the public's rights and interests, as well as those that play a key role in the regulation and administration of the appointments process itself. Under this system:

while parliamentary committees will be permitted to interview nominees

before their formal appointment and query them about their qualifications, they are denied a veto on the traditional grounds this would be incompatible with ministerial accountability.<sup>69</sup>

According to [Maer](#):

The first pre-appointment hearing has already taken place for the candidate of the post of Chair of the Care Quality Commission. Baroness Young appeared before the Health Select Committee on 8 May and was subsequently recommended for appointment.

## 12 Developments in Canada

In the [Research Paper](#) published in April 2008 Maer extends her discussion to other jurisdictions, notably the European Commission, the United States and Canada.

**Federal level:**<sup>70</sup> In relation to Canada, at the federal level there is a [Public Service Commission](#), similar in purpose to the UK Civil Service Commission. In addition, the 2006 [Federal Accountability Act](#) makes provision for a Public Appointments Commission along the lines of its UK equivalent OCPA.<sup>71</sup> According to the Government [website](#), this proposed Commission, which is to be located in the Prime Minister's portfolio, will be composed of a Chairperson and four Commissioners with support from a small Secretariat. The Commission is to:

- oversee, monitor, and report on the selection process for Governor in Council appointments for agencies, boards, commissions, and Crown corporations;
- set a code of practice to govern the selection process for

Governor in Council appointments;

- approve the selection process that ministers propose to fill vacancies within their portfolio agencies;
- monitor selection processes to ensure that they are followed as approved, including audit and reviews of complaints; and
- apprise the Prime Minister of compliance with the code of practice in an annual report to be tabled in Parliament.

However, as [Maer](#) explains, the plan to establish a Public Appointments Commission stalled when the House of Commons Standing Committee on Government Operations and Estimates rejected the [proposed head of the Commission](#).

The Standing Committee was in this case exercising a power under the [Standing Orders](#) for parliamentary scrutiny of Governor in Council appointments.<sup>72</sup> The committee is empowered to examine an appointee or nominee, but only in respect to the person's qualifications and competence for the designated post.

The Government announced it would not proceed with its plan under minority government circumstances. Currently, a Public Appointments Secretariat is in place, established within the Prime Minister's portfolio. The Secretariat's role is to provide advice and support on the development of the Commission and, once it is established, to provide it with policy and operational support. According to the [Canadian Auditor General](#):

From April to November 2007, there were no personnel in the Secretariat; a staff of two was

assigned in November 2007 and is developing the draft Code of Practice for the Commission.<sup>73</sup>

**Provincial level:** Significant developments have also occurred at the provincial level, both in terms of parliamentary and non-parliamentary oversight of public appointments. According to Emeritus Professor Edwards:

Several Canadian provinces have also introduced reforms to the appointment process for public sector boards that curtail the role of ministers. In British Columbia, for example, again following a crisis, a radical new appointment system has been put in place. All appointments to boards of public agencies now go through a single clearing house, a specialised central agency, which screens all applicants according to skills-based criteria determined in advance without ministerial involvement. The agency offers a selection of suitable candidates to the relevant minister after it has completed recruitment and vetting of candidates for a specific vacancy.<sup>74</sup>

The single clearing-house in question is British Columbia's [Board Resourcing and Development Office](#).

Emeritus Professor Edwards continued:

Nova Scotia—again following a scandal in the early 1990s—has gone a step further in constraining the power of ministers by giving legislative committees the power to veto ministerial appointments as well as introducing a relative-merit standard that requires the appointment of the *most qualified* applicant.<sup>75</sup>

In Ontario, the Legislative Assembly's Standing Committee on Government Agencies has, since 1991, reviewed

the intended appointments of persons to agencies, boards and commissions and of directors to corporations in which the Crown in right of Ontario is a majority shareholder<sup>76</sup> according to the procedures set out in the Committee's [terms of reference](#).

