

Improving Parliamentary Scrutiny of Public Appointments

Robert Hazell draft article for Parliamentary Affairs January 2018

r.hazell@ucl.ac.uk

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ABSTRACT

Since 2007, candidates for 50 of the most senior public appointments in the UK have been scrutinised by the relevant House of Commons Select Committee before ministers confirm their appointment. Committees regard pre-appointment scrutiny as a chore, but our research shows it has real impact. Candidates have not been appointed as a result, and others have been forced to resign. Since the Grimstone review in 2016 gave Ministers more scope for political patronage, parliamentary scrutiny is all the more important. Committees could be more effective if they were more selective, but also more systematic in their approach to pre-appointment scrutiny. They could range beyond the Cabinet Office list of the 'top 50' appointments; and they could use questionnaires to candidates to help decide the issues they wish to discuss, or whether to hold a hearing at all.

Keywords Confirmation hearings, parliamentary effectiveness, pre-appointment scrutiny, public appointments, select committees, veto power

1. Parliamentary Scrutiny of Public Appointments

In the UK government ministers make thousands of public appointments every year. Until 20 years ago these were largely unregulated: ministers could appoint whom they wished, without any competition, and senior appointments formed an important part of ministerial patronage, with the whips' office proffering lists of likely candidates. That changed in 1995, when the Committee on Standards in Public Life, chaired by Lord Nolan, recommended in its first report the creation of a Commissioner for Public Appointments (Committee on Standards in Public Life, 1995). Sir Len Peach became the first Public Appointments Commissioner, required to monitor, regulate and approve departmental appointments procedures. Under his Code of Practice public appointments became subject to open competition: Ministers were still able to choose, but only from a shortlist of suitably qualified candidates following a competitive recruitment process.

In 2007 there was a further important change, when the new Prime Minister Gordon Brown announced that in future the most senior public appointments would be submitted to parliamentary scrutiny:

... the Government nominee for key positions ... should be subject to a pre-appointment hearing with the relevant select committee. The hearing would be non-binding, but in the light of the report from the committee, Ministers would decide whether to proceed. The hearings would cover issues such as the candidate's suitability for the role, his or her key priorities, and the process used in selection (Ministry of Justice, 2007).

The Cabinet Office and the House of Commons Liaison Committee (consisting of all the Select Committee chairs) subsequently agreed a list of just over 50 key positions which would be subject to the new procedure. Ten years later, by the end of the 2015-17 parliament, there had been almost 100 scrutiny hearings, involving almost every departmental House of Commons Select Committee. Just under 20 different select committees have been involved, although some much more frequently than others, as shown in Table 1.

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Table 1: Number of Hearings held by each House of Commons select committee, July 2007 to December 2017

Select committee	Number of hearings conducted
Public Administration ¹	16
Justice	13
Health	11
Communities and Local Government	8
Education	8
Culture, Media and Sport	7
Environment, Food and Rural Affairs	7
Business, Innovation and Skills	6
Science and Technology	6
Treasury	4
Work and Pensions	3
Energy and Climate Change	2
International Development	2
Joint Committee on Human Rights	2
Home Affairs	2
Defence	1
Transport	1
Welsh Affairs	1
Women and Equalities	1
Total number of hearings	95²

Source: Commons Liaison Committee Table of Pre-Appointment Hearings July 2007 to December 2017

Right at the start in 2007 the second Commissioner for Public Appointments, Janet Gaymer, expressed a series of important reservations: that pre-appointment hearings might deter good candidates; politicise the appointments process; lengthen the process; that committees would ask inappropriate questions; and ministerial accountability for appointments would be changed (evidence to Public Administration Select Committee, 2007). That led the Constitution Unit to undertake an evaluation of the first 20 pre-appointment scrutiny hearings, in a study published by the Liaison Committee in 2010 (Waller and Chalmers, 2010; Hazell, Chalmers and Russell, 2012). We found the hearings conferred a positive benefit in terms of democracy, transparency and accountability, and that Janet Gaymer's fears had so far proved unjustified. But we also found parliamentarians frustrated by the new process, not least because in the one case in 2009 where a committee had issued a negative report, the government nevertheless went ahead with the appointment (see section 3.2 below). This led many of the MPs we interviewed to feel the hearings were a charade: they wanted a power of veto, or the ability to see a wider range of candidates. In 2016 the Constitution Unit decided to do a further study of the 70 pre-appointment hearings held between 2010 and 2016, to see if the process had become any more effective.

¹ This includes the Public Administration Select Committee (PASC, 2005 to 2015) and its successor, the Public Administration and Constitutional Affairs Committee (PACAC, 2015 to date), and the Political and Constitutional Reform Committee (PCRC), which existed for just one Parliament, from 2010 to 2015. All three committees primarily scrutinised the responsibilities of the Cabinet Office.

² Five hearings were joint hearings held by two committees. Joint hearings are scored against each committee involved.

