

CHAPTER FOUR

THE AUDITOR OF PARLIAMENTARY ALLOWANCES AND ENTITLEMENTS BILL

Introduction

4.1 The Committee now looks at the Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2]. This proposed legislation is also intended to put in place measures that will assist parliamentarians to observe appropriate standards of behaviour. Again the overriding purpose is to enhance transparency and accountability. Whereas the Charter of Political Honesty Bill was concerned firstly with developing a code of conduct and then providing for its enforcement, the Auditor of Parliamentary Allowances and Entitlements Bill has a different starting point. Its purpose is not to create new codes or modify the rules and regulations determining allowances and entitlements. It focuses tightly on compliance with existing rules and regulations.

4.2 The Bill proposes to establish a position of Auditor of Parliamentary Allowances and Entitlements as an independent office-holder. The Auditor would have powers to receive and investigate complaints about possible misuse of parliamentary entitlements and allowances, and to undertake sample audits on the use of such benefits. The Auditor would also have the authority to provide advice to individual members of parliament on ethical issues connected with the use of parliamentary allowances and entitlements.

4.3 Although the proposed auditor would assume a range of functions, the Bill places a ‘heavy emphasis’ on the auditing and investigative task. As explained by Senator Faulkner, the proposer of the Bill, the principle underlying this approach is that:

Transparency is a powerful incentive to do the right thing. If details of all entitlements are placed regularly on the public record and thus made available for public scrutiny, members of parliament will be truly accountable for their expenditure of taxpayer funds. Expenditure can be compared. Excessive use will have to be justified and irregularities explained.¹

4.4 This chapter presents an overview of parliamentary entitlements and allowances and the role of auditing in an effective accountability system. It then considers the following aspects of the Bill:

- views on the Bill;
- the Auditor of Parliamentary Allowances and Entitlements—procedures for appointment, conditions of service, independence and functions;
- the role of the Auditor as adviser and investigator;
- entry and search provisions;
- the Auditor as auditor or ethics standard bearer

¹ Senator John Faulkner, Second Reading Speech, Senate *Hansard*, 1 November 2000, p. 18848.

- adequacy of the review mechanisms;
- penalties for various offences set down in the Bill;
- ministerial entitlements and allowances;
- the need for this legislation; and
- alternatives to the proposed Bill.

Parliamentarians' remuneration—entitlements and allowances

4.5 Under section 48 of the Constitution, the Parliament is empowered to determine the allowances of parliamentarians.² The *Parliamentary Allowances Act 1952*, the *Remuneration and Allowances Act 1990*, and determinations issued by the Remuneration Tribunal under the *Remuneration Tribunal Act 1973*, set the remuneration, allowances and entitlements of federal parliamentarians.

4.6 One of the Tribunal's main functions is to report on and determine the remuneration, including entitlements and allowances, of members of the federal Parliament. Remuneration of members of parliament comprises two components—the basic salary and a non-salary range of allowances and entitlements for parliamentary and electoral purposes. The Bill is concerned only with non-salary allowances and entitlements.

4.7 The Remuneration Tribunal recognises that to serve the public, parliamentarians require adequate support both in terms of resources and services. In its 1999/01 report it stated:

Parliamentarians, in order to serve their electorates properly must attend to legislative duties and be actively involved in the life of their electorates and in political party activities. These activities, only some of which are resourced by the Commonwealth, are nevertheless part and parcel of the life of Senators and Members. They affect the focus of their energies and the way in which they work.³

4.8 The *Parliamentary Entitlements Act 1990* provides a statutory framework for the provisions of such benefits which include items such as the cost of postage in relation to parliamentary or electorate business; personalised letterhead stationery; and travel for purposes related to parliamentary or electorate business. The Minister for Finance and Administration also determines and provides certain entitlements to senators and members such as office accommodation in their electorates together with equipment and facilities necessary to operate the office.⁴

4.9 There are, however, certain obligations attached to the use of these entitlements and allowances and parliamentarians are expected to abide by the rules and regulations governing

2 The section reads: 'Until Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat'.

3 Remuneration Tribunal, Report 1999/01, http://www.remtribunal.gov.au/Home/dets/report_1999_01.html p. 3 of 18, (22 February 2002). See also comments in Australian National Audit Office, Audit Report no. 5 2001–2002 Performance Report, *Parliamentarians' Entitlements: 1999–2000*, p. 16.

4 See for example, *Odgers' Australian Senate Practice*, 10th edition, 2001, pp. 165–6; *House of Representatives Practice*, fourth edition, I. Harris (ed.), Canberra 2001, p. 151; Schedule 1 the *Parliamentary Entitlements Act 1990*.

the use of such benefits.⁵ The Bill, while acknowledging that parliamentarians need a range of resources and support services to enable them to carry out their public duties effectively, recognises that they should be accountable for use of these resources. The Bill looks to improve the compliance regime to ensure that minimum standards are not breached.

Misuse of entitlements

4.10 In large measure, this Bill, which is intended to improve the overall accountability for the use of parliamentary entitlements, is a response to a perceived need to strengthen public trust and confidence in parliamentarians.⁶ Over the years, a number of parliamentarians, in particular ministers, have drawn public disapproval for the perceived improper use of their entitlements.⁷ In 1997, following well-publicised cases of inappropriate conduct in regard to the use of entitlements and allowances, the Minister for Administrative Services, Mr David Jull, told the House of Representatives that members and senators required better information to assist them to manage their entitlements and ‘to enable us to detect any problems in the use of entitlements’.⁸

4.11 The then Department of Administrative Services engaged a consultant to assist with examining the reporting system dealing with parliamentarians’ entitlements and allowances with the aim of removing any weaknesses. Consultants KPMG under Mr Ken Baxter reviewed the administration of entitlements giving special consideration to improving accountability processes. According to Mr Jull, KPMG made recommendations that ‘new systems be provided to provide effective internal audits, in-built checks and balances and continuing peer pressure to maximise full disclose and the integrity of the system’.⁹

4.12 The Government acted on a number of the findings from the review, in particular the requirement that a report setting out expenditure on air and car transport and related travelling allowances for all senators and members, including ministers and opposition office-holders, should be tabled in Parliament on a six-monthly basis.¹⁰

5 See for example Dr Noel Preston, submission no. 21, p. [3]; Senator Judith Troeth, Senate *Hansard*, 9 November 2000, p. 19593. Senator Troeth stated in the Senate, ‘I would be the first to agree that we would always have to be watchful that we as members of parliament do not abuse the entitlements we are given, courtesy of the taxpayer’.

6 See for example, Senator John Faulkner, Second Reading Speech, Senate *Hansard*, 1 November 2000, p. 18848.

7 The literature on this matter is extensive. For example see, Jack Waterford, ‘Ministerial Responsibility for Personal Staff’, *Senate Occasional Lecture Series*, Friday, 3 May 1996; Debate on Code of Conduct, Senate *Hansard*, 24 August 1995, pp. 383–90; Matter of Public Importance: Members of Parliament: Entitlements, House of Representatives *Hansard*, 31 October 2000, pp. 21702–21708; and second reading speech, Auditor of Parliamentary Allowances and Entitlements Bill 2000, Senate *Hansard*, 1 November 2000, p. 18848; Auditor of Parliamentary Allowances and Entitlements Bill 2000, Senate *Hansard*, 9 November 2000, pp. 19574–19595.