In practice, writes [Maer](#), the Committee only interviews a 'fraction of the total number of new appointments'. After reviewing the Committee's procedures and record, David Pond of the University of Toronto concluded that its 'primary function is to detect patronage appointments'.<sup>77</sup> In his view, the Committee's work reflects the tensions involved in the parliamentary oversight of appointments:

An examination of how the committee conducts interviews reveals a tension between the Members' role in holding the executive accountable, and their identities as partisan politicians. In large part, the committee has become a forum for debates on the appropriate limits to patronage in appointments to public bodies.<sup>78</sup>

On a comparative note, Pond writes:

it is asking too much of a partisan institution organised around the principle of party discipline to expect it to impose credible constraints on the political exercise of the appointments power. Legislative scrutiny must be complemented with institutionalised controls on the selection process, in the form of independent panels for screening candidates.<sup>79</sup>

Pond continues:

In Canada such reforms have been introduced in Nova Scotia, Alberta and British Columbia, where non-partisan advisory panels compose

shortlists of qualified candidates for positions on various categories of ABCs [agencies, boards and commissions], from which ministers make their selections.<sup>80</sup>

### 13 Conclusions

The world of public appointments is complex and varied. From this brief survey it is clear that different standards, practices and procedures for public appointments are in place in the jurisdictions discussed. It is also clear that, while comparisons with other countries are far from straightforward, concern about the integrity of public appointments is something that applies across the board.

Any discussion is complicated by the sheer variety of public appointments. Different practices can apply to lower than to higher-level public service appointments. In many ways appointment of departmental heads bears closer comparison with ministerial appointments to agencies, boards and commissions. However the relationships between Ministers, high level public servants and other public appointments are understood, the fact is that practices differ across jurisdictions. In particular, some have established greater oversight of public sector executive appointments.

The UK is an example of where many appointments to non-departmental public bodies are scrutinised by an independent Commissioner for Public Appointments. While the relevant Minister ultimately makes the decision, this only occurs after an independent panel has reviewed the appointment. In addition, certain key statutory positions can be reviewed by a parliamentary committee, which has the power to query applicants about their qualifications, but does not have

the power to veto a prospective appointment. The concern generally is to balance the principle of ministerial responsibility with that of a transparent appointments system based on merit. The same concerns were expressed in the recent Tasmanian Legislative Council Select Committee report which recommended adoption of the regime in place in Western Australia.

As discussed, parliamentary scrutiny of certain positions is in place in NSW, notably those positions such as the Auditor-General which can be classified as 'independent officers of Parliament'. These proceedings are made subject to secrecy provisions and cannot therefore be equated with US style pre-appointment hearings.

Parliamentary oversight of public appointments has its difficulties, practical and theoretical in nature. As Pond observed, parliamentary committees belong after all to the partisan world of party politics.

As experience from the other jurisdictions discussed in this paper shows, public appointments can also be scrutinised by non-parliamentary bodies. At issue is both the performance of the public sector and the public's confidence in the integrity of the appointments processes.

---

<sup>1</sup> V Bogdanor, 'The civil service' in *The British Constitution in the Twentieth Century*, edited by V Bogdanor, Oxford University Press 2003, p 237.

<sup>2</sup> D Pond, 'Legislative oversight of political patronage in Canada' (2008) 46(3) *Commonwealth and Comparative Politics* 365 at 380.

<sup>3</sup> Pond, n 2, p 381.

<sup>4</sup> NSW Health, *Annual Report, 2007-08*, p 238.

<sup>5</sup> ABS, [6248.0.55.001 – Wage and Salary Earners, Public Sector, Australia, June 2007](#).

<sup>6</sup> Parliamentary staff and office holders, notably the Clerks and Deputy Clerks of the

---

two Houses. Although not part of the public service, these positions adhere to relevant procedures and requirements.

<sup>7</sup> Merit appointment applies at senior levels - *Teaching Services Act 1980*, s 47(4) and (5).

<sup>8</sup> NSW Police is comprised of: the Commissioner of Police, a position appointed by the Governor on the recommendation of the Minister (*Police Act 1990*, s 24 - the appointment is subject to various integrity tests); a Senior Executive Service for which merit appointment applies (*Police Act 1990*, s 39 - with Ministerial approval, the Commissioner may or may not advertise vacancies); as it does for non-executive police and administrative officers (*Police Act 1990*, s 66 and s 82C).

<sup>9</sup> Merit appointment applies to staff recruitment - *Local Government Act 1993*, s 349.

