Chapter 5

Responsibility

The honor of the political leader, of the leading statesman, … lies precisely in an exclusive personal responsibility for what he does, a responsibility he cannot and must not reject or transfer.

— Max Weber[1]

"Systemic Failure" as "Human Failure"

The election to political office carries with it the acceptance of a leadership role in the community. One of the expectations of leadership is that the leader will be responsible and accountable for what he or she does and will apply himself or herself with diligence to the tasks at hand.

Chapter 4 described the identified problems in the management and financial administration of the House of Assembly as a *systemic failure*. This means that there was a broad, system-wide breakdown, not only in controls and proper decision making, but also in attitudes and sense of responsibility on the part of those in charge.

One of the dangers of describing something as a *systemic failure* is that there is a tendency to "de-personalize" the nature of the problem. We should never forget that a systemic failure is always, at its root, a *failure of people*. It is the actions, inattentions and attitudes of people that will ultimately determine whether a system works or fails. At its most basic, a successful system must have actors who acknowledge and accept responsibility for their role in it. This is certainly true where the actors have been entrusted with authority to control and spend public money. It is not enough simply to refrain from intentionally misappropriating it. There must at all times be a heightened sense of responsibility and appreciation that they are the guardians of the public purse and a willingness to be proactive

[1] Weber, Max, "Politics as a Vocation" [Politik als Beruf], *Gesammelte Politische Schriften* (Muenchen: Dunckerf Humblodt 1921), pp. 296-450. This speech was first given at the university in Munich in 1918, and published the following year by Duncker & Humboldt.

and vigilant to ensure that even inattention to duty or complacency does not contribute to system breakdown.

In this chapter attention will be focused on the need for acceptance of responsibility by MHAs, the Commission of Internal Economy, the Speaker, the Clerk of the House, the staff of the House administration and others, not only in an after-the-fact manner, but in carrying out their ongoing responsibilities on a day-to-day basis. The emphasis will be on the creation of an environment where the need for proactive responsible behavior can be constantly brought home to the actors involved, leading ultimately to the establishment of a culture of duty rather than a culture of self-interest, cursory engagement or dereliction. The basic values of accountability and transparency, amongst others, will be examined with a view to translating them into a structure that enhances a sense of public responsibility and, in so doing, may contribute to building public confidence in the system.

External and Internal Responsibility

One of the themes underlying many of the representations made to me and in many of the explanations for the problems with the existing system of administering compensation and allowances for MHAs, has been the notion of *external fault or responsibility*. This took two forms. When confronted with a demand for an explanation of why certain events occurred as they did, there was a tendency to say either that the problem was a "systemic" one, thereby masking the fact that ultimately it is people who make a system work or not work, or, if compelled to point a finger at an individual, to say that "it's not me; it is someone else" who is responsible. Sometimes this mutates into an exercise in scapegoating.

A mature political system, like any system, must have clearly demarcated areas of responsibility for the actors within it, together with an ethos that encourages a willingness on the part of those actors to be prepared to live up to the standards expected of them and to acknowledge failures. Without a culture that encourages honest introspection and a willingness to accept the possibility of *internal fault or responsibility* in appropriate cases, there is a risk that deep cynicism and suspicion will develop among those outside the system who hear an assertion of external responsibility that does not appear credible, leading ultimately to an assumption (even where the actor in fact has no personal responsibility) that the person seeming to deflect blame has something to hide. Ultimately this translates into a received wisdom that politicians are not honest in what they say and generally act out of self-interest.

Often, this over-developed tendency to lay responsibility at the feet of some external source involves too simplistic an analysis. This is well-illustrated, I think, by the recent public controversy, mentioned earlier, involving allegations of "double billing" by certain members against their constituency allowances. Public statements by some individuals, both MHAs and members of the public, have suggested that the problem of double billing arose out of poor bookkeeping practices in the House of Assembly. However, too great a focus on the inadequacies of accounting controls in the House masks an important distinction that has been alluded to earlier. The "problem of double billing" is, in reality, two separate

problems: double *billing* and double *payment.* When this distinction is kept in mind, it is clear that responsibility for ensuring that double *billing* does not occur must rest with the MHA concerned. It is the Member who incurs the expense, controls the records of that expense and causes the claim form to be completed. It is up to the Member to maintain proper controls over the record-keeping within his or her constituency office and to instruct any assistant to whom the task is delegated as to the manner in which the claim process should be carried out. If this is done correctly, there would be no issue. It does not take much sophistication to recognize that one ought not to claim for something twice, and that one has to be alert to that possibility inadvertently occurring when individual receipts are being assembled for claim submission.

It is only where the member does not maintain proper records, or does not take the time to check back over previous records against the possibility of submitting a claim twice, or does not instruct an assistant properly, or a mistake is otherwise made, that there is even a possibility that public funds will be spent improperly.

It has been said that MHAs were encouraged to rely upon the administrative staff in the House of Assembly to pick up any mistakes that may have been made. In fact it was suggested that MHAs were lulled into a false sense of security in relying upon the House staff for this purpose. In some cases, claim forms were actually prepared and filled out by House staff using a collection of receipts that may have been deposited on a staff member's desk by an MHA, and using forms that had been signed blank in advance by the member. I do recognize that, depending upon the nature and intensity of the representations that may have been made to MHAs in this regard, it may not have been totally unreasonable for members to take some comfort in the fact that whatever they submitted would be double-checked. Nevertheless, I do not accept the proposition that it was appropriate for MHAs to download their total responsibility on to others. Surely, there remains a responsibility on the part of the MHA to attempt to be as accurate as possible and not to claim something they have not reviewed and agreed with. Otherwise, MHAs would be encouraged to submit claims for all sorts of things without giving any independent judgment as to whether or not the types of claims were within the understood guidelines or not.

Other scenarios may not be quite so simple. For example, it may be said, analogous with the double billing scenario, that MHAs are equally totally responsible for ensuring that their spending does not exceed specified maximums. However, if the systems are not in place to track spending amounts, and Members are encouraged to rely on officials to tell them when they are over their limit, there may be some basis for saying that the responsibility for exceeding allowance maximums might not rest totally with the MHA concerned. Having said that, it seems to me that there is still a residual responsibility on the part of the Member. Clearly, where there are substantial excesses, one would expect the Member to have a general (if not a precise) sense of whether the amount of spending is likely to be over the maximum allowable.

A still more difficult situation is where the issue involves determining whether a particular item of expenditure falls within the types of expenditure that are allowed to be claimed. This is an area where an MHA may have legitimate difficulty in deciding, in a

particular case, whether to make a claim. In close cases, it may not be sufficient to rely on generalized principles. This is clearly a situation which does require clear rules, or a means of getting clear rulings.

At the end of the day, however, the MHA concerned must bear the residual responsibility for any improper expenditure of public funds. In the words of the great political sociologist Max Weber in the epigram at the beginning of this chapter, "the honor of the political leader, of the leading statesman … lies precisely in an exclusive *personal* responsibility for what he does, a responsibility he cannot and must not reject or transfer."[2] It is not sufficient, I would suggest, in cases of doubt to "take a chance" and make a claim, hoping that others will take the responsibility for allowing or disallowing it. In the end, it has to be a matter of judgment and conscience on the part of the MHA, recognizing that what he or she is dealing with is not his or her own money. Prudent stewardship should require erring on the side of not making a claim unless the MHA concerned is satisfied that it is completely legitimate.

This brief discussion underlines the need for clear criteria to be established to assist MHAs in making appropriate decisions with respect to the use of public funds. The establishment of clear criteria, in itself, will go a long way to creating an environment of responsibility.

Accordingly, I recommend:

Recommendation No. 3

A proper regime providing for claims for reimbursement by MHAs for expenditures made in the performance of their constituency duties should:

(a) place ultimate responsibility on the MHA for compliance with the spirit and intent of the regime as well as its specific limits and restrictions;

(b) provide adequate resources, instruction and training to MHAs and their constituency assistants to enable them to understand and comply with the regime;

(c) be clear and understandable in its application;

(d) contain detailed rules and examples of the types and amounts of expenditures permitted; and

(e) contain mechanisms whereby, in doubtful cases, MHAs can obtain rulings which they can reasonably rely on in making and claiming for a particular expense.

[2] See footnote 1.

The other component of responsibility is that there must be a means of calling violators of clear criteria to account and taking enforcement action in respect of those violations. Without a mechanism of calling to account, the public will not have confidence that the persons within the system are being encouraged to take their responsibilities seriously. It is not sufficient to rely only on criminal and quasi-criminal sanctions in the general law.[3] They have limited application. Enforcement of standards of public behaviour must be accomplished through a variety of other, more broadly applicable, mechanisms.

The rest of this chapter will focus on a number of disparate topics, but which have one of two unifying themes: the establishment of clear expectations and the creation of mechanisms for calling persons to account when those expectations are not met.

Tone at the Top

In Chapter 4 I observed that the "tone at the top" of an organization is fundamentally important in supporting a culture of responsibility. I further observed that there was a failure to pay proper attention to governance issues within the House, with the Commission of Internal Economy not giving the financial management and administrative affairs of the House the priority they deserved and not regarding themselves as having sufficiently high duties of oversight and due diligence.

As I observed in Chapter 4, the "tone at the top" filters down and sends signals throughout the organization as to the overall standards of behaviour expected. Although there has been significant improvement, resulting in part from initiatives taken by the current Speaker since 2004 to improve attention to governance issues, there is, as I have noted, still room for improvement. Other steps should be taken to promote and encourage a sense of responsibility at all levels of the House organization that is commensurate with the duties that are imposed. This is important not only to improve the overall environment, but also to promote public confidence in the integrity of the institution.

The Commission of Internal Economy must take a leadership role in this regard.

Members' Codes of Conduct

The notion of a code of conduct that enunciates basic standards of behaviour has been an integral part of regulation of the professions for a long time. More recently, it is

[3] See *Criminal Code of Canada*, R.S.C. 1985, c. C-46, Ss. 12 (influence peddling); 122 (Breach of Trust by a Public Officer); *Provincial Offences Act*, S.N.L. 1995, c. p. 31.1, s. 5.5 (General Penalty for Contravening Provincial Statute).

becoming common in the business world.[4] In recent times, a number of jurisdictions both in Canada and elsewhere have taken the step of adopting codes of conduct to govern parliamentarians in the conduct of their duties.[5]

The importance of promoting high standards of behaviour by public officials was emphasized by the Supreme Court of Canada, as follows:

> It is hardly necessary … to expand on the importance of having a government which demonstrates integrity. Suffice it to say that our democratic system would have great difficulty functioning efficiently if its integrity were constantly in question. While this has not traditionally been a major problem in Canada, we are not immune to seeing officials fall from grace as a result of a violation of the important trust we place in their integrity … [T]he importance of preserving integrity in the government has arguably increased given the need to maintain the public's confidence in government in an age where it continues to play an ever increasing role in the quality of everyday people's lives …
>
> In my view, given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe.[6]

I am satisfied that a code of conduct is an important element in fostering public trust in our elected officials and in the institutions in which they operate. By setting out guidelines as to the conduct expected of MHAs in fulfilling their duties, a code will reinforce the notion of accountability that should permeate the organization and set an appropriate tone for the House. As stated by E. N. (Ted) Hughes, Conflict of Interest Commissioner of British Columbia:

---

[4] Recently a study was conducted that asked the CEOs of many of Canada's top organizations whether their organization had a corporate ethics policy in place. Eighty-six percent of the respondents to this survey stated that their corporations had a code of ethics in place. As well, 97% of respondents felt that the policy they had adopted was effective. Jang B. Singh, *Business and Society Review: Ethics Program in Canada's Largest Corporations* (Oxford: Blackwell Publishing, 2006).

[5] See Alberta, Office of the Ethics Commissioner, *Conflict of Interest Legislation, Policies and Guidelines for Members of the Legislative Assembly of Alberta and Designate Senior Officials of the Public Service of Alberta*, (2006); Nunavut, Legislative Assembly, *Members Obligations*, (2006); Saskatchewan, Legislative Assembly, *Code of Ethical Conduct for Members of the Legislative Assembly*, (2006); Canada, *Conflict of Interest Code for Members of the House of Commons*, (2006), (Standing Orders Appendix 1); and United Kingdom, House of Commons, *The Code of Conduct together with the Guide to the Rules Relating to the Conduct of Members*, (2005).

[6] Per L'Heureux-Dube, J, writing for the majority in *R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 (SCC) at paras 14 and 18 (on appeal from the Newfoundland and Labrador Court of Appeal).

> It is my view that a nation is no stronger than its ethical and moral principles, and the ultimate strength of those ethical and moral principles is in the hands of those citizens democratically elected to lead our country in the provinces, the territories and our municipalities. The cornerstone that underpins sound moral and ethical principles and values is the integrity, honor and trustworthiness of our democratically elected officials at all levels of government.[7]

Many of the codes that have been adopted are expressed in general, aspirational language. Their intent is not to set out a set of detailed rules to control every aspect of Members' behaviour, but rather to set general public standards by which the behaviour of parliamentarians can be assessed and, in so doing, provide general guidance to them so they can order their affairs on the basis of principle, not expediency or self-interest. The focus of a code is usually not on obviously illegal behaviour since that is already the subject of normative rules in the law of the land. Instead, codes often focus on areas of activity that would generally be regarded as unethical or inappropriate according to community expectations. In that regard they often contain general guidelines, and broad prescriptions and prohibitions.

Conflict of interest guidelines are a subset of broader guidelines that are often contained in codes of conduct. In this province, MHAs are subject to a series of conflict of interest prescriptions set out in legislation.[8] The trend in Canada and in the United Kingdom is towards a movement away from specific narrow concerns like conflict of interest to broader concerns of general propriety and integrity. It is generally recognized now that legislative functioning can be compromised in many ways apart from violation of conflict of interest prescriptions.

In those jurisdictions that have adopted codes of conduct for elected officials, it is generally accepted that standards of proper behaviour need to be declared publicly and, as well, an effective process for holding officials to account for breaches of those standards should be developed and implemented. To achieve acceptability by the public, however, any code of conduct that is adopted must be seen to be administered impartially and independently of the political system to which it applies.

A number of approaches to the implementation of a code of conduct have been developed. One is to enshrine the code in a legislative framework. Another is to have the legislators themselves develop the code and assign it either to a parliamentary commissioner for implementation and enforcement or to a committee of the legislature itself. A further approach would be simply to adopt a series of aspirational guidelines and leave compliance internally to each individual member's conscience.

---

[7] The Hon. G. Evans et al., "A Roundtable on Ethics and Conflict of Interest," (1995-96) 18 Canadian Parliamentary Review 25 at p. 31.

[8] *House of Assembly Act*, R.S.N.L. 1990, c. H-10, Part II.

In my view, given the current political climate, the notion of self-regulation by Members themselves would likely have little credibility with the public. If a code of conduct is to be an important element in a political system designed to foster public trust, it must be seen to be more than merely aspirational; in short, there must be some mechanism for achieving accountability. Having said that, the actual development of the code should not, I believe, be imposed from without. It is now recognized that, to be effective, codes must emerge from within the culture of the organization and reflect its own fundamental values.

It would be inappropriate in the circumstances, therefore, to attempt to legislate a code on the basis of detailed recommendations from me. The Members of the House of Assembly themselves must have a role in debating and defining in a public way the standards of public behaviour that they believe should apply to them.

