Auditor-General for Australia

Australian National Audit Office

27 November 2020

Ms Lucy Wicks MP
Chair
Joint Committee of Public Accounts and Audit
Parliament House
CANBERRA ACT 2600

By email: jcpaa@aph.gov.au

Dear Ms Wicks

JCPAA review of *Auditor-General Act 1997* (the Act)

I welcome the opportunity to provide a submission to the Joint Committee of Public Accounts and Audit's (JCPAA's) inquiry into the *Auditor-General Act 1997* (the Act).

Since its introduction on 1 January 1998, the Act has served the Parliament and the public well in terms of establishing the mandate, functions and powers of the Auditor-General and ANAO. On balance the Act works well and in more than 20 years of operation it has allowed Auditors-General for Australia and the ANAO to support accountability and transparency in the Australian Government and contribute to improved public sector performance.

The last major review of the Act concluded in 2010 when the JCPAA released Report 419: Inquiry into the Auditor-General Act 1997 (JCPAA Report 419) which recommended amendments many of which were implemented through the *Auditor-General Amendment Act 2011* (2011 Amendment Act). The inquiry is therefore a timely opportunity to reflect on changes that could be made to the Act to reflect developments in public administration over the past decade.

Attachment A outlines potential amendments to the Act that could be made in response to each of the JCPAA's terms of reference. The issues raised in Attachment A are all directly, or indirectly, related to the independence of the Auditor-General, the key overarching theme of the submission.

The potential amendments relating to independence raised in Attachment A draw upon the International Organisation of Supreme Audit Institutions (INTOSAI) 2007 Mexico Declaration on SAI Independence (Mexico Declaration) (Attachment B). The Mexico Declaration recognises that it is indispensable for a healthy democracy to have a Supreme Audit Institution (SAI) whose independence is guaranteed by law.

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The importance of SAI independence has been further highlighted by the United Nations General Assembly in Resolution 66/209 of 22 December 2011 (Attachment C) and 69/228 of 19 December 2014 (Attachment D). Both of these resolutions recognise that supreme audit institutions can accomplish their tasks objectively and effectively only if they are independent of the public sector entities that are audited and they are protected against outside influence. The resolutions encourage United Nations member states to apply the Mexico Declaration in a manner consistent with their national institutional structures.

The fact that Attachment A contains a wide range of issues should not detract from my belief that on balance the Act works well and provides a robust framework for supporting accountability and transparency of the Australian Government. I consider that many parts of the Act work very well and I strongly consider should not be changed. The last decade has seen the effectiveness of the following provisions in their current forms and therefore any changes to them may reduce the effectiveness of the ANAO:

- section 8 which reinforces the independence of the Auditor-General;
- section 24 which allows the Auditor-General to set ANAO Auditing Standards independent of executive government, which are subject to disallowance by the Parliament;
- the Auditor-General's information-gathering powers in sections 32 and 33;
- the confidentiality obligations in section 36 which balance the information-gathering powers, except perhaps consideration of a specific provision for the Auditor-General to provide information to integrity agencies;
- the general principles behind section 37, which provides for a public interest test within the Act that is usually applied by the Auditor-General;
- subsection 40(2) which provides that ANAO staff may only be directed by the Auditor-General or a delegate regarding the performance of the Auditor-General's functions; and
- the Auditor-General and ANAO's exemptions from the application of the *Freedom of Information Act 1982* and *Privacy Act 1988*.

I look forward to assisting the Committee with its review.

Yours sincerely

[redacted]

Grant Hehir
Auditor-General

Enclosure: JCPAA Review of the Auditor-General Act 1997 - ANAO Submission

ATTACHMENT A

Introduction

This Attachment A details options for change to the *Auditor-General Act 1997* (the Act) that the ANAO has identified in the course of operating under the Act.

