PARLIAMENT *of* AUSTRALIA
HOUSE *of* REPRESENTATIVES

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Secretary
Standing Committee on Administration and Procedure
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Ms Rafferty

INQUIRY INTO THE FEASIBILITY OF ESTABLISHING THE POSITION OF OFFICER OF THE PARLIAMENT

I am writing in reply to the Committee's invitation to make a submission to the inquiry into the feasibility of establishing the position of Officer of the Parliament as it might relate to the ACT Auditor-General, the Ombudsman, the Electoral Commissioner and other statutory office holders.

If you have any queries on this matter we can be contacted at ph 6277 7111, e-mail *clerk.reps@aph.gov.au* or PO Box 6021, Parliament House Canberra ACT 2600.

Yours sincerely

BERNARD WRIGHT
Clerk

SUBMISSION FROM THE DEPARTMENT OF THE HOUSE OF REPRESENTATIVES

Background

At the Commonwealth level the use of the term "Officer of the Parliament", for other than employees of the parliamentary departments, has to date been confined to the Auditor-General. However, in July 2011 the Government formally agreed to a recommendation by a Joint Select Committee that a Parliamentary Budget Officer should also be established as an Officer of the Parliament.

Several jurisdictions apply the term "Officer of the Parliament" or "Independent Officer of the Parliament" to a wider range of positions, including (in particular) the Ombudsman and the Electoral Commissioner, as is being contemplated by the Committee. A useful summary of Officers of Parliament in Australian jurisdictions is provided in the Victorian Public Accounts and Estimates Committee's (PAEC's) 2006 *Report on a Legislative Framework For Independent Officers of Parliament.*[i] In terms of national Parliaments:

- in New Zealand Officers of the Parliament include the Controller and Auditor-General (and the Deputy Controller and Auditor-General), the Ombudsman, and a Parliamentary Commissioner for the Environment. The NZ House of Representatives has established a dedicated Officers of Parliament Committee, chaired by the Speaker, to consider proposals for the creation of Officers of Parliament, to recommend persons for appointment to those positions (and appointment of auditors to the relevant offices), to make recommendations to Parliament on their budgets, and to develop or review codes of practice;[ii]
- in the United Kingdom the Auditor-General is an Officer of the House of Commons. The Chairman of the Electoral Commission (established by Parliament as a body independent of Government) and the other Electoral Commissioners are appointed by the Queen, following an Address from the House of Commons. The Parliamentary Commissioner for Administration (the Ombudsman) is "accorded the privileges of an officer of the House of Commons";[iii] and
- in Canada the Chief Electoral Officer, the Auditor-General, the Commissioner of Official Languages, the Access to Information Commissioner and the Privacy Commissioner are designated as Officers of Parliament, with their annual reports and any special investigative reports transmitted to the Speaker for tabling in the House.[iv]

Definition of "Officer of the Parliament"

The concept of Officers of Parliament, as applied to officers who are not employees of parliamentary departments, has its origins in the United Kingdom[v] and has emerged in a number of other Westminster-style Parliaments. For its part the Australian Parliament has not sought to define what an "Officer of the Parliament" is, or what criteria should apply to the appointment of persons as Officers of the Parliament. However, some common characteristics generally apply across jurisdictions:

- those positions appointed as Officers of the Parliament – in particular Auditors-General – typically support the Parliament in scrutinising the performance of the executive and its agencies and, in some cases, "protect the rights of individuals in relation to government information and free and fair elections";[vi]
- Officers of Parliament are typically established through dedicated legislation providing a high level of independence from executive and parliamentary direction in the performance of their functions;
- the Parliament will often seek a role, usually through a relevant committee, in making recommendations on budgets of Officers of Parliament;
- the Parliament will often either recommend, or formally approve the executive's recommendation of, persons to fill the relevant positions;
- an Officer of Parliament is usually required to report findings to Parliament; and
- there is frequently a formal relationship with a relevant parliamentary committee, such as the Public Accounts Committee or equivalent or, in New Zealand, the Officers of Parliament Committee.