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This study adds to the literature that Parliament matters. For over a century media and political commentators have lamented the decline of Parliament (Low 1904, Financial Times 2009). Academics have depicted Westminster as the archetype of a weak parliament (Lijphart 2012, Kreppel 2014). It is only in recent years that scholars have begun to challenge the 'parliamentary decline thesis' (Flinders and Kelso, 2011); this study adds to the evidence supporting that challenge.

One of the main scholars leading the challenge is Meg Russell, with her systematic analysis of different aspects of parliamentary scrutiny, and different faces of parliamentary power (Russell and Benton, 2011; Russell 2017). There is hard power, the ability to get a decision changed; for example, when Parliament succeeds in getting a public appointment reversed. But Parliament's influence extends further than this: through soft power, when the government anticipates and internalises what Parliament will accept. And there is the power of exposure, when Parliament subjects government proposals to careful scrutiny, on the public record (Russell 2017, 266-73).

Russell's research on departmental Select Committees has shown how simply counting successful recommendations is a poor proxy for assessing committees' influence overall. As important is the deterrent effect of committee scrutiny: government has to anticipate what will be acceptable to Parliament, and adjusts its behaviour accordingly (Russell and Benton, 2011). The only way to capture this is to combine quantitative with qualitative methods, and we have followed suit by supplementing our quantitative analysis with a lot of interviews.

This study makes an original contribution to the literature in two respects. It is the first empirical study of pre-appointment hearings: no one else has conducted detailed quantitative analysis, or interviewed all the main participants. At the theoretical level, it challenges conventional wisdom: the conventional wisdom of practitioners, where committee chairs and MPs still think pre-appointment scrutiny hearings are a waste of time; and it challenges what is still the dominant paradigm in the comparative literature, that Westminster is a weak and ineffective parliament.

1.1 *Parliament seeks stronger powers*

Parliament continued to press for stronger powers. In September 2011 the Liaison Committee proposed that the list of key appointments be divided into three categories. First tier posts should require a joint appointment by government and Parliament, second tier posts should be subject to an effective veto, and for the remainder, holding a pre-appointment hearing should be at the discretion of the Committee (Liaison Committee, 2011). The government rejected the Committee's three-tier approach, but did agree to consult Committee chairs at the start of the recruitment exercise about the job description and person specification, and for each competition, to give details of the number of applications, and the number shortlisted and interviewed (Liaison Committee: Government's Response, 2012). In November 2013, the Cabinet Office and Liaison Committee issued revised guidelines for pre-appointment hearings, which contained a lot of agreed and overlapping material (Cabinet Office, 2013; Liaison Committee, 2013).

The Cabinet Office guidance included a revised list of appointments subject to pre-appointment hearings, and states that additions to the list must be agreed by the Secretary of State and the relevant Select Committee. It remains up to the relevant Committee whether to hold a pre-appointment hearing, but we found no instances of a Committee deciding not to. Equally, nothing in the guidance prevents a Committee ranging beyond the 'top 50' if they wish, but the Treasury Committee is the only one regularly to have done so. Starting in 1997, the Treasury Committee began holding 'pre-commencement' hearings with newly appointed members of the Monetary Policy Committee of the Bank of England, and has gradually added to this list the Governor, Deputy Governors, members of the Financial Policy Committee and Chair of the Court of the Bank of

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England; the Chair of the Financial Conduct Authority, and its Regulatory Decisions Committee; and the Chair and Tax Director of the Office of Tax Simplification (Treasury Committee, 2016 para 1). None of these bodies is on the Cabinet Office list.

Around the fringes Parliament has continued to chip away in seeking greater control over public appointments, and in some cases a veto. It has gained a formal veto over the appointment of the top staff in the Office for Budgetary Responsibility; an effective veto over the appointment of the Information Commissioner; and parliamentary involvement through a Select Committee chair sitting on the appointment panel for the chair of the UK Statistics Authority, and the Parliamentary Ombudsman.³

This growing assertiveness by Parliament led two academic commentators to express concern that Parliament was pressing for a move from voice to choice over public appointments: from their traditional role of scrutiny, to becoming joint decision makers. Matthews and Flinders summarised their argument as follows:

Select committees have become increasingly willing to publicly challenge the appointment of the Government's preferred candidate (*activism*). This has resulted in further unintended consequences, as select committees have failed to focus solely on independence and professional competence and have instead engaged in political point-scoring (*aggression*). In turn, the highly public and increasingly partisan nature of pre-appointment scrutiny (re-politicisation) has served to discourage involvement in public life ... This has therefore promoted critical questions regarding the desirability of an extra layer of inherently political scrutiny within an otherwise independently regulated process (*added-value*) (Matthews and Flinders, 2015 pp 164-5).

These were serious charges, expanded on in the remainder of the article, which criticised the 'increasingly partisan and adversarial nature of pre-appointment hearings', and reported a 'qualitative shift in the tone and nature of hearings, which are replete with examples of committees engaging in inappropriate, even aggressive, cross-examination' (*ibid* pp 168, 170). Matthews and Flinders concluded that select committees had become *de facto* veto players; and that a deterrent effect was beginning to emerge from highly politicised hearings. They also argued that the relation between the systems of regulation and scrutiny - one independent, one legislative - had been allowed to drift, without explicit consideration of the interface between these two systems.

