

# CHARITY COMMISSION

# INDEPENDENCE

## NCVO DISCUSSION PAPER

April 2015

### Executive summary

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Independence from both government and party politics is vital for the Charity Commission, particularly as the regulator of a sector that is characterised by its party political neutrality. Independence is necessary for its effective functioning, and for its credibility in the eyes of the general public and the charities it regulates. A charity regulator perceived to be political risks undermining perceptions of charities more generally.

And it is worth emphasising that perceived independence – being seen to be independent – is just as important as actual independence. It is not necessary to accept that the accusations of political bias levelled against both current and previous Commission boards have any merit in order to see that they can be damaging. Charities cannot afford for their regulator to be anything other than beyond all suspicion.

This paper aims to address some of the questions that over the years have been raised about the Charity Commission's independence, both with regards to its legal status as a non-ministerial department and its governance arrangements whereby the chair is a ministerial appointee.

The paper explores some alternative legal structures for the Charity Commission, which as a non-ministerial department is currently open to the criticism of being insufficiently distant from the executive and accountable to Parliament. Although some of the alternatives would offer considerable advantages, the paper concludes that none of them would be entirely appropriate for the Charity Commission, and there isn't a strong enough case to warrant such considerable constitutional change.

The paper therefore moves on to focus on the governance of the Commission, and how the current model could be strengthened. The paper argues that the current appointment process can be improved in way that distances the role of chair of the Charity Commission from executive control, and therefore addresses the issue of perception of independence. It is not suggested that ministerial involvement should be removed from the process entirely. But evidence from how the appointment process has worked for the National Audit Office, the Electoral Commission, the Parliamentary

and Health Service Ombudsman and the Office for Budget Responsibility indicates that greater parliamentary involvement is a success, by securing increased transparency in the process and better accountability of the position.

Finally, a number of proposals on how to change the appointment process for the Chair of the Charity Commission are put forward for discussion:

- to give formal control of the appointment to the House of Commons
- to widen the membership of the parliamentary committee responsible for the pre-appointment hearing so it includes representatives of both houses
- to give parliament an effective power of veto at the pre-appointment hearing
- to make the term non-renewable and fixed
- if there is to be reappointment for this to take place following a parliamentary hearing similar to the pre-appointment hearing
- to require a unanimous vote for appointment.

# Introduction

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It is nine years since the Charity Commission was restructured under the Charities Act 2006. While that legislation did much to improve charity law, some of its provisions relating to the status and governance of the Commission have created new challenges.

In particular, subsequent boards, and especially chairs, have been subject to the accusation that as appointees of the government of the day they are not sufficiently accountable and at serious risk of being perceived to be politically biased.

This is deeply problematic not only for the Commission itself, but also for public trust and confidence in charities. If the regulator is perceived to be political, it has the effect of casting a shadow of over charities more generally and putting into question their independence from party politics.

The case for a review of the Charity Commission's governance was made even more compelling by the recent report by the National Audit Office,<sup>1</sup> which highlighted a blurring of the executive and oversight functions. While acknowledging that the board's involvement in executive functions from late 2013 to mid-2014 could be justified by the need to address the under-performance issues highlighted in the first NAO report,<sup>2</sup> concerns are raised about the risk that the board's continuing involvement in executive matters for an extended period could limit its independence and ability to hold the executive to account effectively.<sup>3</sup>

Furthermore, the Commission is likely to be granted a range of additional powers by the Protection of Charities bill. As tools to enable the Commission to tackle abuse more swiftly and effectively, most of these powers seem reasonable. However, during the pre-legislative scrutiny carried out by the Joint Committee on the Protection of Charities Bill a number of concerns were raised about how the powers could be used.<sup>4</sup> This reinforces how important it is for the Commission to be seen to be acting independently and free from the pressures of any political agenda.

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<sup>1</sup> National Audit Office, Follow up on the Charity Commission, (January 2015) [www.nao.org.uk/wp-content/uploads/2015/01/Follow-up-on-the-charity-commission.pdf](http://www.nao.org.uk/wp-content/uploads/2015/01/Follow-up-on-the-charity-commission.pdf)

<sup>2</sup> National Audit Office, The regulatory effectiveness of the Charity Commission, (December 2013). [www.nao.org.uk/wp-content/uploads/2013/11/10297-001-Charity-Commission-Book.pdf](http://www.nao.org.uk/wp-content/uploads/2013/11/10297-001-Charity-Commission-Book.pdf)

<sup>3</sup> The Charities Act 2011 allows the board to undertake executive activities. However, the government's UK Corporate Governance Code says boards should not stray into executive management.