In my view, therefore, while I am satisfied that the adoption of a code of conduct is advisable, the way in which that should be brought about is by the House referring the matter to the Standing Committee on Privileges and Elections, or to a committee specially constituted for the purpose, to develop and propose a code to the House for adoption by resolution.[9] Types of areas often covered by codes of conduct are as follows:

- standards of behaviour, impartiality and conflicts of interest
- appointments and other employment matters
- outside commitments
- personal interests
- the tendering process
- corruption
- use of financial resources
- gifts
- whistle-blowing[10]

There are many examples of codes in existence. Several of them are appended to this report.[11] As a starting point, a suggested draft for consideration by the Standing Committee on Privileges and Elections is also appended.[12]

Upon the adoption of a code, it should be regarded as setting a standard of behaviour

[9] I have been informed that the Privileges and Elections Committee of the House has not been appointed for the current General Assembly. Obviously, if that committee is to be charged with responsibility for developing and recommending a code of conduct to the House, members should be appointed forthwith.

[10] These components for a code of conduct are taken from "Code of Conduct for Local Government Employees," a paper prepared by the Local Government Staff Commission for Northern Ireland, (2004). They are but some of the many kinds of conduct that can be considered for such a code.

[11] See Appendix 5.1 for samples from the United Kingdom House of Commons, the Legislative Assembly of Saskatchewan, the Legislative Assembly of Nunavut and the Federal House of Commons.

[12] See Appendix 5.2.

for members which, if violated, would expose the violating member to censure. The House of Assembly presently has a mechanism in place with respect to conflicts of interest for investigation of alleged violations by the Commissioner for Members' Interests who can make recommendations to the House for a variety of sanctions.[13] I believe this model, which has some familiarity, should be adapted to deal with broader questions of behaviour as well as conflicts of interest.

All Members of the House, when being sworn as Members following an election, should be expected, as part of the oath that they swear, to include an affirmation of support for the principles stated in any code of conduct adopted by resolution of the House. In this way, especially for newly elected members, it can become an important reminder of the expectations for an MHA's behaviour.

It may be objected that, for existing Members of the House, the participation in the development of a code and its affirmation may amount to an acknowledgment by Members that they have not, until now, met the standards being adopted. On the contrary, participation in a debate and in the adoption and subsequent affirmation of a code gives each Member of the House an opportunity to affirm values which they believe in and have attempted to follow. The process can and should be a positive affirming experience.

It may also be argued that codes are in essence "motherhood" statements and that there is little likelihood of real practical impact or enforcement. The answer to this objection is found in the following observation:

> Arguing that codes should be avoided because they will never be implemented or enforced is to concede the point that is at issue; that parliament is incapable of regulating itself. It is to concede that the public's perception is correct. So the conclusion is that codes are needed in order to prove the skeptic wrong; and if they are to be effective, and to avoid being classed as window dressing or ploys to avoid responsibility, or if they are to avoid reducing still further the reputation of parliamentarians and parliament, then codes will need to be enforced and sanctions imposed upon those who violate them. Imposing sanctions will not be the first option. Education is usually the first appropriate response, but the possibility must exist if the code is to be taken seriously by both those who must obey it and those whose trust it is intended to garner.[14]

It is not enough to rely upon the ordinary electoral process to ensure proper standards of public behaviour. The ballot box does not always remove people who display less than desirable standards of public behaviour. That is why it is useful, in my view, to have clear,

---

[13] *House of Assembly Act*, Ss. 43 - 46.

[14] Dr. Andrew Brien, "A Code for Parliamentarians?" (Research Paper 2), September 14, 1998), online: Parliament of Australia Parliamentary Library, <http://www.aph.gov.au/LIBRARY/Pubs/RP/1998-99/99rp02.htm >.

understandable and published standards against which the behaviour of our elected officials can be judged and subjected to criticism between elections. In that way, accountability may be improved.

I am therefore prepared to recommend:

Recommendation No. 4

(1) Upon the legislative reforms recommended in this report coming into force, the Speaker should refer to the Standing Committee on Privileges and Elections, or to a special committee appointed for the purpose, the responsibility for developing and proposing to the House of Assembly the adoption, by resolution, of a code of conduct for Members to provide guidance on the standards of conduct expected of them in discharging their legislative and public duties;

(2) The Commissioner for Members' Interests, constituted under the House of Assembly Act, should be assigned responsibility for investigating and conducting an inquiry, if necessary, to determine whether a Member has failed to fulfill any obligation under the code of conduct and to report to the House with recommendations as to appropriate sanctions similar to the ones that are available for breaches of conflict of interest duties in Part II of the* House of Assembly Act. *The Act should be amended accordingly;

(3) The Commissioner for Members Interests should be renamed "Commissioner for Legislative Standards" in recognition of this expanded role; and

(4) The oath or affirmation of office that a member of the House of Assembly is required to swear or affirm upon election to the House should include an affirmation and an agreement to follow the code of conduct adopted by the House.

In making this recommendation, I recognize that there are more elaborate mechanisms employed in some jurisdictions with respect to the way in which allegations of a breach of code of conduct may be investigated and enforcement action taken. I have declined to recommend a more elaborate scheme at the present time. This is partly because the provisions of Part II of the *House of Assembly Act* dealing with conflicts of interest of Members are not technically within the scope of my mandate and the whole area of the code of conduct, including conflict of interest, should be reviewed comprehensively. That would require a more detailed analysis than I was able to give to the matter for the purposes of this report. I regard the foregoing recommendation, therefore, as an interim measure, but an interim measure that should be proceeded with forthwith with a view to restoring public confidence.

Code of Conduct for House Staff

Because so few of the expected standards of behaviour of the House staff were recorded in formally issued and easily accessible policies, there was often general confusion as to what policies actually applied and, in particular, whether policies of the executive applied within the House. Issues with respect to alleged conflicts of interest of a senior member of the House administration in dealing with businesses in which he may have had an interest and the failure to follow up to ensure that, after the employee was told to cease, that he did in fact cease, have already been referred to.[15] As well, the Auditor General has made reference in his reports to a failure to abide by government tendering practices.

This is an unacceptable situation. The staff should have clear guidelines setting out the standards expected of them. There should be a code of conduct promulgated for House staff as well as for MHAs. Not only would it be fairer to them, but clearly understood guidelines would go a long way to enhancing a general culture of accountability within the House administration.

Generally, the standards to be expected of House staff should be as close as possible to the standards expected in the general public service. The adoption of executive policies in this regard would be not be a violation of legislative autonomy because it is recognized that the IEC could make changes in the policies to fit its own special circumstances if that were necessary. It is important, however, to ensure that if the IEC were ever to opt out of executive policies it not leave a void, but have a responsibility to substitute other substantive policies in their place.

I therefore will make the following recommendation:

Recommendation No. 5

(1) The Commission of Internal Economy should develop and adopt a code of conduct applicable to persons employed in the House of Assembly and in the statutory offices;

(2) All policies and guidelines respecting standards of behaviour of House staff should be made by the Commission of Internal Economy or the Clerk in writing and published in a formal policy manual;

[15] Chapter 3 (Background) under the heading "The Refocusing Era: 2004-2005" under the sub-heading "Audit of the House of Assembly."

(3) The* Conflict of Interest Act *should, as a general rule, apply to the House of Assembly; and

(4) If the Commission were to modify the existing conflict of interest regime and other standards of conduct applicable to staff in the executive branch of government, the IEC should be required to put in place an alternative substantive regime.

Access to Information and the House of Assembly

A fundamental part of achieving transparency in government is the provision of access to information on a timely basis to persons who might have use for it or might have an interest in monitoring and reporting on the activities of officials and politicians. Within the last 15 years, there has been an increasing trend in Canada and elsewhere towards the enactment of legislation that provides for a general right for members of the public, subject to some exclusions, to access government records and information. Indeed, the province of Newfoundland and Labrador has recently enacted updated access to information legislation reflecting this general approach.[16]

The right of access given by such legislation is usually not contingent on the person seeking access being able to demonstrate that he or she has a "legitimate" or "reasonable" use for the information. In that sense, "nosey-parkerism" is not prohibited. The rationale for this is that a greater good will be achieved by allowing a broad right of access without allowing the custodian of the information to shield it from view on the pretense of questioning the motives of the person seeking it. In this way, there is a greater likelihood that transparency will be achieved. After all, if something is truly transparent it is transparent to all who care to look.

In principle, the right to access to information should apply not only to the executive branch of government, which implements the law but also to the legislative branch which makes it. "Those who insist on others being open should be open themselves. This is the essence of transparency."[17]

The terms of reference require me to give consideration to "opportunities to achieve accountability and transparency," but "without undermining the autonomy of the legislature and its elected members." In my view, adherence to a general principle of transparency and

[16] *Access to Information and Protection of Privacy Act*, S.N.L 2002, c. A-1.1 (Access to information provisions in force as of January 17, 2005) [*ATIPP Act*]. The *ATIPP Act* replaces earlier pioneering legislation in this province: *Freedom of Information Act*, S.N.L. 1981, c. 5.

[17] Dr. Christopher Dunn, "Access to Information Legislation and a Publication and Disclosure Regime for the House of Assembly," p. 1. This part of the report relies heavily upon this research paper, which was prepared for the Commission and has been reproduced in Appendix 5.3 [Christopher Dunn, "Access to Information"].

accountability in the legislative branch is not fundamentally inconsistent with the autonomy of the legislature.

While the notion of legislative autonomy requires the legislature to be treated and dealt with separately from the executive and to organize and operate its affairs free from improper influence by the executive, it does not justify the legislative branch adopting a "bunker" mentality that ignores fundamental principles of accountability in government. It may, however, justify the adoption of a different or modified regime to take account of the special peculiarities of the legislative branch. For example, it would have to take account and be respectful of the constitutional principles underpinning parliamentary privilege which, as was noted in Chapter 2, is reflective of legislative autonomy.

Although the principle that a general access to information regime should apply to the legislative branch is perfectly defensible, it has not been commonly adopted by legislatures, either in Canada or abroad. This, however, seems to be a function of the age of the access legislation rather than of principled objection. Countries with older legislation, like Australia, New Zealand and Canada, do not have it, but those with more recent initial adoption, like the United Kingdom, the Scottish Parliament, The National Assembly of Wales, the Northern Ireland Assembly, the Republic of Ireland, India and Trinidad and Tobago, do have application to their legislatures. Thus the thrust of reform of best practices, as it were, is clearly with the newer access/freedom of information regimes.

This province's *Access to Information and Protection of Privacy Act* presently does not apply to the House of Assembly. The Act places access obligations on "public bodies," but the definition of "public body" does not include the House and specifically excludes the office of an MHA or "an officer" of the House.[18] Thus, records maintained in the offices of the House of Assembly administration are completely outside the bite of the Act. Furthermore, to emphasize the point, the Act excludes "records created by or for an officer of the House of Assembly in exercise of that role,"[19] thereby excluding House records even if maintained and stored in another part of the government service.

Although Newfoundland and Labrador has not shown any sign of movement towards including the legislative branch within the ambit of access to information legislation, there has been development in that direction elsewhere. Alberta and Quebec now apply their legislation to the legislative branch.[20] Federally, there has been a long history of advocacy for its application. Canada has had access to information legislation since 1983, but it did not apply to parliament or its officers. In 1987, a Commons standing committee advocated including both the Senate and House of Commons (but not the actual offices of senators and MPs) as well as certain parliamentary officers such as the Auditor General, the Information

[18] *ATIPP Act*, ss. 2(p).
[19] *ATIPP Act*, ss. 5(c).
[20] Saskatchewan and British Columbia do not. The legislation in Nova Scotia, New Brunswick, Manitoba and Ontario is ambiguous on the point. See Christopher Dunn, "Access to Information" at pp. 6-7 for a more detailed discussion.

Commissioner and the Official Languages Commissioner.[21] Again, in 2002, the Access to Information Review Task Force reasserted the appropriateness of its application based on the rationale that parliamentary bodies were public institutions and that all publicly funded bodies should fall within the ambit of the legislation.[22] The Task Force also addressed the impact of legislative autonomy in this area. Dr. Christopher Dunn, in his paper written for this commission, described the approach of the Task Force this way:

> In making its recommendations the Task Force was respectful of legislative autonomy, parliamentary privilege and the functional needs of officers of parliament. Parliamentary privilege, the collective and individual rights enjoyed by parliamentarians which guarantee that they will be able to carry out their respective functions without obstruction, should be the guiding principle in access questions. The Task Force, urged that the *Act* should apply to information touching on the administrative operations of the Senate, the House, and the Library of Parliament, save for the information that would be protected by parliamentary privilege. This stipulation would protect the independence and effectiveness of the two Houses. It also recommended the exclusion of the records of the political parties, as well as the personal, political and constituency records of individual Senators and members of the House of Commons ...
>
> Officers of Parliament were also a focus of the Task Force. It recommended that the *Act* apply to the offices of ... the Auditor General, the Commissioner of Official Languages, the Information Commissioner and the Privacy Commissioner, but not to the Office of the Chief Electoral Officer. In order to respond to the concerns of the first four offices, the Task Force recommended the exclusion of records connected with the audit or investigatory functions of an Officer of Parliament, or such records from other government institutions in the custody of an Officer.[23]

Since 2002, there have been further calls for inclusion of parliament within the scope of the legislation.[24] The Gomery Commission also made reference to access issues, though not specifically in relation to application of the Act to parliament. Of interest, however, is Gomery's recommendation that "the government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and

[21]Canada, Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer, 1987).
[22]Canada, Access to Information Review Task Force, *Access to Information: Making It Work for Canadians* (Ottawa: Queen's Printer, 2002).
[23]Christopher Dunn "Access to Information", p. 7.
[24]Further studies and reports are summarized in Christopher Dunn, "Access to Information," pp. 9-10.

deliberations leading up to decisions."[25] This recommendation of an explicit duty to keep records is of significance in the context of the current inquiry. As has been noted at several places throughout this report, there have been a number of instances of misleading or missing records relating to deliberations of the Commission of Internal Economy. Although I have been given full "access" to information in the offices of the House, the staff of this inquiry have still had considerable difficulty in gaining a full appreciation of the essence of certain decisions - not to mention the nuances of certain decision making processes - because of these unexplained gaps in the records of the House.

The new *Federal Accountability Act*, which finally passed parliament in late 2006, amended the federal *Access to Information Act* so as to extend its provisions to officers of parliament (with certain exemptions and protections built-in), but drew back from its application to parliament itself.[26]

On the other side of the Atlantic, the United Kingdom *Freedom of Information Act 2000*, which came into force in January 2005, gives a general right of access to information held by public authorities, which includes the House of Commons and the House of Lords (though with separate appropriate arrangements applying to them).[27] Of significance as well is that the legislation mandates that all public bodies, including the parliamentary institutions, prepare a "publication scheme" which, in relation to the Lords and Commons, resulted in information on Members' allowances, amongst other things, being periodically publicized automatically. This placement of allowance information in the public domain, in the words of the House of Commons Commission (analogous to our Commission of Internal Economy) "constitutes a considerable extension in openness and transparency about allowances paid to Members."[28]

---

[25]Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations* (Ottawa: The Commission, February 1, 2006), p. 181.

[26]*Federal Accountability Act*, S.C. 2006, c. 9, Ss. 89-90; 109; 129; 141-172.1; 179; and 221 made changes to the current *Access to Information Act*, R.S. 1985, c. A-1.

[27] *Freedom of Information Act 2000*, 2000, c. 36.

