



AUSTRALIAN SENATE

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18 January 2011

Senator the Hon John Faulkner
Chair
Joint Select Committee on the Parliamentary Budget Office
Parliament House
Canberra ACT 2600

Dear Senator Faulkner

INQUIRY INTO THE PARLIAMENTARY BUDGET OFFICE

Thank you for your invitation to make a submission to the committee on the Parliamentary Budget Office (PBO).

This submission addresses selected terms of reference only.

The appropriate mandate for the PBO

All of the post-election agreements between the cross benches and the government proposed that a Parliamentary Budget Office be established in the Parliamentary Library under the supervision of an all party committee. The idea of a Parliamentary Budget Office has had currency for some time and a private senator's bill proposing the establishment of such an office was referred to the Senate Finance and Public Administration Legislation Committee in the last Parliament. A copy of my submission to that inquiry is attached. It deals largely with technical matters about the powers of the proposed statutory Parliamentary Budget Officer. (The committee's examination of the bill was halted by the general election and the bill has not been reintroduced.)

One of the key issues for the committee is to develop recommendations about what it is that the PBO is to do. There are many possibilities. They include the following:

- provide analysis of the government's economic statements and designated economic publications

- provide analysis of budget documentation at the macro level and on a portfolio basis
- provide costings of any policies announced by the government, opposition, minor parties or independent members and senators
- respond to client requests for economic or related analysis from members, senators and committees
- produce regular publications of economic data.

The office will only succeed, however, if it is providing a service that members and senators want and will use.

The function of costing policies has been suggested as an appropriate function for a PBO because of some disquiet about the operation of the Charter of Budget Honesty process. After the last election, during negotiations to form government, there were also reports of the Finance Secretary being concerned about his departmental officers being involved in analysis of opposition policies when that was clearly outside the established caretaker conventions. For any organisation to undertake policy costings, it is necessary for the organisation first to have access to the relevant information. If any party is going to be reluctant to hand over such information to an organisation, it does not matter where the organisation is located or what it is called. It cannot perform that function without running the risk that its analysis will lack credibility.

A fundamental aspect of the mandate of the PBO is how it will obtain the information it needs to do its work. There are two basic models to consider.

The first is the legislative model under which the office is established on a statutory basis with appropriate powers to require the production of information if necessary. In my submission to the Senate Finance and Public Administration Legislation Committee on Senator Barnett's private senator's bill, I suggested that, if the legislative model was pursued, such powers could be modelled on those of the Auditor-General, with corresponding guarantees about the non-inclusion of sensitive information in public reports. Such a model, however, may not sit well with an organisation that not only produces public reports but also provides a private and confidential briefing service to senators and members. If an agency was ordered to hand over sensitive information that the PBO then provided to a senator or member who released it during the course of debate, the agency would be placed in a very difficult position while the member's or senator's actions would be protected by parliamentary privilege.

The alternative model would have the office established by resolution of both Houses but the office would then need to function in accordance with agreements with the executive government about the provision of information. How quickly such agreements may be forgotten is demonstrated by an incident discussed at the 2010 budget estimates hearings involving access by the Parliamentary Library to information held by Centrelink. There is also the question of what happens when the agreements fail to secure the necessary information. One option would be to provide the PBO with a capacity to report to the Houses on any difficulty in obtaining information and for either House to use its inquiry powers to

order the production of the information. This would be a more attractive option, however, if further progress had been made on an arbitration mechanism when governments are unwilling to comply with orders of the Houses for documents.

The nature of information needed to assist the Parliament in its consideration of matters related to the budget AND the role and adequacy of current institutions and processes in providing this support, and the areas in which additional support is required

A primary role of Parliament is to approve expenditure proposals put forward by the executive in the form of appropriation bills (or in other bills which are not primarily appropriation bills but which contain an appropriation of funds, often of a standing and uncapped nature, called special appropriations).

The annual appropriation bills now account for only about 20 per cent of appropriations, a matter which has been a cause of concern in the past. In terms of budget information, however, the budget papers which accompany the main appropriation bills (including the portfolio budget statements) are the major source of financial and economic information released by the government, along with the Mid Year Economic and Fiscal Outlook, the Tax Expenditures Statement and the portfolio additional estimates statements. These documents include explanations of special appropriations. The documentation of expenditure from the Advance to the Minister for Finance and Deregulation is another important source of accountability information and the document setting out the final charge on the advance for the financial year is still considered in committee of the whole immediately after the Senate has finally considered the main appropriation bills (although it is some years since senators have used the opportunity to discuss it).