<sup>4</sup> See the report by the Joint Committee on the Draft Protection of Charities Bill (February 2015) [www.publications.parliament.uk/pa/jt201415/jtselect/jtcharity/108/108.pdf](http://www.publications.parliament.uk/pa/jt201415/jtselect/jtcharity/108/108.pdf).

# Concerns about the Charity Commission's independence

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## Legal structure

The Charity Commission's independence has been subject to criticism for many years. Much of this criticism can be related to its legal status as a non-ministerial department (NMD).<sup>5</sup>

The general basis of the criticism is that the Commission should exercise its powers on behalf of the public interest at large and free from government control and direction. More specifically, the Commission should be able to resist any attempt by the government of the day to interfere with the independence of charities and their right to criticize government actions and policies.

During the parliamentary debates on the Charities Act 2006, the question of the Commission's status was hotly debated in both houses, with politicians of different parties flatly disagreeing on what was best.<sup>6</sup> The Commission remained a non-ministerial government department, but government spokesmen were asked to provide assurances to Parliament that the independence of the Commission would be respected. As a concession government added a provision to the Act stating that 'in the exercise of its functions, the Commission shall not be subject to the direction or control of any minister or government department'.

It was also agreed that the Commission's status must be one of the areas specifically addressed in the five-year review of the Act.<sup>7</sup> Lord Hodgson's Review in 2011 did go on to consider a number of alternative options for how the Commission might be structured, but concluded that its current status as an NMD was 'the least worst option'.

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5 Non-ministerial departments are Government departments in their own right – but they do not have their own minister. NMDs are however accountable to Parliament through their sponsoring ministers. Another key characteristic of NMDs is that they have their own Estimate (money voted directly by Parliament) and separate resource accounts. Further information about the categories of public bodies is available in the Cabinet Office Guide for Departments.

6 Government minister Baroness Scotland of Asthal said 'Under the Bill [the Commission] will remain an independent regulator, completely free from any form of ministerial control... The Government believes that the Commission's independence in that respect is of paramount importance for the proper regulation of charities and for the public's confidence in charities.' But Baroness McIntosh of Hudnall argued that 'Whatever the formal issues, the terms "independent" and "a Government Department" do not sit altogether happily together. Therefore, despite my noble friend's earlier assurances, I urge the Minister to reconsider that matter and include in the Bill, for the sake of those who come after, a clear assertion that the Commission's independence from government is paramount.' (HL Debates, 20 January 2005).

7 In the final debate on the Bill, the Government Minister Lord Bassam of Brighton referred to this requirement: 'It might be that in four or five years' time people will take a different view about the way in which the Commission operates and, as a Government, we would be foolish to ignore criticism at that stage. We will judge any case for a change in the status of the Commission on its merits' (HL Deb 7 November 2006).

However, this model, while offering some degree of independence, is still seen by some legal experts and commentators as neither sufficient nor appropriate for the Charity Commission. The

Charity Law Association, for example, sees the current status of the Commission as:

‘likely to lessen, rather than increase, public confidence in charities. It will be seen as susceptible to being used by the government to further its own policies. Indeed, it is conceivable that this is in fact what the relationship between the Commission and the Government would develop into; it may not only be a matter of perception. To avoid this, the Commission needs to be – and to be seen as – an entity established to serve the public benefit and uphold the law, not beholden to the government and outside the sphere of governmental policy considerations.’<sup>8</sup>

Arguments for a review have become even more compelling in light of the latest version of the Treasury’s guidance to departments, which raises concerns about the accountability consequences of NMDs’ non-ministerial status. The guidance makes clear that ‘only rarely is a non-ministerial department the right choice as NMDs have limited accountability to Parliament’.<sup>9</sup>

## The appointments process

As with the majority of senior public roles, the Chair of the Charity Commission is appointed following a recruitment process in compliance with the Code of Practice published by the Commissioner for Public Appointments. However, the current process for public appointments has been subject to some criticism.

One of the key aspects of the current process of public appointment is the introduction of pre-appointment hearings to examine the ‘preferred candidate’ for certain public appointments, before the minister proceeds to confirm an appointment. In the case of the Charity Commission chair, this falls within the responsibility of the Public Administration Select Committee (PASC).