[28]Quoted in Christopher Dunn, "Access to Information," p. 3. On May 18, 2007, on a second attempt, and with the tacit consent of both the Labour and Conservative front benches, a Private Member's Bill passed in the House of Commons 113-27, amending this legislation. [If passed by the Lords and given Royal Assent, it would be called the *Freedom of Information (Amendment) Act 2007.]* The effect of the legislation would be first, to remove both Houses of Parliament from the list of public authorities included within the scope of the *Freedom of Information Act 2000* and second, to make communications between MPs and public authorities exempt from the *Act*. It is unclear as of this writing whether the bill will have enough support in the House of Lords to pass into law. The proposals have been subject to criticism by some public commentators. Significantly, many see the change as rooted in opposition to greater transparency and detail regarding Members' expenses. *The Times* reported on May 19 that "*Critics said that data protection legislation should already prevent such incidents [release of MP-public body communications], urging better enforcement, and that there was a hidden agenda to exempt Parliament from releasing other information such as MPs' expenses. MPs have been forced into disclosing details of how much they claim on taxis, trains, flights and other transport after the previous practice of publishing a single figure for each MP's travel expenses was challenged using freedom of information powers*." For a background to the bill, see Oonagh Gay, "The Freedom of Information (Amendment) Bill," (Research Paper 07/18), (February 21, 2007), online: House of Commons Library <http://www.parliament.uk/commons/lib/research/np2007/rp07-018.pdf>. In my view this approach

The requirement of a "publication scheme" has had a very important incidental benefit for those charged with the time-consuming task of fielding and responding to access to information requests under the legislation. Because much more information is now in the public domain, there is less of a need for such requests to be made.

This theme of automatic publication of relevant information is picked up in the *Freedom of Information (Scotland) Act 2002*.[29] Its publication scheme provides for the publication of information in a variety of ways, including by way of a website, printed leaflets, videos and DVD and CD ROMs, and covers information available relating to the Scottish Parliament, including parliamentary business, the administration of parliament and information about individual members of the parliament. The Scottish Parliament Corporate Body (analogous to the Commission of Internal Economy) describes the application of the "high tech" scheme to Members' allowances:

> In order to ensure that the Scottish parliament's allowances system is as open and accessible as possible, and with our obligations under [the Freedom of Information (Scotland) Act] in mind, it was agreed that all Members' allowances information should be published on the Parliament's website ...
>
> We consider that the facility, which allows members of the public to view and search on-line MSPs claims and accompanying receipts in respect of allowances claimed while carrying out parliamentary duties, was an important step in ensuring that the work of parliament continues to be as open and transparent as possible.[30]

Attitudes with respect to access to information are changing. I agree with Dr. Dunn's summary of the position:

> Access to information can now be regarded as a fundamental value not only of our country, but also of many others. As a fundamental value, its drift is towards universalism. It is significant that the scope of the program has been steadily outward, to become more inclusive, like a tree takes on rings. It began as a program three decades ago, first in the provinces, then in the

---

goes against the trend towards making freedom of information legislation applicable to the legislative branch and is a retrograde step, certainly as a precedent for application to Newfoundland and Labrador. Commons opponents to the measure have made comments similar to those in this report, to the effect that it was unprincipled to seek to exempt the Houses of Parliament from FOI legislation while applying it to all other public authorities; that such exemption would undermine respect for Parliament, its members and officers; and that Parliament's ability to have authority on matters of accountability, transparency and openness would be harmed. It is significant that for the sake of principle, the Speaker, Michael Martin, has promised to continue publishing the expenses of the Members even if this Bill should pass.

[29] A.S.P. 2002, c. 13.

[30] Quoted in Christopher Dunn, "Access to Information," p. 4.

federal sphere. Its emphasis has steadily expanded.[31]

In my view, the time has come for the adoption in this province of an access to information regime and a concomitant publication scheme that is applicable to the House of Assembly and, in particular, one that will provide for public accessibility to information concerning Members' allowances.[32]

Until now, the structure of the existing system respecting the setting of Members' salary levels and the setting and administration of allowances lent itself to secrecy and suspicion. The events that occurred in 2000 that removed the ability of the Auditor General to perform a legislative audit and eliminated any means of ensuring documentary justification for allowance claims, as well as the consignment to the IEC of the power to adjust salaries behind closed doors without leaving a proper paper trail that would enable complete after-the-fact examination, effectively made the IEC and the House administration a fiefdom onto itself without any proper checks and balances. In the name of legislative independence, the IEC and the House administration have hidden behind the inapplicability of the access requirements that apply to the executive branch, resulting in a "dark zone" in government into which the public cannot peer. The public concern that has been created over the alleged improper administration of constituency allowances has led to a severe lack of confidence in our political institutions.

One of the antidotes to this lack of confidence and suspicion is to shine light into the darkness by giving access to information so that members of the public can reassure themselves that public funds are being spent properly and that decisions are being made in a responsible manner. Indeed, if an access regime had been in place over the past several years, it is arguable that investigative media could have used such legislation to review Members' allowances and spending patterns and thereby brought allowance issues to light well before the issues of 2006 were identified.

To advocate application of an access regime to the House is, in my view, consistent with emerging trends in this area. It is a best practice. The time is right.

---

[31]Quoted in Christopher Dunn, "Access to Information," p. 10.

[32] A first step towards a rudimentary publication scheme has been recommended recently in British Columbia in the *Report of the Independent Commission to Review MLA Compensation* (Sue Paish, Q.C. Chair), p. 17: "We recommend that a plain-language summary listing all expenses reimbursed to each MLA (accommodation, food, incidental expenses and travel) be tabled with the Speaker on an annual basis." Saskatchewan has already implemented a form of publication scheme: information about members' allowances must be periodically made available in the office of the Speaker and in each MLA's office for inspection by members of the public on demand.

Accordingly, I recommend:

Recommendation No. 6

(1) Subject to limitations designed to respect the different functioning of the legislative branch, Parts I, II and III of the* Access to Information and Protection of Privacy Act *should be amended to provide for its application to the House of Assembly administration, including financial information about Members' salaries and expenditures on allowances, and to the offices of the Citizens' Representative, the Child and Youth Advocate, the Chief Electoral Officer, the Information and Privacy Commissioner and the Commissioner of Members' Interests;*[33] *and

(2) It should be a legislated requirement that the House of Assembly be subject to a publication regime where basic information concerning the finances of the House, especially information about expenditures in relation to Members' allowances, is made publicly available as a matter of course.

Clearly, there are special considerations applicable to the legislative branch that may impact on the appropriateness of making certain types of material publicly available either by way of an access application or by prior publication. I agree with the analysis of the federal Task Force, referred to earlier, that parliamentary privileges must be protected. This recognizes a legitimate aspect of the autonomy of the legislature and ensures its effective functioning.[34] It allows protection of the legislative branch, in certain circumstances, from

[33]It will be noted that I have included the statutory offices within the recommended changes. One might question whether making recommendations about them falls within my mandate. However, it must be borne in mind that issues of improper expenditure involving two of those offices have also arisen in recent years. Similar considerations of principle apply to them. Because the statutory offices are, for some purposes, part of the House of Assembly administration, which *is* within my mandate, from a practical point of view, it is necessary to deal with them if for no other reason than to differentiate between them and the general House operations.

[34]The *House of Assembly Act*, R.S.N.L. 1990, c. H-10, s. 19 provides that the House and its members "hold, enjoy and exercise those and singular privileges, immunities and powers that are now held, enjoyed and exercised by the House of Commons of the Parliament of Canada and by the members of that House of Commons." The case law interpreting federal law respecting parliamentary privilege in turn refers the inquiry back to these privileges as they existed in the United Kingdom parliament. See *New Brunswick Broadcasting Co v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, which holds that parliamentary privileges have constitutional status, that it is up to the courts to determine if circumstances providing the support for the existence of privilege in a given case exist, and that the test for the existence of a privilege is the test of necessity. One of the leading cases on the scope of parliamentary privilege originated in Newfoundland when it was a colony of England: *Kielley v. Carson* 1843 CarswellNfld 1, (1893), 13 E.R. 225 (JCPC). It holds that the local legislature has, in the words of Baron Parke, "every power reasonably necessary for the exercise of their functions and duties". The test of "necessity", to ensure that the House and its members can carry out

interference by the executive or judicial branches, or from any other person for that matter. A claim to parliamentary privilege may arise in multifarious ways. For example, in *Gagliano v. Canada (Attorney General)*,[35] the Federal Court held that freedom of speech regarding the debates in parliament and its committees was a parliamentary privilege, justifying a refusal of the Public Accounts Committee of the House of Commons to make available a transcript of its proceedings for use in the Gomery Inquiry to enable counsel to cross-examine a witness on the basis of prior, allegedly inconsistent, statements made by that witness before the Public Accounts Committee. The degree to which parliamentary privilege may be able to be invoked as a means of refusing to disclose information that otherwise would be available under the *ATIPP Act* will, of course, have to be worked out on a case by case basis, applying the test of necessity of ensuring that the effective functioning of the House will not be inappropriately affected by the disclosure.[36]

As well, the personal records of a Member and the political records of his or her constituency office should also be inaccessible. Such records would relate to political strategies and decisions and to dealings with individual constituents. Those are matters where the reasonable expectation of confidentiality is high.

Other circumstances that might require exemption are those involving personal data relating to third parties and situations where the release of the data would, or would be likely, to endanger the health or safety of an individual.[37] These latter two circumstances,

---

their functions efficiently and effectively, is still essentially the test for the scope of privilege today.

[35] [2005] 3 F.C.R. 555.

[36] In *Canada (House of Commons) v. Vaid* [2005] SCC 30, the Supreme Court of Canada reaffirmed that it is for the courts, not the legislative body itself, to determine the *existence* and *scope* of a claimed privilege. (At the same time, of course, the judgment also reaffirmed that parliamentary privilege was as much a part of the Constitution as was the Canadian *Charter of Rights and Freedoms* and that it was up to the Court to balance both.) At para. 29 Binnie J. wrote: "The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by parliament or its officers and employees that exceeds the necessary scope of the category of privilege." This is consistent with the existing *Access to Information and Protection of Privacy Act*, S.N.L 2002, c. A-1.1 (if it were made applicable to the legislature) which contemplates a challenge to a refusal to provide access to requested information by appeal directly to the Supreme Court of Newfoundland and Labrador, Trial Division under ss. 43(3), or indirectly on appeal to that court from a review decision of the Information and Privacy Commissioner under s. 60.

[37] Of interest in this connection are two administrative decisions, one in England and the other in Scotland, that have dealt with the issues of third party data protection and safety issues as argued justifications for non-disclosure in relation to parliamentarians' travel expenses. In *The Corporate Officer of the House of Commons and the Information Commissioner and Norman Baker, MP* EA/2006/0015 and 0016 (January 16, 2007), the Information Tribunal, on appeal from decisions of the Information Commissioner, held that information giving a further breakdown of aggregate figures for travel claims for MPs already published under the publication scheme under the *Freedom of Information Act 2000* should be provided so that specific figures for rail, road, air and bicycle for each MP would be made available. The Tribunal concluded: "the legitimate interests of members of the public outweigh the prejudice to the rights, freedoms and legitimate interests of MPs." Similarly, in *Paul Hutcheon, The Sunday Herald and the Scottish Parliamentary Corporate Body*, Decision 033/2005 (delivered October 6, 2005), the Scottish Information Commissioner held that a newspaper journalist's request for information as to a Scottish MP's travel claims supporting mileage, air travel, car rental and taxis without blacking out information regarding the taxi travel destinations, as had been done when the

however, are dealt with as potential exemptions in the existing legislation[38] and would not have to be specifically provided for in any amending legislation applying the *ATIPP Act* to the legislature.

With respect to statutory offices, I recognize that these offices deal with sensitive and confidential information gained through investigations into the lives of individual citizens who approach them for assistance. That sort of information, often given in an expectation that privacy will be respected, should not be disclosed.[39] Nevertheless, there is no reason why general financial and other information about the operation of the offices themselves and the expenses of the heads of the offices and the staff should not be available.[40]

The office of the Auditor General should, however, be put in a separate category. At present there is a general obligation of confidentiality imposed on that office by section 21 of the *Auditor General Act* with respect to matters that come to the staff's knowledge in the course of their work. The Auditor General occupies a special - some would say unique - place in the government. This is cause for proceeding slowly before wrapping this office into any system of general reform of the legislative branch. Having said that, I believe a case can be made for subjecting the Auditor General to basic access to information requirements about the financial and administrative organization of the office. The Auditor General is, by law, an officer of the House and is responsible, just as are other officers, for the expenditure of public money. I am aware, however, that some consideration is being given to making substantial revisions to the Auditor General's constituent legislation. The better approach for the present, therefore, is to exempt the office from the reforms being recommended in this report and to recommend that the application of access to information provisions be considered at the time of the general revision of the Act.

Accordingly, I recommend:

Recommendation No. 7

(1) The application of the ATIPP Act to the House of Assembly administration should be excluded in relation to:

---

information was originally provided, should be granted. The Commissioner commented: "even though the [publication] scheme is audited both internally and externally. The *Freedom of Information (Scotland) Act* has brought a further expectation that information involving public expenditure should be made publicly available."

[38] *ATIPP Act*, Ss. 26, 27 and 30.

[39] In fact, there are statutory obligations of confidentiality and secrecy imposed on a number of the statutory offices. See e.g. *Citizens' Representative Act*, S.N.L. 2001, c. C-14.1, Ss. 13, 23, 27; *Child and Youth Advocate Act*, S.N.L. 2001, c. C-12.01, Ss. 13, 17.

[40] It should be noted that many government departments also are repositories of sensitive and confidential information (for example, social service recipients) but that, in itself, has not been regarded as a justification for *complete* exclusion from an access to information regime.

(a) information protected by parliamentary privilege;
(b) records of political parties and caucuses; and
(c) personal, political and constituency records of individual MHAs.

(2) The application of the ATIPP Act to statutory offices should be excluded in relation to records connected with investigatory functions or otherwise expressly required by law to be kept confidential; and

(3) The ATIPP Act should not be extended to the Office of the Auditor General but the appropriateness of requiring access to information should be examined as part of a general legislative review of the Auditor General Act.

Having recommended in Recommendation No. 6(2), that the House develop a publication scheme for the automatic disclosure of certain categories of information about House operations, it is necessary also to consider what such a scheme should look like specifically with respect to disclosure of information about MHAs' expenditures on their allowances. I believe this is one area that *must* be included in a publication scheme. It would go a long way to dispelling suspicion and mistrust in the minds of the public about the stewardship by MHAs of public money in this area if anyone who cared to look could see exactly what expenditures were being made. This is the situation that now exists in both the United Kingdom and Scottish parliaments.

The question is: what level of detail should be published? There are at least four possibilities: (i) periodic publication of running totals of expenditure by each MHA in selected categories, such as travel, meals and office operation; (ii) periodic publication of total claim amounts as of the dates the claims are processed, broken down only into totals for various categories of expenses; (iii) periodic publication of daily amounts of total expenditure, as of the days on which the expenditures are incurred, with only totals of categories of expenditure on a given day being recorded (for example, a total for three meals on a given day); and (iv) periodic publication of individual expense items, as disclosed on individual receipts submitted, such as each meal bill. It will be seen that the required level of detail increases as one moves from the first to the fourth category.

In reality, the choice to be made depends in part on the technology available and on a cost-benefit analysis of each choice. At the moment, the financial management system of government, which the House is presently accessing, is capable of producing information to the level of choice (ii) above. Any further degree of information would have to be provided by a laborious and expensive manual compilation. This is because MHAs submit claims only periodically, containing claims for reimbursement for a number of different days of activities and on each day there may be more than one item of expenditure. The forms used

by the House require the individual expenditures to be categorized in columns and the totals for each type of expenditure to be added up at the bottom of each column.[41] The individual receipts are attached to the claim form as backup. After checking the receipts to the items of expenditure listed, it is the total claim that is approved for payment and the only information that is recorded in the financial management system is the total amount for which the cheque will be cut, as well as the totals of the breakdown of each category of expenditure. In that way, the system is able to keep track of the total amounts of expenditure incurred by an MHA in each category and thereby determine how much he or she has left to spend in that category for the rest of the year.