This prompted the Constitution Unit to re-visit the topic of pre-appointment hearings. With over 70 more hearings by the end of 2016 there was much more data available. It was time for a further evaluation, to test whether select committees still experienced the frustrations reported in our initial study. We also wanted to test the Matthews and Flinders thesis that hearings had become increasingly partisan, adversarial and politicised. And we wanted to re-visit the ideas proposed by the Liaison Committee, of dividing senior public appointments into three categories; and to re-visit the whole 'top 50' list, since several posts had disappeared, new ones had been created, and select committees might have developed different ideas about their priorities.

1.2 *Grimstone relaxes the rules*

³ The Treasury Committee must consent to the appointment of the Chair of the OBR and two board members under Schedule 1 to the Budget Responsibility and National Audit Act 2011. The Justice Minister said in 2011 that the government would respect the Justice Committee's recommendation on the Information Commissioner, and the government fulfilled this commitment again in 2016. Parliamentary involvement through Select Committee chairs sitting on appointment panels has occurred through changes in administrative practice.

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The subject gained added topicality in 2016 because of the controversy generated by the Grimstone review of public appointments, which appeared to extend the possibilities for ministerial patronage (Cabinet Office, 2016a). The central recommendation of Sir Gerry Grimstone's report was that ideally public appointments should be concluded within three months. But alongside this tightening of Whitehall practice went a loosening of the constraints on ministers. The Commissioner for Public Appointments and his independent assessors would no longer be directly involved in appointments, safeguarding the integrity of the process, but instead become an arm's length regulator. In exceptional cases ministers could appoint someone they favoured without running any competition, or appoint a candidate who had been judged non-appointable by the selection panel.

The government was quick to announce that it accepted all the main recommendations in the Grimstone review (Cabinet Office, 2016b). But behind the scenes the outgoing Public Appointments Commissioner, Sir David Normington, had been fighting a rearguard battle to defend the integrity of the system and the Commissioner's role as its main champion and guardian. In his last weeks in office he sounded a public warning in an article which concluded:

The Commissioner is taken right out of the equation. Taken together, Grimstone's proposals would enable Ministers to set their own rules; override those rules whenever they want; appoint their own selection panels; get preferential treatment for favoured candidates; ignore the panel's advice if they don't like it; and appoint someone considered by the panel as not up to the job (Normington, 2016a).

It was left to the new Commissioner, Peter Riddell, to negotiate with the Cabinet Office the new set of Public Appointment Principles and Governance Code which will underpin the new system. After protracted negotiations, he was able to ensure that the Commissioner is notified in advance when ministers want an exemption from the normal process of competition. In reserving the right to express his doubts publicly, the new Commissioner explicitly envisaged that he would also be sounding a warning to the relevant select committee (Riddell, 2016).

To the extent that the role of the Commissioner is weakened, it will fall to select committees to strengthen their role, and themselves become stronger scrutineers of the integrity of the appointment process, as well as inquiring into the suitability of individual candidates. One purpose of pre-appointment hearings had always been to scrutinise the recruitment process, but the main focus of select committees is understandably on the suitability of the candidate before them. Post-Grimstone, the balance might need to change. So in framing our own objectives for our new study, one of our main questions to interviewees was to ask them how they would rank the different objectives of pre-appointment scrutiny; and we added a further question, whether the Grimstone review might in future require select committees to change their game.

2 Research Questions and Methods

We set out to evaluate the effectiveness of pre-appointment hearings. To assess their effectiveness, we needed first to identify what purposes they were intended to achieve. From the official documentation, we identify three broad objectives which were then tested in the following research questions:

- Is the primary purpose of pre-appointment hearings to scrutinise the recruitment process; or the suitability of the preferred candidate; or to discuss their initial priorities once appointed?
- How effective are pre-appointment hearings in fulfilling these different purposes?

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- How often do committees issue a negative report, or express lesser concerns at the hearing? What is the impact of committee criticism on the government's decision?
- How closely do select committees follow the Liaison Committee guidelines, in asking questions which are appropriate, relevant, not too hostile?
- Post-Grimstone, how could the system of pre-appointment scrutiny be improved?

Our research methods consisted of reading all the relevant literature; analysing the transcripts and reports of 71 pre-appointment hearings, and the media coverage they attracted; and conducting 25 interviews with key participants. The literature is listed in the bibliography.