8 Answer to question without notice, David Jull, House of Representatives *Hansard*, 5 March 1997, p. 2015.

9 Answer to Question without Notice, David Jull, House of Representatives *Hansard*, 16 June 1997, p. 5220.

10 Answer to Question without Notice, David Jull, House of Representatives *Hansard*, 16 June 1997, p. 5220. See also Senator Jeannie Ferris, Senate *Hansard*, 9 November 2000, p. 19588 who outlined a number of areas where the accountability of the use of parliamentary entitlements have been tightened in recent years.

4.13 Despite this, those supporting this Bill argue that more could be done to improve the transparency and accountability of the processes surrounding the use of parliamentarians' entitlements and allowances. They argue, in particular, that auditing would provide a strong incentive for ensuring that parliamentarians comply with the rules and regulations.

Auditing

4.14 The Australian National Audit Office (ANAO) recognised auditing as essential to a workable accountability system. It maintained that:

Auditing is a key component of an effective compliance strategy in a self-assessment/self-regulation environment. Compliance audits are a verification process that seek to ascertain whether a Parliamentarian has complied with his or her obligations. They can be conducted as part of a series of audits that aims to address identified high risk categories of entitlements or Parliamentarians, or may be initiated where there has been an indication of some potentially material irregularity for an individual Parliamentarian.¹¹

4.15 The Auditor of Parliamentary Allowances and Entitlements Bill would strengthen the current auditing regime by providing for the appointment of a statutory office-holder to audit the use of parliamentarians' allowances and entitlements. In introducing this legislation in the Senate, Senator Faulkner told the chamber:

This Auditor is no toothless tiger. The office will constitute a very powerful deterrent against abuse of taxpayer-funded entitlements and will have a salutary effect on the administration of entitlements by Government departments and members of parliament.¹²

4.16 Those opposing the introduction of the Bill saw the proposal for a standing auditor of parliamentary entitlements to be 'unworkable, intrusive and unwarranted.' Senator Judith Troeth, Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry, maintained that the Bill 'reaches a level of scrutiny that simply makes it impossible for any government to function. To institute another office, another officer and another level of bureaucracy to deal with this problem is simply beyond belief.'¹³

4.17 Nonetheless, there exists among some sections of the community a strongly held viewpoint that the use of parliamentary entitlements must come under closer scrutiny if the integrity of the system is to be upheld. The ANAO in its performance report on Parliamentarians' Entitlements: 1999–2000 commented at length on the importance of the effective auditing of parliamentarians' entitlements. It stated:

ANAO considers that the detailed checking of each entitlements transaction is not a practical, cost-effective approach. Nor should it be necessary if there is an effective audit program in place to periodically test the effectiveness of the existing system, supported by sensible risk management. In this context, it would be prudent for Finance to include, within its payments control framework, a program of risk-based

11 Australian National Audit Office, Audit Report no. 5 2001–2002, Performance Report, *Parliamentarians' Entitlements: 1999–2000*, p. 130.

12 Senator John Faulkner, Senate *Hansard*, 1 November 2000, p. 18848.

13 See for example Senator Judith Troeth, Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry, Senate *Hansard*, 9 November 2000, p. 19593.

audits of payments made in respect of Parliamentarians' entitlements. This would provide enhanced assurance as to the validity and correctness of those payments.¹⁴

4.18 This view builds on a body of opinion that favours the implementation of an effective auditing regime for the use of parliamentary entitlements. The ANAO noted that the need for such a program was identified in the 1997 Baxter Review of the administration of parliamentarians' entitlements. According to the ANAO, the Government subsequently agreed to a recommendation by the Department of Finance and Administration (DOFA) that an auditor be appointed to undertake regular audits of the use parliamentary entitlements. DOFA informed ANAO that, in agreeing to the appointment of an auditor, the then minister did not see this initiative as a priority. The minister also made the comment that Finance's Internal Auditor had a role of undertaking audits, including audits of parliamentarians' entitlements. Based on information in the ANAO's report on parliamentarians' entitlements, the Committee understands that a period of more than four years has elapsed since the recommendation was made and that there is still no regular program of audits of entitlements payments.¹⁵

Views on the Bill

4.19 The Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2] received considerable support in submissions from the public. For example, Mr Arnold Sandell submitted that the Bill could be one of the 'most important piece of legislation passed during the term of the current Parliament'. He saw it as addressing concern about politicians' misuse of entitlements, and as a means of improving public opinion of politicians.¹⁶

4.20 The Bill was also welcomed by those working in the field of ethics and public administration. Dr Gerard Carney applauded the Bill as essential for both the protection of members and for public confidence in the parliamentary system.¹⁷ Dr John Uhr considered the legislation to be the 'most urgent Bill'.¹⁸ Dr Noel Preston saw 'a lot of merit' in the Bill, and supported the possible integration of 'reforms of parliamentary entitlement procedure with enhanced overall ethical accountability for Parliamentarians'.¹⁹

4.21 While general opinion favoured the overall object of the proposed legislation, some witnesses held strong reservations about key provisions in the Bill. These provisions deal with the following matters:

- the independent status of the Auditor;
- the advisory and investigatory functions of the Auditor;
- the powers conferred on the Auditor, especially powers to enter and search premises;
- the adequacy of review mechanisms;

14 Australian National Audit Office, Audit Report no. 5 2001–2002, Performance Report, *Parliamentarians' Entitlements: 1999–2000*, p. 131, para 3.81.

15 Australian National Audit Office, Audit Report no. 5 2001–2002 Performance Report, *Parliamentarians' Entitlements: 1999–2000*, p. 131.

16 Submission no. 6, p. 3.

17 Submission no. 11, p. 3.

18 Submission no. 16, p. 1.

19 *Committee Hansard*, p. 45 and submission no. 21, para, 5.4, p. [8].

- the blurring of the auditing role with matters concerned with ethics; and
- penalties.

The Auditor of Parliamentary Allowances and Entitlements

4.22 As noted earlier, the intention of the Bill is to appoint an independent office-holder with the power to determine whether a parliamentarian has failed to comply with the rules and regulations governing the use of his or her entitlements. The Auditor is intended to be an ‘independent, objective umpire’.²⁰ Clause 7(4) confers on the Auditor discretionary powers in the performance or exercise of his or her functions. It stipulates, in particular, that the Auditor is not subject to direction from anyone in relation to:

- a) whether or not a particular complaint is to be investigated; or
- b) the way in which a particular inquiry is to be conducted; or
- c) the priority to be given to any particular matter.

4.23 The process for appointing the Auditor of Parliamentary Allowances and Entitlements is meant to enhance further the independent status of the office and follows the model for the appointment of the Auditor-General under the *Auditor-General Act 1997*.²¹

4.24 In the previous chapter of this report, the Committee raised concerns about possible undue executive influence on the selection of the Commissioner for Ministerial and Parliamentary Ethics whom the Bill proposes would be appointed by the Presiding Officers. This is not the case with the proposed appointment of the auditor where strong parliamentary involvement is anticipated in the appointment process through the role of the Joint Committee of Public Accounts and Audit (JCPAA).

4.25 The Bill proposes appointment of the Auditor for a term of ten years by the Governor-General on the recommendation of the minister. Before a recommendation can be made for the appointment, the minister must have referred the proposal to the JCPAA and that committee must have approved the proposal.²²

4.26 The JCPAA comprises 16 members—six members of the House of Representatives nominated by the Government Whip, four members of the House of Representatives by the Opposition Whip, three Senators by the Leader of the Government in the Senate, two senators by the Leader of the Opposition in the Senate and one senator by any minority group or groups or independent senators.²³ The decision to approve or reject a proposal would be by the majority of the members of the committee holding office at the time.²⁴

20 See Lindsay Tanner MP, House of Representatives *Hansard*, 31 October 2000, p. 21708.

21 See chapter 3, para. 3.54. As noted there Schedule 1 of the *Auditor-General Act 1997* stipulates that the Minister must not make a recommendation on the appointment of the Auditor-General to the Governor-General unless the Minister has referred the proposed recommendation to the Joint Committee of Public Accounts and Audit for approval, and the committee has approved the proposal.