Both Houses have procedures for scrutinising details of the budget but the Senate estimates process is the more extensive one, occurring three times each year. It is the one area where committee secretariats do not play an active role in the content of hearings, apart from the crucial logistical and procedural support functions. The reason for this is historical. From early days, it was apparent that the estimates process was more "political" than other areas of committee work and it was thought that the involvement of secretariat staff in drafting "political" questions for senators would tend to undermine perceptions of their non-partisanship and neutrality. The growth in the number of personal/electorate staff available to senators has allowed the preparation of questions and the researching of issues to be undertaken within senators' offices, whether by senators' staff or senators themselves. A second reason for secretariat staff taking a back seat is that estimates hearings are, in effect, a substitute for the committee of the whole stage of the bills.

While there have been many noble exceptions over the years, it is non-government senators who have tended to make the most use of the estimates process to scrutinise particular programs, incidents, failings or "hot" issues. As the estimates process has expanded, there have been corresponding developments relating to the consideration of the appropriation bills in the Senate, including limitations on committee of the whole consideration of the bills to avoid that process being used to re-run all the issues covered in the estimates hearings

themselves. (For a summary of these developments, see the entry on standing orders 26 and 115 in *Annotated Standing Orders of the Australian Senate* (2009), also available online at: <http://www.aph.gov.au/Senate/pubs/aso/index.htm>.)

At the same time, the estimates process (and related committee inquiries, principally by the Finance and Public Administration Committee and its predecessors) has been responsible, in large part, for the evolution of the documentation accompanying the appropriation bills. During the early days of estimates committees, senators sought more information to amplify the lines of figures contained in the schedules to the bills (the "particulars of proposed expenditure"). Placed on a systematic basis, these amplifications became Explanatory Notes which evolved into Program Performance Statements which, in turn, evolved into today's Portfolio Budget Statements (and Portfolio Additional Estimates Statements). During the 1980s, under the then Government's Financial Management Improvement Plan (FMIP), the accountability value of these documents was recognised as an essential part of the cycle of performance reporting under program budgeting, including agency annual reports (also examined by estimates committees). The content was managed more and more by the Department of Finance and the low point of their usefulness as explanatory documents for Parliament was during the implementation of accrual budgeting and reporting from 1999 when they became almost unreadable outside the accounting profession. This trend is now reversing (and more cash- and program-based information is being included) under the influence of the Finance and Public Administration Committee's report, *Transparency and accountability of Commonwealth public funding and expenditure*, and Operation Sunlight (to which former Senator Andrew Murray was a consultant).

The reason for rehearsing this background is to highlight some questions for the committee about where the PBO might be able to contribute to the provision of information to assist the Parliament in budget-related considerations and, specifically, to assist the legislation committees in their consideration of estimates:

- is there a need for more analysis of PBSs and annual reports as budget-related documents, perhaps in the form of bills digest-like documents in relation to each portfolio's publications, highlighting issues and possible areas of underperformance?
- would the PBO undertake client requests to provide material for estimates (for example, by monitoring media in relation to specified portfolios and collecting "stuff-up" stories), and how would this function affect perceptions about the office's neutrality and its availability to serve the needs of members of both Houses?
- could the office have a role in monitoring and reporting on expenditure under the 80 per cent of "other" appropriations that are outside the annual appropriation bills?
- do members and senators want broader economic information and analysis?
- can a PBO deliver the information in time for it to be used effectively?

As a source of analysis and advice on budget matters, the PBO could also assist committee inquiries in the same way that the Parliamentary Research Service currently assists committees with research and analysis.

A red herring in this context – Section 53 of the Constitution and ordinary annual services of the government

One issue of particular importance to the Senate relates to the content of the various appropriation bills and, in particular, that of the bill for the ordinary annual services of the government which the Senate may not amend. It is in the Senate's interests for the limitations on its powers to be as narrowly cast as possible. Early understanding of the concepts in the post-Federation era was revived in the early 1960s after the Menzies Government proposed to combine the formerly separate (and amendable) works and services appropriation bill with the non-amendable ordinary annual services of the government bill. The Senate's response, informed by the report of a committee of government senators, led to a statement to the House by Treasurer Harold Holt, known as the Compact of 1965, which set out various items that were agreed not to be "ordinary annual services of the government". There have been several modifications to the compact since then, all of them examined by the Appropriations and Staffing Committee and endorsed by the Senate, culminating in the June 2010 consolidating resolution of the Senate. The one sticking point is what constitutes "new policies not previously authorised by special legislation". A misunderstanding between the Senate and the Government following the introduction of accrual budgeting has never been satisfactorily resolved.