We conducted a systematic analysis of the transcripts of the 71 pre-appointment hearings that took place between February 2010 (the date of the Unit's first report on pre-appointment hearings (Waller and Chalmers, 2010)) and September 2016. In analysing each hearing, we asked a series of questions derived from our research questions. What is the main purpose of the hearing? Is the committee's questioning appropriate, relevant, not too intimidating? How much publicity do the committee hearings and their reports attract? Our full analysis of the pre-appointment hearings was collected in a large table published on the Constitution Unit website.⁴

For each hearing we recorded the number of questions asked, and then analysed separately how many were appropriate, irrelevant, aggressive or politicised. To analyse the amount of media coverage attracted by each pre-appointment hearing, we searched online for media entries relating to that appointment. In our scoring system, hearings with 'minimal' coverage had fewer than three non-mainstream media entries. 'Moderate' coverage was used to describe either three to five media entries or at least one mainstream media entry. Anything with six or more media entries, or with at least two mainstream media entries, we categorised as 'significant'. 'Mainstream' media was defined as national media with a high readership (for example, the BBC, The Guardian, The Times).

Finally, we conducted 25 interviews with those involved in pre-appointment scrutiny. This included interviews with 14 select committee chairs, members and clerks; with seven candidates (including two unsuccessful ones); recruitment consultants; the Commissioner for Public Appointments; and the Cabinet Office Public Appointments Team. In July 2016 the House of Commons kindly organised a half-day seminar for us with 14 committee clerks, to discuss their different experiences of pre-appointment scrutiny.

3 Findings

3.1 *The multiple purposes of pre-appointment scrutiny*

Our first research question was to ask whether the primary purpose of pre-appointment hearings is to scrutinise the recruitment process; or the suitability of the preferred candidate; or to discuss their initial priorities once appointed. Our second was to ask how effective pre-appointment hearings are in fulfilling these purposes.

Analysing the transcripts, we found the hearings covered four main issues. The most important focus was on the candidate's **suitability for the role**. Questions have addressed candidates' skills, past experience (and the transferability of this experience), management and/or leadership experience,

⁴ <https://www.ucl.ac.uk/constitution-unit/news/pre-appointment-table-2017>.

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and ability to deal with the media. This has been a central feature of all hearings, with competence-based questioning in 70 out of the 71 hearings analysed.

Next, and related to suitability, committees have questioned candidates about their **independence**: primarily from the government; but second, from other conflicts of interest. Candidates have been asked about party affiliations (including party funding); and about their policy views if seen as being too close to those of the government. David Prior was asked whether his political background as a former deputy Chair of the Conservative party would not compromise his work at the Care Quality Commission (Health Committee, 2012). Civil servants have been asked to demonstrate how they would maintain their independence in light of their previous government service. And committees have identified other potential conflicts of interest which should have been picked up during the recruitment process.

A second common area of questioning is about the candidate's **initial priorities**. This was particularly the case where the suitability of the candidate was not in doubt, so the committee could quickly move on. Some committees engage candidates in generic discussion about the large-scale problems facing an organisation. Others have preferred more detailed discussion about candidates' initial priorities, including suggestions of what the candidate's priorities should be.

The third stated purpose of pre-appointment hearings is scrutiny of the **recruitment process**, but questioning about this was uncommon. Candidates were asked about the process in only nine out of 71 hearings. In five of these, the committee enquired how the candidate came across the vacancy - usually, whether or not they were headhunted, and if so, by whom. Questioning on this area tended to be brief, except where the committee perceived potentially improper governmental influence. As an example, Glenys Stacey was questioned at length about being telephoned by Michael Gove about the position of Chief Inspector of Probation, and whether this might not compromise her independence (Justice Committee, 2015).

3.2 Effectiveness of pre-appointment scrutiny

Pre-appointment scrutiny has proved most effective in testing candidates' suitability for the role. In particular, it has helped to screen out unsuitable candidates. Since 2007 there have been nine pre-appointment hearings which have called appointments into question. In only three cases out of the nine did the appointment continue. The nine cases are set out in Table 2, and then discussed in more detail below.

Table 2: Pre-appointment hearings which have queried appointments, 2007-2017

Candidate	Hearing date	Position	Negative committee report?	Result
Maggie Atkinson	12 October 2009	Children's Commissioner for England	Yes	Appointed
Diana Fulbrook	11 May 2011	HM Chief Inspector of Probation	Yes	Not appointed
Professor Dame Janet Finch	28 June 2011	Chair of the UK Statistics Authority	No	Withdrew anticipating negative report
Professor Leslie Ebdon	2 February 2012	Director of the Office for Fair Access	Yes	Appointed

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Candidate	Hearing date	Position	Negative committee report?	Result
Dominic Dodd	15 October 2013	Chair of Monitor	Yes	Withdrew
Philip Dilley	15 July 2014	Chair of the Environment Agency	No	Candidate's comments during hearing were significant factor in later resignation in January 2016
Amanda Spielman	29 June 2016	HM Chief Inspector, Office for Standards in Education (Ofsted)	Yes	Appointed
Rona Fairhead ⁵	6 July 2016	Chair of the BBC Board	No	Did not apply after government persuaded that position would be subject to competition
Charlotte Hogg ⁶	14 March 2017	Deputy Governor of Bank of England	Yes	Resigned after Treasury Committee exposed undeclared conflict of interest

In only one case did the government withdraw a candidate. Diana Fulbrook (Chief Inspector of Probation) was the subject of a unanimously negative report, supported by all the Conservative members on the Justice Committee (Justice Committee, 2011). The Lord Chancellor, Kenneth Clarke, withdrew her as a candidate, and started a new competition.