22 Clause 9. See also *Explanatory Memorandum* circulated by the Hon. Kim Beazley, Auditor of Parliamentary Allowances and Entitlements Bill 2000, p. 4.

23 Section 5—Joint Committee of Public Accounts, *Public Accounts and Audit Committee Act 1951*.

24 Subsection 8A (3), *Public Accounts and Audit Committee Act 1951*.

4.27 With regard to the appointment of the proposed Auditor of Parliamentary Allowances and Entitlements, the Clerk of the Senate noted that, as the Auditor would play a parliamentary role, it may be more appropriate for Parliament rather than the Executive to make the selection.²⁵ He also questioned why the JCPAA would be required to examine the proposed appointment²⁶ given that its role is to scrutinise the performance of all Commonwealth agencies in spending funds appropriated to them by Parliament.

4.28 Dr Noel Preston, in his submission, suggested that, as the appointment is to assist and monitor the entitlements and allowances of members and senators across Parliament, it should have the support (across Party lines) of an appropriate parliamentary committee.²⁷

4.29 Some witnesses were also concerned about a potential conflict of interest arising from the provision allowing the Auditor to be appointed on a full or part-time basis. The ANAO advised the Committee that it was important to ensure that any additional activities undertaken by a part-time Auditor would not result in an actual or perceived conflict of interest.²⁸

4.30 The provisions governing the Auditor's removal from office serve as another safeguard to preserve the Auditor's independence. The Bill provides that the Governor-General could remove the Auditor from office if each House of the Parliament, in the same session of Parliament, requests that the Governor-General remove the Auditor on grounds of misbehaviour or physical or mental capacity.²⁹

Committee views—*independence of the Auditor*

4.31 The Committee notes the observations made on the role of the JCPAA in the appointment of the proposed Auditor but recognises that the provisions for his or her appointment are identical to the procedures now adopted for the appointment of the Auditor-General. Although the membership of the JCPAA is skewed in favour of the Government, the Committee believes that the JCPAA's process of approving the appointment of the Auditor would provide a forum for open debate and transparency. The Committee believes that the provisions for the appointment of the Auditor provide adequate transparency and allow an appropriate level of parliamentary involvement in the process.

4.32 The Committee notes the criticism levelled at the proposed appointment process of the Auditor but is satisfied that the provisions in the Bill governing the appointment and removal of the Auditor, and the discretionary powers conferred on him or her are adequate.

Other concerns about the Auditor

4.33 Other concerns were raised about the conditions of the Auditor's appointment. The Bill provides that the new Auditor be appointed for a term of ten years. During the Second Reading Debate on the Bill, Senator Susan Knowles noted that the standard term for public service appointments was five years and questioned the need for the proposed ten year term. The Committee notes, however, that the Auditor-General and other parliamentary officers,

25 Submission no. 4, p. 6.

26 Submission no. 4, p. 6.

27 Submission no. 21, Part B, para. 1.6.

28 Submission no. 15, para. 9, p. 3.

29 Clause 13—Removal from office.

such as the Clerk of the Senate and the Clerk of the House of Representatives, are also appointed for a ten-year term. The Commonwealth Ombudsman's tenure may not exceed seven years.³⁰

4.34 The Committee also notes that the Bill proposes that the Remuneration Tribunal set the level of remuneration and other conditions for the Auditor. On this point, Senator Knowles expressed the view that a conflict of interest may arise if, in exercising the investigative and advisory role proposed under the Bill, the Auditor makes critical comment about the determinations of the Tribunal governing entitlements of parliamentarians.³¹

Committee views—other concerns about the Auditor

4.35 The Committee accepts that a ten-year term is a relatively long appointment but has no strong views on whether the Auditor's time in office should be restricted to a seven or five-year tenure.

4.36 The Committee notes that one of the functions of the Auditor is to make recommendations to the Minister or to either House of the Parliament for changes 'to the system of parliamentary allowances and entitlements.' It notes Senator Knowles' concern about possible friction between the Remuneration Tribunal and the Auditor but believes that such an eventuality is unlikely.

4.37 Nonetheless, to facilitate a good working relationship, the Committee believes that the Bill should stipulate that a copy of any report containing recommendations that may touch on the jurisdiction of the Tribunal in regard to parliamentary entitlements and allowances should be provided first to the President of the Commonwealth Remuneration Tribunal.³² Further, if the President provides written comments in response to any report, the Auditor should consider them before preparing a final report.³³ In the Committee's view, the requirement that the Remuneration Tribunal determine the Auditor's remuneration enhances the independency of the Auditor by distancing the office from the influence of government.

The role of the Auditor

Conflict between advisory and investigative roles

4.38 While the Committee is satisfied that there are no significant difficulties with the appointment of the Auditor, some witnesses perceived a fundamental problem with the combination of functions proposed for the Auditor. Under Part 3 of the Bill, the Auditor is:

- to receive and investigate complaints about the possible misuse of entitlements and allowances;

30 Section 22, *Ombudsman Act 1976*.

31 Senator Susan Knowles, Senate *Hansard*, 9 November 2000, p. 19577.

32 Arnold Sandell, submission no. 6, p. 4. Mr Sandell drew attention to the function to make recommendations to the Minister or to either House of the Parliament for changes to the system of parliamentary allowances and entitlements. He suggested that the Auditor may be encroaching on the domain of the Remuneration Tribunal and that as an alternative the Auditor should first approach the Tribunal.

33 These suggestions are based on provisions contained in the *Auditor-General Act 1997*. See section 19—Comments on proposed report.

- to inquire into and report on any matter referred to it in writing by a minister or by resolution of either House of Parliament;
- to undertake sample audits of the use of entitlements and allowances by individual members or groups of members of either House of Parliament or by persons employed or engaged under the *Members of Parliament (Staff) Act 1984* (MOPS Act);
- to undertake inquiries on his or her own initiative in relation to any matter relevant to this Act;
- to report all matters relevant to the Act to the Minister and to each House of Parliament;
- to make recommendations to the Minister or either House of Parliament for changes to the system of parliamentary allowances and entitlements; and
- to provide advice to individual members of parliament, or to persons employed under the MOPS Act, on ethical issues connected with the use of parliamentary entitlements and allowances.

4.39 Clause 35 reinforces the advisory role of the Auditor as stipulated above. This provision allows a senator, a member of the House of Representatives or a person employed or engaged under the MOPS Act to request the Auditor to provide advice on ethical issues connected with the use of that person's parliamentary allowances or entitlements.

4.40 These provisions are significantly broader than the range or type of advice provided by the Auditor-General. Under section 23 of the *Auditor-General Act 1997*, the Auditor-General may provide advice or information relating to the Auditor-General's responsibilities to a person or body if, in the Auditor-General's opinion, it is in the Commonwealth's interests to provide the information or advice.

4.41 Some witnesses feared that the proposal that the Auditor provide advice on ethical issues confers a power on him or her that is incompatible with an auditing role. Dr John Uhr had no difficulty in accepting that the Auditor should have a scrutiny role and considered that this was an important example of an appropriate role for appointed officials.³⁴ He expressed concern, however, that the Auditor would be ill-prepared to offer ethical advice on the proper or 'ethical' use of publicly provided resources, since the Auditor himself does not have a role in determining or approving appropriate standards.³⁵

4.42 A number of submissions also drew attention to the potential for tension in relation to the Auditor's proposed roles. They considered that public confidence in the impartiality and independence of the Auditor might be undermined if he or she had dual advisory and investigative roles. Professor Charles Sampford of KCELJAG considered the proposed combination of advisory and investigative roles as a central failing of the Bill.