On balance the Act works well and provides a robust framework for supporting accountability and transparency in the Australian Government. In particular the following provisions have been effective and any amendments risk reducing the effectiveness of the ANAO:

- section 8 which reinforces the independence of the Auditor-General;
- section 24 which allows the Auditor-General to set the Auditing Standards independent of executive government, which are subject to disallowance by the Parliament;
- the Auditor-General's information-gathering powers in sections 32 and 33;
- the confidentiality obligations in section 36 which balance the information-gathering powers, except perhaps consideration of a specific provision for the Auditor-General to provide information to integrity agencies;
- the general principles behind section 37, which provides for a public interest test within the Act that is usually applied by the Auditor-General;
- subsection 40(2) which provides that ANAO staff may only be directed by the Auditor-General or a delegate regarding the performance of the Auditor-General's functions; and
- the Auditor-General and ANAO's exemptions from the application of the *Freedom of Information Act 1982* and *Privacy Act 1988*.

The background section below provides background information in relation to the role of the Auditor-General and the ANAO, as well as providing background about key issues related to the independence of the Auditor-General. After the background, the remainder of this submission follows the terms of reference for the inquiry:

> To inquire into and report on the adequacy of general provisions contained in the *Auditor-General Act 1997* (the Act), with particular reference to:
>
> 1. the governance framework as it relates to the Auditor-General and the Australian National Audit Office (ANAO), including the independence of the Auditor-General as an Officer of the Parliament and the audit independence of the ANAO, and resourcing arrangements;
> 2. the Auditor-General's information gathering powers and confidentiality of information, including with reference to parliamentary privilege and the interaction between the Freedom of Information Act 1982 and the Act;
> 3. the interaction of the Act and other relevant legislation including the Public Governance, Performance and Accountability Act 2013, the Public Accounts and Audit Committee Act 1951, Freedom of Information Act 1982, and the Parliamentary Privileges Act 1987;
> 4. the Auditor-General's capacity to initiate audits into, and examine the performance of all entities in the Australian Government sector;
> 5. accessibility and transparency of reports and audit conclusions, including the operation of section 37 of the Act;
> 6. the Audit Priorities of the Parliament;
> 7. the role and appointment of the Independent Auditor; and
> 8. any related matters.

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Background

History of the Auditor-General Act

1. The office of Auditor-General was the first statutory integrity entity established by the Commonwealth Parliament, following passage of the *Audit Act 1901*. That Act was the fourth passed by the new Commonwealth Parliament.

2. The Auditor-General was intended to be an independent and impartial public official who could scrutinise Commonwealth administration and give true assessments on the state of the public accounts without intimidation by government or other vested interests. The role of the Auditor-General was seen as fundamental to good government[1]. The *Auditor-General Act 1997* took effect on 1 January 1998 and replaced the Audit Act. The Act was introduced in parallel with the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*. The 1997 Act was initiated following a recommendation of the Joint Committee of Public Accounts (JCPA) and enhanced the independence of the ANAO as well as clarifying its responsibilities.

Role of the Auditor-General and ANAO under the Act

3. The role of the Auditor-General is to provide independent reporting and assurance to Parliament on whether the executive government is operating in accordance with Parliament's intent, and within the executive's own policy and rule framework, to achieve desired objectives. The Auditor-General's mandate extends to all aspects of Commonwealth entities' efficiency, effectiveness, economy and ethical behaviour in their use and management of public resources.

4. The Governor-General, on the recommendation of the Joint Committee of Public Accounts and Audit (JCPAA) and the Prime Minister, appoints the Auditor-General for a term of 10 years. As an independent officer of the Parliament under the Act, the Auditor-General has—subject to the Act and other Commonwealth laws—complete discretion in the performance or exercise of the functions or powers under the Act. Importantly independence is underpinned by the Act establishing that the Auditor-General is not subject to direction in relation to:

   - whether a particular audit is to be conducted;
   - the way a particular audit is to be conducted; or

[1] For more information see: https://www.anao.gov.au/about/the-auditor-general

- the priority given to any particular matter.

5. In the exercise of the functions or powers under the Act, the Auditor-General must have regard to the audit priorities of the Parliament, as determined by the JCPAA.

