

In September of 2009, the government of Ontario introduced the Public Sector Expenses Review Act. Amongst other changes, the Act gave the Integrity Commissioner of Ontario the power to review twenty-two of the provinces' largest arms-length government agencies. This move came on the heels of two major scandals, in which e-Health and the Ontario Lottery and Gaming Corporation (OLG) came under heavy scrutiny for the mismanagement of taxpayer dollars. As a result, the government mandated the expansion of the Integrity Commissioner's role to report on these arms-length bodies and ensure that they comply with the same ethical standards as Cabinet Ministers. This effort was launched in the name of accountability, but has left many questions unanswered in its wake.

This paper will address the two central themes of scrutiny and ministerial responsibility, within the wider context of parliamentary reform. Specifically, it will attempt to answer in which ways the Integrity Commissioner's new role supports or supplants the scrutiny function traditionally held by Members of Provincial Parliament (MPPs), in holding the executive to account. Second, does her new role impact the concept of ministerial responsibility by shifting the burden of reviewing expense accounts of arms-length agencies on to an independent officer?

First, I introduce the literature on independent officers of the legislature, as well as the theoretical foundations for ministerial responsibility and the scrutinization of the executive. Background information is then provided on the passing of the legislation, and the events leading up to its inception. The primary methodology for this paper was interviews conducted with individuals directly involved in the passing of the legislation. Their testimony points to varying opinions about the direction of government and accountability that does not necessarily follow political party lines. Although there was consensus that the legislation is positive for what it provides in terms of oversight of spending, not all opinion was uniform when it came to the impact the Integrity Commissioner's role may have in future cases of misspending.

The expanded role of the Integrity Commissioner is part of a larger trend of expanding the scope of the independent officers of the legislature. A parallel trend indicates that the role of the MPP has either remained stagnant or declined. What is evident by the interviews conducted is that government structure is fluid, it can change and adapt, but it has not done so when it has come to the role of the MPP. Therefore, as the role of the Integrity Commissioner is a positive step in reviewing the ethical standards of arms-length agencies, it is clear that there is a lot of room for the Legislature (opposition and backbench MPPs) to find new relevancy through more parliamentary reforms.

Theoretical Foundations

Independent Officers of the Legislature

The academic literature on the role of the independent officers of the legislature is usually focused on the auditor general and ombudsman. In Ontario, there are additional independent officers including; the environmental commissioner, the information and privacy commissioner, the electoral officer, and of course the integrity commissioner. Across Canada, each legislature has their own make-up of officers, but the one thing that is common for all of them is that they report directly to the legislature. Either through a standing committee or through the Speaker, the independent officers are agents of the legislature, not of the government (Fleming & Glenn 1997,

137). In most cases, their power comes through their ability to report, not through reversing government decisions (Fleming & Glenn 1997, 137).

Within the structure of the Ontario Legislature, the auditor focuses on value for money audits as his main role (White 1989, 64). Whereas the Ombudsman has a function that is “clearly one that MPPs can and do perform, but the ombudsman has a number of advantages over the members in performing this task” (White 1989, 65). His office has more staff as well as the authority to take evidence under oath (White 1989, 65). According to Graham White, members have traditionally held a better opinion of the auditor than the ombudsman. This in part is related to the ombudsman’s duty to report maladministration and the role he or she plays in fostering more government accountability to the legislature (White 1989, 216).

In the context of our Westminster Parliamentary system, the role of independent officers is relatively new. Besides the auditor general, most have only been in existence for a few decades. It is still unclear how they fit within “the existing constitutional framework of ministerial responsibility and administrative accountability” (Thomas 2003, 287). But they do assist in holding Ministers and the bureaucracy accountable to the Legislature. What is unclear is how they themselves are to be held accountable for their performance (Thomas 2003, 287).

Scrutiny Function

Parliament is supposed to be at the forefront of the policy process in Canada. Under constitutional theory, it approves both spending and legislation, holds ministers accountable for the performance of the government, and parliamentarians should provide “continuous scrutiny and debate of the actions and inactions of both the political and administrative leadership within governments” (Thomas 2003, 288). However, in practice there has been a growing trend away from this model of governance in favour of a system that relies heavily on the centralized power of the executive. This has occurred both in Ottawa and at Queen’s Park. The legislature has lost a lot of its power to other institutions such as the judiciary, the bureaucracy, and especially the executive (Thomas 2003, 288). According to Paul Thomas, legislators are continuously viewed as powerless especially in cases of majority governments (Thomas 2003, 288).

