

Submission to the JCPAA

On

The Public Governance, Performance and Accountability Bill 2013

By

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Personal Background:

I retired from the APS in 2010 as a Deputy Secretary of the Department of Education, Employment and Workplace Relations after 37 years in the APS. Ten of those years were in the then Department of Finance. I now work at the Institute and am a member of a number of APS agency Audit Committees, and have an ongoing interest in public administration.

CFAR (Commonwealth Financial Accountability Review)

The Bill is seeking to replace the basis of financial administration in the Commonwealth. This is a very important matter. Firstly the use and accountability of public moneys is at the heart of good government. Secondly, and more importantly, it goes to the balance of power between the Parliament and the executive government.

The Bill derives from the CFAR (Commonwealth Finance and Accountability Review) process. I made a submission to CFAR, in which I raised a number of concerns with regard to the approach to public financial administration being proposed at the time. Chief among my concerns was the apparent attitude to role of Parliament in financial administration. I will leave a copy of my submission to CFAR with the Secretariat. CFAR did not find that the machinery of financial management in the Commonwealth was broken – its main findings were that it might be made more efficient for the public servants concerned, and that some good practice already occurring had arisen despite not having a legislative basis. Yet this Bill does not provide for amendment and addition, it seeks to replace the entire framework.

The history of parliamentary democracy has, since the Magna Carta, been one of parliaments winning greater influence, scrutiny and approval of the spending by the executive arm of governments and so improving the public value gained from public outlays. In this long struggle, seldom has the convenience of the bureaucracy been a motivating force in seeking to limit parliament's interests, but that seemed to me to be part of the CFAR proposals. One instance was the proposition that appropriations should be very broad, allowing ministers and public servants to move funds around as they saw fit after the purpose and level of funding had been approved by parliament.

Unfortunately, I see some of the same thinking in this Bill which claims to be principles based/framework legislation. In a matter as important as public financial management and

accountability I believe such an approach inappropriate for a set of key controls on public outlays. We need more than good intentions.

I will direct my comments to three themes: undue haste, convenience to bureaucrats, and the powers of the Minister for Finance.

Undue Haste

This Bill is expected to be passed by 30 June, at a time when other budget bills are under scrutiny by parliament. That is hardly conducive to thorough and thoughtful consideration. In fact, it is so rushed we have not yet seen the “Consequential and Transitional” Bill that could be expected to accompany the replacement of the entire financial accountability basis of the Commonwealth, nor the proposed Rules on which this Bill so heavily depends. In Chapter 1 and 2 of the Bill alone, the rules were referred to some 40 times before I stopped counting, and yet they are not available for scrutiny. Rules can be used to change the application of, augment or provide the detail for many provisions of the intended Act.

In presenting the Bill in undue haste, it seems the easiest option has been to treat the financial affairs of the Commonwealth as far more homogeneous than they are, or ever should be, in reality. The diverse requirements of, say, the RBA compared to Centrelink, or the ANU compared to the Department of Education, or the ABS and Indigenous Business Australia are very different. And yet the Bill proposes far more standard approaches than at present without acknowledging the consequences. For example Clause 59 (1)(b) does not allow for corporate Commonwealth entities to invest relevant monies in line with their enabling legislation as approved by parliament. The explanatory memorandum says that existing exemptions will be preserved, which begs the question of why are we replacing the CAC Act in the first place. However, the explanatory memorandum is not law and this is why the consequential Bill is important.

The principle of “government should operate as a coherent whole” is a simple mantra divorced from the real breadth of functions in public administration. It is also somewhat interesting that the Bill then provides for entities to be treated differently in terms of the rules, levels of autonomy and scrutiny on some as yet unstated basis of “earned autonomy”, the rules for which are as yet unknown, and to be set by the government, not the parliament. At present, the Parliament decides which of two pre-determined frameworks applies to a body (because a CAC authority can't be created without an Act). This Bill will allow the Finance Minister to create multiple frameworks, and then decide which applies to which body.

Similarly, some provisions are to be applied so broadly as to make their practical application very problematic. Is it realistic to expect every official under the catch all definition at Clause 13, to disclose interest in all matters of the entity in which they are employed under Clause 29? In some instances the Bill assumes all people in an entity have an equal impact on the conduct of the entity when this is not the case, and so stands at odds with corporation law which clearly understands that Directors have influence and are held accountable in ways employees are not. Despite the claim that the Bill is in line with corporation law, the Bill also moves away from the corporation law by removing sanctions and penalties from directors of corporate entities.

