

A productive anomaly: New Zealand's Parliamentary Commissioner for the Environment

Introduction

"A bold and unique innovation", was how the then Minister for the Environment described the position during the first reading of the bill to establish the Parliamentary Commissioner for the Environment (PCE), the third of New Zealand's officers of Parliament, alongside the Ombudsman and Controller and Auditor-General. This paper explores the form and functions of the PCE and its historical origins. It attempts to evaluate its place in New Zealand's parliamentary system, and looks at the question of whether it should have the status of officer of Parliament. It argues that the PCE occupies a valuable position for the public and Parliament by assisting Parliament in holding the executive to account in an area of public policy that is often given less priority than others. It examines some of the characteristics of the role's interactions with Parliament, and finds that the notional support of and accountability to Parliament enjoyed by the PCE is in reality not always exercised by Parliament. The onus to protect the PCE from interference by the executive, now and in the future, resides with Parliament as part of the reciprocal, interdependent relationship between Parliament and its officers. The paper finds that Parliament's present performance in this regard may not be adequate if further functions, which will affect the PCE's current mandate and how it operates, are required of the role.

As will be discussed, the PCE's functions are wide-ranging and its powers far-reaching. Over the last 25 years New Zealand's three PCEs have been involved in a huge number of specific environmental issues. This paper is restricted to the PCE's relationship with Parliament, and does not attempt to assess its impact on environmental management and policy in New Zealand. The research is informed by literature on officers of Parliament, ombudsmen, and auditors, as well as the author's experience as Clerk of the Local Government and Environment Select Committee for the last three years.

The establishment of the PCE

This section summarises the historical and political circumstances that influenced the PCE's foundation. One commentator has noted that the PCE's establishment was not controversial at the time.¹ This is surprising because its mandate, as set down in the PCE's enabling legislation, is far broader than other officers of Parliament who tend to perform either "core" parliamentary functions or act as watchdog-type integrity agencies, rather than a combination of the two.

The PCE has its origins in the significant organisational reforms of the mid-1980s, which followed the country's first Environmental Performance Review by the Organisation of Economic Co-operation and Development (OECD). The OECD review expressed a number of concerns about the adequacy of New Zealand's environmental administration and management, including noting the problematic status of New Zealand's original Commission for the Environment, established in 1972 with no formal legislation of its own and with roles that could often be perceived as contradictory. For example, the Commission was expected to advise on and criticise government policy, as well as act as an advocate for environmental issues both within and outside government. One of the Commission's key roles was the auditing of major (typically government) infrastructure projects.²

The resulting policy debate and subsequent passing of the Environment Act 1986 sought to resolve these structural deficiencies and ambiguities, creating as it did the Ministry for the Environment to provide policy advice to government, and the Parliamentary Commissioner for the Environment to oversee environmental activities from a position of independence from the executive. Section 16(1) of the Act provides for seven statutory functions of the PCE:

(a) review the system of agencies and processes established by the government to manage the allocation, use, and preservation of natural and physical resources, and report to the House of Representatives

(b) investigate the effectiveness of environmental planning and environmental management carried out by public authorities, and advise them on remedial action

¹ Ton Bührs in *Guardians for the Environment*, p. 191.

² Young, pp. 21-4.

(c) investigate any matter where the environment may be or has been adversely affected, advise on preventative measures or remedial action, and report to the House of Representatives

(d) at the request of the House of Representatives or any select committee, report on any petition, bill, or other matter which may have a significant effect on the environment

(e) on the direction of the House of Representatives, inquire into any matter that has had or may have a substantial and damaging effect on the environment and report to the House

(f) undertake and encourage the collection and dissemination of information relating to the environment

(g) encourage preventive measures and remedial actions for the protection of the environment.

The PCE's functions are supported by legislative powers to obtain information (section 19), to be heard in proceedings (section 21), and for privilege from civil or criminal proceedings to be accorded to the Commissioner's activities performed under the Act, unless it is shown that he or she has acted in bad faith (section 22A).³

Over twenty-five years since its inception, the PCE remains an exceptional institution, both within New Zealand and internationally. A common feature of all three of New Zealand's officers of Parliament is that their powers, duties, and functions derive from the specific statutory provisions that apply to each officer.⁴ However, it is the potential multiplicity of roles prescribed in law and the power to critique the decisions of the executive in a particular area of public policy that differentiate the PCE from New Zealand's other officers, the Auditor-General and Ombudsmen. Other countries have since established similar bodies, but a national standalone organisation that has jurisdiction over environmental matters as well as the special relationship with

³ The current Parliamentary Commissioner for the Environment has recently invoked her powers under section 19 to require the state-owned enterprise, Solid Energy, to provide information on the specific mitigation strategies it had considered for proposed lignite developments in the South Island, their cost-effectiveness and technical feasibility.