The government’s original rationale for proposing pre-appointment hearings was based on increasing democratic scrutiny of public appointments and providing greater public reassurance that

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8 See the report by the Joint Committee on the Draft Charities Bill (September 2004)

<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167.pdf>

9 HM Treasury, Managing Public Money

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212123/Managing\\_Public\\_Money\\_AA\\_v2\\_-\\_chapters\\_annex\\_web.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212123/Managing_Public_Money_AA_v2_-_chapters_annex_web.pdf)

The guidance sets out the reasons why at length: ‘NMDs do not answer directly to any government minister. They have their own accounting officers, their own estimates and annual reports, and settle their budgets directly with the Treasury. However, some ministerial department must maintain a watching brief over each NMD so that a minister of that department can answer for the NMD’s business in Parliament [...]. This limited degree of parliamentary accountability must be carefully justified.’

those appointed to key public offices are appointed on merit.<sup>10</sup> The expectation was that the committee hearings would focus on the professional competence and personal independence of the candidate.<sup>11</sup>

But some argue that the current system has a big weakness: MPs have insufficient power to influence appointments, and this undermines the important accountability function that scrutiny of appointments is intended to deliver. Aside from a handful of exceptions such as the Electoral Commission, the Independent Parliamentary Standards Authority and the Office for Budget Responsibility, MPs have no formal power over major public appointments. While the logic of the pre-appointment scrutiny system is that committees get a chance to have their say before an appointment is confirmed, it remains for ministers to make the ultimate decision.

As a result, there is some doubt about the extent to which Ministers may be fettered in their discretion to reject an appointee on the advice of a committee, meaning that most pre-appointment scrutiny is seen as serving little purpose except as a ‘rubber stamp’ for the benefit of the executive. In fact, the guidance says: “In the vast majority of cases, where an open and transparent process has been followed and the candidate selected on merit, the expectation is that the Select Committee will agree with the appointment of the Government’s preferred candidate”.<sup>12</sup>

The House of Commons Liaison Committee has considered the experience of holding pre-appointment hearings by select committees. Its finding was that, although the procedure represents a step forward in securing democratic accountability of ministerial decision-making, this is only a modest step forward and a number of changes to the system would be advisable.<sup>13</sup>

A report by the Constitution Unit at University College London (UCL)<sup>14</sup> also highlighted some difficulties in the process, in particular with regard to the apparent lack of a decisive role for parliamentary committees. The UCL research team suggested a number of options for the future development of pre-appointment hearings, including a greater role for parliament such as engagement with more than one candidate and a statutory power of veto.

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10 The Governance of Britain (July 2007)

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228834/7170.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf)

11 Concerns have also been expressed about the introduction of pre-appointment hearings. For a useful overview see House of Commons Standard Note ‘Pre-Appointment Hearings’ (February 2015).

12 Cabinet Office Guidance: pre-appointment scrutiny by House of Commons select committees, November 2013 ([www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/410932/Guidance\\_publication.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/410932/Guidance_publication.pdf))

13 Liaison Committee, First Report of Session 2010-12, Select Committee and Public Appointments, HC 1230

14 An Evaluation of Pre-Appointment Scrutiny Hearings, February 2010 ([www.ucl.ac.uk/constitution-unit/research/consultancy/consultancy-projects/PASreport](http://www.ucl.ac.uk/constitution-unit/research/consultancy/consultancy-projects/PASreport))

The operation of pre-appointment hearings was also examined by the Institute for Government,<sup>15</sup> which found a number of advantages but also potential risks in the process. The main advantages are that cross-party committees can assess candidates' independence from government and test their ability to withstand robust public scrutiny. Parliamentary scrutiny can also increase the transparency of the appointment process and the democratic accountability of executive functions carried out at 'arm's length' from ministers. But the risks include the possibility of deterring prospective candidates, politicising the appointments system and introducing delays into the process.<sup>16</sup>

Of particular relevance for the purposes of this paper is the concern among charities about the risk that exposure of appointees to select committees could lead to 'politicisation of the process', whereby candidates are judged on what their political affiliation is or how close they are to a minister instead of on whether they can do the job.

This is because, notwithstanding the non-partisan character of select committee work and the appointments system being structured in a strongly non-politicised way, the practice does not always live up to the ideal and political considerations can come into play.