The Bill confuses the duties under the Bill with duties that are rightly covered in employment law. How for example is it expected that Clause 17 requiring officials to cooperate is to be implemented

or policed other than through employment arrangements? This provision already exists with the recent amendments to the Public Service Act around collaboration responsibilities of Secretaries. Apparently, the only ones not to be covered by the duties in the Bill are those people called on to be members of advisory boards, advising on the governance of an entity to which they have no accountability or responsibility (Clause 24).

The current financial administration of the Commonwealth is not so broken, or so deficient, as to justify anything other than the full and thorough consideration of the changes proposed in this Bill. At paragraph 24 the explanatory memorandum notes that it is not broken, so the question remains what is to be gained from wholesale replacement of the FMA and CAC Acts.

Convenience to bureaucrats

It is hard to identify exactly in what regards the Bill strengthens financial management practice within the Commonwealth or what actual deficiencies are being redressed. The examples and justifications given in the Second reading speech and explanatory memorandum are hardly convincing and one forms the opinion these have been created to explain a problem for the solution that had already been formulated. For example, the claimed principle that “a common set of duties should apply to all resources handled by Commonwealth” leads to applying uniform approaches to different situations, rather than devising different ways to reach this goal in a variety of circumstances.

The consistent theme to emerge is however that a number of changes make it easy for the bureaucracy, and particularly officials in the Department of Finance. Why, for example, are the subsidiary legislative instruments of choice “Rules” rather than Regulations? Rules can be drafted by Finance without the involvement of the Office of Parliamentary Counsel. They are less formal, do not have to conform to the same standards and do not have to go before the Governor-General. Despite the arguments at Paragraph 484 of the explanatory memorandum, they are easier for Finance, and shift the focus from parliament to the bureaucracy.

There is nothing of substance created by this Bill that are not already required or practiced in Commonwealth financial administration, despite the claims in the second reading speech. Effective Risk Management (Clause 16) is now universally applied across all Commonwealth entities under the influence of the Auditor –General, without the need for a legislative base. The solution proposed to the concern that collaborative working practices are required in modern times is to insert the ineffectual Clause 17. Why is this to be part of financial administration legislation when the matter is now covered in the Public Service Act?

The shift of control from Parliament to ease of administration also occurs in Clause 87. The Finance Minister can create a body corporate under section 87, this previously would need to be done by Act of Parliament. Clause 87(j) is a particular concern in providing for rules that may deal with the application of other Commonwealth laws to the body corporate. I would have considered that those other laws should apply on their own terms as determined by Parliament, not only where the Finance Minister determines by rule.

Powers of the Minister for Finance

At Clause 52 of the Bill we have the Constitution consigned to a footnote, which implies that rules will seek to minimise breaches of Section 83 of the Constitution, not necessarily enforce it and

ensure money could not be spent without an appropriation - rules should not be the thing that ensures the constitution is not usually breached and the explanatory memorandum limply says that rules MAY detail arrangements to ensure compliance with section 83.

CFAR raised concerns in regard to special appropriations and the extent to which they now authorise the majority of appropriations. The arguments against standing appropriations were not a compelling case then and are not now. It is therefore of interest that the Bill at Clause 105 uses this very mechanism in a shortcut way to overcome one of the issues arising from Section 83 of the Constitution.

Constitution Clause 83 requires a lawful appropriation for all expenditure of public funds. This is the strongest control parliament has over expenditure by the government. Yet Clause 105 of the Bill proposes that where a lawful appropriation for a purpose does not exist, expenditure could be covered by a special appropriation to the Minister of Finance. This seems a simplistic and possibly dangerous solution to the problem the Bill seeks to overcome described in the Explanatory Memorandum. The High Court could take the view that such an appropriation clause is not sound as it does not state the purpose, the amount or the time in which the expenditure should occur. Such a view would be in line with its recent decision on the Schools Chaplains case.

In conclusion, this is a Bill that appears to be born out of an apparent and unstated dislike for the form of the current financial administration Acts, not of a failure of those Acts, yet it does not change the arrangements in substantial ways other than extending the power of the Minister for Finance to overcome administrative inconveniences of Section 83 of the Constitution.

If the Bill does not lead to substantial change in the financial administration of the Commonwealth in practice, as it seems, there is no urgency to pass the Bill. If there are substantial changes beyond rhetoric that are not obvious from the Explanatory Memorandum, it seems that considering the importance of the legislation in approving a re-write of the basis for the financial administration of the Commonwealth is more the work for a commencing parliament, not the last act of an ending one.