David Docherty has noted that there are three key functions of legislators; scrutiny, representation, and legislation (Docherty 2005, 94). As the centralization of power unfolds, and the role of members in participating in the legislative process shrinks, it is imperative that they continue to help keep the executive honest (Docherty 2005, 118). Besides question period’s obvious advantages in holding the government to account, committees provide another great opportunity to “probe deeply and seriously into government activity at all levels” (Docherty 2005, 128). However, even in committee the debate has been inundated with partisan messaging, which has reduced the ability to have lasting impact on legislation or provide relevant scrutiny of the executive.

One of the complaints often heard by Parliamentarians is that they lack the relevant information necessary to hold governments accountable (Thomas 2003, 289). This is one area where independent officers of the legislature do provide assistance to members. Annual reports are generally used by opposition parties to lay blame and embarrass the government. Thus, the negative contained within the document are generally highlighted, and not necessarily the report in its entirety (Thomas 2003, 290).

However, according to Jonathan Malloy, the relationship between the officers and legislators is still an uneasy one,

“Many MPs argue that the officers have little regards for parliamentarians’ scrutiny function and largely pursue their own agenda. Thus, while they are nominally parliamentary agents and important instruments for executive accountability, it is not clear where they fit in the general study of legislative-executive relationships” (Malloy 2004, 211).

Regardless of the status of the relationship, Parliament must still play an effective “watchdog” role in the scrutiny process. They ultimately have to follow-up on the reports and force the government to comply with recommendations (Thomas 2008).

Ministerial Responsibility

Ministerial responsibility is one of the cornerstones of the Westminster parliamentary system. Considering many of the changes in government and society over the last few decades, many individuals both within government and without have questioned whether this model still holds relevancy. Malloy and Millar define ministerial responsibility as, “ministers, supported by their officials, be solely responsible for correcting administrative errors that could occur within their departments, and that they provide related information to Parliament” (Malloy & Millar 2008, 105).

This definition fits into the large framework of responsible government, where the Premier (or Prime Minister) and cabinet have the authority to “govern but are then responsible to Parliament and ultimately the electorate for the exercise of that authority” (Malloy & Millar 2008, 106). Even the mistakes of public servants fall under the responsibility of the Minister. Punishment of the public servants is supposed to be done in private, without fear of public scrutiny (Malloy & Millar 2008, 108).

Considering this definition of ministerial responsibility, why then would the government give more power to independent officers who serve to scrutinize and hold governments to account? One possible explanation is to demonstrate to the public that the executive does have an interest in the promotion of more accountability (Thomas 2003, 291). Another possibility is the desire to create institutions or independent officers that could review, but have no real power besides the power to report (Thomas 2003, 291). Other explanations focus on Ministers needing the help of officers to hold their own departments accountable, because they have become too large to manage alone (Thomas 2003, 291).

Traditionally, the bureaucracy would answer to the Minister, the ministers would be accountable to Parliament, and finally Parliament would answer to the public. However, this form of accountability was developed at a time when governance models were relatively simple (Thomas 2003, 304). Paul Thomas, in discussing the complexity of the public service, wrote,

“New types of organizations, like Crown corporations and regulatory agencies, were described as ‘structural heretics.’ Because they seemed to undermine the central constitutional principles of ministerial responsibility. More recently, the adoption of other ideas of managerialism- contracting out, privatization, public-private partnerships, special

operation agencies- represent new challenges to the traditional framework of accountability” (Thomas 2003, 304)

These trends present real challenges for governments, and it is still unclear how the independent officers of the legislature fit into this framework of accountability.

Arms-Length Agencies

Under the Public Sector Expenses Review Act, the expense accounts of twenty-two arms-length agencies are to be reviewed by the Integrity Commissioner. The very concept of arms-length agencies complicates the notion of ministerial responsibility, because these government organizations are operating at arms-length from the Minister on a day-to-day basis. The spread of arms-length agencies has created concern about their accountability structure, and the limitation on “ministerial control” (Schillermans 2008).