6. Under the Act, the Auditor-General's functions include:

   - auditing the financial statements of Commonwealth entities, Commonwealth companies and their subsidiaries;
   - conducting performance audits, assurance reviews, and audits of the performance statements and measures of Commonwealth entities and Commonwealth companies and their subsidiaries;
   - conducting a performance audit of a Commonwealth partner as described in section 18B of the Act;
   - providing other audit services as required by other legislation or allowed under section 20 of the Act; and
   - reporting directly to the Parliament on any matter or to a minister on any important matter.

7. Under the Act, the ANAO supports the Auditor-General in undertaking these functions.

8. The purpose of the ANAO, as articulated in its corporate plan, is to support accountability and transparency in the Australian Government sector through independent reporting to the Parliament, and thereby contribute to improved public sector performance. The ANAO delivers its purpose under the Auditor-General's mandate in accordance with the Act, the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act), the *Public Service Act 1999* and the ANAO Auditing Standards set by the Auditor-General under the Act.

9. The ANAO's primary relationship is with the Australian Parliament and the ANAO's key interaction with the Parliament is through the JCPAA.

Australia's Supreme Audit Institution

10. The ANAO, led by the Auditor-General, is Australia's Supreme Audit Institution (SAI).

11. The Organisation for Economic Co-operation and Development (OECD) has stated that:

> An independent and professional Supreme Audit Institution (SAI) is an important actor in a country's accountability chain. It is a government entity whose external audit role is established by the constitution or supreme law-making body.[2]

12. As discussed in the ANAO's submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Regulation of Auditing in Australia[3], independence is the foundation on which the value of an audit is built. It is the ability to act with integrity and objectivity and is therefore critical to maintaining trust and confidence in the audit work, which in turn is fundamental to the impact of that work. Independence comprises independence of mind and independence in appearance. That is, it refers to a state of mind where professional judgment is not compromised by bias, conflict of interest or undue influence. An auditor must be independent, and be seen to be independent, for their opinions, findings, conclusions, judgements and recommendations to be impartial and viewed as impartial by reasonable and informed third parties.

13. An internationally recognised basis for assessing the independence of a Supreme Audit Institution

[2] https://www.oecd.org/gov/external-audit-supreme-audit-institutions.htm
[3] See page 5: https://www.aph.gov.au/DocumentStore.ashx?id=0efc12dd-3c5e-433e-9ee0-d181874efdc5&subId=672300

is the International Organisation of Supreme Audit Institutions (INTOSAI) 2007 Mexico Declaration on SAI Independence (Mexico Declaration) (see Attachment B). The Mexico Declaration sets out eight core principles for SAI independence. The United Nations General Assembly has encouraged United Nations member states to apply the Mexico Declaration in a manner consistent with their national institutional structures through both Resolution 66/209 of 22 December 2011 (Attachment C) and 69/228 of 19 December 2014 (Attachment D). These resolutions were passed by consensus with no objections by the Australian Government. Given the recognition of the Mexico Declaration by the United Nations General Assembly and its member states, including Australia, the ANAO considers that comparison against the Mexico Declaration is the best method of assessing the independence of the Auditor-General for Australia.

14. The eight independence principles in the Mexico Declaration are as follows:

Principle 1: The existence of an appropriate and effective constitutional/statutory/legal framework and of de facto application provisions of this framework.
Principle 2: The independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties.
Principle 3: A sufficiently broad mandate and full discretion, in the discharge of SAI functions.
Principle 4: Unrestricted access to information.
Principle 5: The right and obligation to report on their work.
Principle 6: The freedom to decide the content and timing of audit reports and to publish and disseminate them.
Principle 7: The existence of effective follow-up mechanisms on SAI recommendations.
Principle 8: Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources.

15. The Mexico Declaration recognises that as state institutions, SAIs can never be absolutely independent and no SAI achieves good practice against all of the principles. Therefore the independence of an Auditor-General must be regularly reviewed, as operating and regulatory environments change, to ensure that the Auditor-General and SAI can continue to contribute to improved public sector performance.