A suggestion made in part of the Incoming Government Brief of the Department of Finance and Deregulation on the PBO, released following the election, was as follows:

The process to establish the PBO could also be used to settle a long-standing debate about which appropriations can be amended by the Senate. This issue, which revolves around the so-called "Senate-Executive Compact", is raised in the agreements with the Greens (at Item 5.1(h)) and the Independents (at Item 13 of Annex A).

The agreement with the Independents states: "The Senate resolution on appropriation bills which contain matters which should have been the subject of separate legislation is noted. To prevent this occurring, the parties and non-aligned Members agree to developing a mechanism to resolve this issue prior to the next appropriation bills being introduced." Since 2007, the Additional Estimates Appropriation Bills have been introduced between December and February. It will be difficult to have any change implemented in this timeframe.

Early decisions on what comprises "the ordinary annual services of the Government" will be necessary to allow sufficient time to implement relevant changes to systems and practices of central and line agencies in preparing for additional estimates.

It is not at all clear to me what connection the "process to establish the PBO" has with the issue of "ordinary annual services of the government" or what that process could possibly contribute to a resolution of the issue, hence my reference to it as a red herring. Senate officers currently examine the budget documentation to identify any new policy proposals that appear to have been funded under the bill providing for the ordinary annual services of the government (contrary to the Senate's views on the matter) and draw these to the attention of the President of the Senate who, in accordance with the 50th report of the Appropriations and Staffing Committee, draws them to the attention of that committee and the Minister for Finance and Deregulation. Over the years that this practice has been in operation (and it pre-

dates the 50th report by some years) there has not been one substantive response from government to any of the particular cases raised as possibly inappropriately classified items. The ball is strongly in the Government's court. It is a matter between the Senate and the Government (in effect representing the House) to which the process to establish a PBO can add nothing.

However, if the dispute remains unresolved, it is conceivable that there could be some role for the PBO in the future in identifying items inappropriately included in the appropriation bill for the ordinary annual services of the government (although it would be preferable that such analysis continues to be undertaken by Senate officers who bring institutional knowledge to the task).

The most appropriate structure, resourcing and protocols for a PBO

I have no particular views about where the PBO might be located but, from an institutional point of view, if a PBO is established it would not be appropriate for it to be under the management and control of either of the chamber departments. While there are two common services that are managed on behalf of the Parliament by one of the chamber departments (the Parliamentary Education Office by the Department of the Senate, and the International and Community Relations Office by the Department of the House of Representatives), I do not believe that this is an appropriate model for a PBO. The reason is the discrete and specialised nature of the work of a PBO and the lack of any intellectual crossover between its work and the parliamentary work supported by the chamber departments. As Clerk of the Senate, I know something about parliamentary operations and government finances but nothing about economic modelling, costing methodologies or the resources required to carry out such functions. In these circumstances, I think it would be difficult to be responsible for the work of such an office and while the selection criteria for future Clerks could be adjusted, the field of suitable applicants would surely be even smaller than it is now.

As an organisation with a specialist research function, the PBO might more suitably be co-located with the Parliamentary Research Service (PRS) or as a standalone body. One argument for not co-locating the PBO and the PRS is that the PBO might overbalance the remaining functions of the PRS and its expected high profile and engagement in potentially controversial research (policy costings) might create a risk that it will drain resources from other functions that are currently being performed by the PRS and for which there is a continuing need. One question worth asking, however, is whether the functions envisaged for a PBO could be carried out most cost-effectively by an enhanced PRS.

Resourcing requirements of a PBO will inevitably have implications for the parliamentary departments. If the Government in its wisdom decided that the office should be funded by the reallocation of resources from across the parliamentary departments (as a previous government decided in relation to security funding when all other departments received additional resources), then this would have serious implications for the ability of the Senate Department to provide the level of service that senators require to carry out their constitutional functions. I would urge the committee to explicitly reject this possibility.

Even if the office is to receive new funding, there could be pressure to prioritise funding bids by the chamber departments and other funding bids by DPS, leaving the Senate Department potentially disadvantaged. The establishment of a PBO as a completely independent standalone body outside the structure of the parliamentary departments would not alleviate this risk.