The legislation passed in Ontario is an attempt to regain control over the governance models of arms-length agencies in the province, and bring them in line with the same ethical spending standards expected of Ministers. Lynn Morrison is the Integrity Commissioner of Ontario. She has stated that the new rules present new challenges. First and foremost, each agency has its own structure and its own set of rules surrounding their expense accounts. Despite the basics being the same, they do differ from what is found in the public service (Morrison 2010). She goes on to say,

“When I started Ministers expenses, there was a culture of entitlement. I can honestly say that today, that is no longer the case. Ministers and minister’s staff understand the rules, and have become much more prudent” (Morrison 2010).

She is confident that the same culture change will occur within the agencies. She described a convergence in governance models, but reminded that spending will continue to vary based on the type of agency and the needs of individual organizations. For example, when the expenses of the Liquor Control Board of Ontario (LCBO) go online, will there be a general understanding of why they require to spend more than other organizations (Morrison 2010).

The Public Sector Expenses Review Act

In order to gain a better grasp of the context in which the Public Sector Expenses Review Act was formed, it is beneficial to go over the background of the legislation and the events leading up to its inception.

In an interview conducted with John Tory, former leader of the Progressive Conservative Party of Ontario, he recalls some of the events that brought to light the e-Health spending scandal. According to Mr. Tory, an audit was done in 2003 by an independent auditing firm, which called into question the initial spending from the PC government, and subsequently the Liberal government, on a program that dealt with electronic health records. This auditing initiative was undertaken at the time to try and have a value for money assessment done on the program. The results were terrible, with references to a lack of results for money spent. Three to four hundred million dollars had been spent with relatively little to show for it. This led to the

change in the program's name to Smart Systems for Health, as well as a shuffling of the people in charge. The auditor's result reflected similar conclusions. Just after the 2007 election, the name of the program changed one more time to the newly formed e-Health. It was the catalyst for Mr. Tory to begin questioning the status of the program, and how much had been spent on it. According to Mr. Tory, his suspicion peaked as a result of the name changes (Tory 2010).

What ensued was months of questioning on the misspending of taxpayer dollars. According to John Tory,

“If George Smitherman- who was the Minister of Health at the time- was not told of the state of the agency, than why not? Why weren't you told? Furthermore, where was the Legislature in all of this? If it did have the political teeth to deal with this where were they? Or, were they so emasculated that they were asking questions to no effect” (Tory 2010).

This sentiment reflects the complicated nature of arms-length agencies and the aptitude of government to oversee their activities.

The fallout of the scandal required action on the part of the government. One of the responses was to introduce legislation that allowed the Integrity Commissioner to review expenses of twenty-two of the largest arms-length agencies. In the process of drafting the legislation, Lynn Morrison was contacted and asked if she would take on the new responsibility. She agreed under the circumstances that the expanded role would be outlined in legislation, which she would help draft. Furthermore, the changes could not jeopardize the office of the Integrity Commissioner in any way. The reputation of the office remains tantamount to its overall effectiveness (Morrison 2010).

The Act was first introduced on September 16, 2009 by the Honourable Harinder Takhar, Minister of Government Services. The bill was subsequently time-allocated and received royal assent on October 19, 2009. It passed with a majority of votes as a result of the Liberal Party and New Democratic Party voting in favour, with the Progressive Conservative Party voting against.

The Act ensures that the Integrity Commissioner has the power to review all expense accounts of the twenty-two agencies (Public Sector Expenses Review Act, 2009 Section 2), and then posts the expenses on the internet. It also allows her to order reimbursement from the agency, if the specific claim is not deemed to fall in line with the standards set out in the legislation (Public Sector Expenses Review Act Section 8:2[b]). According to Lynn Morrison, she does not approve the expenses, she only reviews them. The approval will come from the head of the agency, because they are the ones ultimately accountable (Morrison 2010). Her role is to determine if they fall within the guidelines. Lynn Morrison states, “they have different needs, and I have to interpret the rules and give them guidance, as to whether I think they are within those rules” (Morrison 2010). She sends a written response back to the agency and they ultimately make the final decision.

Ms. Morrison has stated that her only concern with the legislation lies with the online public posting of the expense accounts. She wonders if the public's perception will accept the diversity of spending across agencies. Second, she also worries about circumstances surrounding privacy issues. For example,

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“If there is a claimant with a disability and they have a requirement such that more expenses have to be incurred for that individual’s specific role in the agency. Without violating any privacy issues, how do you put that out in the public domain?” (Morrison 2010).