In 1989 the New Zealand Parliament's Finance and Expenditure Committee set out the following five criteria to consider when the creation of an Officer of Parliament was contemplated:

- an Officer of the Parliament must only be created to provide a check on the arbitrary use of power by the executive;
- an Officer of the Parliament must only discharge functions which the House itself, if it so wished, might carry out;
- an Officer of Parliament should be created only rarely;
- the House should, from time to time, review the appropriateness of each Officer of Parliament's status as an Officer of Parliament; and
- each Officer of Parliament should be created in separate legislation principally devoted to that position.[vii]

A subsequent inquiry found that an official with an advocacy role should not be an Officer of Parliament, because:

> ...an officer of Parliament must be seen to act impartially so as to retain the integrity and confidence of the whole House. The ability of an officer of the Parliament to take a position on a matter of public controversy is thus necessarily inhibited. It was also considered inappropriate for an officer of the Parliament to exercise executive responsibility and so become involved in the development of policies and services provided by the Government or for officer-of-the-Parliament status to be accorded where the official's functions were confined to providing informational and related educational activities.[viii]

In the Australian context the most comprehensive recent consideration of the concept of "Officer of Parliament" is the Victorian PAEC's 2006 report. Amongst other recommendations the Committee recommended principles for appointing further Officers of the Parliament (in addition to the Auditor-General, the Ombudsman and the Electoral Commissioner) similar to those which had been adopted in New Zealand.[ix] While this matter has not been formally considered by the Australian House of Representatives, the principles set out in New Zealand and Victoria seem reasonable.

The Victorian committee also considered claims that the status of "Officer of the Parliament" should be extended to other statutory officers, such as the Privacy Commissioner, the Director of Public Prosecutions, the Surveyor-General and the Building Commissioner, but ultimately decided against making such a recommendation:

> ...the Committee considers the categorisation of officers of Parliament depends on whether the functions and responsibilities of a particular office-holder are primarily directed to serving the interests of Parliament rather than the executive government. In other words, are the functions and responsibilities of an office-holder concerned with independent review or scrutiny of the implementation of executive government policy on behalf of Parliament, or do they constitute, even with a clear and vital independent status, an inherent element of the policy framework of the government or have a judicial role. The Committee's review identified that a number of the aforementioned officers had roles which were predominantly regulatory, judicial, advisory or involve advocacy. The Committee considers that these officers do not meet the core criteria for classification as an officer of the Parliament.[x]

In the event that the ACT Legislative Assembly did decide to institute a system of Officers of the Parliament it may wish to consider the implications, if any, in terms of parliamentary approval of appointment and dismissal of the relevant positions, parliamentary approval of budgets, the information-gathering powers of the Officers of the Parliament, and the interaction between those Officers and Assembly committees. Some background on these issues with respect to the Commonwealth Auditor-General follows.

Commonwealth Auditor-General

The Commonwealth Auditor-General is formally recognised as an Independent Officer of the Parliament (ss 8(1) of the *Auditor-General Act 1997*). This change to the Auditor-General's status was made in 1997 when a suite of new legislation, including the *Auditor-General Act*, replaced the former *Audit Act 1901*.

The new *Auditor-General Act* reflected many of the recommendations made by the Joint Committee of Public Accounts (JCPA) in its 1996 *Report 346: Guarding the Independence of the Auditor-General*. In recommending that the Auditor-General be declared an Independent Officer of the Parliament, the Committee explained that:

> The title, 'Independent Officer of the Parliament', symbolises the role and status that the office of Auditor-General would have if the recommendations in this report were to be adopted...