16. Since the JCPAA's last major review of the Act, which concluded in 2010, Australian jurisdictions have been implementing the Mexico Declaration by increasing the independence of their Auditors-General. In 2009 the Victorian Auditor-General's Office commissioned a report into the independence of Australian and New Zealand Auditors-General which assessed those Auditors-General against the Mexico Declaration. An update to that report was made in 2013 and Australasian Council of Auditors-General (ACAG)[4] recently commissioned a further update that was released in March 2020 (the 2020 Independence Update which is in Attachment E).

17. The independence scores given in the 2020 Independence Update show that since the JCPAA's last major review of the Act, all jurisdictions have strengthened the frameworks that support the independence of their Auditors-General, except for New Zealand and Western Australia, which already had the most independent frameworks in 2009. In particular there has been very significant strengthening of the independence frameworks of the Auditors-General for the Australian Capital Territory, Queensland, South Australia and Victoria.

18. The 2020 Independence Update also shows that despite improvements in the 2011 Amendment Act (relating to the *Auditor-General Act 1997*), in the last decade the independence frameworks supporting the Auditor-General for Australia have not kept pace with other Australian and New

[4] The Australasian Council of Auditors-General (ACAG) is an association established by Auditors-General. For more than 60 years ACAG has facilitated the sharing of information and intelligence between Auditors-General in a time of increasing complexity and rapid change. ACAG is an unincorporated association governed by a Constitution.

Zealand Auditors-General. The overall independence scores in the 2020 Independence Update placed the Commonwealth's independence frameworks 7th in Australia and New Zealand, which is a decrease from 6th in 2013, which was a further decrease from 5th in 2009. Further, except for New South Wales and the Northern Territory, all other Australian and New Zealand jurisdictions either received a higher independence score than the Commonwealth, or have increased their independence score by a greater amount since the first report in 2009.

19. Many of the options for change presented in this submission are directed, fundamentally, to maintaining the effectiveness of the Auditor-General's independent reporting and assurance to Parliament. While the Act still works well, given the time which has passed since the previous review of the Act and the developments in better practice for the independence of Auditors-General being implemented by Australian jurisdictions, it is important to consider the operation of the Act and its implications for the independence of the role of the Auditor-General.

20. The nexus between the Auditor-General's independence and the provision of effective assurance to Parliament, and the need for periodic review of the Act to maintain audit independence, has long been recognised by the JCPAA and its predecessor, the Joint Committee of Public Accounts (JCPA). In JCPAA Report 386: Review of the Auditor–General Act 1997, the JCPAA Chair commented on the importance of keeping the Auditor-General's enabling legislation under review:

> In view of the Committee's significant legislative responsibilities to guard the independence of the Auditor-General it was considered timely to conduct a review of the Act. (JCPAA, 2001, p.iii).

21. In Report 346 Guarding the Independence of the Auditor-General, the JCPA highlighted that the Auditor-General 'works first and foremost for the Parliament' (JCPA Report 346, 1996, p.35) and that the title of 'independent officer of the Parliament':

> … is a symbol of the primary role of the Auditor-General who assists the Parliament in its role of scrutinising the exercise of authority and the expenditure of public funds by the Executive (JCPA, 1996, p.56).

22. In 1996, in the context of recommending that the Auditor-General be made an independent officer of the Parliament, the JCPA Chair commented that:

> It will be apparent in this report that the JCPA considers the independence of the Auditor-General to be absolutely fundamental to public accountability in Australia. If the Auditor-General is not properly resourced or does not have a legislative mandate to carry out an effective and broad scrutiny of the public sector, then Parliament itself is compromised in its ability to hold the Executive Government to account (JCPA, 1996, p.xii).

23. Similarly, in its two major reviews on the operation of the Act, the JCPAA has observed that 'The independence of the Auditor-General is fundamental to public accountability in Australia' (JCPAA report 419, 2010, p.50) and that:

> A fully functioning and successful parliamentary democracy owes much to the accountability mechanisms that are in place to provide transparency for scrutiny of its operations. The Auditor-General, as an independent officer of the Parliament, plays a key role in the accountability framework by supporting the Parliament in its scrutiny of executive government (JCPAA report 386, 2001, p.1).