The new role for the Integrity Commissioner falls in line with her other role of reviewing the expense accounts of Cabinet Ministers and Opposition Leaders. In addition, she also oversees the lobbyist registration list, MPP integrity, whistleblower protection, and ethical standards for Minister’s staff (Office of the Integrity Commissioner, 2010). She has hired a communications person for public outreach, because most people in Ontario are not aware of who she is and what she does (Morrison 2010). The reasoning for the public outreach is summed up by Ms. Morrison, “if people know there is somebody there, who is providing advice to Members, or to agency’s on their expenses, maybe they’ll have more confidence that people are doing the right thing” (Morrison 2010).

Interviews:

In an effort to understand how the expanded role of the Integrity Commissioner will impact the Ontario Legislature, I interviewed a number of individuals involved in the passing of the legislation. As aforementioned above, two of those interviews were with the Integrity Commissioner herself Lynn Morrison and John Tory, who was the leader of the official opposition until 2008 and is well-versed in concepts related to parliamentary reform. I also interviewed the Hon. Harinder Takhar, Minister of Government Services, who introduced the bill and was one of the principle debaters in the passing of the legislation. From the PC Party, I interviewed John O’Toole, MPP from Durham (principle debater) and Elizabeth Witmer, MPP for Kitchener-Waterloo. From the New Democratic Party, I interviewed Michael Prue, MPP for Beahces-East York and Paul Miller, MPP for Hamilton East-Stoney Creek (principle debater). Finally, from the Liberal party I interviewed Dave Levac, the Member from Brant, and Bruce Crozier, MPP for Essex.

Reactionary Measures

The evolving role of the Independent Officers of the Legislature has been an ongoing process in recent years in the province of Ontario. In the name of accountability and transparency, their breadth of responsibilities has grown steadily. Despite this fact, the new role given to the Integrity Commissioner is still perceived to be a reactionary measure on behalf of the Ontario government to demonstrate action in the face of public scandal.

According to John Tory, there is no doubt that it was a reactionary measure. Although careful not to deem all reactions as necessarily bad, he was very critical of the lack of proactive measures taken by the government to curb the type of misspending that occurred (Tory 2010). Conceding that in part it was reactionary, Minister Takhar points out that elements of the change were natural. The Integrity Commissioner was already reviewing expense accounts of Ministers, but the timing of the introduction of the bill was dependent on the timing in the House (Takhar 2010). Conversely, John O’Toole perceived the whole process to be reactionary. This was echoed by Michael Prue. His opinion was that the entire change was a move to alleviate the responsibility of the scandal and take some of the heat off of the government (Prue 2010). In his words, he does not “believe in evolution in politics... when change comes it is not evolutionary,

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it is revolutionary” (Prue 2010). These large episodes in the politics of the province forces change to occur.

Dave Levac provided an alternate way of examining what transpired. For the longest time, he explains, there was no light on what was occurring in these agencies. Despite being reactionary in terms of the timing, it was a natural step to have an independent officer examine the spending of arms-length agencies (Levac 2010).

Role of the Independent Officers

Independent officers of the legislature have defined roles, and if they stay within the roles defined by the legislators, the design is to bring an apolitical perspective of their expertise, in so much as to foster best practices, and report on shortcomings (Levac 2010). To give an example from the private sector, there is always an external auditor whose role is not to constantly search for management wrongdoing, but to confirm to shareholders that the management is doing things right (Takhar 2010). If there are weaknesses, then internal controls are improved. This process is encouraged because it is impossible for shareholders to be involved in the day-to-day processes of the organization (Takhar 2010). This metaphor was employed by Minister Takhar to demonstrate the crucial importance of independent officers within the structure of the Ontario government.

As one of the independent officers, Lynn Morrison sees herself as providing a resource to members. Unlike the Auditor, Ombudsman, or Environmental Commissioner, the Integrity Commissioner is there to foster transparency, and is not an accountability watchdog (Morrison 2010). In her words, “I see my role as being different from government and the other officers” (Morrison 2010). As governments grow, and people become more involved in the process, the question of ethics is not the black and white that it used to be ten or twenty years ago (Morrison 2010).