This concern has emerged specifically with regards to the appointment process for positions in arm length bodies: as the Nolan Report on Standards in Public Life put it, there is 'much public concern about appointments to quango boards, and a widespread belief that there are not always made on merit'.<sup>17</sup>

Twenty years later, despite a number of improvements to the process since the Nolan report was published, these concerns persist and are often expressed in political and media circles. For example, the editor of The Spectator Fraser Nelson has warned against the serious political consequences of having a majority of Labour supporters as politically active quango appointees, describing this situation as a Labour Party 'government-in-exile'.<sup>18</sup>

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15 Institute for Government, *Balancing Act: the right role for Parliament in public appointments* (March 2011)

16 See House of Commons Research Paper 'Parliamentary involvement in Public Appointments' 08/39 (April 2008). The public appointments process has also been criticised for failing to encourage diversity, particularly with regards to crucial dimensions such as occupational and socio-economic diversity. See Policy Exchange report on 'Reforming Public Appointments' (2013) [www.policyexchange.org.uk/images/publications/reforming%20public%20appointments.pdf](http://www.policyexchange.org.uk/images/publications/reforming%20public%20appointments.pdf).

17 The Nolan Committee, *First Report on Standards in Public Life*, 1995

18 Fraser Nelson, 'Gordon Brown's secret army could defeat the Coalition's welfare and education reforms', (The Telegraph, October 2012) [www.telegraph.co.uk/news/politics/david-cameron/9633379/Gordon-Browns-secret-army-could-defeat-the-Coalitions-welfare-and-education-reforms.html](http://www.telegraph.co.uk/news/politics/david-cameron/9633379/Gordon-Browns-secret-army-could-defeat-the-Coalitions-welfare-and-education-reforms.html)

## Perception of independence

Criticism of both the legal status of the Charity Commission and the appointment process of its chair lead to problems surrounding the perception of its independence and politicisation.

The question of whether the criticism of politicisation is fair or whether these concerns are well founded is not the point: in the case of the Charity Commission the issue is that it must be seen to be manifestly independent, and this independence needs to be supported by a statutory status that prevents improper interference by any government. As the Institute for Government noted, the Charity Commission is one of those arm's length bodies the credibility and authority of which rests in large part not only on its actual but also on its perceived independence from the executive.<sup>19</sup>

At present, the crucial point is that the Commission is sometimes drawn into the political arena, which is inappropriate for a quasi-judicial body and deeply problematic for a sector that relies on being known as non-party political.<sup>20</sup>

As Lord Philips of Sudbury aptly put it during the parliamentary debates surrounding the passage of the Charities Act 2006:

'The Charity Commission is a quasi-judicial body and, just as the judges in the courts have to be seen to be independent as well as being independent, so the greater constitutional distance one can create between the Commission and the Government, the better for the Commission and the Government ... The public will not believe that, if the Charity Commission has non-ministerial departmental status, it is completely free of influence from, or behind the arras of, government or, indeed, senior opposition politicians.'<sup>21</sup>

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19 On the specific issue of political patronage, a recent ESRC-funded project led by Professor Matthew Flinders suggests that such political patronage in appointments is neither as prevalent nor as straightforward as commentators often suggest. OCPA data suggest that the vast majority of people appointed to ALBs claim no political affiliation at all. However, OCPA data shows that there is clearly a slight bias towards the incumbent party in public appointees. This does not necessarily mean that there is political bias in the appointments process: it may simply be that potential applicants are more likely to apply to serve a political party whose policies they are more sympathetic to.

20 For example, the previous Labour government urged the Commission to take a much closer look at the public benefit activities of private schools ([www.telegraph.co.uk/education/6838576/Private-schools-attack-politically-motivated-charity-rules.html](http://www.telegraph.co.uk/education/6838576/Private-schools-attack-politically-motivated-charity-rules.html)). More recently, the Coalition government's agenda on anti-terrorism is seen by many to be influencing the type of statutory inquiries opened by the Commission (see the report by think tank Claystone 'Muslim Charities: a suspect sector', November 2014, [www.claystone.org.uk/wp-content/uploads/2014/11/MuslimCharities\\_SuspectSector\\_Claystone.pdf](http://www.claystone.org.uk/wp-content/uploads/2014/11/MuslimCharities_SuspectSector_Claystone.pdf)).