In terms of oversight of the PBO, the agreements on parliamentary reform envisaged oversight by an all-party committee. If the PBO is to be established as part of the Parliamentary Library, then it would make sense for the oversight committee to be the existing Joint Committee on the Parliamentary Library whose terms of reference could be amended accordingly. Establishing the PBO as part of the Parliament Library (despite the risks alluded to above) would also give it a degree of independence, subject, of course, to whatever resource agreement is struck between the Parliamentary Librarian and the Secretary, Department of Parliamentary Services under section 38G of the *Parliamentary Service Act 1999*.

In considering the question of a separate joint committee to oversee the PBO, I draw the committee's attention to appendix 8 of *Odgers' Australian Senate Practice* which contains statistics on the number of committees on which senators serve. The table, which has been updated for the forthcoming supplement, shows a steady expansion of the number of committees on which senators serve, currently 48. The largest growth area over the years has been in joint committees of which there are currently 16, up from nine in 1990. A 17th committee, on human rights, is proposed in a bill currently before the parliament (although, of course, the completion of your committee's work will bring the total back to 16). The capacity of the Houses to supply membership of committees is finite. If members and senators do not have adequate time to devote to committee business, the work is driven by staff and this is not a desirable outcome, in my view, because it represents an abrogation of the very special functions and status of members of Parliament.

In conclusion, while there are important questions of principle and practicalities to be considered in relation to the establishment of a PBO, any enhancement to the information available to senators and members that improves their capacity to scrutinise the operations of government must be welcomed.

I would be happy to assist the committee further if I can.

Yours sincerely



(Rosemary Laing)

*From - Odgers' Australian
Senate Practice
Appendix 8*

COMMITTEES ON WHICH SENATORS SERVED 1970-2010

Year	Domestic	Estimates	Legislative Scrutiny	Legislative and General Purpose	Select	Joint	Total
1970	7	5	1	2	5	7	27
1971	6	5	1	7	3	7	29
1972	6	5	1	7	2	7	28
1973	6	6	1	7	4	7	31
1974	6	7	1	7	3	9	33
1975	6	7	1	7	3	10	34
1976	6	6	1	7	1	8	29
1977	6	6	1	8	0	8	29
1978	6	6	1	8	0	8	29
1979	6	6	1	8	0	7	28
1980	6	6	1	8	2	7	30
1981	6	8	2	8	5	6	35
1982	4	8	2	8	4	7	33
1983	5	6	2	8	3	8	32
1984	7	6	2	8	6	9	38
1985	7	6	2	8	6	10	39
1986	7	6	2	8	4	11	38
1987	7	6	2	8	4	9	36
1988	6	6	2	8	5	10	37
1989	7	6	2	8	5	12	40
1990	7	6	2	8	4	9	36
1991	7	6	2	9	4	12	40
1992	7	6	2	9	5	12	41
1993	7	6	2	8	6	11	40
1994 ⁽¹⁾	8	6	2	8	5	12	40
1994 ⁽²⁾	8	0	2	16	6	12	44
1995	8	0	2	16	9	12	47
1996	8	0	2	16	4	12	42
1997	8	0	2	16	5	12	43
1998	8	0	2	16	3	12	41

COMMITTEES ON WHICH SENATORS SERVED 1970–2010

Year	Domestic	Estimates	Legislative Scrutiny	Legislative and General Purpose	Select	Joint	Total
1999	8	0	2	16	4	14	44
2000	8	0	2	16	4	12	42
2001	8	0	2	16	2	12	40
2002	8	0	2	16	2	12	40
2003	8	0	2	16	3	12	41
2004	8	0	2	16	6	12	44
2005	8	0	2	16	1	13	40
2006	8	0	2	16	0	12	38
2007⁽³⁾	8	0	2	8	0	13	31
2008	8	0	2	8	6	13	37
2009⁽⁴⁾	8	0	2	16	6	13	45
2010	8	0	2	16	6	16	48

- (1) To 10 October 1994
- (2) From and including 10 October 1994
- (3) From and including 11 September 2006
- (4) From and including 14 May 2009

Total number of senators
 1970–1975 60
 1975–1984 64
 1984– 76



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20 July 2010

Ms Christine McDonald
Secretary
Finance and Public Administration References Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Ms McDonald

PARLIAMENTARY BUDGET OFFICE BILL 2010

Thank you the opportunity to make a submission to the committee on the Parliamentary Budget Office Bill 2010. I offer the following brief comments but would be happy to elaborate further if required by the committee.