In three cases the candidate decided to withdraw. Dame Janet Finch (UK Statistics Authority) withdrew after a gruelling appearance before PASC. Dominic Dodd (Monitor) fell victim to unfortunate timing when one of the Conservative members on the Health Committee arrived too late to vote. The Department of Health wanted to proceed with his appointment, but he felt that he lacked legitimacy without the support of the select committee, and so withdrew. Rona Fairhead had been appointed Chair of the BBC Trust in 2014; the government later announced that she would become Chair of the new BBC Board. The Culture, Media and Sport Committee invited Fairhead for what it described as 'in part ... a pre-appointment hearing' (Culture, Media and Sport Committee 2016a). In its ensuing report, the Committee made the case for a fresh competitive process (Culture, Media and Sport Committee, 2016b). When the government accepted the Committee's recommendation, Fairhead announced that she would not be a candidate.

In three cases the government proceeded with an appointment, despite a negative report from the select committee. In the case of Maggie Atkinson, the Select Committee did not question her expertise to be Children's Commissioner for England, but feared she was not robust enough to stand up to the Secretary of State, Ed Balls. Professional bodies and children's charities came out strongly in support of her appointment. In the case of Professor Leslie Ebdon, the Conservative members on the committee were protesting as much about the new Office for Fair Access as the candidate (Business, Innovation and Skills Committee, 2012). Opposition members supported his candidacy, which may have made it easier for the government to proceed. Amanda Spielman was appointed as

⁵ This was not formally a pre-appointment hearing, and so not one of the 71 hearings analysed in our study.

⁶ This was also not formally a pre-appointment hearing.

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Chief Inspector of Ofsted, despite a detailed negative report from the Education Committee (Education Committee, 2016). But again, the dispute was as much about the role of Ofsted as about the candidate, who received a lot of support from within the profession.

The last two cases are of people forced to resign because of statements at the pre-appointment hearing. Philip Dilley was asked how he would respond in times of crisis at the Environment Agency, such as severe flooding. He responded that it would be important to 'turn up in your wellingtons and so on very early on' (Environment, Food and Rural Affairs Committee, 2014). This statement returned to haunt him when severe winter floods in December 2015 found him on holiday in Barbados, and he resigned. Charlotte Hogg realised when completing the Treasury Committee's questionnaire in advance of her hearing as a new Deputy Governor of the Bank of England that she had failed to declare her brother's role at Barclays bank, a potential conflict of interest. This led to the Bank instituting disciplinary proceedings, and to Hogg's resignation following a strongly critical report from the Treasury Committee (Treasury Committee, 2017).

What these cases show is that even though committees have no power of veto, they have very significant influence. More often than not, when a committee gives a candidate a hard time or issues a negative report, the appointment does not go ahead. Committee screening for conflicts of interest has also proved, in some cases, more stringent than the government's recruitment processes. And finally, our interviews suggested there is a wider deterrent effect: because pre-appointment scrutiny is rigorous, testing and in public, ministers will be reluctant to put forward weak candidates who will not pass muster before the select committee. It cannot be quantified in the same way; but the wider deterrent effect (Parliament's 'soft power') may be as important as the number of appointments reversed.

3.3 *Media coverage*

Because select committees' main power is one of voice, not veto, our research included examining how much media coverage there is of pre-appointment scrutiny. The more publicity they gain, the greater is likely to be their leverage (Kubala, 2011). The results are summarised in Table 3. Media coverage varied greatly, with the most highly publicised hearings gaining over 100 media mentions. A lot of these reports were in specialist press and trade journals, which for some positions (such as the Pensions Ombudsman, or HM Inspector of Probation) is all that might be expected.

Table 3: Amount of media coverage generated by pre-appointment scrutiny, 2010-16

Category	Number of hearings, and percentage
Minimal coverage (less than 3 media mentions)	19 (27%)
Moderate coverage (3 - 5 mentions, or 1 mainstream media mention)	19 (27%)
Significant coverage (6+ mentions or 2+ mainstream media coverage)	33 (46%)

Around 46 per cent of the hearings and subsequent reports gained significant coverage in the media. The most high-profile positions, such as Chair of the BBC and Governor of the Bank of England, gained very significant coverage, as did positions such as the Chief Inspector of Ofsted and the chair of NHS England. Hearings also attracted significant media coverage if there was criticism or controversy, for example where the committee recommended against appointment or the candidate withdrew. There was also significant media coverage in cases where the candidate was known to be a donor or senior member of a political party.