21 HL Deb, 10 February 2005



## Alternative models

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We believe there are other options available for both the Charity Commission's legal status and the appointment process of its chair. These merit serious consideration for their potential. We judge them against their potential to fulfil four objectives which we consider to be crucial:

- Independence
- Public perception of independence
- Accountability to parliament
- Confidence of charities in their regulator

## Alternative legal structures

### Non-Departmental Public Body status

The usual model for public authorities whose functions require a degree of distance and independence from government is Non-Departmental Public Body status.

Non-Departmental Public Bodies carry out a wide range of administrative, commercial, executive and regulatory or technical functions which are considered to be better delivered at arm's length from ministers.<sup>22</sup>

NDPBs have varying degrees of operational autonomy and independence from ministers and the sponsoring department. However they all work within a strategic framework set by ministers and charged with fulfilling the public policy objectives within this framework. They are directly accountable to ministers who, in turn, are ultimately accountable to parliament and the public for the performance of their NDPBs and their continued existence.

They are headed by boards (or occasionally office-holders) comprising an independent, non-executive chair and a majority of non-executive members. Board members are usually appointed by ministers or by the Queen on the advice of ministers.

A series of reviews of NDPBs has however highlighted a number of issues with their roles and remits, in particular a lack of clarity about responsibility arrangements. Another major problem affecting NDPBs is the challenge of achieving an appropriate balance between freedom and control in the relationship with the sponsor department.<sup>23</sup>

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<sup>22</sup> An NDPB is defined as "a body which has a role in the process of national government but is not a government department, or part of one, and which accordingly operates to a greater or lesser extent at arm's length from ministers"

<sup>23</sup> National Audit Office, Non-Departmental Public Bodies Performance Reporting to Departments, (May 2010): [www.nao.org.uk/report/non-departmental-public-bodies-performance-reporting-to-departments](http://www.nao.org.uk/report/non-departmental-public-bodies-performance-reporting-to-departments)

To turn the Commission into a non-departmental public body would most likely require it to become accountable to a minister, which would reduce its level of independence. It would therefore fail to fully satisfy the independence test, and would also be found lacking with regard to the need to gain (and maintain) the confidence of those it regulates.

### **Pre-2006 status**

Stephen Lloyd, in an article published posthumously, argued that the best way to ensure that political stakeholders do not dominate the Commission is for its governance to revert to the pre-Charities Act 2006 arrangements.

The 2006 Act gave the Commission corporate status as an organisation in its own right, rather than as a body of Charity Commissioners. So the model here proposed would mean a return to the old style board with a smaller number of commissioners. Under this structure, the commissioners would be civil servants, therefore independent and apolitical.

At least two commissioners would be lawyers from the Government Legal Service and therefore knowledgeable about public law as well as charity law. By putting lawyers at the heart of the Commission's governance its quasi-judicial role would be better reflected.

The downside of this proposal is the risk that, over the years, the Commission becomes excessively dominated by slow-moving lawyers imposing an overly legalistic approach – a criticism that was made of the previous governance system and which led in part to the 2006 reforms.

The former composition of the Commission's board was also open to the accusation that it was too narrowly focused on legal issues, lacking a sufficiently diverse range of skills, and that the interests of some groups of stakeholders were not fully represented in its discussions.<sup>24</sup> In our view this model would therefore not be ideal, since it would not meet the requirement of having the confidence of charities.

### **Parliamentary status**

Parliamentary bodies are set up by, and report directly to, parliament (or one of its committees or offices), not to a government department or minister.

The governance arrangements for the National Audit Office (NAO) and the Comptroller and Auditor General (C&AG), with regard to their relationship with parliament, are often used as a benchmark of independence and accountability to be applied to the creation of new watchdogs.

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<sup>24</sup> Private Action, Public Benefit, Strategy Unit Report (September 2002)

Indeed the story behind the origins of the NAO, set up under the National Audit Act 1983 to replace the Exchequer and Audit Department, is comparable to context of debates about the status of the Charity Commission today.

There were concerns that the Exchequer and Audit Department, as a government department, was insufficiently independent of the government, and the Treasury in particular, to be able to fulfil, and be seen to fulfil, its responsibilities for scrutinising public expenditure free from the influence of government. As with the Charity Commission, the question of whether these concerns were well founded is not the point: the issue is manifest independence, supported by a statutory status which prevents improper interference by future governments.