24. The remainder of this submission follows the terms of reference for the inquiry.

1. The Auditor-General and ANAO's governance framework, including the independence of the Auditor-General and resourcing

Recommendations:
The ANAO recommends that the JCPAA consider:

1. whether the governance frameworks of the ANAO can be amended to better support ANAO independence and recognise the role of the Auditor-General as an independent officer of the Parliament such as by making the ANAO a Parliamentary Department;
2. if it has an appropriate role in setting the ANAO's budget to better implement principle 8 of the Mexico Declaration; and
3. whether the appointment mechanisms for the Auditor-General can be conducted in a way that increases the Auditor-General's independence.

The ANAO does not recommend any changes to the current approach of funding audits through appropriation from the Parliament.

25. Principle 1 of the Mexico Declaration recognises that the Auditor-General and ANAO should operate within an effective legal framework. An effective framework includes legislation that spells out, in detail, the extent of independence. Principle 1 is supported by principle 3, which sets out that the Auditor-General and ANAO should have full discretion in terms of fulfilling their functions. The Mexico Declaration provides further detail on the implementation of principle 3 including that:

> ... SAIs are free from direction or interference from the Legislature or the Executive in the
>
> - selection of audit issues;
> - planning, programming, conduct, reporting, and follow-up of their audits;
> - organization and management of their office[5] ...
>
> SAIs should ensure that their personnel do not develop too close a relationship with the entities they audit, so they remain objective and appear objective.

26. Therefore when considering the governance frameworks of the ANAO, the objective should be to set up the ANAO's governance in a manner that best supports its independence and recognises the role of the Auditor-General as an independent officer of the Parliament.

27. An issue that the JCPAA may wish to consider is that the ANAO currently forms part of the executive government, which means it is subject to the policies and processes of executive government which it is required to audit and this could represent an independence risk. Further, the ANAO is subject to direction making powers that apply to the executive government, such as those under the *Public Service Act 1999* (PS Act). The JCPAA may wish to consider if alternative models, which have been developed since the last review of the Act, would be more appropriate for the ANAO.

28. One option the JCPAA may wish to consider is whether it would be more appropriate for the ANAO to be a Parliamentary Department. After the enactment of the Act, the *Parliamentary Service Act 1999* (Plty Act) was introduced. The Explanatory Memorandum to the Parliamentary Service Bill 1999 explains that the Plty Act was intended to establish a separate and independent framework

[5] See page 9 of the Mexico Declaration

for the employment of staff in the Parliamentary Departments. The intention was that staff in the Parliamentary Departments would owe their allegiance to the Parliament instead of the Executive Government to ensure their independence.

29. When the Act was introduced it created the concept of an independent officer of the Parliament but the concept was not well established and was largely symbolic. After the last JCPAA review of the Act, the Plty Act was modified to establish the Parliamentary Budget Officer and Parliamentary Budget Office (PBO). The Parliamentary Budget Officer is an independent officer of the Parliament like the Auditor-General, and the PBO has been established as a Parliamentary Department. The Parliamentary Budget Officer has greater independence than the Secretaries of other Parliamentary Departments, for example the Officer is not subject to direction in relation to performance of their functions.[6]

30. The PBO model could be seen as a more developed governance model of an agency supporting an independent officer of the Parliament. If the ANAO was being established after the PBO, the governance model of the PBO may well have been considered as appropriate for the ANAO. Having the ANAO as a Parliamentary Department could reinforce the independence of the ANAO and further underline that its role is to support Parliamentary oversight of the executive government, by providing assurance to Parliament that government activities are carried out and accounted for consistently with Parliament's intentions. Making the Auditor-General the head of a Parliamentary Department would also reinforce the role of the Auditor-General as an independent officer of the Parliament.