⁴ McGee, p.70.

Parliament conferred by officer of Parliament status remains rare in the Westminster system.⁵

Drawing on examples from various Commonwealth states, Gay and Winetrobe identify four “core” types of officer: state auditors, ombudsmen, electoral officers or commissioners, and Parliamentary ethics commissioners.⁶ They argue that the former two positions relate to the historic functions of Parliament of authorising expenditure and redressing grievances, while the latter two represent essential services to Parliament which require independence from the executive. They further outline a number of other watchdog-type organisations, whose categorisation as officers of Parliament largely depends on their political and constitutional significance. These include commissioners for human rights, information, privacy, equality rights, public service matters, and public appointments. It is hard to position the PCE neatly into any of these categories. In fact it could be argued that the PCE is almost an “accidental” officer of Parliament, its status both influenced by the legacy of the original Environment Commission’s historical functions and a fortuitous recipient of the political mood of the 1980s which saw increasing importance being attached to the management of environmental issues.

Should the PCE be an officer of Parliament?

This section explores the validity of the PCE’s status as an officer of Parliament. It finds that the PCE is unlikely to have been constituted as an officer of Parliament in the present day for two main reasons. Firstly, the PCE performs functions, particularly advocacy and education, that Parliament has subsequently found to be inconsistent with its conception of what an officer of Parliament should be. Secondly, recent public sector reforms and legislation mean that organisations such as the PCE now tend to have Crown entity status. While accepting that there are arguments against the PCE being an officer of Parliament, this section of the paper concludes that such debates are somewhat peripheral to the more interesting question of the effectiveness of the PCE.

Three years after the establishment of the PCE, Parliament’s Finance and Expenditure Committee conducted an inquiry that sought to address concerns about the devaluing of

⁵ For example, Canada has a federal Commissioner of the Environment and Sustainable Development within its Office of the Auditor-General, and there are state environmental commissioners in Victoria, the Australian Capital Territory, and Ontario.

⁶ Gay & Winetrobe, p.7.

the officer role due to the lack of definition accorded to it and the hitherto *ad hoc* nature of its emergence. The committee proposed the following criteria for the creation of officers of Parliament:

- an officer of Parliament must only be created to provide a check on the arbitrary use of power by the executive
- an officer of Parliament must only discharge functions which the House itself, if it so wished, might carry out
- an officer of Parliament should be created only rarely
- the House should, from time to time, review the appropriateness of each officer of Parliament's status as an officer of Parliament
- each officer of Parliament should be created in separate legislation principally devoted to that position.⁷

Since the committee's 1989 report, Parliament has paid particular heed to the third criterion, to the extent that no subsequent officers have been created. In 2000 the Social Services Committee argued against a proposed Parliamentary Commissioner for Children having officer of Parliament status as it considered advocacy to be a fundamental aspect of the new position's functions, and that

advocacy was not an appropriate role for an Officer of Parliament because the Officer must act impartially and be seen to act impartially in order for their investigation and reporting to retain integrity and the confidence of the House. (...) An Officer of Parliament is not an advocate for any particular policy and avoids engaging in public debate at the outset of discussion on a specific issue.⁸

Four years later the same select committee rejected according officer status to the Retirement Commissioner as "its emphasis on the provision of information and related education activities differ from functions of an Officer of Parliament."⁹ Parliament has effectively "put the brakes" on the creation of new officers and this trend has been reinforced by the passage of the Crown Entities Act 2004, which allows for categories of publicly-funded organisations to have differing relationships to the executive. One such

⁷ New Zealand Parliament, Finance and Expenditure Committee, *Inquiry into Officers of Parliament*, 1989, I. 4B, pp. 6-7.

⁸ Social Services Committee, *Parliamentary Commissioner for Children Bill, Interim report*, p. 5.