4.43 As an example, the Clerk of the Senate referred to the difficulty that might arise if the Auditor provided advice on acceptable or ethical conduct that later became the subject of an investigation by the Auditor. He pointed out that a perception could arise that the Auditor had compromised his or her decision-making capacity.³⁶

34 Dr John Uhr, *Committee Hansard*, 6 April 2001, p. 16.

35 Submission no. 16, p. 2.

36 Submission no. 4, p. 3.

4.44 Elaborating on the problems inherent in entrusting both advisory and investigative functions to the auditor, Mr Evans stated:

There is a built-in conflict in combining the two roles. If a member goes to the auditor and gets advice on a particular course of conduct, and the auditor gives advice that the conduct is acceptable under whatever guidelines they are operating, but then subsequently somebody raises a complaint, that immediately puts the auditor in a very difficult situation. The auditor is being asked, in effect, to overturn his or her original advice, and that is a very awkward position in which to put a supposedly independent person. But if the auditor upholds the complaint, the member might then say, 'I had this cleared by the auditor; the auditor obviously does not know what he or she is doing.'³⁷

4.45 The Deputy Auditor-General, Mr Ian McPhee, also expressed concern about the appropriateness of advisory and investigative functions for the Auditor. He suggested that advice giving functions were more usually located with administrative ones, such as in the Australian Taxation Office, and that this should be the case for the purposes of this Bill.³⁸

I think if you have an audit function, you should maintain it clearly as an audit function without necessarily adding on almost executive type roles to that role.³⁹

Committee view—the role of the Auditor

4.46 In chapter three, the Committee dealt with the potential for conflict created by the Charter of Political Honesty Bill which proposes that one authority, the Commissioner for Ministerial and Parliamentary Ethics, perform both advisory and investigative functions. In that case, the Committee favoured maintenance of the advisory role by the Commissioner with the investigative role allocated to a different authority.

4.47 In the case of the Auditor of Parliamentary Allowances and Entitlements Bill, the Committee has more definite views on the appropriate role for the Auditor. The Committee believes that the Auditor should not assume both the advisory and the investigative functions. It considers that an auditor has a special and distinct role to investigate complaints of the misuse of parliamentary entitlements. Indeed, it considers that the Auditor would have the experience and expertise needed to carry out that investigative function. It also considers that the authority responsible for administering the scheme for parliamentary entitlements would be better placed to undertake the advisory role. In that case, DOFA would have the main responsibility for providing advice on parliamentary entitlements, although the parliamentary departments would also have a role.

Entry and search provisions

4.48 If enacted, the Bill would confer on the Auditor or an authorised person a wide range of powers similar to those of the Auditor-General and the Ombudsman. Most notable are the powers to enter and remain on premises, and powers providing access to and examination of

37 *Committee Hansard*, p. 10.

38 *Committee Hansard*, p. 30.

39 Ian McPhee, Deputy Auditor General, *Committee Hansard*, 6 April 2001, p. 28.

documents, including provision for copying documents, for the purposes of gathering information.⁴⁰

4.49 In its Fourth Report of 1999, the Senate Standing Committee for the Scrutiny of Bills dealt at length with entry and search provisions in Commonwealth legislation. It underlined the importance of common law rights regarding private property:

At common law, every unauthorised entry onto private property is a trespass. The modern authority to enter and search premises is essentially a creation of statute. As such, it should always be regarded as an exceptional power, not a power granted as a matter of course, and any statutory provisions which authorise search and entry should conform with a set of principles.⁴¹

4.50 The committee outlined the principles that govern the granting of powers of entry and search. Among the most relevant for the purposes of this inquiry are:

- people have a fundamental right to their dignity, to their privacy, to the integrity of their person, to their reputation, to the security of their residence and any other premises, and to respect as a member of a civil society;
- such intrusion is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process;
- powers to enter and search are clearly intrusive, and those who seek such powers should demonstrate the need for them before they are granted, and must remain in a position to justify their retention; and
- a power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required.⁴²

4.51 With these principles in mind, the Committee considered the entry and search provisions of the Bill. Under Subdivision A, which applies to members of parliament and their staff, the Auditor can request information, documents and answers to questions from members of parliament and their staff. The Bill also provides that the Auditor may enter and remain on any premises officially occupied by the senator or member, and have full access to documents and make copies of those documents. The Bill requires, however, that the consent of the senator or member must first be obtained. It also provides that the Auditor's requests for access and information must be made in writing. A person who refuses to comply with such a request must be given the opportunity to provide the Auditor with written reasons for not complying. After considering the response, the Auditor may report to the relevant House the nature of the request, the reasons given for not complying and whether the Auditor recommends that the relevant House exercise its powers in relation to the member.⁴³

4.52 Subdivision B, which applies to any other person not covered under Subdivision A, contains similar provisions but with some significant differences. The Auditor would have

40 Clause 21.

41 Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2000*, Entry and Search Provisions in Commonwealth legislation, 6 April 2000, Executive Summary p. 49.

42 *ibid.*

43 Clause 17, Subdivision A—Members of Parliament and their staff.

the power to direct a person not only to provide information and to produce documents, but also to attend and give evidence under oath or affirmation before the Auditor or an authorised person.⁴⁴

4.53 Furthermore, in order to exercise his powers, under clause 21 the Auditor does not require consent to enter and remain on premises, nor to access, examine and copy documents or extracts of documents. Indeed, the occupier of the said premises ‘must provide the authorised person with all reasonable facilities for the effective exercise of his or her powers under this section of the bill’. Failing to do so carries a maximum penalty of 10 penalty units.⁴⁵

4.54 As well as not requiring consent for entry and search, this provision uses the term ‘any premise’ without further qualification except that ‘premises’ includes any land or place. The Bill makes no provision for obtaining a warrant for entry and search from a judicial officer. Thus it differs markedly from Subdivision A, which stipulates first, that consent is required before the Auditor may enter and remain on the premises, and second, that entry is only available for the purposes of the inquiry to premises occupied in an official capacity by the senator or member.

4.55 Clause 21 drew particular comment from the Senate Standing Committee for the Scrutiny of Bills. It considered that:

Legislation should authorise entry on to, and search of, premises only with the occupier’s genuine and informed consent, or under warrant or equivalent statutory instrument, or by providing for a penalty determined by a court for a failure to comply.⁴⁶

4.56 The Committee for the Scrutiny of Bills sought advice from Senator Faulkner, sponsor of the Bill, as to why this section did not require the Auditor to obtain a warrant if he or she was not granted consent for entry and search purposes.

4.57 In response, Senator Faulkner stated that clause 21 of the Bill was based on section 33 of the *Auditor-General Act 1997*, although it differed from section 33 in not being confined to Commonwealth property.⁴⁷ He further stated that, while the clause conferred wide powers on the Auditor, his actions would be overseen by, and were closely accountable to, Parliament and that this would act as a safeguard against any misuse of the Auditor’s powers.⁴⁸

4.58 The Scrutiny of Bills Committee remained unconvinced. It found that ‘notwithstanding the other accountability mechanisms in the bill, the Committee continues to draw Senators’ attention to this provision’.⁴⁹ It considered that ‘the restriction to Commonwealth property in the Auditor-General’s Act represented a substantial limitation

44 Clause 20, Subdivision B—Other persons.

45 Clause 21, Subdivision B—Other persons.

46 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 16 of 2000*, November 2000, p. 5.