The NAO's independence derives from the unique position of the Comptroller and Auditor General. The key characteristics of this model can be summarised as:

- Special parliamentary involvement in appointment and dismissal
- The C&AG is appointed by the Queen, the Head of State, on an address from the House of Commons moved by the Prime Minister after agreement with the Chairman of the Public Accounts Committee. The C&AG can only be removed from office by the Queen on an address from both Houses of Parliament.
- A statutory committee which is responsible for budget approval and oversight, on recommendation from the C&AG thus allowing the NAO financial independence.
- Parliamentary Accountability through the Committee of Public Accounts and the Public Accounts Commission, and through independent auditors appointed by the Commission.
- Staffing independent of the civil service.

The model governing the National Audit Office offers a useful starting point at least as an analogy for what is needed. To make the Commission accountable to parliament, in a similar way to the NAO, would help increase its independence from government.

However, the NAO performs its functions on behalf of parliament and serves to hold the executive to account, so it is easy to see why such functions must be under the control of parliament and not that of the executive. It is less easy to see how an equivalent case could be constructed for the executive and judicial functions involved in regulating charities.

Therefore, although the NAO might be a desirable model for the Charity Commission in theory, it is not justifiable in practice.

## Alternative appointment processes

The focus of our attention has therefore been on the governance of the Commission, and how to ensure that the current organisational model works better by strengthening its governance.

This is where parliamentary model does offer a number of preferable options, particularly for the appointment process of the Chair of the Charity Commission.

### National Audit Office: partnership between parliament and government

Again the model adopted by the National Audit Office is worth considering, as a way to address the concerns about the status of the Charity Commission.

One of the key characteristics of this model is the parliamentary involvement in appointment and dismissal of the Comptroller and Auditor General: the appointment is made by the Queen on the recommendation of the prime minister having consulted the chairman of the public accounts committee.<sup>25</sup>

Establishing the office as an officer of the House of Commons, to be appointed by the crown, but in consultation with the chairman of the PAC has the effect of moving the C&AG's centre of gravity away from the Treasury and towards the Commons, leaving him or her in an independent position between the two.

The fact that the PAC chair is, by convention, an opposition backbencher indicates the bi-partisan nature to the process. It also gives backbenchers an important role in the actual appointment, if not the recruitment process.

The National Audit Act also specifically provides that neither the C&AG nor NAO staff 'shall be regarded as holding office under Her Majesty or as discharging any functions on behalf of the crown'.

### Electoral Commission: direct control by parliament

The Electoral Commission is another parliamentary body, set up under to Political Parties Elections and Referendum Act in 2000. The Commission is directly accountable to Parliament through the Speaker's Commission on the Electoral Commission.<sup>26</sup>

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<sup>25</sup> Section 1 of the Act provides that: 'The power of Her Majesty under section 6 of the Exchequer and Audit Departments Act 1866 (appointment of and status of Comptroller and Auditor General) shall be exercisable on an address presented by the House of Commons, and no motion or shall be made for such an address except by the Prime Minister acting with the agreement of the Chairman of the Committee of Public Accounts'.

<sup>26</sup> The Committee is overseen and chaired by the Speaker. There are a number of ex officio members, the Chair of the Political and Constitutional Reform Committee, the Lord President of the Council. The Prime Minister then appoints a Minister with responsibilities in local government. In addition to these members, there are five members appointed by the

The Speaker's Commission has various roles, including determining and overseeing the procedures for selecting individuals to be put forward for appointment or reappointment at the head of Electoral Commission.

Although appointments to the Electoral Commission are not monitored by the Office of the Commissioner of Public Appointments (OCPA), the Speaker's Committee seeks to act in accordance with the principles laid out by the OCPA in making appointments. For the last appointment in 2012, the Speaker's Committee accordingly carried out a performance appraisal using a sub-committee, which unanimously recommended reappointment of the chair.

Once the Committee has decided to recommend the appointment or reappointment of a member of the Electoral Commission, PPERA requires the Committee to consult with the leader of each party in the Commons. Once this has taken place and been agreed to, the Queen appoints to the Chair and Commissioner's on behalf of the Commons and the Speaker's Committee.

A similar example is the Parliamentary Commissioner for Standards, who is selected following a process run by the House of Commons Commission (chaired by the speaker).

### **Parliamentary and Health Service Ombudsman: joint recruitment by Parliament and Government**

The Parliamentary and Health Service Ombudsman is an independent crown servant appointed by the Queen. Arrangements for the Parliamentary Ombudsman partially mirror those of the C&AG. They therefore offer an interesting example of how a public appointment can be made with greater involvement by Parliament, which in this case takes a lead role in a joint process with the executive.