⁹ Social Services Committee, *New Zealand Superannuation Amendment Bill*, p. 3.

category, the independent Crown entity, includes the Children's Commissioner, Human Rights Commission, and Electoral Commission, and often performs accountability and advocacy functions that require statutory protection from government direction.¹⁰

These recent developments leave the PCE's status as an officer of Parliament open to question and attack. If New Zealand has an environmental commissioner, should it not also have bodies with broad oversight powers over health or justice issues, or other equally important areas of public policy? And if such bodies perform functions, such as advocacy and education, that exceed the strict functions of Parliament, should they not all be constituted as independent Crown entities? Certainly the validity of the PCE's position has been raised and even debated on the floor of the House¹¹, and it is the only one of the three officers who could potentially be subject to the Finance and Expenditure Committee's fourth criterion that the appropriateness of its status be reviewed by the House.

However, it has been argued that the environment is a special case in the public policy field and deserving of a dedicated scrutiny agency with close links to Parliament. In her latest annual report, the current PCE, Dr Jan Wright, reflects on some of the many challenges she faces in promoting good environmental policy, including the acceptance that the immediate benefits of such policy are not always obvious. According to Dr Wright, "the tradeoff is not between the economy and the environment, but between the short term and the long term."¹² Another commentator believes that input from the PCE is essential to the debate on environmental matters because, "the environment is...so fundamental and complex, yet so weak in the lobby-driven political system, that only an independent, influential guardian for the environment could make a difference."¹³

In this light, the existence of the PCE and its status as an officer of Parliament is more persuasive, and questioning whether the PCE should be an officer of Parliament is somewhat academic. A review of the appropriateness of its status is unlikely, given the already significant limitations on parliamentary time, as well as the now entrenched nature of the PCE in New Zealand's parliamentary system. A government that sought to

¹⁰ Buchanan, p.87.

¹¹ Buchanan, p.84.

¹² Parliamentary Commissioner for the Environment, *Annual report 2009/10*, p.4.

¹³ Guardians for the Environment, p.34.

abolish it or alter its powers would also risk considerable unpopularity. As Wettenhall comments of another integrity body: "To have an Ombudsmen makes a government look good."¹⁴ The creation of the PCE was a groundbreaking decision, made particularly so by the enabling breadth of the functions provided in the Environment Act. For at any given time, the PCE may serve variously as environmental auditor, ombudsman, commentator, advocate, researcher, or authoritative source of advice, and be acting consistently with its statutory mandate. However, Wettenhall goes on to say about the Ombudsmen, "To underfund the office ensures that it is not too troublesome."¹⁵ A more pertinent discussion, then, may be regarding how the PCE interacts with Parliament and whether it is sufficiently supported, and not just financially, to discharge its wide-ranging functions appropriately.

An independent agency?

Independence and the perception of independence are essential to the credibility of an agency such as the PCE charged with scrutinising the activities of the executive. This section assesses the institutional and operational independence of the PCE, finding that the notion of independence is intimately associated with the PCE's evolving ability to decide what it chooses to investigate.

Thomas identifies the following five structural features that determine the independence and accountability relationships of certain parliamentary agencies:

- the nature of the agency's mandate
- the provisions for appointment, tenure, and removal of leadership of the agency
- the processes for deciding budgets and staffing for the agency
- whether the agency is free to identify issues for study and whether it can compel the production of information
- the agency's reporting requirements and whether its performance is monitored.¹⁶

The PCE, and indeed New Zealand's other officers of Parliament, are effectively supported in relation to these five criteria. The relevant legislation defines the PCE's mandate and provides clear direction on appointment, tenure, removal, remuneration,

¹⁴ Wettenhall, p.121.

¹⁵ Ibid., p.121

¹⁶ Thomas, p.7.

and staffing. Under the Act, the PCE has the status of an employer and is empowered to employ such staff as are considered necessary to perform the role.¹⁷ The PCE's accountability to Parliament is principally devolved to its committees with the appropriate subject select committee able to conduct the annual financial review and estimates scrutiny of the Commissioner. A cross-party select committee, the Officers of Parliament Committee, is chaired by the Speaker and oversees the appointment process for officers on Parliament's behalf, develops protocols for how officers interact with Parliament, and approves draft budgets and alterations to appropriations.