Choice (ii), insofar as it must rely on the financial management system to produce reports of expenditure, will therefore only provide totals, by category, for each claim that is periodically submitted by an MHA. It will not disclose individual expenditures, showing which hotel was stayed in or what restaurants were visited and the amounts spent on each occasion. Realistically, that is about all that can be provided in a publication scheme *at the moment using the financial management system*. At least that amount of information should immediately be published on the House of Assembly website.

Having said that, I believe that the maximum amount of information, including individual items of expenditure, should be made available if it is not cost prohibitive. I have been told that the government is in the process of introducing a new financial management system known as the "Iexpense" system in the coming year, first on a trial basis for some departments and then for all departments. Eventually, it can be made available to the House of Assembly administration as well. It may be that this new system can be reconfigured so that, when applied to the House, it can capture a much greater deal of information. When that happens, the publication scheme can and should be expanded. In the meantime, the IEC should engage in a careful study of the Scottish system, which, I understand, publishes individual items of expenditure, to see if there are other ways to duplicate that degree of publication on a cost-effective basis.[42]

There is a supplementary question that must also be addressed in the context of a publication scheme. There may, from time to time, be differences of opinion between an individual MHA and the House officials as to just how much the MHA has spent at any point in time. Before the information is published, it is only fair to give the MHA the opportunity to dispute the calculations and to arrange for correction. Accordingly, the Clerk of the House should be required to provide periodic statements to each MHA summarizing the

[41] A sample of the form now in use can be found in Appendix 5.4.

[42] I should note in passing that in Chapter 10 (Allowances) I will recommend a substantially revamped system of constituency allowances. Many expenditures now made by MHAs will henceforth be made by direct payment by the House. As well, many other expenditures will be controlled and regulated in other ways - such as by means of quantity control (for example, maximum numbers of trips), or automatic maximum *per diem* amounts rather than overall financial caps. Furthermore, many of the categories of expenditure that were allowed in the past will no longer be permitted. As a result, the amount of money available for "controversial" expenditures will be substantially reduced.

expenditures which, according to the House records, that MHA has spent. The MHA should be given a limited opportunity to dispute those records. Thereafter, he or she should be required to keep a copy of the record on file in his or her constituency office so that a member of the public may access it. As well, a copy of the record should be on file with the office of the Speaker for public access and also published on the House website.

I therefore recommend:

Recommendation No. 8

(1) The publication scheme developed by the IEC, as recommended in Recommendation No. 6(2), should involve publication on the House's website;

(2) The publication scheme should include publication of information about MHAs' expenditures on their constituency allowances, including, at the least, a breakdown of information by category of expenditure relating to each claim made by each MHA as and when processed by the existing financial management system;

(3) The IEC should undertake a further study of the Scottish system of publication of information about Members' allowances with a view to expanding the amount of information that can be displayed, with the ultimate intent of publishing the details of individual items of expenditure on a regular basis;

(4) The Clerk of the House should be required, prior to periodically publishing information about an MHA's allowance expenditures, to provide a statement to the MHA and give the MHA an opportunity to dispute the accuracy of the information;

(5) If there is a dispute between an MHA and the Clerk about the accuracy of the information in a statement that cannot be resolved, the information should nevertheless be published, but the MHA should be allowed to publish at the same time and in the same place his or her disagreement and the reasons therefor; and

(6) In the case of publication of information about an MHA's allowance expenditures, the information, in addition to being published on the website of the House, should also be kept on file in the MHA's constituency office and in the office of the Speaker and made available for inspection by the public.

I also believe it to be good practice, in light of the experience noted previously of missing and incomplete records of the IEC, to adopt, as applicable - at least within the legislative branch - a provision as recommended by the Gomery Commission, imposing a requirement of accurate record-keeping and making it an offence to alter records. This is merely good business practice. It will make it more difficult for officials to bury indiscretions, and the potential of public exposure of accurate records will have a deterrent effect on persons contemplating decisions that may have questionable justifications. Furthermore, it is important for the Auditor General or any other auditor performing a compliance audit to be able to have access to backup documentation to properly determine whether decisions have been taken in accordance with law and policy.

I therefore recommend:

Recommendation No. 9

It should be a legislative requirement:

(a) that the IEC, officers of the House and the staff of the House of Assembly administration document decisions and recommendations; and

(b) that it is an offence to fail to so document, or to destroy documentation recording decisions or the advice and deliberations leading up to those decisions.

Finally, it is worth noting at this point that, as important as making the specific access to information legislation applicable to the legislative branch may be, the acceptance of the underlying *principles* of openness and transparency is even more important. The recognition that these principles are equally applicable to the legislative branch, and that the House cannot shelter behind notions of legislative autonomy to avoid them, has the potential of infusing the analysis of all aspects of reform of House administration and MHA accountability with an awareness of these principles and may provide bases for reform in other areas, such as, for example, ways in which the IEC should conduct its business and MHAs should account for their spending practices.

Commission of Internal Economy

The discussion in Chapter 4 demonstrates that one of the contributing causes of systemic failure was the manner and the environment in which the Commission of Internal Economy operated or, in some cases, failed to operate. I observed that there was a failure to place sufficient importance on fundamental notions of governance, accountability and transparency.

Notwithstanding these significant issues, it is not necessary, in my view, to consider jettisoning the concept of the IEC as a management board in favour of some other, completely different model. In countries following the Westminster parliamentary tradition, a management board similar in concept to our IEC is generally recognized as the means whereby the legislative branch of government exercises management, administration and control over its affairs.[43]

The more important issue is to consider how the IEC can best be reorganized and restructured to ensure that it properly fulfills its function as steward of "all matters of financial and administrative policy affecting the House of Assembly, its offices and its staff."[44] This can be accomplished, I believe, by: adjusting the IEC's formal operating structure (a matter to be dealt with in the next chapter); developing and imposing greater controls over and clear limits on the types of decisions it can make, and the manner of making those decisions (also dealt with in the next chapter); reorganizing its operational methodologies to ensure a better functioning environment of responsibility; and developing higher and more appropriate standards of responsibility for the IEC collectively and for each member individually. Since these changes mark a significant new departure both in philosophy and management practices, now is an opportune time to signal this new departure by changing the name of the Commission. Accordingly, I propose that the name be changed to the "House of Assembly Management Commission."

I therefore recommend:

Recommendation No. 10

(1) Subject to (2) below, the management and administration of the House of Assembly, including financial management, should continue to be under the supervision and control of a management board presently called the Commission of Internal Economy but to be henceforth renamed as the "House of Assembly Management Commission"; [45]

(2) The existing Commission must:

(a) be restructured legislatively with respect to its formal operating structure;

[43] In the Survey administered to MHAs by inquiry staff 64% of respondents answered, in response to the statement "The most appropriate person/body to apply the rules with regard to Members' compensation is …", either a "reformed IEC" or the IEC as presently constituted. See Appendix 1.6 (Survey Results), Question 46.
[44] *Internal Economy Commission Act*, R.S.N.L. 1990, c. I-14, ss. 5(2).
[45] Although all further references in the text of the report to the restructured and renamed IEC should in reality be to the "House of Assembly Management Commission;" for ease of reference it has been decided to continue with reference to the old name in the text and to confine the use of the new name to references is the formal recommendations.

> ***(b) have greater controls over, and limits on, the types of decisions it can make and the manner of making those decisions;***
>
> ***(c) have its operational procedures reorganized; and***
>
> ***(d) have higher and more appropriate standards of responsibility, both as an institution and also with respect to its members individually, so that the Commission will be able to function efficiently, openly and with due regard to its stewardship mandate.***

In this part of the report, I will deal with items (c) and (d) in Recommendation No. 10(2) above: reform of the Commission's operational procedures and the imposition of better standards of responsibility. The remaining matters in the recommendation relating to formal restructuring will be dealt with in Chapter 6.

As the Commission staff and I interviewed some of the past and present members of the IEC, as well as other MHAs, it became apparent that there were many concerns about the manner in which the IEC conducted its business. While the points of view expressed were by no means always coincident, I gained a general impression that at many times in the past the work of the IEC was not given the priority it deserved. There was no set schedule of meetings that was adhered to for dealing with routine business. Meetings were cancelled at the last minute because one or more members claimed they had other commitments that had greater priority. This was particularly true with respect to cabinet members who served on the Commission. When meetings were held, agendas were sometimes cobbled together at the last minute and presented at the meeting. Often, no briefing book of materials was circulated in advance of the meeting. Issues would sometimes be worked out in advance by agreements reached between the Government House Leader and the Official Opposition House Leader and then ratified by the Commission as a whole.

While there are no doubt exceptions to this picture, I have to say that the general image that has been presented is one of casual attention to the work of the Commission with little sense of the importance of acting with prudence and diligence at all times to ensure that the absence of checks and balances, present in other aspects of the political process, but absent in the IEC, would not lead, perhaps unthinkingly, to the subordination of the public interest to other considerations.

It was also suggested to me that members of the IEC did not regard themselves as a working committee. The members relied, perhaps to too great an extent, on officials of the House to look after the details and to present proper information to them. It was suggested that the IEC functioned, and was expected to function, like a cabinet, where ministers are responsible for matters of broad policy, but rely heavily on their officials.

In my view, the analogy with cabinet responsibilities is not apt. The cabinet is at the

apex of a large professional bureaucracy whose basic function is to analyze and refine information, consider policy options and present distilled advice to the executive council for final decision. Decisions made by cabinet are, by virtue of the doctrine of ministerial responsibility, subject to scrutiny in the House by the Opposition. Not only are the checks and balances inherent in the notion of ministerial responsibility present, but the scrutiny comes about in the public forum of the House. The duty of the Opposition is to challenge and test, through questions and debate, the policy decisions made by Government.

Contrast this with the way the IEC functions. It does not have a large bureaucracy to do the type of in-depth analysis that the executive does. Its decisions, though reported to the House for information purposes after a considerable time lag, are not subject to debate and challenge. Most importantly, there is no incentive to challenge them because in many cases the decisions, especially when dealing with benefits for members, affect all members equally, no matter what political party. The same checks and balances do not apply because self- interest is a much more pervasive factor. This is not to say that members of the IEC will always act out of self-interest. Nevertheless, any system that leaves open the possibility that public interest will be subordinated to self-interest raises serious perception problems affecting public confidence that proper decisions will be made.

I have concluded that the closer analogy for IEC operations is not that of a cabinet but a board of directors of a publicly traded corporation. I say this primarily because, especially following the *Enron* and *WorldCom* scandals, a much greater emphasis has been placed on stewardship responsibilities and duties of boards of directors, particularly responsibilities of diligence, prudence, knowledge acquisition, supervision and good faith. A board of directors wields considerable policy making power and must do it independently of management influence, while taking into account the information that management provides. Its decisions govern the direction of the corporation subject, of course, to accountability at the next annual meeting of shareholders. Because accountability at the shareholders' meeting can be influenced by many factors, including unbalanced shareholdings, accountability is increasingly not being left solely to the shareholders' meeting, but is being placed by law and regulatory requirements directly on the directors themselves by the imposition of stricter standards of behaviour. These standards extend beyond mere passive reactive diligence to, instead, proactively ensuring that proper information is provided by management so that fully-informed decisions can be made.

It used to be said that the most important duty of a board of directors is to hire a good chief executive officer and then support him or her to enable a good job to be performed. This is now no longer regarded as sufficient to discharge the duties of a board member. The duties now extend to such things as: exerting good and informed judgment in decision making; directing and empowering management in accordance with a clearly established vision; effectively overseeing management by means of establishment of measures of outcomes and accountability reporting; publicly communicating and providing access to information; and generally acting proactively in the discharge of their duties.

This change in approach, especially the emphasis on being proactive and on acting on the basis of adequate information, has led to the notion of "management certification" of the

adequacy of systems and of the information emanating from those systems, so as to enable the directors to be able to do their job properly and effectively.[46]

The notion of a board of directors as a supervising or monitoring body is now well recognized in Canadian law.[47] In discharging their responsibilities, directors are regarded as having a positive duty to act diligently and prudently in managing the corporation's affairs. Subsection 122(1) of the *Canada Business Corporations Act* provides:

> Every director … of a corporation in exercising their powers and discharging their duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation;
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[48]

It is not enough for a director merely to show up at the board meeting and collect the fee. There are objective standards against which his or her participation will be judged. It is more than a duty, subjectively, not to be grossly negligent with respect to the affairs of the corporation.[49] It requires a director to act in good faith and on the basis of adequate information in arriving at business decisions. It is described thus in a recently published text:

> Directors are expected to spend sufficient time on the affairs of the corporation to comply with such duty. It includes the responsibility to oversee the activities of the corporation by attending board meetings, requiring the corporation to provide adequate information upon which to make decisions, carefully reviewing documents prepared in view of a meeting and monitoring the activities delegated by the board to committees and management.[50]

Of course, "perfection is not demanded"[51] in the discharge of a director's responsibilities. A director will generally not be held to be in breach of the duty of care in subsection 122(1)(b) if, objectively considered, he or she "act[s] prudently and on a reasonably informed basis

---

[46] See the discussion of management certification in Chapter 7 (Controls) under the heading "Quality and Risk Management."
[47] See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss. 102(1) which provides that "the directors shall manage or *supervise the management* of, the business and affairs of a corporation. The Newfoundland and Labrador *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 167 similarly provides that the directors shall "*direct the management* of the business and affairs of the corporation." [emphasis added]
[48] The equivalent provision in this province's *Corporations Act* is s. 203.
[49] *Peoples Department Stores (Trustee of) v. Wise*, [2004] 3 S.C.R. 461 at pp. 489-491.
[50] Thierry Dorval, *Governance of Publicly Listed Corporations* (Toronto: LexisNexis Canada Inc., 2005), p. 95.
[51] *Peoples Department Stores*, p. 493

even though, with hindsight, the decision appears to have been ill-advised."[52]

I believe that the public sector is entitled to expect similar standards of diligence, prudence, knowledge acquisition, supervision and good faith from its political leaders, who are put in a position of stewardship over public money, as are expected from directors of corporations in the private sector.

Accordingly, I believe that the legislation governing the Commission should be amended to set out the standards expected of individual members of the Commission in a manner similar to those expected of corporate directors.

I therefore recommend:

Recommendation No. 11

(1) Legislation governing the House of Assembly Management Commission should set out clearly the standards, diligence, prudence, knowledge acquisition, supervision and good faith expected of each member of the Commission;

(2) Those standards should include:

(a) a duty to exercise powers with the care, skill and diligence that a reasonably prudent person would exercise in comparable circumstances;

(b) a duty to act in good faith, on the basis of adequate information in arriving at Commission decisions;

(c) a duty to attend Commission meetings except in exceptional circumstances;

(d) a duty to spend time on the affairs of the Commission to be able to comply with his or her responsibilities; and

(e) a duty to act in such a way to promote compliance with law and policy and to advocate policies in support of such objective; and

(3) It should also be stated in the legislation that a member of the Commission should not be considered in breach of these duties so long as he or she acts prudently on a reasonably informed basis.

[52] Ibid., p. 493.

Of course, individual standards of behaviour do not have much practical meaning unless the nature of the subject matter for which a commission member is to be held responsible is clearly spelled out. It is therefore important to describe carefully and in detail the *collective* duties and responsibilities of the Commission. Such a description should start with a broad statement of responsibility for financial stewardship, management and administration and then move to a detailed listing of the substantive areas of involvement expected of the Commission, followed by procedural or process responsibilities.