47 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000, p. 515.

48 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000, p. 515.

49 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000, p. 515.

which had not been included in clause 21'. It repeated its concern that the provision could be considered to trespass unduly on personal rights and liberties.⁵⁰

4.59 The Attorney-General's Department's submission also referred to the provisions of entry and search in the Bill and noted that the Senate Standing Committee for the Scrutiny of Bills had taken the view that 'entry without consent of judicial warrant should only be allowed in limited circumstances'.⁵¹

Committee view—entry and search provisions

4.60 The Committee considers that clause 21, by not stipulating, as does the *Auditor-General Act 1997*, that the premises to be entered and searched are restricted to Commonwealth properties, leaves the occupiers unnecessarily vulnerable to unwarranted intrusion on his or her privacy.

4.61 Although not raised by the Scrutiny of Bills Committee in relation to this legislation, the principles governing the provision of information to occupiers were a focus of its comprehensive report on the general matter of entry and search.⁵² The Committee notes that these principles included the right of occupiers of the premises to be informed of their rights and responsibilities under the relevant legislation, and their right to be given a genuine opportunity to have an independent third party, legal adviser or friend present throughout the search. The Committee also notes that no such provisions are spelt out in this Bill.

4.62 In light of the concerns about the entry and search provisions in the Bill, the Committee believes that clause 21 requires closer consideration to ensure that legislation does not trespass unduly on personal rights and liberties. The Committee notes that the Fourth Report of 1999 by the Committee for the Scrutiny of Bills provides a valuable reference for the principles governing entry and search.

Adequacy of review mechanisms

4.63 Under the proposed legislation the Auditor has authority to prepare a public report that has the potential to harm the reputation of a member of parliament or a member of his or her staff. The Bill contains a number of provisions that are intended to safeguard the rights of a person who has undergone an investigation by the Auditor.

4.64 Before commencing an investigation, the Auditor must inform the person subject to a complaint that a complaint has been made. The Bill also stipulates that an investigation must be conducted in private. Furthermore, the Auditor must not make a report in respect of an investigation in which he or she sets out opinions that are, either expressly or impliedly, critical of a person, before informing that person of the findings of the investigation. The Bill requires the Auditor, before completing an investigation into the use of parliamentary entitlements and allowances, to afford the person who is the subject of the investigation an opportunity to appear before him or her to make submissions in relation to the investigation.⁵³

50 *ibid*, and Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 18 of 2000, 6 December 2000, pp. 10–11.

51 Submission no. 17, p. 2.

52 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000.

53 Clause 29.

4.65 In respect of conducting sample audits, the Auditor must not disclose the identity of those who were the subject of audits or information that may lead to the identification of those who were the subject of audits.⁵⁴

4.66 Despite the precautions taken in the Bill to protect the privacy of individuals and to afford them the opportunity to respond to adverse comments, some witnesses were still concerned about the inadequacy of provisions to safeguard the rights and liberties of persons subject to investigation by the Auditor.

4.67 In his submission, the Clerk of the Senate noted that the Auditor would report his findings after an investigation but that the Bill did not propose the power to enforce those findings, nor did it include proposals for regular mechanisms for review. According to the Clerk:

A finding by the Auditor that a member had misused an entitlement or allowance would be virtually a condemnation with no right of appeal. The making of such a finding would condemn the member in the court of public opinion, with the Auditor no doubt described in the media as the ‘independent umpire’. The finding would immediately impose a heavy political penalty on a member which could not be removed or reversed if the finding is subsequently discovered to be wrong or defective.⁵⁵

4.68 He urged Parliament to consider carefully ‘whether it would be wise to establish such an office-holder as a sort of grand inquisitor with the de facto power to try in secret and condemn a member of Parliament before the bar of public opinion with no possibility of appeal or redress in case of error’.⁵⁶

4.69 Mr Evans also noted that the proposed model had been applied in the British House of Commons, with the appointment of the Parliamentary Standards Commissioner. In the UK, the decisions of the Commissioner are reviewed by the Standards and Privileges Committee. Mr Evans noted that this committee had rejected the Commissioner’s findings against the conduct of some British parliamentarians in cases where the committee ‘regarded the findings as wrong or defective’. However, he did not consider that an equivalent Australian committee would have the courage to take the same course of action in Australia, given the likely media treatment of the event.⁵⁷

Committee view—the right of review

4.70 The Committee is aware that a senator’s or member’s reputation could be damaged by the public disclosure of his or her misuse of parliamentary entitlements, and that he or she would have no right of review of the Auditor’s findings. It notes, however, the provisions to protect the privacy of any person subject to a sample audit and the requirement for persons who are the subject of audits to be given an opportunity to make submissions to the inquiry before the investigation is completed. Parliament would then provide an open forum for considering the Auditor’s report along with the submission from the person who is the subject

54 Clause 34(4).

55 Submission no. 4, pp. 2–3.

56 Harry Evans, submission no. 4, p. 3.

57 Submission no. 4, p. 3.

of the inquiry. Ultimately, the fate of the person named in the report would rest with his or her party colleagues and the electorate.

4.71 As noted by the Clerk of the Senate, the Bill includes an option requiring the Auditor to report to a parliamentary committee. The Committee believes that this option deserves further consideration.

Auditor or ethics standard bearer

4.72 The likelihood of a member of parliament being tried in secret and unfairly condemned by public opinion depends, in large part, on the extent to which the Auditor becomes, in the words of the Clerk, an ‘ethics policeperson’.⁵⁸

4.73 The Committee understands the term ‘auditor’ to suggest a narrow and specific role, that is, examination of accounts to see that they are in order. As applied to the proposed legislation, the Auditor would be required to establish whether or not an infringement of the rules or regulations governing the use of parliamentary entitlements had occurred. The Bill, however, in requiring the Auditor to investigate complaints about the misuse of entitlements and to inquire and report on any matter referred to him or her by the minister or parliament, suggests a role wider than a traditional Auditor’s role for this office. The Clerk of the Senate submitted that ‘it is not clear whether the concept of misuse embraces only questions of illegality or also questions of impropriety’.⁵⁹

4.74 Dr Noel Preston was certain in his view that the Auditor ‘cannot be expected to give general ethics advice’. He drew attention to Senator Faulkner’s Second Reading Speech in which the senator stated :

It is our intention that the Auditor will become a reliable, independent and authoritative source of advice to members of parliament in the varied ethical dilemmas they face in the discharge of their responsibilities.⁶⁰

4.75 Dr Preston rejected this notion outright and maintained that advice from the Auditor ‘must be limited to allowances and entitlements issues as stipulated in clause 16 (h)’. This clause states that the Auditor’s advisory function is to provide advice on ethical issues connected with a person’s parliamentary allowances and entitlements. The Committee notes, however, the use of the word ‘ethical’ in this clause.

4.76 Dr Uhr also commented on the lack of clarity concerning the auditing function. He stated:

Under the proposed scheme, the Auditor’s role is of *public* accountability and not simply government efficiency. Accordingly, community confidence in the performance of the Auditor will be affected by the standards that he brings to bear in his investigations. It would help sustain community confidence if Parliament had a public process for confirming and legitimating these auditing standards. The Bill as it stands lacks this feature, making it an open question whether the Auditor is meant to adopt the standards implicit in the Remuneration Tribunal guidelines,

58 See Harry Evans, *Committee Hansard*, 6 April 2001, p. 1.

59 Submission no. 4, p. 3.

60 Noel Preston, submission no. 21, para 1.4. p. [8]. Section underlined by Dr Preston.

devise his own standards or wait for Parliament to come forward with more recent and more appropriate standards.⁶¹

Committee view—auditing or ethics keeping

4.77 The Committee believes that the Bill needs to be explicit in defining the boundaries of the auditor's function. It considers that the Bill needs to establish the extent to which the Auditor might make judgements concerning standards of conduct.