Impact on Scrutiny

The academic literature on the independent officers points to a tension between the fulfillment of their mandates and the scrutiny function of MPPs in holding the government to account. Despite some authors, like David Docherty, stating that the independent officers support the Legislature in their scrutiny function; even he acknowledges the argument that these officers can detract from the role of Parliament (Docherty 2005, 132).

When questioned about how the new role of the Integrity Commissioner impacts his ability to scrutinize the government, Michael Prue responded that it definitely help him fulfill that role. He spoke about the lack of resources for opposition members,

“In opposition, you rely on every piece of information, no matter how it is gathered... when the independent officers stand up, we take what they have to say with huge import, and we thank them for it” (Prue 2010).

Furthermore, Mr. Prue was not troubled by the un-elected nature of the independent officers. He stated, “they are chosen by the Legislature and are accountable to me” (Prue 2010).

The sentiments of Mr. Prue were echoed by Elizabeth Witmer. According to Mrs. Witmer, the function of independent officers definitely helps MPPs. The new role of the Integrity Commissioner can “put in place some guarantees to the public that their money is well spent” (Witmer 2010).

Conversely, John O’Toole worries that the Premier and Cabinet should not delegate integrity. By having the Integrity Commissioner reviewing expenses, he believes they are pushing it off the Minister’s table (O’Toole 2010). Providing an interesting example, Mr. O’Toole wonders what if future misspending is questioned by the opposition. Rather than respond, he worries the government will deflect the questions by claiming they are currently being reviewed by the Integrity Commissioner (O’Toole 2010). As a result, the new legislation may in fact limit the ability of the opposition to properly scrutinize government.

On the other hand, Dave Levac sees the Integrity Commissioner’s new role as a compliment to the scrutiny by MPPs. In political terms, members could potentially turn around and ask Ministers responsible, “why is it that the Integrity Commissioner had to find this mismanagement of funds, Were you not doing your job?” (Levac 2010) The Integrity Commissioner can act as an assistant to the Minister, in a non-partisan way, by highlighting what type of spending is taking place within the arms-length agency (Levac 2010). According to Bruce Crozier, this additional role for the Integrity Commissioner does not add nor detract from the role of MPPs, but is one more tool for transparency (Crozier 2010). **His fear is that although in this particular instance the role of the MPP has not truly been affected, over the course of his career at Queen’s Park, it has diminished** (Crozier 2010).

The fear of a diminished role for MPPs is reiterated by John Tory. His belief is that the Legislature is being passed over in terms of being given meaningful methods for oversight. The Estimates Committee provides a good example. At one point in time, it was supposed to be where all expenses were reviewed (Tory 2010). Currently,

“You have effectively rendered the committee impotent, especially the opposition members, because what can they do? They can ask people to come forward, ask questions which don’t have to be answered. But nothing ever changes and there is a lack of effectiveness” (Tory 2010).

Mr. Tory went on to say that the reason the executive is supposed to hold the confidence of the House in our Parliamentary system is because MPPs are supposed to have the ultimate power and control. Furthermore, by having the MPPs take on the additional powers, it poses no threat to traditional concepts of ministerial responsibility. Although the independent officers do good work, he believes they are not the best answer. Instead, the Legislature must be empowered to take on more responsibilities (Tory 2010). In terms of their scrutiny function, John Tory believes it is not making it worse, but it is not making it any better. He would advocate reinstating MPPs as the true watchdog over the executive (Tory 2010). On the reason why it has not happened so far, Mr. Tory provided this useful insight into the world of the Legislature,

“I don’t want to sound unsympathetic to the government of the day. The government does not want to submit to a committee of MPPs because they know that it automatically becomes a witch hunt. And that doesn’t help the public interest”

Impact on Ministerial Responsibility

The growing phenomenon of arms-length government agencies contributes to complicating the foundations of ministerial responsibility. Having an independent officer of the legislature reviewing their expense accounts may complicate things even further. As mentioned above, there was concern by Mr. O’Toole that in certain respects the new legislation may allow Ministers to skirt responsibility and have the Integrity Commissioner somehow provide some political cover in certain circumstances. Whether this is through deferring a question during question period, or ministers claiming a certain expense had already been approved by the Integrity Commissioner, the possibility for this type of occurrence does exist. The question remains, does this new role somehow transform the concept of ministerial responsibility?