This is particularly important because the approach sometimes taken by the IEC in the past was to take the position that it was not bound by the *Financial Administration Act* nor by the financial and management policies of the executive branch but, having created a policy void by claiming their non-application, the IEC did not then move to fill the void by enunciating proper or adequate alternative policies in their place. This is certainly exemplified in the IEC's decision not to require *any* receipt justification to be sent to the office of the Comptroller General in support of MHA claims submitted for payment, and by not insisting on adequate claim assessment and authorization, through a proper segregation of duties, within the House administration itself. Given such events, it is necessary therefore not only to spell out what the IEC's duties are, but to require that it be bound by the *Financial Administration Act.* The IEC should further be bound to follow the executive's financial and management policies unless it takes formal steps to modify those policies in their application to the House by putting alternative adequate polices in place covering the same ground.

Accordingly, I make the following recommendation:

Recommendation No. 12

(1) New legislation should contain a broad statement of the responsibility of the House of Assembly Management Commission for the financial stewardship of all public money appropriated for the use of the House and for all matters of financial and administrative policy affecting the House administration;

(2) The specific duties and responsibilities of the Commission should be set out in legislation and should include responsibilities to:

(a) oversee the budget, revenues, expenses, assets and liabilities of the House:

(b) review and approve administrative, financial and human resource and management policies of the House;

(c) implement financial and management policies for the House and keep them updated;

(d) give general direction with respect to the efficient and effective operation of the House;

(e) make and keep current rules respecting MHA allowances;

(f) annually report in writing, fully and accurately, to the House through the Speaker;

(g) regularly review the financial performance of the House and compare that performance with the House budgets;

(h) ensure proper audits are conducted of the accounts of the House;

(i) ensure that full and plain disclosure of the accounts and operations of the House is made to the auditor on a timely basis; and

(j) consider and address on a timely basis any recommendations for improvement made by the auditors from time to time;

(3) Delegation of duties by the Commission should not relieve it of ultimate responsibility for what is done or not done and, when delegation is made, the Commission should be required to establish oversight mechanisms by means of measurement of outcomes and accountability reporting;

(4) The Commission should be guided by the spirit and letter of the* Financial Administration Act*; and

(5) It should be stated in legislation that the financial and management policies of the executive branch shall apply to the House except to the extent that they may be modified by the Commission, in which case the Commission must put in place alternative policies deemed more appropriate.

In order for the Commission to be effective, and for the individual members to be able to discharge their responsibilities, the manner in which the Commission conducts its business will have to be improved considerably. It is obvious that if members are to fulfill their duties to act reasonably on the basis of adequate information, there have to be mechanisms in place for them to amass the requisite information in sufficient time to be able to analyze and digest it. This is certainly the case with the way in which corporate boards are expected to operate and I would expect nothing less from our public stewards.

I therefore recommend:

Recommendation No. 13

As one of the first orders of business of the newly restructured House of Assembly Management Commission, the Commission should develop and adopt rules with respect to the advance circulation of agendas and briefing materials respecting items on those agendas, and give instructions to the Clerk with respect to compliance with those rules.

I have already alluded to the fact that there are no inherent checks and balances present in the operations of the IEC that would give assurance that the public interest is not subordinated to self-interest in the decision making of the Commission. There is no natural "opposition" with a duty to challenge and question decisions in the Commission. IEC decisions are not government decisions and hence the official opposition does not have the same role to play, especially since opposition members may be just as interested in obtaining additional benefits as others. The reality is that, in these circumstances, the real "opposition" to, or questioning skepticism about Commission decisions must come from the public, through the media. The notion of the media as performing a "watchdog" function on the possible abuse of government power is a central part of our democratic political culture. For that to happen, the decision making process would have to be opened up to public scrutiny, possibly engendering comment and debate through such means as editorials, opinion pieces and letters to the editor.

I have also recommended earlier in this chapter that access to information legislation apply to House operations, and that there be a publication scheme implemented so that basic information respecting MHA allowances and other matters is made available to the media and the public. In so doing, I observed that these policy positions underscore a broader principle in favour of openness and transparency generally, which may provide the basis for reform in other areas of House administration.[53]

Melding these two ideas leads to the proposition that the proceedings of the IEC should be open to the public and be capable of being recorded, reported on and broadcast in the same manner as are the proceedings of the House itself. In this way, the exposure to public scrutiny and possible criticism of the decision making process may lead to a greater assurance that decisions will be based on public interest considerations or, if not, there will be an opportunity for community debate on the matter.

Of course, there will always be some matters that would be appropriate to deal with in private discussion. Legal matters and private personnel matters are examples. Any exceptions to public meetings should, however, be carefully circumscribed.

[53] See discussion under the heading "Access to Information and the House of Assembly."

I therefore recommend:

Recommendation No. 14

(1) With limited exceptions, all proceedings of the House of Assembly Management Commission should be open to the public and should be able to be electronically accessed by the media in the same manner as proceedings of the House of Assembly;

(2) Recordings of Commission meetings should be made as part of the Hansard service;

(3) Exceptions to public meetings of the Commission should include:
(a) legal matters involving actual or impending litigation;
(b) personnel issues relating to officers of the House; and
(c) matters protected by privacy and data protection laws.

The discussion in Chapter 4 underlined the poor and inadequate record-keeping functions of the Commission. In addition, there was an absence of clarity in the way in which Commission decisions were reported. There was even a practice of maintaining two sets of minutes, one of which would be released to the House as part of the IEC's annual report with another, more expansive and clear set, kept for the IEC's internal use. This state of affairs is completely unacceptable. There must be clear, timely and substantively complete reporting to the House and the public. Of course, public meetings of the IEC will go a long way to ensuring this. However, the permanent record of the Commission's work should be equally clear and accessible for all.[54]

Accordingly, I make the following recommendation:

Recommendation No. 15

(1) The* substance *of* all *decisions of the Commission, including the final decisions of matters decided in private meetings, should be recorded in publicly accessible records of the Commission;

[54] It is to be noted that a recent review commission in British Columbia recommended that communication of decisions of the Legislative Assembly Management Commission (the B.C. equivalent of the IEC) would be enhanced if minutes of its meetings were posted on the Legislative Assembly's website. See *Report of Independent Commission to Review MLA Compensation* (Sue Paish, Q.C., Chair), p. 17. Online: http://www.leg.bc.ca/bcmlacomp/index.htm.

(2) Minutes containing the substance of all decisions should, following approval, be tabled in the House within a short time frame, be provided to each MHA and be placed on the House website for inspection by the public.

The Need for Training and Orientation and Members' Manual

One important message I received from my interviews with MHAs, members and former members of the IEC, House staff and others is that there has been a serious absence of any coordinated attempt to provide information to MHAs and bureaucrats as to the nature of their roles and the extent of the expectations of their respective jobs. In Chapter 4 I referred to the experience of one MHA, upon being elected, of arriving in the capital not knowing where to go, what to do and what resources to which he had access, and having to acquire a knowledge base essentially by trial and error. In particular, he received little or no instructions on the substantive rules respecting what he was entitled to claim under his constituency allowance, nor on the processes to be followed in preparing and submitting the claim documentation.

Because of the delays in publishing the IEC's annual report (quite apart from its inaccuracies and lack of clarity), Members were not always kept abreast in a timely manner of changes to constituency allowance rules or of decisions as to how the rules were to be applied in specific cases. Members often had to rely on acquisition of information by way of the informal "grapevine" which, of course, may not always be accurate.

Members and House staff both stressed that, from their respective points of view, it was essential that the rules governing constituency allowances should be clear and detailed and that there be a reliable source to which they could go to get guidance on how to comply with and apply the rules. Indeed, I would have thought that the same could be said of the need for clear and accurate information about a host of other things involving MHA activities as well, including the types of infrastructure and other resources available to MHAs, how to set up and operate a constituency office and how to obtain secretarial and other constituency assistance. A newly elected member should not have to find out this information by osmosis. It should be readily available in an authoritative source.

If ultimate responsibility is to be placed on the individual MHA for compliance with the rules with respect to constituency allowances and other aspects of constituency duties - as was recommended in Recommendation No. 3 - then, in fairness, it is necessary for the MHA to be given the means to be able to access, understand and follow those rules.

There is, in my view, a need for a manual of information to be prepared and made available to all MHAs containing all the basic information that a MHA would need to access from time-to-time with respect to job responsibilities and the resources available to enable those responsibilities to be discharged effectively. In addition, newly elected MHAs should be provided, at an early date following their election, with an orientation program; and all

MHAs should, from time-to-time be given training and updated information on various aspects of constituency duties, especially when new programs are introduced.

Accordingly, I recommend:

Recommendation No. 16

(1) A Members' manual should be prepared under the direction of the House of Assembly Management Commission within six months (and, in any event, before the next general election scheduled for October 9, 2007) and made available to every Member following the election.

(2) As a minimum, the Members' manual should contain:

(a) information with respect to allowances available to MHAs;

(b) duties of MHAs with respect to claims for allowances and the management and expenditure of public money;

(c) copies of applicable legislation including:

i) legislation recommended in this report,
ii) the House of Assembly Act,
iii) the Financial Administration Act,
iv) the Members of the House of Assembly Retiring Allowances Act;

(d) copies of rules and directives made by the Commission;

(e) information summarizing rulings and determinations made by the Speaker and the Commission respecting matters affecting Members' responsibilities;

(f) copies of the Code of Conduct adopted from time to time by the House;

(g) instructions as to the manner in which duties of MHAs are to be carried out with respect to making claims, and the forms to be employed and the documentation to be supplied; and

(h) information as to how to organize and operate a constituency office;

(3) The House of Assembly Management Commission should have responsibility to keep the Members' manual continuously updated;

(4) The Commission should be made responsible for causing to be developed and offered to all newly elected MHAs, whether in a general election or by-election, an orientation program on matters contained in the Members' manual and on other matters pertaining to expectations for MHAs; and

(5) The Commission should also be responsible for causing to be developed and offered to MHAs such training and information dissemination programs as may be appropriate from time to time on various aspects of an MHA's duties as well as changes in the rules.

There is also a need, in my view, for an orientation program for new members of the Commission of Internal Economy. It is obvious from the recommendations I have already made[55] that the Commission as an entity, as well as the Members of the Commission individually, should be subject to considerably higher standards and expectations than before. It is vitally important that members of the Commission under the new regime I am recommending be fully aware of the responsibilities that are placed on them and are given appropriate levels of information as to Commission processes. The Commission, with the assistance of the Clerk of the House, should be responsible to ensure this is done.

Accordingly, I recommend:

Recommendation No. 17

(1) The Speaker should cause each new member of the House of Assembly Management Commission to be provided with an information package containing, at least, information as to:

- ***(a) the responsibilities of the Commission and individual members;***
- ***(b) past minutes of the Commission that are of continuing relevance;***
- ***(c) rules and directives of the Commission;***
- ***(d) policies and guidelines issued to House staff;***
- ***(e) procedures and processes of the Commission; and***
- ***(f) the role of the audit committee[56] of the Commission;***

(2) The Clerk should be required to conduct a briefing session with all new members of the Commission within 30 days of their

[55] See Recommendations 11, 12, 13 and 14.
[56] See Recommendation 35.

appointment.

The Clerk as "Accounting Officer"

In Chapter 6 I observe that the Clerk of the House plays a "pivotal role" in the affairs of the House and should have increased duties and responsibilities especially in respect of management and financial administration. I make a series of recommendations designed to strengthen the position of Clerk in the role as chief financial and administrative head of the House administration.

The Clerk is, and should be, the senior official charged with the stewardship and effective operation of the legislative branch of government. It is essential that he or she be provided the mandate to ensure the effective operation of the House and, as well, be held accountable for that mandate. The Clerk also needs, in my view, to be given the assurance (and associated protection) that positions he or she advocates in good faith in attempting to carry out the responsibilities of office that might be in opposition to positions of the Speaker and the Commission of Internal Economy will not work to his or her disadvantage. It is important to create an environment in which the Clerk can be encouraged to speak up on matters of principle, even as against his or her political masters.[57]

In a research paper prepared for this inquiry, Dr. Christopher Dunn advocates that the House of Assembly adopt a practice of having the Clerk serve as "accounting officer in the UK tradition," and that legislation be drafted to emphasize the Clerk's personal accountability to the Public Accounts Committee of the House for the propriety and regularity of certain aspects of the responsibilities associated with the office.[58]

The term "accounting officer" may be confusing to some. It might suggest that the emphasis is on performing the functions of an accountant. That is not so; rather, it emphasizes a special degree of "accountability" for the responsibilities of office. The term is usually applied to the permanent head of a government department or entity.

The concept of an accounting officer has existed in practice in the United Kingdom since 1872. In 2000, the concept was enshrined in statute. Traditionally, the deputy minister of a department was regarded, with respect to accountability, as having the function of supporting his or her minister with respect to the minister's accountability to the legislature and its committees under the doctrine of ministerial responsibility. In supporting the minister

[57] In the Members' survey conducted by the inquiry staff 53% of respondents either strongly or moderately agreed with the proposition, "The Clerk should have the responsibility to challenge the propriety and wisdom of discussions and decisions undertaken in IEC meetings." See Appendix 1.6 (Survey Results), Item 51.

[58] Dr. Christopher Dunn, "The Applicability of the Accounting Officer Position in the House of Assembly," (February 1, 2007). This paper has been reproduced as Appendix 5.5 [Christopher Dunn, "Accounting Officer"].

before committees and in other public venues, the deputy acted, not in his or her own right, but on behalf of the minister under the ministerial responsibility umbrella. The notion of the deputy as "accounting officer" changes this traditional idea and purports to place personal responsibility directly on the deputy for the overall organization, management and staffing of his or her department, particularly in the area of financial issues where matters are directly assigned or delegated to him or her by legislation. The deputy then becomes directly accountable. The emphasis is on ensuring, amongst other things, "regularity" and "propriety" in administration.[59] In the United Kingdom, the accounting officer is accountable to the Public Accounts Committee of the House of Commons and is liable to be summoned before it.

Another important aspect of the concept of accounting officer is that it provides a means whereby the deputy (or permanent secretary, as the position is called in the United Kingdom) can object to a proposed ministerial course of action and protect himself or herself for having taken a stand on principle. The accounting officer must put his or her objections in writing and notify the comptroller general or auditor general if the advice is overruled. If the minister persists in the proposed course of action, the accounting officer can request a written instruction from the minister, whereupon the accounting officer will be bound to comply with it. In this way, political will can not ultimately be thwarted, but the potential impropriety of the action will be brought to the attention of public officers like the auditor general. As Dr. Dunn observes, "the deterrent value is great."[60]

In Canada, the federal government has only recently passed legislation to introduce the notion of an accounting officer into the federal public service. The idea had been recommended - in a variety of guises - in a number of government reports and studies as well as by academics over the past 30 years. Most recently it was recommended for adoption by the Gomery Commission.[61] The *Federal Accountability Act* enacted a version of the accounting officer in late 2006.[62] The legislation makes a deputy minister (and sometimes others) "accountable before the appropriate committees of the Senate and the House of Commons" for:

(a) the measures taken to organize the resources of the department to deliver departmental programs in compliance with government policies and procedures;

(b) the measures taken to maintain effective systems of internal control in the department;

(c) the signing of the accounts that are required to be kept for the preparation of

[59] These ideas are described in detail in Christopher Dunn, "Accounting Officer," pp. 4-6.
[60] Christopher Dunn, "Accounting Officer," p. 6.
[61] Canada, Commission of Inquiry into the Sponsorship Program & Advertising Activities, *Restoring Accountability: Recommendations* (Ottawa: The Commission, February 1, 2006), p. 200.
[62] S.C. 2006, c. 9, (amending the *Financial Administration Act* by adding Part 1.1).

the Public Accounts; and

(d) the performance of other specific duties assigned to him or her by, or under "this or any other Act in relation to the administration of the department.[63]

One of the motivations for introduction of these provisions was, in the light of the Gomery inquiry, to send a strong message about the importance of strong departmental management and of the role of the deputy in achieving it. Because accounting officers were not to be accountable to Parliament itself, but only before parliamentary committees, there was no weakening of the doctrine of ministerial responsibility, since the accountability of the deputy before committees would only aid Parliament in holding ministers to account before the House itself, by giving Members more information on which to base questions to the Minister.