Under the Parliamentary Commissioner Act 1967, the appointment is made by the Queen based on the recommendation of the prime minister and with reference to a resolution of both houses of parliament. However, the practice for many years was that the Cabinet Office handled most appointments.<sup>27</sup>

For the latest appointment, it was agreed that it would be more appropriate for the recruitment to be managed by the House of Commons, although this would be done in close co-operation with the Cabinet Office and the Department of Health. The lead given to parliament reflects the parliamentary nature of the role.

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Speaker. Members serve for the full length of the Parliament, (unless they cease to be MPs, resign or someone is appointed in their place), and can be reappointed.

<sup>27</sup> The previous Chair, Ann Abraham, was appointed in 2002 following an open competition managed by the Cabinet Office. The then Chair of PASC was a member of the selection panel – but there was no pre-appointment hearing and no consultation with the wider House of Commons.

Although the appointment does not come within the remit of the Commissioner for Public Appointments, reference was made to the Commissioner's code of practice as best practice.

Consultants were also employed to assist with the employment process. The principle clerk of select committees chaired the selection process and after candidates had been shortlisted, interviews were conducted with the involvement of both PASC and the Department of Health.

The panel unanimously recommended the appointment of the current Ombudsman. After conducting a pre-appointment hearing, PASC also unanimously supported the appointment. The Prime Minister then tabled the motion for debate and approval by the House of Commons.

### **Office for Budget Responsibility: Parliamentary veto**

The Office for Budget Responsibility, established under the Budget Responsibility and National Audit Act 2011, offers a rather radical example of how parliamentary involvement can be enhanced.

The Treasury Select Committee of the House of Commons has been conferred the right to veto the government's nominees for the most senior positions, meaning that they are subject to a 'dual lock', with minister and select committee both needing to approve the appointment.

The decision to give MPs a veto over appointments to the OBR was motivated by a desire to ensure that the independence of the new body was put beyond question. It is widely thought that the credibility of the new body has been enhanced by the three OBR executive directors having gone through this scrutiny process.

There have been a number of calls for the power to recommend against the appointment of the preferred candidate to be turned into a formal veto on their appointment.<sup>28</sup> An absolute veto would in effect mean that no appointment would proceed unless the Committee had approved the appointment. This is effectively the system in operation for many posts in the USA where senate agreement is needed to ratify a wide range of Presidential nominations.

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<sup>28</sup> As discussed in the UCL Constitution Unit paper 'An Evaluation of Pre-Appointment Scrutiny Hearings'.

## Proposals for discussion

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We believe that considerable improvements to the issue of perception of independence can be made by first addressing the appointment process, and by making changes to the current system aimed at distancing the role of chair of the Charity Commission from executive control.

This could be achieved without the need for major reforms such as those which would be required to change the legal status of the Charity Commission. While its present NMD status has the disadvantages outlined above, adopting other forms would have substantial implications in terms of the Commission's funding and staffing arrangements.

We have therefore set out a number of proposals specifically aimed at the appointment process.

None of our proposals suggest removing ministerial involvement from the process entirely. This is because trust between the organisation's chair and ministers is an important basis for a good institutional relationship – and trust is likely to be greatest when the current ministers have been involved in the appointment of the current chair.

We do however argue in favour of a greater role for parliament in the appointment of the chair of the Charity Commission. By increasing the opportunities for parliament to scrutinise the executive and require it to account for its decisions, the post is distanced from too close a relationship with the executive.

Indeed, involving parliament in the public appointments process brings a number of advantages. Cross-party committees can assess the independence from government of candidates and test their ability to withstand robust public scrutiny. Parliamentary scrutiny can also increase the transparency of the appointment process and the democratic accountability of executive functions carried out at 'arm's length' from ministers.<sup>29</sup>

Greater parliamentary involvement could take on a number of forms.

### Joint appointment with the executive

One possibility is to give the House of Commons formal control of the appointment of Chair of the Charity Commission, along the pattern provided by arrangements for the appointment of the Comptroller and Auditor General of the NAO.

The advantage of giving formal responsibility to parliament, and requiring confirmation from the relevant House of Commons committee is that the process preserves and explicitly demonstrates

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<sup>29</sup> See House of Commons Research Paper '08/39 Parliamentary Involvement in Public Appointments' (April 2008).

the independence from the executive of the role. This is important because the chair of the Charity Commission is a post where it is vital for the reputation and credibility of the public body in question that the post holder is, and is seen to be, independent of individual ministers and government as a whole.