The bill establishes an independent officer, the Parliamentary Budget Officer (PBO), and the Parliamentary Budget Office. The primary function of the PBO is outlined in clause 7 of the bill while the powers of the officer are prescribed generally in clause 9.

Given that the bill is a private senator's bill and might therefore be considered more as an outline of a proposal rather than a fully-formed legislative scheme, there are nonetheless two areas which I consider require further development. The first relates to the independence of the officer and the second to the officer's powers.

Independence of the PBO

Clause 6 sets out the independence of the PBO and provides in subclause (4) that the PBO is not subject to direction from anyone in relation to specified matters. However, the Houses by resolution, committees and individual members may refer matters to the PBO (subclause 7(7)) and the PBO must have regard to the priorities of the Parliament, expressed by a resolution of either or both Houses, and to any reports of committees of either or both Houses connected to the functions of the PBO. The PBO therefore retains a discretion to undertake action on any matter so referred – or not, as the case may be – and, having had regard to any relevant committee reports, to pursue a different outcome.

The intention appears to be to place the PBO in a position of independence comparable to that enjoyed by the Auditor-General. If that is the case, then the Parliament is effectively limiting the powers it would otherwise be able to apply to the PBO; for example, to direct the PBO to produce a particular report. Because the powers of the Parliament are provided for in section 49 of the Constitution, an express legislative declaration is required to modify them. To avoid any misunderstanding, it would be preferable if the bill included such a declaration (or, as was the case with the *Auditor-General Act 1997*, an explanatory memorandum made this point explicitly).

As an aside, it seems unnecessary to include reference to the ability of the Houses, committees or individual members to refer matters to the PBO (which they could do in any case without statutory authorisation) if the PBO is not required to act on them.

Powers of the PBO

My greater concern is that the powers of the PBO should be specified in more detail than currently provided for in clause 9. The PBO will only be able to provide services to the Parliament in accordance with the objects of the bill in clause 3 if it has adequate access to information held by government. If the PBO is restricted to undertaking analysis on the basis of publicly available information, it could not provide the unique service that it is presumably being established to provide. Any other body, whether it be commercial, academic or located elsewhere in the public sector, with access to the same information as anyone else, could provide the same service either commercially or in the public interest.

Because information will be such a vital prerequisite for the PBO to function effectively, it would be preferable for the PBO to be given specific information-gathering and reporting powers. For example, the PBO needs to be able to rely on specific powers if, having requested information from government departments and agencies in accordance with paragraph 10(f), the information is not forthcoming. A simple solution would be to provide the PBO with similar powers to the Auditor-General in Part 5 of the *Auditor-General Act 1997*, and possibly with corresponding guarantees about not including sensitive information in public reports.

An alternative solution would be for the PBO to report to the Houses any difficulty in obtaining information and for the Houses (in all likelihood, the Senate) to use their inquiry powers to require the production of the information. As the committee will be aware, however, where access to information is disputed, the mechanism to deal with such disputes has never been tested to its limits and the PBO could therefore have a long wait for the information while the issues were resolved (even if recourse were to be had to an independent arbiter to advise on the dispute).

If the independence of the PBO in relation to the Parliament and the powers of the PBO to obtain information are to be clarified, I would also suggest that subclauses 6(2) and (3) be re-examined. Their effect is not particularly clear (even though I understand there are similar provisions in the *Auditor-General Act 1997*). At the least, it would be useful for the proponent of the bill to prepare an explanatory memorandum to explain the intention of provisions such as these.

Appropriations

The first line of attack on any private senator's bill is often that it is unconstitutional and that it cannot be introduced in the Senate because it imposes taxation or appropriates money, contrary to section 53 of the Constitution. The committee should be aware that clause 31 of the bill is not an appropriation. It refers to an appropriation occurring elsewhere and follows the standard formulation used in the Senate. If the clause were an appropriation within the meaning of section 53, it would contain words to the effect that "the Consolidated Revenue Fund is appropriated" for the purposes of the Act, or some such similar formulation. The words used in subclause 31(1) are in fact an explicit recognition that a bill appropriating money may not originate in the Senate. I note that other provisions in clause 31 are similar to provisions in the *Auditor-General Act 1997*.

Conclusion

As a mechanism for providing the Parliament with independent analysis and advice about the Budget and major policy announcements, the bill has some potential flaws. However, the bill's aim to improve the quality of information provided to the Parliament to underpin its legislative and scrutiny work is surely unexceptionable.

Please let me know if I can provide the committee with any further information.

Yours sincerely



(Rosemary Laing)