Penalties

4.78 In its submission, the Attorney-General's Department noted that the Bill introduces a number of offences that would attract penalties. The department raised a number of issues warranting consideration, notably the adequacy and proportion of the penalty in relation to the nature of the crime. It submitted that penalties should be proportionate to the degree of proven intention or culpability establishing liability, and that it was desirable that penalties reflected the relative seriousness of the offence within the context of the Act. Penalties should also be comparable to analogous offences in other Commonwealth legislation.⁶²

4.79 The Committee notes that the maximum penalty for refusing, without reasonable excuse, either to provide information to or appear before the Auditor, or to be sworn or make affirmation to, or to produce a document for or answer a question by, the Auditor, is 10 penalty points.⁶³ The pecuniary penalty equates with that in the *Ombudsman Act 1976* although this Act also has the option of imposing a penalty of 3 months imprisonment.⁶⁴ For a similar offence under the Auditor-General's Act the penalty is set at a maximum of 30 penalty points.⁶⁵

4.80 The penalty for wilfully obstructing, hindering or resisting the Auditor in the exercise of his or her functions without reasonable excuse is also set at a maximum 10 penalty points.⁶⁶ The Trade Practices Act sets a maximum penalty at 20 penalty points for a similar offence. Ms Enid Jenkins submitted that the penalties were too light.⁶⁷ The Committee agrees that the maximum penalty appears lenient. For knowingly making a false or misleading complaint in a material particular, the Bill proposes a maximum penalty of 50 penalty points to reflect the more serious nature of the offence.

4.81 The Committee is also concerned with an apparent discrepancy between the penalty determined under clause 20(4)(b) and that determined under clause 22(1) and (2). Both clauses deal with knowingly providing information or making statements to the Auditor that are false and misleading in a material particular. The maximum penalties set by the clauses differ, being 10 and 20 penalty points, respectively. The Bill offers no explanation for this anomaly. The penalty for similar offences under the *Criminal Code Act 1995* is imprisonment

61 Dr John Uhr, submission no. 16, p. 3.

62 Attorney General's Department, submission no. 17, p. 2.

63 Under Section 4AA of the *Crimes Act 1914*, (compilation of the Act prepared on 7 January 2002) a Penalty unit means \$110.

64 Section 36, *Ombudsman Act 1976*.

65 Section 32, *Auditor-General Act 1997*.

66 Section 155 *Trade Practices Act 1974*.

67 Enid Jenkins, submission no. 8, p. 8.

for 12 months, and those for like offences under the *Trade Practices Act 1974* can be 20 penalty points.⁶⁸

Committee view—penalties

4.82 The Committee notes that the penalties in the Bill relating to making false or misleading complaints appear to be lenient, except for the penalty for making a false or misleading complaint in a material particular (maximum 50 penalty points). It also draws attention to the apparent anomaly in the penalties for providing false or misleading information in respect of clauses 20 and 22.

Ministerial entitlements and allowances under the Bill

4.83 Although the Bill proposes to establish a scheme that will cover all parliamentary allowances and entitlements, it does not specifically provide for the scrutiny of ministerial entitlements. Dr Uhr expressed concerns about the potential for ministers to escape scrutiny under the Bill. His submission observed:

It would be regrettable if this Bill was limited to allowances and entitlements available to parliamentarians, short of those additional facilities available to ministers. I suspect that this Bill falls short of providing the community with assurances that ministers, as the most powerful of members of parliament, are complying with due standards.⁶⁹

4.84 Dr Uhr further noted that the Bill makes no mention of whether the proposed Auditor has any authority to investigate breaches of a ministerial code of conduct, such as breaches of the current Prime Minister's *Guide to the Key Elements of Ministerial Responsibility*.⁷⁰ He added in evidence:

The two ALP bills, if I can call them that, might be unduly modest—despite the praise that I have just given for the tone—to the extent that ministers escape any regulatory loops that are being established here. I think that would be a shame, because I think there is a responsibility and an opportunity for parliament to come forward and, as the elected forum for the community, to establish standards that ministers can live up to, and not just leave that to the Prime Minister of the day.⁷¹

4.85 In acknowledging the failure of the Bill to capture ministerial entitlements and allowances, Senator the Hon Robert Ray stated at the public hearing into the Bill that this had been an oversight and that he would ensure that the issue was addressed at some stage.⁷² The Committee notes Senator Ray's assurances.

Committee view—auditing the use of ministerial entitlements

4.86 The Committee believes that if an Auditor is created as proposed under the Bill, it is appropriate that his or her jurisdiction extend to the use of ministerial entitlements and

68 Division 137—False or misleading information or documents, *Criminal Code Act 1995*. See section 75AY (4), *Trade Practices Act 1974*.

69 Submission no. 16, p. 2.

70 Submission no. 16, p. 2.

71 *Committee Hansard*, p. 12.

72 *Committee Hansard*, p. 17.

allowances. It disagrees strongly, however, with the suggestion that the Auditor should have a role in assessing whether a minister has breached the Prime Minister's *A Guide on Key Elements of Ministerial Responsibility*, because this would require the Auditor to take on the role of an 'ethics policeperson'.

Is a new auditor necessary?

4.87 So far, the Committee has looked at specific provisions in the Bill and has noted a number of concerns. Although some can be addressed by amending the relevant provisions, the Committee believes that others cannot be so easily remedied. In particular, the Committee questions the allocation of advisory and investigative functions to the proposed Auditor, and extension of his role to include judgement about the ethics of a member of parliament's conduct.

4.88 Despite serious reservations about particular provisions in the Bill and also about the policy that informs the proposed legislation, the Committee now turns to the question of the need for such legislation. The Committee recognises that the Bill intends to strengthen accountability in the use of parliamentary entitlements and allowances by appointing an independent auditor. Those who support the proposed legislation see a definite need for the appointment of an auditor dedicated to the specific role of scrutinising the use of parliamentary entitlements. Mr Beazley, the then Leader of the Opposition, recognised the heavy workload already borne by the Auditor-General. He told Parliament:

The Commonwealth Auditor-General cannot do this task. The Commonwealth Auditor-General is responsible for the full \$150 billion-plus worth of outlays that the Commonwealth has under his purview and is obliged to run across all departments, with a very limited staff and often in very difficult circumstances.⁷³

4.89 Dr John Uhr agreed. He stated that one notable benefit of the Bill was that it would relieve the Auditor-General of many difficult tasks that had fallen to his office in recent times. In his opinion, Parliament had been expecting too much of the Auditor-General in requesting him to inquire into matters relating to the improper use of political office.

4.90 Expanding on this matter, Dr Uhr told the Committee:

We know the way auditors do their work, and it cannot be too difficult to establish another stream of auditing that can report back to parliament on parliament's own compliance with those regulations. Included within that I would like to see the standard setting and the regulations coming out of bodies like the Remuneration Tribunal and whatever guidelines are now being devised within the Department of Finance and Administration being subject to greater scrutiny as well. The auditor would supervise the entitlements aspect.⁷⁴

4.91 Dr Preston believed that the functions of the Auditor proposed in the Bill required the creation of a new position and that the responsibility should not fall to the

73 Mr Kim Beazley MP, *Matters of Public Importance: Members of Parliament: Entitlements*, House of Representatives *Hansard*, 31 October 2000, p. 21702.