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3.4 *Adherence to Liaison Committee guidelines*

We found very little evidence to support Matthews and Flinders' thesis that questioning has become aggressive and politicised, and may deter good candidates. In our detailed analysis of 71 transcripts, almost 90 per cent of the questions were judged to be appropriate; and less than 5 per cent were found to be irrelevant, aggressive or politicised.⁷ We also found very little evidence to support their thesis amongst the candidates we interviewed. Only one complained of hostile questioning. More typical were candidates who said it was like water off a duck's back, or who said they had faced more hostile questioning from other select committees. One candidate said they were glad to be asked of examples when they had given unwelcome advice to ministers (as a test of their independence), because that had not been tested in the departmental interviews. Another interviewee said that the select committee was the first to ask the candidate about being a Conservative Party donor. As one committee chair (from the governing party) put it, 'If governments give the impression that they are appointing cronies, they shouldn't be surprised if committees give them a lot of grief'.

We would make rather different criticisms of pre-appointment hearings. One is the reverse of Matthews and Flinders: that committees sometimes give candidates too easy a ride. The most obvious case is that of Deep Sagar, endorsed by the Work and Pensions Committee to be Chair of the Social Security Advisory Committee, only for him to resign six months later: the Committee had noted that he lacked any experience in social security policy, but did not sufficiently press the point (Work and Pensions Committee, 2012). Another candidate let off lightly was Lord Kakkar, who listed a string of other commitments which would make it difficult to give sufficient time to the Judicial Appointments Commission; but the Justice Committee did not make its approval conditional on his giving up any of those appointments (Justice Committee, 2016).

The candidates we interviewed were mainly very positive about pre-appointment scrutiny. Those who were endorsed by the Select Committee were understandably more positive than those who were rejected. But even the unsuccessful candidates strongly supported the involvement of Parliament in pre-appointment scrutiny. One said to us, 'I think that particularly where there is supposed to be independence, and that you are not a thing of government but also have an accountability to Parliament, that it is absolutely appropriate'. Another candidate welcomed the chance to demonstrate his independence in a public forum: 'if it's the right person for the post, I don't think they should have any real concern. It is a protection because they can demonstrate that they are independent of a particular minister or whatever, they have been chosen on merit, they are the right person for the job'. Others felt that the hearing could help to buttress their independence if subsequently they came under pressure, with a third candidate adding, 'Were the government to injure my independence, the select committee could be a useful ally'. Even a candidate who was the subject of a negative report felt that the hearing had unexpectedly helped legitimise the government's decision to appoint,

⁷ We considered to be appropriate any question relating to the candidate's competence, motivations, or substantive knowledge of the relevant area. 'Irrelevant' questions were those that did not rationally fit into the direction of the conversation. We defined as 'aggressive' any questions that were strongly worded, persistent, or clearly intended to make the candidate uneasy. Finally, we classified as 'politicised' any questions asking the candidate directly about their political views, or political affiliations. We did not consider to be 'politicised' any questions assessing the candidate's views on controversial policy issues.

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because the leaders of the professional bodies and other stakeholders had come out strongly in support.

4 Problems with pre-appointment scrutiny

Our interviews identified several problems with pre-appointment scrutiny. One derives from confusion about the purpose of the exercise. As one of the clerks explained 'it can be a bit difficult to convey to the members exactly what the purpose of this is, and what their role is, because in some ways it can feel like a selection panel ... as though you're interviewing someone for the job. And they have to be clear that's not what their role is'. Another said that it was difficult for committees to test whether the Secretary of State had chosen the best candidate, when they had no knowledge of the other candidates. In only nine cases out of the 71 transcripts we analysed did committees seek to scrutinise the recruitment process; but to do that effectively would require the committee to take evidence from the department rather than the candidate. As for the hearing providing an opportunity for the committee to influence the candidate's priorities at an early stage, interviewees questioned whether it was a good use of time for committees to interrogate a candidate before they had taken up their post. The difficulties in fulfilling these various potential objectives meant that some committee members we interviewed found the whole process rather frustrating. As one committee clerk explained, 'Sadly, I fear that my committee does see it as a chore. I haven't been successful in convincing them of the value of these things, both in the wider constitutional sense, or in an engagement sense. The feeling coming back was griping about the process: why can't we see details of all the other candidates, we're just being asked to rubber stamp this thing, we're not being given any genuine choice here'.

A second difficulty is the inflexibility of the Cabinet Office list of appointments subject to pre-appointment scrutiny, which is both over- and under-inclusive. It is certainly not the product of the consistent application of criteria to all public posts. For example, five Chief Inspectors are on the list, yet the Independent Chief Inspector of Borders and Immigration is not. Equally, there are appointments on the list which need not be. Suggestions from our interviewees of posts which could be added included the Chair of the House of Lords Appointments Commission, and the Legal Services Board; the Chairs of Ofsted and Ofqual (in addition to the Chief Inspectors, already included), and the National Schools Commissioner; the Chairs of NHS Improvement, and of Health Watch. Further additions could be selected from the list of 94 'significant appointments' agreed by Cabinet Office Ministers and the Commissioner for Public Appointments in 2017 (Public Appointments Commissioner, 2017). That was the product of a more recent and more systematic trawl through a longer list of all senior public appointments to decide which required an Independent Senior Panel Member. It could provide a very useful starting point if the Liaison Committee and the Cabinet Office were to conduct a similarly systematic review of those appointments which merited pre-appointment scrutiny.