Elizabeth Witmer does not believe so. As a former Minister of four different ministries, she speaks from experience. Regardless of the arms-length nature of organizational structure, she always felt accountable for those agencies (Witmer 2010). She acknowledged that this move does create the possibility to defer questions, but is adamant that the MPPs have to be vigilant in constantly reviewing the spending, and ensure that the government is accountable for their mistakes (Witmer 2010).

Mr. Prue argued that if Ministers are not held accountable then our system does not work. He states that avoiding scrutiny during question period already happens. Hiding behind the independent officers in the reviewing of cases is successful in the short term, but in the longer term if someone has failed in their responsibility they will be held accountable. He goes on to say, “our system is predicated on the fact that ministers are ultimately responsible for their actions and the actions of their staff” (Prue 2010).

According to MPP Dave Levac, the job description for ministers has not changed. If an agency is found misspending then the head of that agency is still responsible, and it will still be the elected official who will be asked the question during question period (Levac 2010). The Ministers will be held accountable if they are not aware of what is transpiring within their agencies, and the Commissioner will ensure that there is a second set of eyes is overseeing the expenses (Crozier 2010).

Question period would lead one to believe that ministers are always involved with the agencies on a day-to-day basis. But according to Minister Takhar they truly operate at arms-length and the reporting to the Minister is done solely through the Chair of the agency (Takhar 2010). The responsibility to make sure the process and procedures are followed falls on the CEO and the chair, because the Minister will never be in a position to know each and every thing that is occurring (Takhar 2010). According to Minister Takhar the new role of the Integrity Commissioner does not “take away from the minister’s responsibility, or repeal it, it is simply another level of comfort to the public that the process and procedures are being followed” (Takhar 2010). The Integrity Commissioner herself reiterated that she does not approve the expenses, she only reviews them. By setting out the parameters she allows the agencies to make the final decision. (Morrison 2010).

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Conclusion

The expanded role of the Integrity Commissioner is part of a larger trend to broaden the scope of the independent officers of the legislature. Some have attributed this trend to the overtly partisan environment of the Legislature in Ontario and across Canada; requiring an independent third party to tackle the roles traditionally held by elected officials. Whatever the reason, the changing structure of government provides real challenges to our parliamentary system of democracy. Furthermore, there is constant demand by those within government and without to expand the scope of the independent officers even further. Many individuals at Queen's Park want the Integrity Commissioner to review the expense accounts of all agencies not just the largest twenty-two, and others would like to allow either the Ombudsman or the Auditor to review the MUSH Sector (Municipalities, Universities, School boards, and Hospitals).

What was reiterated by the members that I interviewed was that governments, at all times, are fluid. Despite having a framework within which the government operates, things do change. This is evidenced by the ever changing role of the independent officers, as they are handed more responsibility in improving transparency and accountability.

The new role accorded Ms. Morrison, appears to have minor effect on the traditional conception of ministerial responsibility. In large part, members were uniform in their conviction that ministers will still be responsible for their ministries and the arms-length agencies under their purview. It is evident that the existence of arms-length agencies poses a much larger problem for ministerial responsibility than the reporting of expense accounts to an independent officer.

Another major theme throughout the interviews focused on the limits placed on backbench and opposition MPPs. The committees, which at one time were arenas of non-partisan debate, have broken down and become less effective. In my interview with John Tory, he advocated making far greater use of the standing committee on estimates as the place to review spending. Additionally, he would also want select committees with equal representation from each party to come up with *unanimous* recommendations for increased transparency and accountability (Tory 2010).

The structure of government is fluid. The trend over the last few decades has been an increased role for independent officers, while the role of MPPs has either remained stagnant or declined. Support for the independent officers and the Integrity Commissioner was unanimous from all of the individuals I interviewed. They felt as though the additional transparency and accountability is beneficial to the government of Ontario. As the roles of independent officers continues to grow and change, why is it inconceivable that the roles of MPPs can change as well? Backbench and opposition MPPs could be given more oversight of government spending through a retooling of the committee system, and parallel some of the good work being done by independent officers. This could contribute to a less partisan environment and provide MPPs with new avenues to ensure the executive is accountable to the Legislature.

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