- the Auditor-General's audit independence from both the Executive and the Parliament will be guaranteed in legislation;
- the Auditor-General will have an absolute mandate to report to the Parliament on the operations of Commonwealth entities, to assist the Parliament to hold the Executive to account;
- Parliament, through its Audit Committee, will approve the appointment of the Auditor-General;
- Parliament, through its Audit Committee, will monitor the performance of audit functions;
- Parliament, through its Audit Committee, will be involved in the resourcing of audit functions; and
- Parliament, through its Audit Committee, will monitor Executive influence over the Auditor-General.

> The Committee believes that the symbolism of the title, 'Independent Officer of the Parliament', is important. The title states the proper role of the office of Auditor-General for Australia, setting clear parameters of proper conduct for the Executive and the Parliament in their dealings with the Auditor-General. The Committee considers that the symbolism of the title, 'Independent Officer of the Parliament' could well have a more immediate impact on the functional independence of the Auditor-General than the particular operative provisions designed to guard that independence.
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> The Committee considers it essential for the Auditor-General Bill to incorporate a statutory guarantee of absolute audit independence for the Auditor-General, to put beyond doubt the Auditor-General's freedom from direction by the Executive or the Parliament in the performance of audit functions.[xi]

The *Auditor-General Act 1997* also stipulates that the Auditor-General's powers etc are only as specified in the Act and other legislation, and "there are no implied functions, powers, rights, immunities or obligations arising from the Auditor-General being an independent officer of the Parliament".

While this perhaps renders the Auditor-General's classification as an Officer of the Parliament purely symbolic, that symbolism is important for the reasons outlined by the JCPA in 1996. It makes plain the important principle that the Auditor-General's primary client is the Parliament, not the executive, and provides a philosophical basis for key aspects of the Auditor-General's powers and his relationship with the Parliament, principally through the Joint Committee of Public Accounts and Audit (JCPAA).

Parliamentary involvement in appointment

The *Auditor-General Act 1997* provides that the Audit Minister, when nominating a new Auditor-General, must not recommend an appointment to the Governor-General unless the proposed recommendation has first been approved by the JCPAA on behalf of the Parliament.

The Committee's Act[xii] in turn provides that within 14 days of receipt of the nomination, it must either: approve or reject the nomination by absolute majority; or seek an extension of time of 30 days. Failure to reach a decision within that period shall be taken to be approval of the nomination.

The Committee went through the first such approval process in 2005, unanimously endorsing the appointment of the current Auditor-General Mr Ian McPhee PSM. The Auditor-General is appointed for a non-renewable 10-year term and may only be removed from office on limited grounds including bankruptcy or (subject to an address by each House of the Parliament presented to the Governor-General) misbehaviour or physical or mental incapacity.

We note similar parliamentary involvement in the appointment of Auditors-General in other jurisdictions, with variations – for example, the Chair of the Queensland Parliament's PAC served on the most recent panel for the appointment of that State's Auditor-General (as distinct from the Commonwealth model, where the process for selecting the Auditor-General is administered by the executive and the JCPAA's role is limited to either approving or rejecting the nomination) and, as previously mentioned, the New Zealand Parliament has a dedicated committee charged with recommending the appointment of that country's Officers of Parliament, including overseeing the selection process.[xiii]

Parliamentary scrutiny of the Auditor-General's budget

At the Commonwealth level, the Australian National Audit Office (ANAO) is the only agency external to the parliamentary departments where the Parliament, through its committees, has a formal role in making recommendations on the level of appropriation, reflecting the Auditor-General's status as an Independent Officer of the Parliament.

As with other public sector agencies, the ANAO is funded each year through the federal budget process. However, the JCPAA's Act allows it to consider and make recommendations to the Parliament on the draft budget estimates of the ANAO. In support of this process the *Auditor-General Act* empowers the Auditor-General to disclose to the JCPAA, before the federal budget, the draft estimates for the ANAO. The Committee then has the information it requires to make formal representations to Government on behalf of the ANAO if necessary.