<sup>10</sup> Established by the *Public Sector Employment Legislation Amendment Act 2006*, which, as part of the response to the federal *Work Choices Act*, provided that NSW public sector corporations would be employed by the Government of NSW in the service of the Crown.

<sup>11</sup> Established under the *Public Sector Employment and Management Act 2002*, s 65.

<sup>12</sup> *Public Sector Employment and Management Act 2002*, s 16.

<sup>13</sup> *Public Sector Employment and Management Act 2002*, s 64 read with Parts 1 and 2 of Schedule 2.

<sup>14</sup> *Valuation of Land Act 1916*, s 8 and Schedule 1(5).

<sup>15</sup> For example, the chairperson and members of the Consumer Trader and Tenancy Tribunal

<sup>16</sup> For example, the President of the Mental Health Review Tribunal.

<sup>17</sup> For example, the chairman of the Transport Appeals Board.

<sup>18</sup> *Mental Health Act 1990*, s 253. Provision is made for a mix of full and part-time members.

<sup>19</sup> *Ombudsman Act 1974*, s 31BA.

<sup>20</sup> *Public Finance and Audit Act 1983*, s 57A.

<sup>21</sup> *Independent Commission Against Corruption Act 1988*, ss 5, 5A and 64A.

<sup>22</sup> *Independent Commission Against Corruption Act 1988*, s 70(1C); *Ombudsman Act 1974*, s 31H(1C); and *Public Finance and Audit Act 1983*, s 58(2C).

<sup>23</sup> NSWPD, 6 May 1992, p 3574.

- <sup>24</sup> R Alaba, *Inside Bureaucratic Power: The Wilenski Review of NSW Government*, Hale and Ironmonger 1994, p 20. Alaba quotes RS Parker, *The Government of NSW*, University of Queensland Press, 1978, pp 309-10.
- <sup>25</sup> Parker, n 24, p 303.
- <sup>26</sup> Parker, n 24, p 340.
- <sup>27</sup> RS Parker, 'The Government of NSW' in SR Davis ed, *The Government of the Australian States*, Longman 1960, p 166.
- <sup>28</sup> *Public Sector Management (Executive) Amendment 1989*.
- <sup>29</sup> Alaba, n 24, p 24.
- <sup>30</sup> M Laffin, 'The Public Service' in *Reform and Reversal* edited by M Laffin and M Painter, Macmillan 1995, p 84.
- <sup>31</sup> Laffin, n 30, p 80.
- <sup>32</sup> Laffin, n 30, p 89.
- <sup>33</sup> Laffin, n 30, p 73.
- <sup>34</sup> *Public Sector Employment and Management Act 2002*, s 121.
- <sup>35</sup> *Public Sector Employment and Management Act 2002*, s 125(c).
- <sup>36</sup> B O'Farrell, 'Putting people first', *Speech at the 'Start the Change' Dinner*, Sydney, 26 March 2009.
- <sup>37</sup> *Public Service Act 1999* (Cth), s 35(2).
- <sup>38</sup> *Public Service Act 1999* (Cth), s 45.
- <sup>39</sup> *Public Service Act 1999* (Cth), s 41. There is in addition a [Merit Protection Commissioner](#), a position appointed on the same terms as the Public Service Commissioner - *Public Service Act 1999* (Cth), s 52.
- <sup>40</sup> Senator J Faulkner, 'New arrangements for merit and transparency in senior public service appointments', [Media Release](#), 5 February 2008.
- <sup>41</sup> M Edwards, [Appointments to public sector boards in Australia: a comparative assessment](#), University of Canberra ARC Project, Issues Paper Series No 3, July 2006, p 1.
- <sup>42</sup> The latest policy is set out in [Circular 2009/1](#).
- <sup>43</sup> A Podger, 'What really happens: department secretary appointments, contracts and performance pay in the Australian Public Service' (June 2007) 66(2) *The Australian Journal of Public Administration* 131 at 145.
- <sup>44</sup> A Podger, 'Response to Shergold' (December 2007) 66(4) *The Australian Journal of Public Administration* 498 at 500.
- <sup>45</sup> P Shergold, 'What really happens in the Australian Public Service: an alternative view' (September 2007) 66(3) *The Australian Journal of Public Administration* 367 at 370.
- <sup>46</sup> L Briggs, 'Public service secretaries and their independence from political influence: the view of the Public Service Commissioner' (December 2007) 66(4) *The Australian Journal of Public Administration* 501 at 504.
- <sup>47</sup> Briggs, n 46, p 505.
- <sup>48</sup> Briggs, n 46, p 505.
- <sup>49</sup> *State Service Act 2000* (Tas), s 7.
- <sup>50</sup> Parliament of Tasmania, Legislative Council Select Committee, [Interim Report on Public Sector Executive Appointments](#), 2009, p 21.
- <sup>51</sup> [Interim Report on Public Sector Executive Appointments](#), n 50, p 22.
- <sup>52</sup> [Interim Report on Public Sector Executive Appointments](#), n 50, p 187.
- <sup>53</sup> T Daintith and A Page, *The Executive in the Constitution*, Oxford University Press 1999, p 37.
- <sup>54</sup> T Daintith and A Page, n 53, p 49.
- <sup>55</sup> Bogdanor, n 1, p 268.
- <sup>56</sup> A King, *The British Constitution*, Oxford University Press 2007, Ch 9.
- <sup>57</sup> Bogdanor, n 1, p 238.
- <sup>58</sup> On civil service recruitment generally see - T Daintith and A Page, n 53, pp 78-86.
- <sup>59</sup> For a critical perspective on the system from the conservative think-tank Reform see - A Haldenby et al, [Fit for Purpose](#), March 2009.
- <sup>60</sup> PASC, [Politics and Administration: Ministers and Civil Servants](#), para 84.
- <sup>61</sup> PASC, n 60, para 85.
- <sup>62</sup> Committee on Standards in Public Life, *First Report*, para 4.31.
- <sup>63</sup> Committee on Standards in Public Life, *Getting the Balance Right*, Tenth Report, 2005, p 23.
- <sup>64</sup> [The Commissioner for Public Appointments website](#). Separate Commissioners operate in [Scotland](#) and [Northern Ireland](#).
- <sup>65</sup> Cabinet Office, *Government response to the Public Administration Select Committee's Fourth Report of Session 2002-03*, December 2003, Cmd 6056, p 6.
- <sup>66</sup> PASC, n 60, para 107.
- <sup>67</sup> Noted by Maer (page 19, April 2008) was that some public appointments (the Comptroller and Auditor General and the members of the Electoral Commission) are already subject to a formal decision by the House of Commons.
- <sup>68</sup> House of Commons Liaison Committee, [Pre-appointment hearings by select committees](#), First report of Session 2007-08.



