

Request for comments on the Public Policy Forum - Agents of Parliament Project – Draft Paper

Subject	Comment
The ability of Agents of Parliament to evolve to changing circumstances –	• The paper gives examples of how the role of the Auditor General has evolved over time, from reviewing financial transactions to doing Value-for-Money audits (p.5). The paper also states that <i>“the mandates of agencies [are] often not examined by governments and parliaments for long periods of time”</i> (p.6). • However, technology is changing faster than ever before. This strains the ability of governments to keep up with the resulting societal changes and citizen expectations. The Agents of Parliament are potentially facing similar challenges adapting and keeping up with the pace of change. • The backgrounds of the Agents themselves and the skills that they seek when hiring could be particularly impacted by rapid technological change (e.g., does the AG or FAO have people who can audit algorithms or do big data analysis) • In a world of rapidly changing technology, how can Parliament and the public be assured that Agents of Parliament are changing their approaches and their organizations in order to continue to deliver on their mandates?
Ensuring that Agents of Parliament provide the right mix of oversight functions	• In addition to technological changes, the government is also changing in the way that it serves the public. There might be necessary changes to Agency mandates or the creation of new agencies. • As governments make use of new Artificial Intelligence and computing tools – including proprietary tools from companies such as Microsoft and IBM – who can provide independent oversight to ensure that the tools are being used appropriately? • The paper also notes that <i>“the pattern has been to add agencies, rather than to subtract”</i> (p.12) – would the rise of technology require the addition of new Agents of Parliament? Could existing Agents’ mandates (e.g., the Information and Privacy Commissioner (IPC) of Ontario) be changed to accommodate new responsibilities?
Facts in a post-truth world	• The paper notes that <i>“Departments must have confidence that Agencies will conduct their activities in a discrete, fair and balanced manner, including providing an opportunity to confront negative evidence before it becomes public.”</i> (p. 12). • What if an Agent of Parliament and a government fundamentally disagree on facts? What if an Agent refuses to accept feedback from the government highlighting inaccuracies (real or perceived) in an Agent’s report? • Who adjudicates such disagreements? The court of public opinion?

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Civil Service vs. Political actors in relation to Agents of Parliament	• The paper seems to lump politicians and public servants together in some spots - <i>“Parliamentary agents are said to provide independent, impartial and objective scrutiny of politicians and public servants who are seen as too powerful, self-interested, opportunistic, unethical and evasive in the exercise of their authority and their use of public money”</i> (p.1) • The statement above could resonate with the reader in light of high-profile cases, such as the sponsorship scandal (where Chuck Guité, a bureaucrat, was charged alongside political actors) • It may not be appropriate to think about the relationship between the civil service and Agents of Parliament the same way as the relationship between political actors and Agents of Parliament • There are two reasons for this: 1) The relationship between political actors and Agents of Parliament can vary significantly depending on whether politicians are in opposition (generally favourable to the Agents) or in government (sometimes less favourable); and 2) In general, bureaucrats and Agents of Parliament work together for extended periods of time and thus have the opportunity to build longer-term relationships based on mutual respect and recognized differences in mandates • These differences are touched on in Section IX: Agencies are in the “Trust Business” (p.11) – but could be explored more deeply and perhaps more starkly differentiated in future work. • Parliamentary agents/agencies and the civil service share mutual goals – to ensure recommendations to government are sound and based on strong evidence, and that the government’s policy direction and programs are implemented effectively. Investigations which are thorough, fair, apolitical and result in recommendations for genuine improvement provide an important complement to the work of the civil service. Similar to legal counsel investigatory or “watchdog” function, parliamentary agents such as conflict of interest or integrity commissioners are also invaluable in providing advice to the civil service and individual civil servants.
Differences Between Parliamentary Agents	• Given differences in mandate, purposes and functions across various parliamentary agents/agencies, it is only to be expected that there will be some differences in legislative frameworks and powers among different “watchdogs.” That being said, the fact that legislative frameworks are not necessarily aligned can sometimes pose challenges. Examples from Ontario’s experience include: ○ In 2016, the province’s cap and trade program for greenhouse gas emissions, then still under development, was the subject of three contemporaneous but completely distinct reviews by three Officers of the Legislature (the Auditor-General, the Environmental