Immediately before the federal budget is delivered to the Parliament, the Auditor-General briefs the Committee on his funding allocation for that year. The Committee Chair then makes a statement to the House, on budget day and in advance of the introduction of the appropriation bills, on whether the Committee believes the ANAO has been given sufficient funding to carry out its functions.

This power is intended to discourage governments from trying to influence the Auditor-General by unduly restricting his funding, and is reinforced behind the scenes by the Committee having the information needed to engage government during the budget process.

Parliamentary committees in other jurisdictions play a similar role in recommending the appropriation for the Auditor-General, in some cases with still greater autonomy from the executive. For example:

- in the United Kingdom a Public Accounts Commission, comprising the Chairman of the Committee of Public Accounts, the Leader of the House of Commons, and seven other Members of the House of Commons lays before the House the estimate of the expenses of the National Audit Office, in addition to appointing an accounting officer and auditor for the National Audit Office;[xiv] and
- New Zealand's *Public Finance Act 1989* provides for funding for the Controller and Auditor-General, the Ombudsman, and the Parliamentary Commissioner for the Environment to be subject to special pre-budget approval by Parliament through the Officers of Parliament Committee.[xv] The Committee receives submissions from each officer, examines these submissions "in conjunction with advice from Treasury" and reaches a decision on the funding required for the officers to carry out the duties required of them.[xvi]

Other parliamentary engagement

The JCPAA, on behalf of the Parliament, engages the work of the Auditor-General in other respects:

- the Committee is required to advise the Auditor-General of the annual audit priorities of the Parliament (in practice, through a process of consultation with other parliamentary committees). The audit priorities are referred to the Auditor-General for his consideration in preparing his work program for the following financial year (while the Auditor-General may reject the audit priorities, section 10 of the *Auditor-General Act* requires that he "have regard" to those priorities in performing his functions);[xvii]
- the Auditor-General is required to table audit reports in both House of the Parliament as soon as practicable after the completion of an audit. The reports are forwarded to the Presiding Officers for presentation to each House, reflecting the Auditor-General's position as an officer responsible to the Parliament, rather than to the Government.[xviii] The JCPAA, in turn, is required under its Act to examine all reports of the Auditor-General tabled in Parliament; and
- the Committee approves any nomination for the position of Independent Auditor (a person appointed from the private sector on a part-time basis to serve as external auditor to the ANAO).

Parliamentary Budget Office

As part of the negotiations between the major parties and independent members following the 2010 federal election, it was agreed to establish a Parliamentary Budget Office (PBO) "...to provide independent costings, fiscal analysis and research to all members of parliament, especially non-government members", with the structure, resourcing and protocols for the Office to be subject to consideration by a committee of the Parliament.[xix]

A Joint Select Committee on the Parliamentary Budget Office was established to consider the proposal, and reported in March 2011. The Committee unanimously recommended that the position of Parliamentary Budget Officer be established as an Independent Officer of the Parliament through dedicated legislation "...to inform the Parliament by providing independent, non-partisan and policy neutral analysis on the full Budget cycle, fiscal policy and the financial implications of proposals":

> The majority of proponents for a PBO strongly supported establishing, through dedicated legislation, the office of the Parliamentary Budget Officer as an independent officer of the Parliament, similar to the Auditor-General.
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> ...establishing the independence of the Parliamentary Budget Officer and their PBO through legislation would provide for an indisputable clarity of purpose and function for the PBO and establish the powers of the PBO in regard to information collection and publishing of information. More broadly, this approach would serve to strengthen the objectivity and credibility of the office of Parliamentary Budget Officer, as well as enhance transparency of PBO operations.
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> Ensuring independence of the office through dedicated legislation would allow the Parliamentary Budget Officer to have control in setting the PBO's work program according to the allocated funding level and freedom in contracting-in the additional expertise, if required.[xx]

The Committee also recommended:

- that the JCPAA be the Committee tasked with parliamentary oversight of the PBO, in a manner similar to the relationship with the Auditor-General, including consultation on the PBO's work program and oversight of the draft budget estimates for the Office;
- that the arrangements for appointment, dismissal and remuneration of the Auditor-General as far as possible be applied to the Parliamentary Budget Officer, except that the Parliamentary Budget Officer would be appointed for a renewable four-year term;
- that the PBO's powers to access to government information be clarified (through the development of MOUs with the Departments of Treasury and Finance in the first instance); and
- that the work of the PBO be made public wherever possible.[xxi]

In August 2011 the Government confirmed its agreement to the Committee's recommendations, including the recommendation that the Parliamentary Budget Officer be established as an Independent Officer of the Parliament, having previously announced funding in the 2011-12 budget of $29.4 million over four years to establish the PBO. Legislation to give effect to the PBO is still to be introduced.

The Commonwealth Ombudsman and Electoral Commissioner

Unlike in some other jurisdictions, the Commonwealth Ombudsman and Electoral Commissioner are not presently defined as Officers of the Parliament, although they share some features consistent with Officers of the Parliament. For example, both positions are established under dedicated legislation and enjoy a high level of autonomy from the executive in the conduct of their duties; dismissal of the Ombudsman can only be triggered by an address from both Houses of Parliament; and in the case of the Electoral Commissioner there is an ongoing relationship with a parliamentary committee, the Joint Standing Committee on Electoral Matters.

However, in neither case does the Australian Parliament have:

- the capacity to make, or approve, a recommendation for appointment to the position;
- a committee tasked with making recommendations to the Parliament about their budget; or
- any formal role in consultation on proposed work programs, etc.

In these respects the positions of Ombudsman and Electoral Commissioner are, at the Commonwealth level, distinct from the Auditor-General and the proposed Parliamentary Budget Officer, as Officers of the Parliament.

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i Victorian Public Accounts and Estimates Committee (PAEC), *Report on a Legislative Framework for Independent Officers of the Parliament*, 2006, pp.45-65.

ii See the Committee's website at http://www.parliament.nz/en-NZ/PB/SC/Details/OfficersParl/0/e/5/00DBHOH_BBSC_SCOP_1-Business-before-the-Officers-of-Parliament-Committee.htm. See also David McGee, *Parliamentary Practice in New Zealand*, 3rd edn, 2005, pp. 71-73.

iii *Erskine May, Parliamentary Practice*, 23rd edn, 2004, pp. 246-247.

iv Robert Marleau and Camile Montpetit, *House of Commons Procedure and Practice*, 2000, p. 375.

v Oonagh Gay, *Officers of Parliament – A Comparative Perspective*, House of Commons Library Research Paper 03/77, 2003.

vi PAEC, p. 8.

vii See McGee, p. 70.

viii McGee, p. 71.

ix PAEC, p. 85.

x PAEC, p. 8.

xi Joint Committee of Public Accounts, *Report 346: Guarding the Independence of the Auditor-General*, 1996, pp. 60-61.

xii The *Public Accounts and Audit Committee Act 1951* (s. 8A).

xiii McGee, pp. 72-73.

xiv May, p. 246.

xv McGee, p. 103 and pp. 474-475.

xvi See, for example, the Committee's report *Alterations to the 2010/11 appropriations for Vote Audit, Vote Ombudsmen, and Vote Parliamentary Commissioner for the Environment and 2011/12 draft budgets for the Office of the Controller and Auditor-General, the Office of the Ombudsmen, and the Office of the Parliamentary Commissioner for the Environment*, March 2011.

xvii A similar process is followed in several other jurisdictions.

xviii Ian Harris (ed), *House of Representatives Practice*, 5th edn, 2005, p. 172.

xix "Agreement For a Better Parliament", September 2010, Clause 16.1.

xx Joint Select Committee on the Parliamentary Budget Office, *Inquiry Into the Proposed Parliamentary Budget Office*, 2011, p. 75 and p. 80.

xxi JSCPBO, pp. 75-83.