The legal and conceptual framework for the protection and accountability of the PCE therefore appears robust. But any assessment of the independence of an integrity agency must also address its operational independence, that is whether the body can perform its functions without being dependent on any interested party or having to check its actions in order to maintain the goodwill of an interested party.¹⁸ The freedom to identify matters for study forms a subset of this operational independence, and the Commissioner's most recent statement of intent outlines her consideration of the strategic importance of prioritisation. This prioritisation recognises that not all environmental problems are of the same magnitude, that environmental impacts that are irreversible and cumulative require more attention than those that are not, and that projects that result in practical recommendations usually have greater value.¹⁹

The officer's process of prioritisation is overlaid by a further consideration. In the introduction to the same accountability document, the current PCE states that, "the needs of Members of Parliament will continue to be my highest priority,"²⁰ an acknowledgment that Parliament remains the PCE's "ultimate client".²¹ The focus on Parliament is particularly important for the PCE because it operates in a field of numerous and strong-willed stakeholder groups, capture by whom would threaten the perception of the Commissioner's impartiality. Such tensions are found, for example, in a 1997 strategic planning document, in preparation for which the PCE organised a survey and symposium to reflect on its first ten years and explore how its work should proceed.

¹⁷ Environment Act 1986, s.11.

¹⁸ White & Hollingsworth, p.95.

¹⁹ Parliamentary Commissioner for the Environment, *Statement of intent 2010–13*, p.6.

²⁰ *Ibid.*, p.3.

²¹ cited in Lawson, p. 95.

A view emerged from environmental NGO groups that the PCE was too “neutral” and should act more as a campaigner or advocate for the environment.²²

Analysis of the PCE’s accountability documents over the last twenty years reveal the changing prominence accorded to different functions over time and by different Commissioners, and the evolution of the officer’s relationship with Parliament. The tenure of the first PCE, Helen Hughes, particularly the first few years, saw considerable involvement in the resolution of specific environmental issues and incidents. The 1989-90 annual report notes a 136 percent increase from the previous year in requests for assistance from all groups, including Members of Parliament on electorate environmental problems, local government, and members of the public. The Commissioner also comments on a developing trend of local authority environmental review panels seeking the independent opinion of the PCE on planning or management decisions. Such requests put considerable pressure on staff, who numbered only eight at that time.²³

Ten years later, and with a new Commissioner, Dr Morgan Williams, in place, the PCE was still receiving almost 400 external requests for action and investigation per year.²⁴ Dr Williams considered his core business to have two primary roles: environmental systems guardian and environmental ombudsman. Recent years have seen a diminution of the environmental ombudsman role. The PCE’s 2005-08 statement of intent records that “environmental watchdog” (defined as the investigation of citizens’ concerns about the environmental management and planning performance of public agencies) is a primary role for the PCE.²⁵ However, the following year’s statement makes no mention of this role at all, but instead adds “environmental advocate” (which requires responding to enquiries and concerns from the general public and encouraging preventative measures and remedial actions to protect the environment).²⁶ While responding to public concerns and inquiries remains an activity of the PCE, time devoted to their investigation (or the decision not to investigate) has reduced as other avenues for addressing environmental concerns, such as regional councils, have emerged. The move away from local

²² Parliamentary Commissioner for the Environment, *Future directions*, p.18.

²³ Parliamentary Commissioner for the Environment, *Annual report 1989/90*, pp. 4-5.

²⁴ Parliamentary Commissioner for the Environment, *Annual report 1998/99*, p.45.

²⁵ Parliamentary Commissioner for the Environment, *Statement of intent 2005-08*, p.6.

²⁶ Parliamentary Commissioner for the Environment, *Statement of intent 2006-09*, p.6.

concerns to broader analyses of environmental issues and a close relationship to Parliament, the “ultimate client”, informs the mission statement of the current PCE: To maintain or improve the quality of the environment by providing robust independent advice that influences decisions.”²⁷

Relationship with Parliament

The provision of this “robust independent advice” within a parliamentary context can occur in many forms. This section examines how the PCE has worked effectively with Parliament, in particular its committees, within the constraints of a limited staff and budget. It finds that the PCE has had to take a liberal interpretation of what advice means and sometimes eschew the opportunity to act as an appointed adviser to committees. The PCE’s status before committees has been as both provider of advice and evidence. While acting as a submitter puts the PCE at a further remove from a committee than being an adviser does, the PCE’s decision to prioritise making submissions has enabled it to work more widely with Parliament’s committees.