Unlike the United Kingdom model, the Canadian provisions introduce a different regime where there is a difference of opinion between a deputy and his or her minister on interpretation of a policy or directive: the accounting officer must seek guidance from the secretary of Treasury Board, and it is the Board that will, in effect, arbitrate a solution if the minister and the deputy continue to disagree.

As Dr. Dunn points out in his research paper, a number of arguments for and against the concept of an accounting officer have been put forward over the years.[64] On balance, he concludes, as do I, that there is much to the idea that commends it for adoption in the legislative context. He lists a large number of arguments that favour its adoption within the House even though it does not exist - and may not be adopted in the future - within the executive branch of the provincial government.[65] The fact that the United Kingdom has an accounting officer within the legislative branch is testimony to the fact that the concept can work.[66] Indeed, since section 5 of the *Clerk of the House of Assembly Act* provides that the general duties of the Clerk, where no special provision is made, "shall be similar to those of the clerks of the House of Commons in England,"[67] it is natural that we should look to United Kingdom practice for guidance in this area. In fact, Dr. Dunn suggests, that because of section 5 "there is already a mandate for adopting the accounting officer idea in the House."[68]

A legislative accounting officer would be a method of clarifying and emphasizing the management responsibilities of the Clerk. By strengthening the position, the Clerk may be

---

[63] S. 16.2 of the *Financial Administration Act*, as amended by the *Federal Accountability Act.*
[64] Christopher Dunn, "Accounting Officer," pp. 16-18.
[65] Christopher Dunn, "Accounting Officer," pp. 18-19.
[66] See the discussion of the Clerk's role as accounting officer in Robert Rogers and Rhodi Walters, *How Parliament Works*, 6th edition (Harlow: Pearson Longman, 2006) at pp. 59-60.
[67] R.S.N.L. 1990, c. C-19.
[68] Christopher Dunn, "Accounting Officer," p. 19.

encouraged to challenge decisions of the Commission of Internal Economy in appropriate cases. The practice to date has been that the Clerk has not often challenged IEC decisions and has become tarred with the results of them. The possible danger of lack of confidence and trust between minister and deputy (an argument sometimes put forward in favour of not adopting the idea) should not be a concern in the present context since the primary relationship is between the Clerk and the IEC. The Speaker is not a perfect analogy for a minister in this context.

On balance, the introduction of the notion of the Clerk as accounting officer for the House has much to commend it. It is another measure, amongst a number of recommended measures, that may assist in restoring public faith in the system, a faith which at the moment appears to be at a low ebb. In addition, declaring the Clerk to be accounting officer will also send a message to politicians generally and to the IEC in particular that the Clerk, as permanent head, has ongoing responsibilities that he or she cannot resile from, and that there is no legal authority resting in the Speaker or the IEC to tell the Clerk to do something that is clearly contrary to rule or policy. It will reinforce ownership by the Clerk of the obligations of office.

Before leaving this subject, however, let me address several arguments that might be put forward in objection to adoption of the idea within the House. The first is the notion that deputy ministers (and by analogy, the Clerk) already have a full, accountable generalized duty of stewardship for the departments over which they preside and that the idea of an accounting officer is redundant. The answer to this is that many studies, government reports - and now legislative initiatives - recognize the concept as adding something significant to the mix of deputies' responsibilities. In fact, the commonly understood notion of the deputy of a department having a generalized responsibility for his or her department does not find specific expression in any legislation.[69] One must extrapolate a general principle from individual provisions on specific subjects in other legislation like the *Financial Administration Act* and in government policy manuals issued under authority of that Act. The matter is therefore not as clear as it might be in the executive branch of government and, in any event, the current legislative description of the Clerk's duties - as will become apparent from the discussion in the next chapter - is even less satisfactory.

The second objection might take the form of an argument that the *Transparency and Accountability Act*,[70] which was made applicable to the House of Assembly and was recently brought into force, provides, in section 21, that the Speaker must enter into a "performance contract" with the Clerk, as an officer of the House.[71] It might be argued that the same result

[69] The closest one can come to a generalized statement is ss. 9(2) of the *Executive Council Act*, S.N.L. 1995, c. E-16.1 which provides simply, and unhelpfully, that "the deputy minister shall be the deputy head of the department."

[70] S.N.L. 2004, c. T-8.1 [the *TAA*].

[71] *Internal Economy Commission Act*, R.S.N.L. 1990, c. I-14, as amended by S.N.L. 2004, c. 41 makes the *Transparency and Accountability Act* applicable to the House and stipulates that the analogue for a minister is the Speaker and that for a deputy minister under s. 21 is "an officer of the House…"

as naming the Clerk as an accounting officer could be achieved by this process. This would be a poor substitute for a legislative accounting officer regime.[72] The primary objection is that, at best, such a performance contract could only provide for accountability to the other party to the contract (the Speaker), whereas the accountability of the accounting officer would be, amongst other things, to a body (the Public Accounts Committee) completely outside the entity in which the Clerk operates.

A third objection could be that the introduction of the accounting officer idea in the legislative branch on its own would involve an inappropriate partial or piecemeal reform. The UK Clerk of the House is the accounting officer for the House of Commons, but he or she exists in the context of a system of accounting officers that are found throughout government departments. The objection would be that one should introduce accounting officers only as part of a government-wide system and, accordingly, the naming of the Clerk alone as an accounting officer is premature. With respect, this logic is faulty. Many wide-ranging reforms start as pilot projects or partial steps. In any event, the more important point is that the imprecision that has marked the job description of the Clerk must be eliminated, and I perceive the accounting officer idea as an appropriate corrective. The introduction of a reform in the legislative context does not preclude it being adopted ultimately by the executive, although this is, of course, beyond my mandate to investigate or recommend.

A fourth objection is that the committee system upon which the British system depends cannot be imported into this province. Much depends in Britain on the venerable Public Accounts Committee. The Public Accounts Committee - or Committee of Public Accounts, as it is sometimes called - is a sixteen-member committee that has existed for over a century and a quarter in Britain. Although it has the power to hear from ministers, its main witnesses are accounting officers. It has an Opposition Chair, but the committee does not manifest party divisions. This committee is a generally non-partisan and active one, making an average of fifty reports a year.[73] Membership on it is coveted, and tends to be long-term in nature. C.E.S. Franks, in a paper prepared for the Gomery Commission, comments on its importance:

> Three factors, apart from its long history and tradition as a powerful committee, permit the British Public Accounts Committee to maintain its importance. First, it is composed of able and long-serving members. It is a matter of great prestige to be appointed to the Committee, and members have to wait for an opening before they are considered for appointment. Once appointed, they remain on the Committee for a long time.

[72] *TAA*, ss. 21(2) provides that the Lieutenant-Governor in Council shall "determine the matters" to be included in a performance contract. While the subject-matter of such a contract can be prescribed, presumably the details of the terms are a matter of negotiation between the minister (Speaker) and deputy (Clerk). There is, therefore, no guarantee that a specific level of responsibility will necessarily emerge. In any event, at present there are no regulatory prescriptions issued stipulating the matters to be included in performance contracts.
[73] Rogers and Walters, footnote 66, p. 284.

> Second, the Public Accounts Committee adopts a non-party attitude in its work and seeks to reach dispassionate findings and recommendations whatever government is in power. The Committee performs a vital function on behalf of Parliament. It gives Parliament, and through Parliament the people of Britain, assurance that the Government handles its finances with regularity and propriety, and, as far as possible, ensures that expenditures are made with due regard to economy, effectiveness and value for money. The Committee's sense of this vital function in the broader scheme of parliamentary government creates a demand that its members act in this non-partisan way.
>
> Third, the British Public Accounts Committee operates within a system of clearly and logically related bodies and functions. Its focus on the Accounting Officers as the officials personally responsible for good financial administration provides a logic and coherence to the system. The Committee has a well-established place within an effectively operating system of roles, responsibilities and accountabilities.[74]

In contrast, this province's legislature is highly partisan, both at the committee level and in the plenary legislature. The committees are not particularly active (as the discussion in Chapter 4 indicates).[75] The output of the Public Accounts Committee has been minimal in the last several years.

However, institutions can change. Even the federal House of Commons Public Accounts Committee, which has traditionally been derided as partisan and short-sighted, has impressed observers in the past few decades as having matured into a more even-handed oversight committee. The Gomery Commission Report was of this opinion as well, but, in order to continue that progress, suggested that members of the federal Commons PAC be appointed for the duration of a Parliament.

In the next section I argue for a more active role for the Public Accounts Committee. In the context of the events and issues chronicled in this report, the House of Assembly will, I hope, likely be in a collective mood to make its operations, and those of the PAC, more active and relevant. If they do not, the Committee may have to be restructured in order to encourage greater effectiveness. In any event, I do not believe that the past performance of the PAC in this province compared with the vibrant status of the UK equivalent should be accepted as an insuperable objection to the adoption of the accounting officer concept.

I therefore remain of the view that the accounting officer concept should be applied

---

[74] C.E.S. (Ned) Franks, "The Respective Responsibilities and Accountabilities of Ministers and Public Servants: A Study of the British Accounting Officer System and its Relevance for Canada," in *Restoring Accountability: Research Studies Volume 3*, Commission of Inquiry into the Sponsorship Program and Advertising Activities, pp. 177-178.

[75] See Chapter 4 (Failures) under the heading "Inaction by Public Accounts Committee."

to the Clerk. I agree with Dr. Dunn that the United Kingdom model should be followed, rather than that of the *Federal Accountability Act*, in relation to the manner of dealing with disagreements between the Clerk and the Speaker or the IEC. Under the Canadian federal model, the Treasury Board would be the arbiter of disagreements. That would result, in the current context, in an unnecessary intrusion of the executive branch into the legislative. Besides, the idea of the political level having the final say, but having to account for the decision in the context of principled objection, is, in my view, appropriate and consistent with notions of responsible government.

Accordingly, I recommend:

Recommendation No. 18

(1) The Clerk of the House of Assembly should be designated as accounting officer for the House, to be directly accountable to the Public Accounts Committee for the authorities and responsibilities assigned by law or delegated by the House of Assembly Management Commission, including for:

(a) measures taken to organize the resources of the House to deliver programs in compliance with established policies and procedures;

(b) measures taken to implement appropriate financial management policies;

(c) measures taken to maintain effective systems of internal control;

(d) the certifications that are made in annual reports regarding accuracy of MHAs' transactions and the minutes of the Commission and

(e) the performance of other duties specifically assigned;

(2) Where the Speaker or the House of Assembly Management Commission is unable to agree with the Clerk on the interpretation or application of a rule, directive, policy or standard applicable to an MHA, the House administration or the statutory offices, the Clerk should seek guidance from the Comptroller General or the Deputy Minister of Justice; and

(3) The legislation should provide that no reprisal shall be taken

against the Clerk for actions taken by him or her in good faith as accounting officer.

Role of the Public Accounts Committee

In the parliamentary system of government, the Public Accounts Committee (PAC) has a very important role to play in "hold [ing] government accountable for the stewardship of public assets and the spending of public funds."[76] The annual report of the Auditor General usually provides the basis for the lines of inquiry that the PAC makes.

The PAC, a standing committee of the House, is virtually moribund. As noted in the previous section and in other parts of this report, the PAC has not been very active in recent years. This is unfortunate, given the potentially important role it could play in ensuring good governance. In years past, the PAC was not always so inactive. In the late 1970s, for example, the PAC played a fundamental role in examining alleged improper tendering practices within government, using comments in the Auditor General's annual reports as a basis of inquiry. The Committee held a series of public hearings and summoned a variety of witnesses. The proceedings were followed daily by the media. The issues became a matter of public discussion. The work of the PAC was one of the catalysts for the appointment of a commission of inquiry (the Mahoney Inquiry) to examine the whole issue and make recommendations for improvements in the tendering processes and legislation.[77]

In my view, there is room for a greater role for the Public Accounts Committee than it has been playing in recent years. In Chapter 4 I observed that there was an important oversight role that could be played by an active PAC in relation to the financial affairs of the legislature, as well as the role it should play in relation to financial accountability of the executive. So long as there is no overlap in membership between the PAC and the Commission of Internal Economy, there is a basis for the PAC, independent of the IEC, to fulfill its time-honoured role of financial watchdog with respect to spending in the House.

I therefore recommend:

[76] *Financial Management Handbook of the Office of the Comptroller General*, (March 2003), p. 6. Order 62 of the *Standing Orders of the House of Assembly*, which constitutes the Public Accounts Committee, does not set out any formal mandate.

[77] See *Report of the Commission of Enquiry into Purchasing Procedures of the Department of Public Works and Services*, (March 1981).

Recommendation No. 19

(1) The Public Accounts Committee of the House of Assembly should develop a program of action for regular investigation of matters of concern expressed in the Auditor General's annual reports, whether they relate to the executive or legislative branches of government; and

(2) The Public Accounts Committee, additionally, should regularly examine and investigate matters dealt with in the annual reports of the House of Assembly Management Commission, including the financial statements of the House and auditors' opinions thereon, as well as matters disclosed in the course of compliance audits and any other matters of concern arising out of decisions of the Commission.

(3) The Public Accounts Committee should regularly review with the Clerk of the House of Assembly, the Clerk's responsibilities as accounting officer of the House.

As I noted in the previous section, the PAC appears in recent years to have operated in a highly partisan manner, therefore hampering its effectiveness. The operation of the equivalent body in the United Kingdom Parliament is an example of how such a committee, mindful of the vital function it performs, can put partisan politics aside and seek "to reach dispassionate findings and recommendations whatever government is in power."[78]

I am hopeful that in the new climate engendered by the events that have occurred, as commented on by the Auditor General and as dealt with in this report, the PAC may develop a more active and constructive role as a government spending watchdog. While I am not prepared to recommend it at this time, I will observe that if the PAC does not become more active and effective, perhaps the time will come when the committee should be mandated to have a balance of government and combined opposition party representation on it. The House could deal with this issue by appropriate amendments to its Standing Orders.

Internal Rulings and Investigations

Having internal processes to deal with potential irregularities, financial or otherwise, is an essential part of a truly accountable system. In the context of Members' constituency allowances, the institution of such processes would have a number of benefits. The most

[78] See Franks, footnote 70.

obvious benefit is the early identification of problems and the ability to deal with them expeditiously. Such processes would also be of significant assistance to MHAs generally because, notwithstanding the greater detail that will be provided with respect to allowable constituency expenses as a result of later recommendations in this report,[79] and notwithstanding the provision of a Members' Manual as previously recommended,[80] complex situations requiring clarification will undoubtedly arise from time to time.

One model for these internal investigations would be a system consisting of two separate processes. The first would involve the situation where a Member makes or contemplates making or incurring an expense and wishes to clarify whether it is an expense that is susceptible to being reimbursed. Thus an advance inquiry could be made by a Member to the Speaker as to the appropriateness of an anticipated expenditure, or of an expenditure already made.[81] In Recommendation No. 3(e), I recommended that a proper expenditure regime should, amongst other things, contain mechanisms whereby, in doubtful cases, MHAs could obtain rulings they could reasonably rely on in making and claiming reimbursement for a particular expense. Such a process would involve: a) a written request by a Member to the Speaker for a ruling; b) a written response and ruling by the Speaker; c) the right to make an appeal of the Speaker's ruling to the Commission, and d) ultimately, if necessary, a ruling from the Commission, which decision would be final.