## Joint parliamentary committee

Another option for reform is to simply change the last stage of the process, by giving responsibility for the pre-appointment hearing to a joint parliamentary committee. The committee would comprise representatives of both houses, and would be chaired by a cross bencher (a composition similar to that of the recently established Joint Committee on the draft Protection of Charities bill).

The cross-party membership and inclusion of peers is likely to better demonstrate that pre-appointment hearings provide impartial scrutiny at the highest level.

## Parliamentary veto

The Institute for Government has argued for the creation of a new category of 'independent public interest bodies', which would 'comprise bodies whose credibility depends on them being clearly insulated from ministerial interference'.<sup>30</sup>

Senior positions in this category would form an 'A List', for which the Institute recommends that parliament should have a similar level of oversight to that granted over the OBR, with an effective veto power over appointment.<sup>31</sup>

A recommendation for reform is that the role of Chair of the Charity Commission should be included in the list of roles for which parliament should be granted an effective veto power over appointment. This is because the post of Chair of the Charity Commission is one for which it is of great importance that independence from government is preserved, given its relevance to the Commission's credibility, and the significant public and parliamentary interest.

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<sup>30</sup> Institute of Government, Read Before Burning: how to increase the effectiveness and accountability of quangos (July 2010)

<sup>31</sup> This would not however be an absolute veto such as the one that operates posts in the USA where senate agreement is needed to ratify a wide range of Presidential nominations. This is because the concept of an absolute veto is not compatible with the UK system, which is considerably different from the USA. The logic for the US veto is that candidates have not gone through an application process which formally tests their competence to perform the role but are essentially put forward as political nominees. That approach is not followed in the UK where posts of this nature are open to public application and there is very limited scope - in principle none - for party political considerations.



## Non-renewable term

To achieve a higher degree of independence, the chair of the Charity Commission could be appointed for a single non-renewable term. This is seen to be one of the most effective safeguards against concerns that an individual's independence may be influenced by a desire for reappointment. For example, a single non-renewable term has recently been established for the Parliamentary Commissioner for Administration. A regulatory reform order was put into effect to enable the ombudsman to work more flexibly and in partnership with the local government ombudsmen, and the Parliamentary Commissioner Act 1967 now specifies a seven year term for the post.

If this option were chosen, we propose that the chair of the Charity Commission be appointed for a single term of five years, similar to that set for the Parliamentary Committee for Standards.<sup>32</sup>

## Unanimity

Another minor change, without restructuring the whole appointment process, could be to require that after the pre-appointment hearing PASC agrees unanimously on the candidate.

An overview of voting records shows that when committees have not split on particular appointments, this has been beneficial for the role and for the candidates' success.<sup>33</sup>

## Parliamentary power over reappointment

At the moment, pre-appointment hearings only apply to appointments of new candidates – and not to extensions or re-appointments.

If the possibility of reappointment is maintained, it is proposed that, for all appointments on a renewable fixed-term basis where a select committee has the right to hold a pre-appointment scrutiny hearing, government should make time for a reappointment hearing on the same terms. This would allow parliament to focus on an appointee's performance and conduct in the role to date as well as their plans for the future.

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32 The term of office for the Commissioner is of five years and non-renewable. This change was made following the eight report from the (Wicks) Committee on Standards in Public Life, which commented on the ambiguous nature of the office in terms of its operational independence.

33 The Liaison Committee maintains a list of pre-appointment hearings held by select committees and their outcomes: [www.parliament.uk/documents/commons-committees/liaison/Pre-appointment-table-by-department-Oct-2014.pdf](http://www.parliament.uk/documents/commons-committees/liaison/Pre-appointment-table-by-department-Oct-2014.pdf).

## Conclusion

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In this paper NCVO sets out a range of proposals to improve the process by which the chair of the Charity Commission is appointed, with particular focus on how parliament's involvement can be increased. The credibility and authority of the Charity Commission rests in large part on both its actual and its perceived independence, so the rationale underlying all the different options is to distance the appointment process from party political influences and expand the power of parliament.

Undoubtedly our proposals will not find favour on all sides, but we hope at least to make a constructive contribution to the long standing debate about political bias in the appointment process, and most importantly to help the Charity Commission remove itself from ongoing criticism about political patronage.

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