A further issue is that the list ignores changing political considerations. A committee might, for example, decide that an appointment to a body not on the list has become more important over time and a pre-appointment hearing might be justified. Equally the current system works on the basis that a pre-appointment hearing will be held whether or not the committee has any real wish to scrutinise the candidate. The committee could decline to hold a hearing, but we did not uncover any such cases in our research.

Finally, there remains a lingering concern that pre-appointment hearings will deter good candidates. Sir David Normington told us that he had believed this when first appointed as Commissioner for Public

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Appointments; but in office he found no evidence of a deterrent effect. Our research similarly failed to uncover any such evidence. Good candidates may be deterred by the length and complexity of the whole public appointment process, but that is a separate issue, addressed by the Grimstone review. Some candidates may be reluctant to put themselves into the firing line; but a public appointment is in the public arena, and pre-appointment hearings test candidates' ability to withstand public scrutiny. Our interviews suggested that candidates see the pre-appointment hearing in that light, not least in giving them public legitimacy (Waller and Chalmers, 2010, para 3.12.1).

5 Improving the system of pre-appointment scrutiny

Pre-appointment scrutiny was introduced in 2007, initially as something of an experiment. Parliament, through the Liaison Committee, has made several attempts to propose improvements but its reports have largely been rebuffed. With the Cabinet Office sitting on its hands, the initiative rests with parliament. The final part of this article offers suggestions first, for how parliament could make individual pre-appointment hearings more effective, and second, for improving the system as a whole

Pre-appointment hearings generally serve multiple purposes, with the main ones being to scrutinise the suitability of the candidate; to discuss their initial priorities; and to probe the openness and fairness of the recruitment process. There is nothing wrong in pursuing multiple purposes in the same hearing. But it can appear chaotic and unpredictable, to candidates and committee members alike, to arrive at the hearing without knowing which purposes will be pursued, or in what order. It would be more efficient if at the start of each hearing the chair announced the main purpose, and what issues the committee wished to pursue. That will make clear the structure to be followed, and the committee's main concerns.

To assist the committee in identifying the main issues to be pursued, our second recommendation is that each candidate should be invited to complete a written questionnaire before appearing before the committee. That would save time at the hearing by enabling the committee to focus on those issues which still cause concern; or if there are no concerns, it might enable the committee to dispense with a hearing altogether. The use of questionnaires is a practice which has been followed for some 20 years by the Treasury Committee (Treasury Committee, 2016), but has yet to be adopted by other committees. Following the model of the Treasury Committee, questionnaires could focus first on the personal independence and professional competence of the candidate, and second on the strengths and weaknesses of the organisation.

We turn next to improving the system as a whole. Previous attempts have focused on dividing the current list of 50 or so top public appointments into an A, B and C list. We begin instead by considering first the procedural options for enhanced scrutiny. There are already several different options available, from recent developments for certain post holders deemed to need a very high degree of independence. These developments can be used to construct a ladder with varying degrees of parliamentary control, ranging from total parliamentary control to no parliamentary involvement:

- Parliament makes the appointment with no involvement of the executive (as with the Chair of the Electoral Commission, and the Independent Parliamentary Standards Authority).
- Government and parliament make the appointment jointly, giving each a veto (as with the Comptroller and Auditor General, and since 2011 the Ombudsman).

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- Government can only make the appointment with the consent of a select committee, or its chair: giving the committee a formal veto (as with the Office for Budgetary Responsibility).
- Government makes the appointment but agrees to abide by a Resolution of the House: giving parliament an effective veto (as with the Chair of the UK Statistics Authority).
- Government makes the appointment but agrees to abide by the select committee's recommendation: giving the committee an effective veto (as with the Information Commissioner).
- Government makes the appointment but with a select committee chair on the panel.
- Government makes the appointment subject to pre-appointment scrutiny.
- Government makes the appointment with no reference to parliament.

The top four or five rungs of this ladder (highest in parliamentary control) are unlikely to be extended to a much larger number of public appointments: the case is strongest in relation to the main constitutional and ethical watchdogs, which number about a dozen.⁸

Select committee chairs and members continue to be unduly focused on acquiring a power of veto; they do not appreciate how effective their soft power is. But a veto may prove to be a distraction, especially considering the changes introduced by the Grimstone review (Cabinet Office, 2016). Grimstone has changed the rules of the game, and may require committees to focus on a much wider range of public appointments than just the 'top 50': the challenge in future may be one of quantity, not quality. This is how it was put by the outgoing Commissioner for Public Appointments, Sir David Normington:

If the Grimstone review is implemented, then the case for extending Select Committee scrutiny of individual appointments becomes unanswerable. At present such pre-appointment scrutiny, as it is known, is limited to a list of appointments agreed with the Government, which contains mainly regulators, inspectors and others where independence from the executive is a requirement of the job. If the Commissioner's scrutiny is to be weakened, pre-appointment scrutiny may need to be extended to all significant appointments (Normington, 2016b).