The second process could involve the review of an allowance use where a particular expenditure appears to be questionable. It could be initiated at the request of a Member, or of the Clerk, or of the Speaker's own accord. The Speaker would then conduct, in his or her capacity as Chair of the Commission, a review to determine whether the Member's use of an allowance or other disbursement complies with the purposes for which the allowance or other disbursement was provided, or complies generally with legislation, or the rules or directives of the Commission. This idea has now found legislative favour in some other jurisdictions.[82]

This process would involve a series of steps, similar at the outset to those suggested with respect to the advance ruling, wherein the Speaker would make an initial determination. Again, this ruling would be appealable. However, because in this circumstance suggestions of impropriety may be involved, the appeal should be to a person who is not part of the House administration. The Commissioner for Members' Interests (renamed in accordance with an earlier recommendation[83] to be Commissioner for Legislative Standards) is, in my view, an appropriate appellate venue.

---

[79] See Chapter 10 (Allowances).
[80] See Recommendation 16.
[81] Even expenditures that have already been made could be made the subject of such an interpretative ruling. The need for such a ruling could arise, for example, where a claimed expenditure is rejected by House staff or where, although a member has had a claim honoured, he or she still has concerns about the application of the rules to that type of expenditure and wishes a definitive ruling in case a similar expenditure has to be claimed in the future.
[82] See e.g. *The Legislative Assembly and Executive Council Act, 2005,* S.S. 2005, c. L-11.2, s. 56.
[83] See Recommendation 4(3).

These processes should foster a further measure of self-discipline on the part of Members. They would have the assurance of a formal process wherein they can initiate the review of a difficult matter in a positive sense and not a pejorative one. At the same time a formal process would exist to enable those in charge of the administration of allowances to better protect and account for the expenditure of public money by conducting internal investigations where warranted.

The adoption of such a regime should also have a broader benefit: the reversal of a certain culture of neglect and carelessness by the elimination of pleas of ignorance of the rules, something that is rarely justified, but too often made in the past.

I therefore make the following recommendation:

Recommendation No. 20

(1) A procedure should be established in legislation whereby an advance inquiry could be made in writing by a Member to the Speaker as to the appropriateness of an anticipated expenditure, or of an expenditure already made, with the resulting ruling being binding;

(2) A procedure should be established in legislation whereby the review of an allowance use could be initiated at the request of a Member or of the Clerk or of the Speaker's own accord, and the Speaker would conduct, in his or her capacity as Chair of the House of Assembly Management Commission, a review to determine whether the Member's use of an allowance or other disbursement complies with the purposes for which the allowance or other disbursement was provided, or complies generally with legislation, the rules and the directives of the Commission;

(3) Both of the above described procedures should include procedural safeguards by way of further review and/or appeal mechanisms. In the case of advance inquiries, these would ultimately involve the House of Assembly Management Commission. In the case of review of allowance use, these would ultimately involve the Commissioner for Legislative Standards.

"Whistleblower" Legislation

A mechanism to promote good governance that has been developed in both the private and public sectors in recent years has been the notion of a "whistleblower" policy designed to encourage persons within an organization to report instances of behaviour of others in the organization that is considered improper, unethical or wrong. In the public

sector, the policy is usually embodied in legislation and is often referred to by other names such as "public servants disclosure"[84] or "public interest protection."[85] The key elements of a whistleblower policy are: the provision of a well-publicized formal mechanism whereby a person concerned about the improper behaviour of another in an organization may express those concerns in confidence to another person who is regarded as independent; a process whereby those concerns will be investigated in a fair manner; and protection to the whistleblower against reprisals for having come forward. For the scheme to work, the policy must be communicated to all employees affected and key members of management should stress the importance of the policy.[86] As well, potential whistleblowers must have confidence in the protections that are provided.

In the area of publicly traded corporations, either an independent member of the board of directors or an independent firm often monitors the whistle-blowing policy. In the public sector, the monitor is often a statutory officer specially appointed for the purpose and who, by virtue of the position, is regarded as independent and not subject to influence by the organization being investigated.

The public service of the province of Newfoundland and Labrador does not have a formal, legislated public interest disclosure policy within any part of the government. In other jurisdictions that have implemented a whistleblower policy, the policy does not usually apply within the legislative assembly service or within the legislature generally. Notwithstanding this, and notwithstanding the considerable opposition to the concept by local MHAs,[87] I believe that it is appropriate to recommend such a policy within the House of Assembly in this province. It is obvious from the events that have been documented in Chapters 3 and 4 that at least some people within the public service - both within and without the House administration - would have seen the way in which claims were being processed without proper documentation and without checking or segregation of duties. Others would have known about the year-end payments that were made to MHAs in violation of the previously enunciated policy of requiring receipts for all future claims. These are but two examples. If a system had been in place encouraging reporting of perceived improprieties, it is possible (and I recognize there is no guarantee) that some of the events that occurred could have received scrutiny much earlier than they did.

I realize that there is a concern that applying a whistleblower policy to publicly-visible persons like MHAs leaves them open, perhaps more than others, to spurious claims being made by disgruntled persons with an axe to grind. A fair and thorough investigation

---

[84] *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46.
[85] *Public Interest Disclosure (Whistleblower Protection) Act*, S.M. 2006, c. 35.
[86] William B. deMeza, "New Protections for Employees, Responsibilities for Employers Under Sarbanes-Oxley Whistleblower Provisions," (March 27, 2003), online: Hollard & Knight LLP <http://www.hklaw.com/Publications/OtherPublication.asp?ArticleID=1984>.
[87] In the survey of MHAs conducted by inquiry staff, 50% of respondents either strongly or moderately disagreed with the notion of a whistleblower process applicable to inappropriate behaviour by MHAs. See Appendix 1.6 (Survey Results), Item 53.

process should, however, screen out unfounded allegations of a vindictive nature. I do not believe that a concern of this nature is sufficiently strong to overbalance the other benefits of implementing such a policy, particularly the removal of public suspicion that MHAs have something to hide and the bolstering of public confidence in the open and transparent nature of the political system.

I have already recommended that the Clerk be designated the "accounting officer" for the House administration.[88] That concept involves the expectation that the Clerk will "stand up and be counted" when he or she believes that the Speaker or the Commission of Internal Economy is embarking on a course that is contrary to a rule, directive, policy or standard, and provides a mechanism for the Clerk to document his or her concerns and a protection against reprisal for doing so. To some degree, that will protect the Clerk against the pressure of always having to support his or her masters at all costs.

A whistleblower policy is broader than this. It should provide all persons, whether in high management positions or not, an opportunity to voice concerns about impropriety in the confidence that they will not be penalized for speaking up.

A number of models for public interest disclosure mechanisms exist in this country but, as I have noted, they do not generally apply to the legislative branch.[89] I have chosen to follow the Manitoba model because of its relative simplicity, but I have had to adapt it to make it apply to the House. The opportunity to invoke the policy should not be limited to persons within the House administration, but should include members of the public service generally. Since the financial affairs of the House occur within the broader system of management of the spending of public money under the *Financial Administration Act*, there may well be people in other parts of government (such as in the office of the Comptroller General) who may become aware of impropriety involving the House. The focus of inquiry should not be solely on employees of the House or its statutory offices, but should include the Speaker, MHAs and members of the IEC.

The whistleblower policy I am recommending will only apply to the legislative branch. To recommend application throughout government would be outside my mandate. Since it would be inappropriate and not cost-effective to recommend that a new statutory office be created to perform the investigative and monitoring function safely within the legislative branch, and assuming that the policy will not expand beyond its present size, I believe the Citizen's Representative should be named as the person to whom a disclosure could be made and who would conduct an investigation.

Accordingly, I recommend:

---

[88] See Recommendation 18.

[89] *Public Service Act*, R.S.O. 1990, c. P-47; *Civil Service Act*, R.S.N.S. 1989, c. 70*; Employment Standards Act*, S.N.B. 1982, c. E-7.2*; Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2*; Public Interest Disclosure (Whistleblower Protection) Act*, S.M. 2006, c. 35; *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46.

Recommendation No. 21

(1) A public interest disclosure ("whistleblower") program should be implemented by legislation in the legislative branch of government;

(2) Under the program, members of the public service or MHAs who believe that wrongdoing, such as committing a statutory offence, gross mismanagement of public money, violation of a code of conduct or failure to disclose information required to be disclosed, has been committed by an MHA, the Speaker, persons employed in the House or its statutory offices, or members of the House of Assembly Management Commission should be provided with a mechanism to report such wrongdoing in confidence;

(3) The program should provide a means whereby the disclosure of alleged wrongdoing can be investigated in a fair manner and recommendations made for appropriate action to be taken;

(4) The Citizens' Representative should be designated as the investigator under the program;

(5) The program should provide that no reprisals can be taken against any person making a disclosure in accordance with the program; and

(6) The Clerk should be tasked with undertaking at an early date the development of explanatory material relating to the program, and how it should be used, for approval by the Commission, and then for general distribution to members of the public service and MHAs, stressing the importance of the program and its full support by the Commission.

The details of the policy I am recommending are set out in the draft legislation that is being submitted with this report.[90]

Public Exposure by Auditor General

[90] See Chapter 13, Schedule I, Part VI.

There can be no doubt that one method of preventive enforcement of a Member's obligations is the existence of the possibility of exposure to the public, through the media and otherwise, of a Member's failure to comply with expected standards of financial accountability. Such exposure depends, however, on the ability to gain access to the information indicating the failures in question. One method is through a whistleblower policy just discussed.

Section 15 of the *Auditor General Act*[91] requires the Auditor General in certain circumstances to report instances of improper financial activity discovered in the course of an audit. The specific provision reads as follows:

> (1) Where during the course of an audit, the auditor general becomes aware of an improper retention or misappropriation of public money or another activity that may constitute an offence under the Criminal Code or another Act, the auditor general shall immediately report the improper retention or misappropriation of public money or other activity to the Lieutenant-Governor in Council.[92]
>
> (2) In addition to reporting to the Lieutenant-Governor in Council under subsection (1), the auditor general shall attach to his or her annual report to the House of Assembly a list containing a general description of the incidents referred to in subsection (1) and the dates on which those incidents were reported to the Lieutenant-Governor in Council.

This provision applies generally to all aspects of the Auditor General's audit work. It is not specifically aimed at MHAs or only financial activities in the House of Assembly. Identical standards applicable to reporting by the Auditor General must therefore be applied throughout government including both executive and legislative branches.

There are constraints on the obligation of the Auditor General to make a section 15 report. They are that:

1. the information must be obtained "during the course of an audit," and not otherwise;

2. the information must indicate an "improper retention" or "misappropriation" of public money or "another activity" that may constitute a criminal or statutory offence; and

[91] S.N.L. 1991, c. 22 as amended.
[92] Section 31 of the *Auditor General Act* in fact requires that reports to the Lieutenant-Governor in Council should be submitted through the Minister of Finance.

3. the retention, misappropriation or activity must be such that it is either "improper" or "may" constitute an offence under the *Criminal Code* or provincial statute.

It is important to note that the role of the Auditor General involves considerably more than merely reporting every time a discrepancy is discovered in the course of an audit. The reporting obligation under section 15 is only triggered where there is a basis for believing that there may have been some impropriety, criminality or illegality associated with the questionable transaction. Accordingly, it is not correct to say, as has been suggested, that the Auditor General's role is only to state the facts relating to the discrepancy and does not extend to determining whether there is a potential for concluding that the author of the transaction intended to bring it about in circumstances that might be criminal. If that were so, it would mean that every time the Auditor General discovered an instance of, say, double billing or overpayment, however benign, he or she would be obligated to report it. That is not so. Instead, there must be a basis for belief by the Auditor General that there may be impropriety, criminality or illegality involved in the discrepancy.

The issuing of a section 15 notice is therefore a serious matter inasmuch as it carries with it the suggestion of potential impropriety or criminality and may well trigger further investigative processes that could possibly lead to criminal charges being laid or civil actions being instituted.

It is true that the role of the Auditor General is not to decide whether charges should be laid or prosecutions or actions be proceeded with. Those decisions are for the police and Crown prosecutors. The police must apply a threshold test of "reasonable grounds" to believe an offence has been committed.[93] That essentially involves an assessment, objectively, of whether there is admissible evidence that could result in a conviction and, subjectively, whether the police officer contemplating laying the information believes that grounds exist. This is a lower standard than that applied by a Crown prosecutor in deciding whether to proceed with a prosecution. That standard involves consideration, additionally, of whether, given the nature, credibility and admissibility of the available evidence, there is any reasonable prospect of conviction, and whether it is in the public interest to proceed with prosecution.[94]

Both the police and prosecutorial standards, though low thresholds in themselves, are higher than the threshold contemplated by section 15. Nevertheless, section 15 does require an advertence to the question of potential criminality before proceeding with the issuance of a notice.

Because the consequences of initiating a report can be significant in terms of their impact on the reputations of individuals who may be identified as being involved in the

[93] *Criminal Code of Canada*, s. 504.
[94] Newfoundland and Labrador, Public Prosecutions Division, *Crown Policy Manual*, Topics 200, 2005.

impugned activity and on the ability of such individuals to receive a fair trial if criminal charges are ultimately laid, the discretionary decision to make a report under section 15 must be exercised judiciously and with caution. Factors that should be taken into account in exercising the discretion would include:

1. whether, judged against proper accounting and other investigative standards the retention, appropriation or other activity actually occurred;

2. whether, following a thorough investigation, it can be said that the nature of the transaction, viewed in context, indicates that it is something more than a mistake or inadvertent error - i.e., is there no realistic possibility that there is an innocent explanation for what occurred?;

3. whether the transaction is materially significant; i.e. is something that extends beyond *de minimis; and*

4. whether there is a realistic (i.e. not merely fanciful) possibility that a reasonably informed public official could conclude that the transaction was improper or evidenced criminal or illegal behaviour.

The report that the Auditor General is required to make is two-fold: (i) he or she must "immediately" report to the Lieutenant-Governor in Council; and (ii) he or she must attach to the annual report to the House of Assembly a list containing "a general description" of the incidents.

The legislation does not contemplate that a written report be issued to the public or the media, or that a news conference be held, or that interviews be given to the media amplifying what is in the report. This is as it should be. Undue publication of the information in a report at such an early stage - before decisions are taken to lay charges, or prosecute or seek reimbursement - risks interfering with important constitutional and other values. Given the relatively low threshold justifying the making of a report, even though its issuance may cause considerable damage to an individual's reputation that may be difficult to repair if it is ultimately shown that there is an innocent explanation, one ought to be careful about bandying details about in the public domain. Furthermore, undue publication of the information with its implicit suggestion of impropriety or criminality may have an effect on a person's constitutional right to a fair trial if charges are ultimately laid.

As a general rule, therefore, the reporting function of the Auditor General should be limited to making the official reports to the Lieutenant-Governor in Council and the House as contemplated by section 15. I note that, as a general rule, even at the stage of the decision to prosecute, where the threshold for acting is higher, the police do not make a habit of making public announcements that charges have been laid.

While I recognize that there is a possibility that the Lieutenant-Governor in Council might not do its duty on receipt of a report and disregard it, that risk is minimized by the fact that ultimately there has to be public disclosure - at least with respect to a "general

description" - of the incident in the Auditor General's annual report to the House.

These observations, I believe, are all the more important when one comes to dealing with situations involving public figures such as MHAs. They are particularly vulnerable to attacks on their reputations. Allegations of impropriety - even if ultimately shown to be unfounded - may have the effect, given the tendency of the public to ascribe low motives to politicians, of making the MHA's continuing job untenable, and may irrevocably affect re-election chances. Caution in the manner of dealing with such situations is called for.