74 Dr John Uhr, *Committee Hansard*, 6 April 2001, p. 19.

Auditor-General. He maintained that ‘this special auditor needs to work closely with Members of Parliament’.⁷⁵

4.92 Although referring specifically to ministerial entitlements, Mr John Wanna and Mr Alexander Gash, after examining the possible role of the Auditor-General in scrutinising ministerial ethics, concluded that there were some ‘substantial risks’ in relying on the Auditor-General to investigate incidences of ministerial breaches of accountability. They suggested a better solution might be to establish a dedicated Ministerial and Parliamentary Auditor.⁷⁶

4.93 While Dr Uhr advocated the appointment of an auditor dedicated specifically to monitoring and scrutinising the use of parliamentary entitlements, he recognised that additional resources would be needed to support this new office. Clause 15 of the Bill stipulates that the staff necessary to assist the independent Auditor be made available by the Auditor-General. Allowances, therefore, must be made to accommodate the additional demands on ANAO staff.⁷⁷ The Explanatory Memorandum to the Bill conceded that funding would be required for the office but concluded that the financial impact would be somewhat reduced and that additional funding would be less than might otherwise be the case, since staff would be provided from the Auditor-General’s Office.⁷⁸ Dr Uhr submitted:

The Committee should satisfy itself that the relevant Minister will take to the parliamentary Public Accounts and Audit Committee an adequate budget supplementation and that this parliamentary Committee will itself determine exactly how adequate this supplementary budget will be. This is consistent with the role of this Committee in approving the government’s recommended appointee. The fact that the new Auditor’s staff must ‘be made available by the Auditor-General will only work if the overall financial and staffing budget for the Australian National Audit Office is expanded to cover the additional responsibilities.’⁷⁹

4.94 Some witnesses saw no need for the proposed Auditor and submitted that the Auditor-General was a more suitable authority to audit the use of parliamentary entitlements and allowances. They believed that the creation of a new auditor would be both wasteful and unnecessary. Mr Clem Campbell maintained that establishing an Auditor of Parliamentary Allowances and Entitlements would be ‘a costly and bureaucratic way to determine, investigate and report on the use of allowances and entitlements by members of parliament’. He believed that the Auditor-General could fulfil this function.⁸⁰ Further, Mr Campbell contended that establishment of the proposed Auditor would not reduce the number of complaints concerning misuse of entitlements, nor improve the use of entitlements, because of the many ‘grey areas’ of parliamentary duties and private benefits.⁸¹

75 Dr Noel Preston, submission no. 21, p. [8].

76 ‘The Role of the Auditor-General in Scrutinising Ministerial Ethics’, submission no. 22, attachment no. 2, pp. 41 and 48 of 49 pages.

77 See for example, Dr John Uhr, submission no. 16, p. 3.

78 *Explanatory Memorandum* circulated by Hon Kim Beazley, Auditor of Parliamentary Allowances and Entitlements Bill 2000, p. 2.

79 Dr John Uhr, submission no. 16, p. 3.

80 Clem Campbell, submission no. 10, para 3.

81 Submission no. 10, pp. 1–3.

4.95 Similarly, Mr E. J. Lockett, considered that the proposed Auditor would duplicate the functions performed by the Auditor-General and that the audit of parliamentary entitlements should be undertaken by that office.⁸²

4.96 Senator Murray noted that the Auditor-General is ‘the most experienced, most capable and best resourced auditor to do the job’.⁸³ The Deputy Auditor-General, Mr Ian McPhee, noted that the work of the proposed auditor may duplicate that of his office and that there could be uncertainty about the roles of both auditors. He stated further that there were existing mechanisms whereby audit coverage of the administration of parliamentary entitlements could be included in the ANAO’s annual work schedule.⁸⁴ Mr McPhee told the Committee:

We are suggesting that there are some avenues within the existing framework for Audit, including the arrangements we have with the Joint Committee of Public Accounts and Audit where the parliament or the committee can request the Auditor-General to do particular audits. Obviously the Senate can request the Auditor-General to do more coverage in this area. So there are avenues in the existing framework to respond to not all but many of the matters covered by this bill. Our view is that the committee might explore the existing mechanisms in the first place before moving to legislation.⁸⁵

4.97 Mr McPhee emphasised, however, that constraints placed on the ANAO would limit its ability to fully satisfy the objects of the Bill. In relation to parliamentary entitlements, he explained that the ANAO’s work concentrated on the systems that agencies have in place for administering parliamentary entitlements. For example, the ANAO could investigate the systems of the Department of Finance and Administration to ensure that expenditure was in accordance with Remuneration Tribunal arrangements and the rules for members’ entitlements.

4.98 He pointed to regulations that restricted ANAO access to staff employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act) and to individual members of parliament. He informed the Committee that although ANAO could look at the level of expenditure incurred by an individual, the extent of its authority to obtain details about individuals was unclear.⁸⁶ Mr McPhee informed the Committee that:

Where we believe we probably run short of authority is looking at individual members. If someone said, ‘Member X or member Y, can you investigate what they have been up to in terms of entitlements and their exercise of them,’ we believe we may be inhibited in that area.⁸⁷

4.99 He accepted that government could restrict the investigative powers of the Auditor-General, but considered that, as a general principle, it would be sound practice for ANAO to have a review function of members of parliament.⁸⁸

82 E. J. Lockett, submission no. 12, p. 1.

83 Senator Andrew Murray, submission no. 13, p. 11.

84 Ian McPhee, Deputy Auditor General, Australian National Audit Office, submission no. 15, pp. 3–4.

85 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, p. 30.

86 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, p. 32.

87 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, p. 31.

88 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, pp. 32–3.

Committee view—the need for an auditor dedicated solely to scrutinise the use of parliamentary entitlements

4.100 The Committee is convinced that the use of parliamentary entitlements and allowances should be adequately monitored and scrutinised. It notes the findings of the Auditor-General's recent report on parliamentarians' entitlements that, although it had been recommended in the Baxter report of 1997, the use of parliamentary entitlements has not yet been subject to audit. An office-holder dedicated solely to auditing the use of parliamentary entitlements and allowances would offer assurances that parliamentarians were being held accountable for their expenditure of public funds.

4.101 The Committee appreciates that the appointment of a new auditor would enhance the transparency and scrutiny of the use of parliamentary entitlements. It is not convinced, however, that such an appointment is the best approach. In particular, it believes that the potential for the Auditor-General to be involved more closely in the auditing of the use of parliamentary benefits has not been given adequate consideration.

4.102 The Committee accepts that the current Auditor-General's Act would have to be amended if the Auditor-General were to facilitate the regular audit regime anticipated by the Bill. For example, the Bill provides that the new Auditor would have the power to conduct audits on individual members of the Houses of Parliament and staff employed under the MOPS Act. The Auditor-General is explicitly prohibited from this under the *Auditor-General Act 1997*.

Other options

4.103 The Committee has acknowledged in this report the importance of auditing as an accountability tool but it considers that it is not the only accountability mechanism. The Committee now discusses whether the desired level of accountability could be achieved in another way.

4.104 The Bowen report concluded that parliamentarians required more information before improved compliance and standards of conduct could be expected.⁸⁹ As noted earlier, the former Minister for Administrative Services told Parliament in 1997 that members and senators needed better information to help them manage their entitlements.⁹⁰ Moreover, the recent ANAO report, *Parliamentarians' Entitlements: 1999–2000*, found that there are no comprehensive guidelines or codes to enable members of parliament to determine required standards in a number of areas.