Sir David has suggested this might comprise over 100 appointments.⁹ That would double the frequency of pre-appointment hearings, which would be resisted by the Cabinet Office, and would not be welcomed by the select committees themselves. But it does suggest a new way of working, in which committees seek to monitor a wider range of public appointments, but are more selective in those subjected to pre-appointment scrutiny. Their guide to selection can be the new Commissioner, whose

⁸ The Liaison Committee has suggested joint appointments for the Parliamentary Ombudsman, chair of the Statistics Authority, Information Commissioner, chairs of the House of Lords Appointments Commission and Judicial Appointments Commission, First Civil Service Commissioner, Commissioner for Public Appointments, chair of the Committee on Standards in Public Life and chair of the Equality and Human Rights Commission: Liaison Committee, *Select Committees and Public Appointments* HC 1230, 4 September 2011.

⁹ In discussion at Constitution Unit seminar on 8 December 2016. In February 2017 the Commissioner for Public Appointments published a list of 96 'Significant Appointments', agreed with the Cabinet Office as requiring a Senior Independent Panel Member: for the list see <https://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2017/07/20170706-HMG-List-of-significant-appointments-1.pdf>.

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powers are much reduced, but who still has power to speak out and alert the relevant select committee (Riddell, 2016).

It will be important whenever the Commissioner does sound a warning for the select committee to respond. Post-Grimstone, committees may need to move away from a system of routine police patrolling, where they scrutinise every appointment in the top 50, to a system of fire fighting in which they are more selective about which appointments they choose to investigate. That may be welcome to those select committees which find routine pre-appointment hearings a tedious chore. But if they delegate scrutiny of the more routine appointments to a paper check conducted by committee staff, that would release more committee time for investigating those appointments requiring further scrutiny.

Once in each parliament the Liaison Committee might usefully review any new public bodies which have been created, to see whether they merit pre-appointment scrutiny. Post-Brexit there is going to be a plethora of such bodies, especially in the regulatory field. At the start of a parliament each committee could also benefit from a discussion, led by the chair, about its scrutiny role in relation to public appointments, how it will work alongside the Commissioner, how much time it is willing to devote to public appointments, and how much it is willing to delegate. It would also be assisted if the committee staff drew up a list of all the senior public appointments within the committee's remit due for renewal over the next five years, so the committee could identify in advance those posts of particular interest.¹⁰ Committees have become prisoners of the agreed Cabinet Office list, rarely straying outside it; the Liaison Committee guidelines recognise that committees may wish to scrutinise other appointments, but they rarely do so (Liaison Committee, 2013, paras 8 and 11). The Treasury Committee has blazed the trail, routinely scrutinising six public appointments in addition to those on the Cabinet Office list (Treasury Committee, 2016, para 1); where the Treasury Committee has led the way, other committees can follow.

The Treasury Committee calls such hearings 'pre-commencement' rather than pre-appointment, because strictly the candidate has been appointed, and ministers are not formally required to consider the committee's recommendations. But the Treasury Committee applies exactly the same criteria, of personal independence (including lack of conflicts) and professional competence, and they use the same tools, including written questionnaires, to probe candidates' suitability. Despite the lack of formal recognition on the Cabinet Office list, these pre-commencement hearings can produce equally dramatic results, as illustrated by the resignation of Charlotte Hogg (Treasury Committee, 2017).

Select committees and their chairs do not appreciate how powerful they really are. The Treasury Committee has repeatedly called for a formal power of veto (Treasury Committee, 2011, para 148; 2016, *passim*). But the resignation of Charlotte Hogg shows how powerful a select committee's voice can be when it decides to make a fuss. The same is true of the other committees which have issued negative reports, or given candidates a hard time at the hearing: the fact that four candidates have withdrawn following pre-appointment scrutiny shows the effectiveness of the process, even though committees have no power of veto.

The second lesson worth emphasising is how much select committees can achieve through sheer dogged persistence. The Treasury Committee has never received any encouragement from successive Chancellors for its keen interest in public appointments. But for 20 years it has persevered, and improved its procedures, in particular through pioneering the use of questionnaires. It has also extended the range of appointments being scrutinised way beyond the Cabinet Office list. Its experience shows that parliament has all the powers that it needs for pre-appointment scrutiny, and

¹⁰ Committee staff may rely on the list appended to the latest Public Appointments Order in Council.

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that committees which wish to become more effective could benefit from adopting a more systematic approach. Being more systematic does not necessarily involve a heavier workload; they could also be more selective, by deciding at the start of a parliament (or the start of a session) which appointments they want to single out for particular scrutiny. Select committees need not feel constrained by the Cabinet Office guidance or the top 50 list: they need simply to be a bit bolder in setting their own agenda for scrutinising public appointments, rather than having it set for them.

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