It is outside my mandate to make recommendations with respect to the continuing operation of section 15 generally. However, I believe it to be appropriate to address the matter with respect to matters involving MHAs. After all, it was the issuance of section 15 reports that became the catalyst for the current inquiry.

In the first place, I believe it important - indeed a fundamental aspect of fairness - that in undertaking the analysis of whether the Auditor General should exercise his or her discretion to issue a section 15 report, the Auditor General should make full disclosure to the Member concerned, give him or her an adequate opportunity to provide any additional information as well as an explanation for what has been found, and consider those responses as part of his or her discretionary decision making.

Additionally, I believe the role of the Auditor General, at least when dealing with identified discrepancies involving Members, to be one of preparing and delivering to the appropriate officials a comprehensive report detailing the transactions being questioned, why he or she believes that a report is warranted, and containing any recommendations he or she considers appropriate to make. I do not believe it appropriate, however, to make the report to the Lieutenant-Governor in Council as section 15 now contemplates. The Auditor General is an officer of the House and provides his or her audit services to the House. The report should therefore be to the Speaker. In addition, however, the report should be given to other persons who have a vital stake in the information disclosed. They include:

1. The Premier. With respect to MHAs who are also Cabinet Members, the Premier must be in a position at the earliest opportunity to make decisions as to whether the Minister ought to remain in Cabinet. With respect to MHAs who are not Cabinet Members, the Premier also must be aware of any potential impropriety in case he or she is contemplating inviting such a person into cabinet.

2. The Leader of the political party of which the MHA is a member. The Leader needs to know this information in case the roles assigned to the MHA in caucus will be compromised by the information disclosed in the report.

3. The Attorney General. Inasmuch as a report is based on the possibility of impropriety or criminality, the Attorney General in his political role as chief law officer of the Crown must decide whether to request a police investigation and, if charges are laid, to proceed with prosecution.

4. The Minister of Finance. Any time public funds are in issue the Minister of Finance is *ipso facto* interested. It would be necessary for the Minister, at an early date to be in a position to initiate action to recover public funds and, in the interim, to freeze assets or institute set-offs.

The Auditor General should not, unless in the most exceptional of circumstances, make his or her report known to any other individual. Indeed, section 21 of the *Auditor General Act* provides that the Auditor General must "keep confidential all matters that come to his or her knowledge in the course of his or her employment or duties under [the] Act and shall not communicate those matters to another person." The only exception is where such communication may be required in connection with the discharge of responsibilities under the Act or the *Criminal Code*. Inasmuch as the Auditor General's responsibilities to report under section 15 are limited to reporting to the Lieutenant-Governor in Council and in his annual report, it is arguable that the Act already forbids communication to any other person, including the media and the general public.

I am not concerned about the risk of the report being "buried" with no action being taken on it. I cannot conceive of an Attorney General, who must act without reference to political considerations in such matters, not doing his or her duty to initiate the appropriate action. If charges are laid, or an action commenced, the matter may then become public in the same way as any other prosecution or court proceeding. In any event, the Auditor General must include a reference to the matter in his or her public annual report to the House. Thereafter the Public Accounts Committee, if it is doing its job conscientiously, would be in a position to examine the matter.

Furthermore, there are other mechanisms whereby information in a section 15 report may legitimately become public. The circumstances surrounding the creation of this Commission are a case in point: upon being made aware of a section 15 report involving a Cabinet Minister, the Premier relieved him of his office and, quite properly, felt compelled to provide a public explanation for his decision.

Accordingly, aside from making his or her report to the individuals I have identified, the Auditor General generally ought to remain mute. Indeed, the Auditor General even generally ought not to make it known to any person - even those identified above - that he or she is examining transactions and records involving an MHA until he or she has made the decision that there is a reasonable prospect that a section 15 report will have to be issued.

Finally, there is one other matter touching on this issue that bears comment. As noted previously, section 21 of the *Auditor General Act* places an obligation of confidentiality and non-communication on the Auditor General. It has been suggested that this section amounts in effect to an immunity from court process. I do not agree. There would have to be more explicit statutory language employed to lead me to the conclusion that the Auditor General - perhaps the only one with the requisite knowledge - could, with

impunity, refuse to comply with a subpoena requiring him or her to give material evidence in a judicial proceeding and thereby jeopardize a fair trial in either a civil or criminal matter. Whatever may be the merits or otherwise of according the Auditor General a *general* immunity from court process (on which I do not propose to comment because it is outside my terms of reference), I am prepared to state that the legislation should be clarified to provide that in any civil or criminal matter regarding alleged improper retention or misappropriation of public money by a Member, or any matter that may constitute an offence by a Member under the *Criminal Code* or another statute, the Auditor General should be a fully compellable witness. Otherwise, valuable evidence relating to potential civil recovery of misappropriated funds, or relating to prosecution or full defence to a prosecution, may not be available.

I am prepared to make the following recommendation:

Recommendation No. 22

(1) Section 15 of the* Auditor General Act *should be amended to make it inapplicable to members of the House of Assembly;

(2) The new legislation recommended in this report should contain a provision dealing specifically with reporting of possible impropriety and criminality by MHAs by providing that, if during the course of an audit, or as a result of review of an audit report prepared by another auditor employed by the House of Assembly or as a result of any internal audit procedure, the Auditor General becomes aware of an improper retention or misappropriation of public money by a Member, or another activity by a Member that may constitute an offence under the* Criminal Code *or another Act of the Parliament of Canada or the Province, the Auditor General should be required immediately to report the improper retention, misappropriation of public money or other activity to:

- ***(a) the Speaker;***
- ***(b) the Premier;***
- ***(c) the leader of the political party with which the member involved may be associated;***
- ***(d) the Attorney General; and***
- ***(e) the Minister of Finance;***

(3) In addition to reporting the retention, misappropriation or other activity, the Auditor General should be required to attach to his or her annual report to the House a list containing a general description of these incidents and the dates on which those incidents were reported;

(4) Before making a report, the Auditor General should be required to give to any Member involved and who may be ultimately named or identified in the report:

(a) full disclosure of the information of which the Auditor General has become aware;

(b) a reasonable opportunity to the Member to provide further information and an explanation; and

(c) the Auditor General should take that information and explanation, if any, into account in deciding whether to proceed to make the report;

(5) The Auditor General should be under a duty not to make the existence or contents of a report referred to in Recommendation 22(1) known to any other person except:

(a) as part of his or her annual report to the House;

(b) in accordance with court process;

(c) as part of proceedings before the Public Accounts Committee; and

(d) as a result of a request from the House of Assembly Management Commission

(6) The Auditor General should be a compellable witness in any civil or criminal proceeding and in a proceeding before the Public Accounts Committee relating to any matter dealt with in a report made under this section; and

(7) Section 19.1 of the* House of Assembly Act *should not apply to a report made by the Auditor General under the new legislative provision.

Enforcement of Duties by the Public

The history of the administration of constituency allowances, recited in Chapter 3, highlights a number of circumstances where there was a failure on the part of various persons to perform legal duties to which they were subject. Two notable examples can be repeated.

The first example was the failure of the IEC to appoint an auditor and cause an audit to be conducted of the accounts of the House for the fiscal year 2000-01, despite the fact that section 9 of the *Internal Economy Commission Act* placed a mandatory duty on the IEC to do so. In fact, that audit has yet to be conducted or completed in the manner contemplated by the legislation. As well, the audit for the final year for which the external auditor was engaged during the "Hold the Line" era, as described in Chapter 3 - fiscal year 2003-04 - has also not been completed, as a result of instructions from the Speaker, on behalf of the IEC.

In my view, section 9 imposes a continuing obligation on the IEC, no matter that its membership subsequently changes, to ensure that an annual audit of the House is carried out; that obligation cannot be avoided except by ensuring that the audit is ultimately completed.

The second example is the failure to disclose and document decisions of the IEC in the annual report to the House in a manner that would enable an informed member of the public to understand the nature and import of those decisions. Subsection 5(8) of the *Internal Economy Commission Act* requires that "all decisions of the commission shall be a matter of public record and those decisions shall be tabled by the speaker," in the House. The decision in May of 2004 to grant to all members an additional payment of $2500 (plus HST) without supporting receipts, as discussed in Chapter 4, is but one example of a failure to document and publicly report in an understandable manner decisions relating to expenditures of public money.

In my view, subsection 5(8) of the *Internal Economy Commission Act* places an obligation on the Speaker to record IEC decisions and make them public through the tabling process in a way that makes it possible for a reader to understand the true nature of the decision.

From a practical point of view, obligations imposed by legislation on members or officials of government are often hard to enforce. These difficulties are compounded, in the case of the IEC by two factors. The first is the relative secrecy under which the performance (or lack of performance) of the obligations takes place. The second is that the normal political checks and balances inherent in a system that pits opposing political interests against each other is weakened by the fact that all Members can be said to have similar self-interests in matters pertaining to their financial circumstances as members of the House. There is less likelihood, therefore, that political partisanship would result in criticism from within the IEC, or in agitation for action with respect to a failure to comply with statutory

obligations pertaining to matters that have equal effect on Members, no matter what their political persuasion.

While it is true that enforcement of statutory duties on the part of government officials often falls to the Attorney General, the circumstances under consideration demonstrate that that has not been an effective remedy. For example, I have not been made aware of any requests having been made to the Attorney General from within the government service or by a Member of the House that the obligation of the IEC in section 9 of the *Internal Economy Commission Act* be enforced, nor have successive Attorneys General taken it upon themselves of their own motion to initiate enforcement action (presumably because the failures to comply were not brought to their attention).

The fact that I am recommending that greater openness be brought to the proceedings of the IEC increases the possibility that failures to perform a statutory duty may become more easily known, through the media and otherwise, by members of the public. It is not unreasonable, therefore, that members of the public who become aware of a major failure to comply with a statutory duty should have an opportunity, out of sense of public duty, to seek enforcement of those duties through the courts where they perceive that others in the system are not taking appropriate enforcement action.

The judicial remedy for enforcement of a statutory duty is the order of *mandamus*. It will be granted by a court where: (i) a public duty (not merely a discretion) is imposed on an official (not merely the Crown generally); (ii) there is an identifiable person or group of persons who have a right to performance of the duty; (iii) there is no alternative specific legal remedy which is not less convenient, beneficial and effective; and (iv) there has been a demand for performance of the duty and a failure to comply.[95]

The second and third requirements raise issues relating to standing and the role of the Attorney General. Traditionally, the Attorney General was regarded as the appropriate person to take proceedings against public officials to enforce statutory duties; accordingly, a private citizen seeking a *mandamus* could be met with the argument that the wrong claimant was before the court or that, at the very least, the Attorney General's consent had to be obtained to proceed with the action. Additionally, the traditional rule was that a claimant for a *mandamus* had to show that he or she was specifically entitled to performance of the duty above and beyond the fact that he or she was entitled simply because the duty was owed to the public generally.

More recent case law has relaxed the general public law requirement for participation by the Attorney General by, first, permitting the claimant to proceed in situations where the consent of the Attorney General was refused, so long as the claimant then joined the Attorney General as a defendant, and then, later, by recognizing that in some cases there was

[95] See *Johns-Mansville Canada Inc. v. Newfoundland (Minister of Mines and Energy)* (1985), 51 Nfld. & P.E.I.R. 338 (NLSC, TD).

no need to involve the Attorney General directly at all.[96] Furthermore, the rules regarding standing in public law generally were relaxed by allowing the claimant, in ratepayers' and taxpayers' actions, to challenge the constitutionality or *vires* of legislation or regulations without any claim to being specifically aggrieved,[97] and then extending the relaxation to other circumstances on a discretionary case-by-case basis.[98]

Given this trend towards allowing greater access to the courts to challenge governmental action, it is not unreasonable, in my view, to allow members of the public to seek to enforce statutory duties imposed on bodies like the IEC where they perceive in good faith that observance is being ignored. After all, the duties imposed on bodies like the IEC are designed, in the last analysis, to ensure proper stewardship of public funds and thereby achieve accountability to members of the public for that stewardship. My sense is that members of the public often feel shut out of direct involvement in the political process, thereby breeding a sense of helplessness with respect to being able to have any real influence, and even a sense of cynicism about the motives of their elected representatives. It is not unreasonable, however, to require a claimant to first make a demand on the person or body alleged to have failed to observe the duty before proceeding to court.

While I agree that a claim to enforce a statutory duty should not be automatically derailed because the Attorney General has not been made a party (either as plaintiff or defendant), I do see value in giving the Attorney General the opportunity to become involved and to take the steps it is being alleged he or she should have taken earlier or to present to the court other information that could explain why the duty should not be enforced. It is appropriate, therefore, to require copies of the application to be served on the Attorney General. In a meritorious case, perhaps that in itself would be enough to precipitate informal action on the part of the Attorney General to persuade the person or body involved to perform the duty.

---

[96]See *Thorson v. Canada (Attorney General) (No 2)*, [1975] 2 S.C.R. 138; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.
[97]See *Thorson v. Canada (Attorney General) (No 2)*, [1975] 1 S.C.R. 138; *MacNeil v. Nova Scotia (Board of Censors)*, [1976] 2 S.C.R. 265.
[98]See *Carota v. Jamieson*, [1977] 1 F.C. 19; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.

Accordingly, I make the following recommendation:

Recommendation No. 23

(1) Express statutory recognition should be given to a right of a member of the public to seek an order of* mandamus*, as well as consequential and declaratory relief, to enforce statutory duties imposed on the House of Assembly Management Commission, the members of the Commission as well as MHAs where the member of the public, acting in good faith, believes that a statutory duty has not been complied with and no other action to enforce it has been or is being contemplated;

(2) A member of the public seeking an order of mandamus:

(a) should not be denied standing on the ground that he or she is not affected by the alleged failure to perform the duty to any greater degree than any other person; and

(b) should be required to serve notice of the application on the Attorney General who should have the right to intervene and be heard on the application; and

(3) A person seeking a mandamus in the above circumstances should not be exposed to an adverse order as to costs, even if unsuccessful, provided he or she has acted in good faith in bringing the application.

I am under no illusion that this remedy, in itself, will provide an adequate or complete means of enforcing public obligations. Nevertheless, every bit of accountability in an area that traditionally has presented difficulties for accountability should be welcome.

In addition to giving the public direct access to the possibility of achieving greater accountability, we should not diminish the importance of more traditional means of enforcement of public duties. The Attorney General should be given greater opportunity to be made aware of the need for enforcement in specific cases. It is to be hoped that, as the chief law officer of the Crown charged with the responsibility of upholding the rule of law uninfluenced by political considerations, he or she would, if made aware of serious failures to perform public duties that had been imposed by the legislature, take appropriate action, either by seeking mandatory orders if the recalcitrant person or body rebuffed any demands for compliance, or even, in appropriate circumstances, by commencing a prosecution.[99]

[99] See s. 5 of the *Provincial Offences Act*, S.N.L. 1995, c. P-31.1.

I therefore make the following additional recommendation:

Recommendation No. 24

(1) The new legislative regime being recommended should expressly provide mechanisms for the provision of information to the Attorney General concerning alleged failures by Members and public officials to comply with legal prescriptions, thereby improving the likelihood that the Attorney General will be in a position to take appropriate enforcement action;

(2) Examples of such mechanisms would include:

(a) direct notification by the Auditor General if a notice of potential improper retention or misappropriation of funds or a possible criminal or statutory offence is proposed to be issued under section 15 of the* Auditor General Act*; and

(b) notification of a finding of potential wrongdoing following a disclosure under the "whistleblower" legislation being recommended in this report.