How the PCE assists the House of Representatives, its committees and its members is guided by a code of practice issued by the Officers of Parliament Committee. The Commissioner may appear before a select committee on consideration of bills, petitions, inquiries, or its own reports. The code is silent on financial scrutiny items of business (financial reviews and estimates), but the PCE could assist a select committee on these too. The code of practice indicates that the “default” status of the PCE in these circumstances is that of adviser, unless the committee in question decides otherwise. Whether the PCE appears as a submitter or as an adviser has implications for how the views presented are received by the committee. Submissions are generally heard in public and a committee may receive a large number of submissions on an item of business. For example, in the current Parliament the PCE was one of over 800 written and 400 oral submitters to the Local Government and Environment Committee considering the Resource Management (Simplifying and Streamlining) Amendment Bill. The risk in these circumstances is that the impact of comments may be diluted, both by the volume of viewpoints heard by the committee and the time that it can allocate to hear them. The current PCE was consulted on the 2007 code of practice and raised concerns

²⁷ Parliamentary Commissioner for the Environment, *Statement of intent 2010-13*, p.5.

about being a submitter. The chairperson of the Officers of Parliament Committee replied as follows:

...you suggest that given your officer of Parliament status it is not appropriate that you appear before committees on the same basis as other submitters. The inference is that you would prefer your status to be that of “special witness”. There is however no provision in Standing Orders to provide an officer of Parliament with “special witness” status.²⁸

Given that a select committee determines its own processes and can choose by leave to hear evidence in private, it is hard to establish what tangible benefits would result from introducing a new category of “special witness”, eligibility criteria for which would inevitably be controversial. Such a category could also perversely result over time in an officer of Parliament being considered more as a witness than an adviser to select committees.

The code of practice preserves a select committee's prerogative on how it receives information to assist in its consideration of business, and also affords flexibility to the PCE on how best to disseminate its views. Interestingly, the current PCE's “default” position in regards to select committees appears to be submitter. In this parliamentary term she has submitted on a number of bills but only advised on an inquiry by the *ad hoc* Emissions Trading Scheme Review Committee. Partly this is a response to the limited resources available. Providing quality advice to a select committee over a period of weeks or months is a significant undertaking for an office of 17 full-time equivalents. But there is also a strategic logic to the decision, as it recognises that environmental issues occur over a range of subject areas, and that responding to some items of business (bills or inquiries) before committees are more likely to result in practical change than others (financial scrutiny activities).

Under the previous Commissioner, staff from the PCE's office advised the Local Government and Environment Committee on their scrutiny of executive spending and the performance of government departments and Crown entities as part of the annual estimates and financial review processes. The committee received written and oral

²⁸ Letter from Hon Margaret Wilson, Chair of the Officers of Parliament Committee, to the Parliamentary Commissioner for the Environment, 16 July 2007.

briefings on departmental performances and government spending plans which included suggested lines of questioning. Given that a similar service to committees is also performed by the Office of the Auditor-General, and the current Commissioner's stated intent to work with all select committees that may be addressing environmental matters, it seems prudent that the PCE no longer performs this time-consuming activity. Rather, the PCE has been able to direct resources to appearing in person before a range of subject select committees (Local Government and Environment, Finance and Expenditure, Primary Production, Commerce), rather than being seen to "belong" solely to the select committee that deals with the environment.

Accountability

There is a duality inherent in notions of accountability.²⁹ An organisation charged with holding the executive to account must itself be accountable to someone. In the PCE's case, this someone is Parliament. This section examines the challenges faced by the PCE in receiving adequate responses to its reports. It argues that Parliament plays a pivotal role both in promoting accountability to the PCE's investigations and in holding the PCE to account for its own performance, finding that in both cases, Parliament has not made the most effective use of the powers available to it.

The PCE's relationship with Parliament has been further enhanced by a 2008 amendment to Standing Orders. The PCE's reports on major investigations are presented to the House under the Environment Act but previously no formal process existed for their consideration. Under new Standing Order 387, reports of the PCE, other than an annual report, stand referred to the Local Government and Environment Committee. Similarly, reports of the Ombudsman are referred to the Government Administration Committee, and Controller and Auditor-General reports to the Finance and Expenditure Committee. These committees may refer reports on if the subject matter better fits the terms of reference of another subject select committee. The Standing Orders Committee suggests that the officer provide a briefing on the report and that the select committee consider requesting a response from government officials or a local authority, if applicable.

²⁹ Hollingsworth, White & Harden, p.79.