- <sup>69</sup> D Pond, n, 2, p 381.
- <sup>70</sup> For an overview see – Canada Library of Parliament, [Government in Council Appointments: recent changes and suggestions for reform](#), PRB 06-21E, 17 May 2006.
- <sup>71</sup> The Act is an omnibus piece of legislation. In this case it amends s 227 of the [Salaries Act](#) to provide for a Public Appointments Commission.
- <sup>72</sup> Standing Orders 110 and 111 of the Canadian House of Commons.
- <sup>73</sup> [Status Report of the Auditor General of Canada to the House of Commons](#), 2009, para 2.10. There is, in addition, a [Senior Personnel and Special Projects Secretariat](#) in the Privy Council Office, the work of which focuses on human resource management policies and services relating to Governor-in-Council appointees. Current Governor in Council appointments procedures are set out on the Privy Council [website](#). Their operation is subject to review by the [Canadian Auditor General](#).
- <sup>74</sup> M Edwards, n 41, p 11.
- <sup>75</sup> M Edwards, n 41, p 11.
- <sup>76</sup> Excluding re-appointments and appointments for a term of one year or less.
- <sup>77</sup> D Pond, 'Legislative control of Cabinet appointments to the public service: a Canadian case-study in the political limits to parliamentary reform' (2008) 61(1) *Parliamentary Affairs* 52 at 67.
- <sup>78</sup> Pond, n 77, Abstract.
- <sup>79</sup> Pond, n 2, p 382.
- <sup>80</sup> Pond, n 2, p 382.

Information about Research Publications can be found on the Internet at the:  
[NSW Parliament's Website](#)

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

© 2009

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent from the Librarian, New South Wales Parliamentary Library, other than by Members of the New South Wales Parliament in the course of their official duties.