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	Commissioner and the Financial Accountability Officer), resulting in three sets of findings, conclusions and recommendations set out in three different public reports. All three reviews were undertaken while government was still making key policy decisions and determining program details. Complicating matters further, the three Officers have varying powers regarding information, and the civil service has an obligation to each one to keep investigatory matters strictly confidential (including from other Officers). ○ While in many cases it is imperative for agents to have access to confidential information in order to carry out an effective investigation, a given agent, not subject to confidentiality restrictions, is thus free to make public and draw conclusions about information the civil service itself is unable to disclose or publicly discuss. However, it would be difficult for any government to make changes to these powers or impose any such restrictions without creating the perception of restricting an agency’s ability to investigate, or laying itself open to accusations of muzzling criticism. ○ At the same time, the fact that legislative officers are not subject to access to information legislation at all can raise perceived issues with transparency and accountability. ● From an accountability perspective, it can be challenging to balance an agent’s independence (and the corresponding need for thorough, complete and confidential investigations) with the need for transparency and fairness in how investigations are carried out and conclusions are drawn. ● Without clear and transparent standards, codes of conduct, professional/governing bodies or even a formal mechanism to address disputes and complaints, there is always a risk of actual or perceived abuse of process. As the role of independent agents continues to evolve, it will be important that these kinds of safeguards are in place and that individual parliamentary agents are transparent and accountable about meeting them.

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The rule-making, investigative and compliance powers of Agencies	• The paper cites a 2014 academic journal that was published following the enactment of the FAO Act in 2013 but prior to the appointment of the FAO in February 2015 (p.6). <i>“At the provincial level in Ontario there was controversy in 2013 when the Financial Accountability Officer (FAO) was established over its alleged lack of authority to compel departments and agencies to provide the information necessary for the FAO to fulfill its mandate of supporting the legislature in its scrutiny of government forecasts of revenues and expenditures. This controversy continued down to the present day.”</i> • This source investigates the perceived lack of authority by the FAO primarily through an analysis of the FAO Act as enacted by the Ontario Legislature. In practice, once the FAO was appointed and began to carry out its mandate, the Officer was able to obtain information requested from ministries and public entities consistent with the framework outlined in the FAO Act. • Following the FAO’s first few months of operation, the Officer became concerned about the Cabinet Record exemption included in the FAO Act and conveyed his concerns in the 2015-16 Annual Report as well as in subsequent media interviews where the FAO stated his opinion that ministries were “overusing” the Cabinet Record exception to withhold information. • In response to the FAO’s concern, the government subsequently posted an Order-In-Council (OIC) on October 2016, which authorized ministries and public entities to share a wider range of information with the FAO even if the information is contained in Cabinet records. • Since the OIC has been in place, the FAO has received all the information it has requested of ministries and public entities consistent with the provisions of the OIC. • In the 2016-17 Annual Report, the FAO positively acknowledged the improved access to information as a result of the OIC. “Since the order-in-council was made, the FAO has been able to access more information than he could before, particularly when it comes to detailed medium-term spending projections.” - FAO Annual Report 2016-17 (p.15)
Additional Notes	• The examples of national agents of parliament (p.4) do not include the French Language Services Commissioner. • An additional area of enquiry could be to extend the findings on independence/impartiality versus accountability/responsiveness by exploring their applicability to other organizations such as Agencies, Boards and Commissions and Delegated Administrative Authorities. • In 2017 respectively, Environmental Commissioner special access to requested information through dedicated Orders-In-Council, similar to what was granted to the FAO in 2016. • Page 5 references the dispute with the Auditor General over how pension funds will be treated on the government’s books. Recommend that instead of “fight”, it should be referenced as a “professional disagreement”. The paragraph following the pension one says that broader

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	public policy considerations are also involved in the dispute. OPCD’s position is that this is strictly a dispute over accounting standards as opposed to public policy. • Section IX (page 11) contains the following statement: <i>“Agencies must not adopt a “gotcha” approach that seeks only to expose abuses and mistakes. Departments must have confidence that agencies will conduct their activities in a discrete, fair and balanced manner, including providing an opportunity to confront negative evidence before it becomes public.”</i> This statement opens the question as to what mechanisms are needed to ensure that if this occurs, what recourse exists.