The major benefit envisaged for this new process is to promote appropriate responses to recommendations made by the PCE and Controller and Auditor-General, in the absence of any statutory or formal requirement for the executive or other public authority to respond.³⁰ The Ombudsman Act 1975 allows for an Ombudsman to request that a department or organisation respond within a specified time with details of what steps (if any) it proposes to take to give effect to recommendations made to it. No equivalent power exists under the relevant legislation of the other two officers of Parliament. However under Standing Order 248, a select committee can make recommendations to the government in respect of items of business other than bills, financial reviews, estimates, and questions of privilege, to which the government must respond within 90 days. Alternatively, a committee could use its inquiry powers to pursue and develop findings in an officer of Parliament report.

Accountability is “the obligation to answer”³¹, and for the PCE, responses to its advice and recommendations are an essential measure of effectiveness, of ascertaining whether it is actually influential. The PCE annually sets targets for and reports on the percentage of its recommendations responded to, adopted, or partially adopted. The potential for a project to lead to practical recommendations informs the PCE’s prioritisation process and the Commissioner has reflected on the challenges involved in developing appropriate recommendations. In the 2009/10 financial year the PCE did not meet its targets for having its recommendations adopted or partially adopted, but noted that, “there can be a temptation to make recommendations that are *too easy* to adopt or to claim credit for changes that would have happened anyway.”³² It is therefore essential to the PCE’s credibility that its reports and recommendations retain their rigour. As with many other integrity agencies, the PCE has the capacity to make recommendations only, not determinations.³³ As such the PCE’s influence lies in the power to embarrass, and that power is diluted if reports and recommendations are compromised.³⁴

Since the introduction of the new Standing Order in 2008, the PCE has presented seven reports to the House. Briefings on all from the PCE have been received by select

³⁰ Standing Orders Committee, p.42.

³¹ Loney, p.159.

³² Parliamentary Commissioner for the Environment, *Annual report 2009/10*, p.22.

³³ Snell, p.1.

³⁴ Joseph, p. 378.

committees. Four remain items of business before committees (three before the Local Government and Environment Committee and one before the Commerce Committee) and have been for up to eighteen months. Two received brief *pro forma* reports and one was the subject of a short narrative report from the Primary Production Committee which recommended only that the House take note of its report. While the new process therefore has given greater parliamentary prominence to the reports, as committees may otherwise not engaged with them at all, the response from committees suggests that it has yet to deliver the increased executive accountability hoped for. There may be a number of reasons why this is so. Committees are often busy and other items of business, particularly scrutiny of proposed legislation, may be given higher priority. Committees may genuinely believe that the recommendations in reports need no further exploration. Also, changes to Standing Orders do not immediately produce change in parliamentary practice. It may take a number of years for select committees to develop enduring practices for the detailed consideration of officer of Parliament reports as part of their ongoing work.

A further recent development has the potential to give more parliamentary time to officer of Parliament reports. Through agreement in the Business Committee time can be allocated on members' days for the debate of detailed select committee reports to the House. So far this procedure has been used to debate select committee inquiry reports but could be extended to reports on committees on issues raised by officers of Parliament. Responsibility to appropriately use the processes available to them resides with parliamentarians. Should better accountability not evolve over time and become a convention, the option remains of amending the Officer of the Auditor-General or PCE's establishing legislation to require responses to recommendations from the government or other public authority.

One recent parliamentary activity that suggests that some Members of Parliament are being influenced by PCE reports has also occurred in the current Parliament. Generally every other Wednesday sees the debate of members' bills. Two private members bills have drawn on PCE reports on environmental reporting and the introduction of smart electricity meters for their content. The former remains in the ballot for introduction to the House, while the latter was defeated at its first reading. The influence is not necessarily in one direction either. Another member's bill, on ensuring the sustainability of New

Zealand's biofuels, was referred to the Local Government and Environment Committee in 2009. The PCE made a submission on the bill, which informed a subsequent detailed investigation into biofuels, the findings of which were presented as a report to the House in July 2010.