4.105 The Clerk of the Senate commented on the different types of information available to senators at the present time. He told the Committee:

You have statutory provisions; there are provisions in the Crimes Act about bribery of members of parliament; you have parliamentary prescriptions and one of the Senate's privileges resolutions has a rule about members accepting considerations in return for performing their parliamentary duties. There would be some value in

89 *Public Duty and Private Interest*, pp. 32–3.

90 Answer to Question without Notice, David Jull, House of Representatives *Hansard*, 5 March 1997, p. 2015. See also para 4.10 of this chapter.

simply getting all those things together and putting them in a convenient form for members to look at.⁹¹

4.106 The Deputy Auditor-General agreed that the existing system needed to be improved before the appointment of an auditor of parliamentary entitlements was considered. He pointed out that a range of agencies are responsible for different aspects of administering parliamentary entitlements including DOFA and the parliamentary departments, and that several authorities had developed guidelines or rules in this area, for example, the Remuneration Tribunal. In his view, it was ‘difficult for members of parliament to clearly understand their entitlements.’ He suggested that a simplified system might allay concerns that have given rise to the proposed legislation.⁹²

4.107 As noted above, the August 2001 ANAO report on parliamentarians’ entitlements confirmed that the current system of administering parliamentary entitlements was complicated and needed to be simplified. The report concluded that, as a starting point:

clear and specific rules are fundamental to providing effective support to Parliamentarians to carry out their duties, while ensuring that effective accountability is provided for the public monies involved.⁹³

4.108 The report then commented on the disjointed and difficult system currently in place:

The complexity of the existing entitlements structure has given rise to a number of areas of difficulty for both relevant departments and Parliamentarians in efficiently and effectively managing those entitlements. For example, determining the eligibility of activities under the entitlements, and the extent of the entitlement that arises where there is eligibility, has presented difficulties.

...

The difficulty in effectively administering this system is exacerbated by the absence of a compendium of all relevant legislation, Remuneration Tribunal Determinations, ministerial determinations, Ministerial guidelines and conventions which apply to Parliamentarians’ entitlements that is centrally maintained and available to all departments responsible for the public money expended under those entitlements.⁹⁴

4.109 The report observed that there was much scope for enhancing accountability and transparency concerning the use of parliamentary entitlements, ranging from providing better guidance to assist parliamentarians to ensure they maintain adequate documentation regarding their use of entitlements, to more comprehensive reporting requirements. Additional internal checks to provide assurance that the existing system is working effectively would be another means of ensuring that payments made by the departments were valid and complied with all requirements.

4.110 In addressing concerns about the transparency of parliamentarians’ use of entitlements, the report focused on administrative and practical concerns, such as improving

91 Harry Evans, *Committee Hansard*, 6 April 2001, p. 11.

92 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, pp. 28–9.

93 *Parliamentarians’ Entitlements: 1999–2000*, p. 20.

94 *ibid*, p. 71.

electoral office management, record keeping and archiving.⁹⁵ The report also asked for a clearer definition of key terms such as ‘parliamentary business’, ‘electorate business’ and ‘party business’ and surveyed the feasibility of alternative budgeting measures, such as introducing a global budget which could provide for an enhanced system of capped entitlements and allowances.⁹⁶ The Committee notes that the report identified the following areas as examples of possible improvement:

- the clarity of definition of the conditions of entitlements;
- record-keeping by both parliamentarians and departments;
- the quality and comprehensiveness of the management reports provided to parliamentarians on their use of entitlements, and the certifications sought from them in respect of that use;
- the establishment and maintenance by the responsible departments of an effective control environment, including the introduction of techniques such as benchmarking analysis and regular risk-based auditing of claims against entitlements; and
- the extent of public reporting of parliamentarians’ expenditure on entitlements.⁹⁷

4.111 The Committee notes the recent constructive approach taken by the Special Minister of State, Senator the Hon Eric Abetz, in agreeing to the preparation of a discussion paper by his department to clarify guidelines for members of parliament on the use of parliamentarians’ communication allowance.⁹⁸ He acknowledged the confusion arising from ill-defined terms including ‘electoral business’, ‘parliamentary duties’ and ‘parliamentary business’⁹⁹ and advised an Additional Estimates hearing on 19 February 2002 that:

Everybody wants somebody else to define these terms because there are some real difficulties...No matter what definition we provide, it is my view that there will always be a grey area, but the extent of the greyness of the area could be limited.¹⁰⁰

Committee view—alternatives to the creation of a new Auditor

4.112 The Committee appreciates that the Auditor was proposed with a view to contributing to increased accountability in the use of parliamentary entitlements. But it considers that the creation of this new office is unnecessary at this time. Evidence to this inquiry suggests that less expensive but potentially equally effective means for ensuring compliance with the rules and regulations governing the use of parliamentary entitlements have not been adequately considered.

95 *Parliamentarians’ Entitlements: 1999–2000*, p. 95.

96 *Parliamentarians’ Entitlements: 1999–2000*, p. 97. See also Gary Johns, ‘Desirability of Regulating Political Parties’, *Agenda*, vol. 8, no. 4, 2001, p. 294.

97 *Parliamentarians’ Entitlements: 1999–2000*, p. 95.

98 Senator Eric Abetz, Senate Finance and Public Administration Legislation Committee, Estimates hearings, *Hansard*, 19 February 2002, pp. 179, 182. At a Budget Estimates hearing on 30 May 2002, Senator Abetz advised that the discussion paper was expected to be released by 30 June 2002, *Hansard*, 30 May 2002, p. 385.

99 For example see *Parliamentarians’ Entitlements: 1999–2000*, p. 97; Gary Johns, ‘Desirability of Regulating Political Parties’, *Agenda*, vol. 8, no. 4, 2001, p. 294.

100 Senator Eric Abetz, Senate Finance and Public Administration Legislation Committee, Estimates hearings, *Hansard*, 19 February 2002, p. 179.

4.113 The Committee considers that the accountability regime for the use of parliamentary entitlements should be addressed first, by improving and simplifying guidelines, by clarifying information available to members of parliament, and by publishing more comprehensive statistics on expenditure. Such procedures would not only assist members of parliament to observe the rules governing the use of their benefits but it would also provide the public with information on the nature of the entitlements, on how they are used and for what purposes.

Conclusions and recommendations

4.114 Overall, the Committee supports the object of the Bill to assist members of parliament to observe the rules and regulations governing the use of parliamentary entitlements and allowances. During the course of the inquiry, however, a number of fundamental and serious flaws concerning the proposed legislation were identified that have not been resolved to the satisfaction of the Committee. They include:

- the proposal to confer advisory and investigative functions on the proposed Auditor;
- the entry and search provisions in the Bill and their potential to impact on personal rights and liberties;
- the adequacy of review provisions;
- the definition of the boundaries of the Auditor's function; and
- the need for penalties and their adequacy.

4.115 The Committee considers that there are opportunities within the current framework to improve accountability in the use of parliamentary entitlements. The Auditor-General could be given a more active role in auditing the use of parliamentary entitlements. The Government could also introduce a number of measures including the development and promulgation of clear guidelines on entitlements and their use, greater levels of disclosure such as public reporting of the cost and expenditure patterns of parliamentary entitlements, and regular internal audit and review of the system administering these entitlements.

4.116 The role of the Government might also include reporting back to Parliament on progress made in implementing measures identified in ANAO reports on parliamentary entitlements. Although it may be regarded as an unwarranted intrusion by some, the Committee considers that there may be merit in giving the Auditor-General the power to conduct audits of financial expenditure by senators and members.

Recommendation No. 3

4.117 The Committee recommends that the Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2] not proceed because of significant flaws in the proposed legislation and because other options for ensuring compliance with the rules and regulations governing the use of parliamentary entitlements have not been fully considered.