It is too early to say whether a trend of parliamentary influence is developing or whether such activities are related to the formal process for consideration of reports produced by the 2008 change to Standing Orders. If "Parliament has the potential to act as more than simply the arena for party government"³⁵, then such signs of dialogue between Parliament and its officers are heartening, pointing to ways in which ideas that challenge executive dominance can develop and be debated. The close relationship between officer and Parliament may be characterised as "interdependence", whereby formal parliamentary connections provide the officer with independence from government, but at the same time require a degree of dependence of the officer on Parliament itself.³⁶

The Public Accounts and Estimates Committee of the Victorian Parliament developed this concept of "interdependence" in its inquiry into formalising arrangements for officers of Parliament and found that, "A balance is needed between ensuring officers of Parliament are independent from the executive and operationally independent of Parliament, and ensuring those officers have an appropriate measure of accountability to Parliament for their performance."³⁷ The reciprocal relationship between Parliament and its officers that can result in a select committee endorsing the recommendations of an officer, or an MP using an officer of Parliament report as inspiration for proposed legislation, carries obligations on both sides for it to work effectively and robustly. The officer's independence from the executive of course needs to be fiercely guarded, and the officer should reflect that independence in its work or operations.

At the same time, Parliament has a duty to hold its officers to account. While sufficient formal mechanisms for accountability exist, it could be argued that Parliament in recent years has not adequately held the PCE to account for its performance, and as such compromised the "interdependent" relationship of the two parties. Performance is

³⁵ Gay & Winetrobe, p. 9.

³⁶ Ibid., p.11.

³⁷ Public Accounts and Estimates Committee, p.67.

primarily scrutinised by select committees through annual estimates and financial review processes. The Local Government and Environment Committee has the option of conducting in-depth hearings on the PCE through each process. In the last ten years it has only done this three times for financial reviews and once for estimates, a total of four in-depth reviews out of twenty possible opportunities. The committee invariably reviews the performance of the Ministry for the Environment and Department of Conservation and investigates the ministerial appropriations for environment and conservation each year, but does not then always have time to scrutinise the activities of the PCE. It is logical for committees to prioritise exploring the departments and appropriations where greater sums of public money are spent, but the outcome does not enhance the PCE's relationship with Parliament's select committees.

Future functions

If Parliament is found to be wanting in the discharge of routine accountability duties, there must be some doubt as to whether it is capable of the increased vigilance needed when significant changes to the operations or functions of an officer of Parliament are proposed, as has recently been foreshadowed for the PCE. This section assesses the ramifications of possible new environmental reporting functions being required of the PCE and finds that there is opportunity for the PCE to enhance its role as an authoritative adviser to Parliament. At the same time, any attempt to prescribe activities for the position challenges the independence of its mandate, and increases the likelihood of executive attempts to interfere in how the PCE performs its functions.

The Local Government and Environment Committee conducting the 2007/08 financial review of the PCE was advised, "that the Minister for the Environment had approached the commissioner about a possible change to the functions of her office, asking specifically how she might be involved in developing new policy on state of the environment reporting."³⁸ Although no new legislation has yet been introduced, the same Minister has continued to state that an Environmental Reporting Act remains a priority and the PCE has explored the issue in a report of her own. New Zealand remains the only country in the OECD with no statutory requirement or process to collect data on environmental matters. So far two state of the environment reports have been produced by the Ministry for the Environment, in 1997 and 2007. Particular controversy

³⁸ Parliamentary Commissioner for the Environment, *Annual report 2007/08*, p.4.

surrounded the latter, with accusations of lobby group and executive interference, inappropriate policy interpretations, and the exclusion of a particular chapter from the final report.³⁹ The need for independent, authoritative, and regular state of the environment reporting to inform good environmental policy is widely-accepted.

The PCE, as an independent officer of Parliament would appear to be well-placed to contribute to this important undertaking, but the degree of the officer's involvement and the implications for its current mandate require careful consideration. Effective environmental reporting is difficult to achieve, with amongst others, decisions having to be made on what data should be collected and when, who collects the raw data, and who collates and interprets that data. For the 2007 report, the Ministry for the Environment employed 28 people, receiving assistance from over 200 others and more than 50 external organisations, such as government departments, Crown entities, and regional councils.⁴⁰ An office the size of the PCE, which currently has 17 full-time equivalent staff and a budget which has remained static at around \$2.7 million for a number of years, would be transformed if required to perform environmental reporting functions.

The Public Finance Act 1989 provides for funding for officers to be determined by Parliament through the Officers of Parliament Committee, with each officer making a submission on their draft budget. Thus the PCE would be able to assess the likely funding that would be needed for new functions and apply to Parliament accordingly. Potentially more problematic is the effect of any environmental reporting proposal on the culture and operational independence of the PCE. In its 25 years the PCE has only ever been a small office with a small budget, its success, in common with certain other watchdog positions, heavily dependent on the capability and personality of the office-holder.⁴¹ While this may be considered a weakness of the role, if the incumbent is unsuited to its performance, it is also integral to its identity. The mandate provides considerable scope for the PCE to set its work programme according to the vision of the office-holder and to surround him or herself with staff committed and loyal to that vision.

³⁹ New Zealand Herald, "Pollution study cut because not factual – Mallard", http://www.nzherald.co.nz/environment/news/article.cfm?c_id=39&objectid=10491734, last accessed, 20 January 2011

⁴⁰ Parliamentary Commissioner for the Environment, *How clean is New Zealand?*, p.35.

⁴¹ See Snell, p.1; Richardson, Beaumont, Taylor & Williams, p.168.

Generally there is a period of transition between office-holders and it takes time for the new person to establish their own preferred personnel and structure. Environmental reporting would require the injection of a significant number of new staff and given the technical expertise involved in reporting, the PCE could be limited in its choice of who to employ.

A further limitation of ascribing new functions to the PCE may be upon the officer's ability to determine its own work programme, identified by Thomas as one of the five indices of independence for parliamentary officers. Currently, the Controller and Auditor-General is the only officer that consults with Parliament on its annual work plan. While the submission of a work plan to Parliament offers another means of parliamentary accountability for officers⁴², the PCE's freedom to choose its priorities without interference is one of its great strengths and should be zealously guarded. There is a very real risk that the requirement to perform such a major task as environmental reporting could restrict resources that have previously been described as "limited and shrinking"⁴³ and the major casualty would be the PCE's ability to conduct major investigations. The PCE would be failing in its mandate if its ability to develop creative responses to significant environmental problems gave way to data-gathering tasks.

Parliament would also need to investigate the constitutional ramifications of any changes and consider whether they could alter the PCE's present relationships with Parliament and the executive. Wettenhall comments that agencies that perform transparency, accountability and integrity functions "act for the legislature, strengthening its hand through the technical competence they bring to bear in their work."⁴⁴ If the PCE was sufficiently supported in discharging these new functions and its ability to continue to investigate other matters preserved, then the addition of environmental reporting functions could be another development that demonstrates the "potentiality" of Parliament. True accountability relies on the provision of quality information about government activity.⁴⁵ The PCE would continue to report first and foremost to Parliament, whose receipt of this impartial and high-quality information would be empowering. An officer of Parliament would gather on Parliament's behalf the

⁴² Clark & De Martinis, p.38.

⁴³ Parliamentary Commissioner for the Environment, *Future directions*, p.20.

⁴⁴ Wettenhall, p. 132.

⁴⁵ Loney, p.160.

information that would inform assessment of past government performance and guide the development of future policy.

However, any information that could be used to criticise government performance is potentially controversial and protections need to be put in place to ensure that such information is not subject to executive interference. This type of reporting could draw the PCE closer to the executive. The PCE would need to be given access to a wide range of information, much of which would be held by government departments and other public authorities. Issues of “ownership” of information and who interprets the data would also need to be clarified. In her investigation into the issues, the PCE herself reflects on the importance of maintaining the independence of whoever conducts environmental reporting. She notes that the Chief Statistician decides independently on the procedures and methods used to collect statistics but can also be directed by the Minister for Statistics on what statistics should or should not be collected.⁴⁶ A similar challenge pertains to the collection of statistics on the environment. To prescribe what data should be collected in legislation would be too inflexible. Criteria and categories for data collection could be established through regulation but such instruments receive far less parliamentary oversight than bills.

Conclusion

The Officers of Parliament Committee is consulted on any legislative proposals to create new officers and should be involved when new functions for an existing officer are considered. Even if the government does not directly consult with the Officers of Parliament Committee, the subject select committee considering the relevant legislation could seek an opinion from the committee. The PCE has operated independently and effectively for over 25 years and, if anything, its relationship with Parliament has become closer over time. Appropriate legislative and parliamentary frameworks to support this relationship already exist, but it is important that Parliament recognises the opportunities that new functions could provide both for the PCE and the institution of Parliament itself, and that it assesses any new proposals with caution.

⁴⁶ Parliamentary Commissioner for the Environment, *How clean is NZ?*, p.35.

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