31. While the independence benefits of being a Parliamentary Department largely relate to the appearance of independence, this is an important consideration as independence comprises both independence of mind and independence in appearance. Further, this option better aligns the governance framework of the ANAO with principle 8 of the Mexico Declaration, which requires managerial and administrative autonomy for the SAI. Under this model, ANAO staff would not clearly be members of the executive government. The ANAO has not identified any major practical issues with becoming a Parliamentary Department. For example there would be no practical impact on ANAO staff as the employment arrangements under the Public Service Act and Plty Act are similar and have transfer mechanisms built in, to enable staff mobility and development.

32. Such a change would be best implemented by retaining the Act and proposing minor amendments to that Act and the Plty Act to designate the ANAO as a Parliamentary Department. This would mean that ANAO staff would be employed under the Plty Act, rather than the PS Act. Like the Parliamentary Budget Officer, the Auditor-General should not be subject to direction in relation to the performance of Auditor-General functions.

33. The setting of the ANAO's budget is a key issue in ensuring the independence of the Auditor-General and the ANAO. The question arises as to whether the ANAO should move some audits to a cost recovery model.[7] The ANAO has previously undertaken internal consideration of this issue. The ANAO is currently mainly funded by appropriations. All mandatory financial statement audits and performance audits selected by the Auditor-General, are appropriation funded. This means that the focus of ANAO audits is auditing for the Parliament and if the ANAO was considered to have an audit client for these engagements, the client would be the JCPAA.

[6] See section 64P of the *Parliamentary Service Act 1999.*

[7] Cth, Senate Finance and Public Administration Legislation Committee Hansard 19 October 2020, https://www.aph.gov.au/-/media/Estimates/fpa/bud2021/hansard/Finance_and_Public_Administration_Legislation_Committee_-_Proof_-_19_October_2020.pdf?la=en&hash=88C8B8BAF919DC44FC9C1B93DCEBBD776E6F1953

34. The ANAO previously briefly conducted financial statement audits using a model where all audited entities pay the ANAO audit fees for their audits. This followed a government decision to adopt a user-pay regime in December 1990 but this was reversed following implementation of recommendations in JCPA 296: *The Auditor General: Ally of the People and Parliament; Reform of the Australian Audit Office* that the Parliament is the actual user:

> In keeping with the user pays principle, in future Parliament in future [sic] pay all audit fees. The practice of auditees being charged audit fees should cease.[8]

35. Other Australian audit offices operate on this model, such as the Audit Office of New South Wales. The potential benefit of a cost recovery model for financial statement audits is that it creates efficiency incentives for both audited entities and the ANAO. For example, audited entities that have processes to facilitate efficient audits would be incentivised by reduced audit fees. However, the ANAO considers that this potential benefit is outweighed by the independence risk, discussed below. In the case of performance audits, a cost recovery model would present practical difficulties as performance audit topics are selected by the Auditor-General with all but the largest entities audited on an irregular basis. This means entities could encounter difficulties in budgeting for performance audits.

36. The principal risk associated with entities paying the ANAO for audits is that the ANAO would be placed in a client relationship with those audited entities. This could change the incentives within the ANAO and the ANAO could be seen as serving the audited entities rather than the Parliament. To preserve both the reality and perception of audit independence, the ANAO supports the current approach of having the ANAO funded by appropriations from the Parliament and maintaining the focus of the ANAO on auditing for the Parliament.

37. Principle 8 of the Mexico Declaration relates to financial autonomy and recognises that SAIs should have necessary and reasonable human, material and monetary resources. The identified risk is that the executive government can reduce SAI effectiveness and independence by controlling the budget.

38. Currently the ANAO's draft estimates are prepared by the executive government and considered by the JCPAA in accordance with paragraph 8(1)(j) of the *Public Accounts and Audit Committee Act 1951* (PAAC Act). The Auditor-General is required by section 53 of the Act to provide the JCPAA with the ANAO's draft estimates when requested to do so by the JCPAA. The current system is effective when there are no changes to the ANAO's budget, but there are risks when there have been late budget changes such as in 2018. In 2018 the Auditor-General was advised by the Treasurer that he was not able to inform the JCPAA directly of the changes made to the ANAO's budget after the draft estimates were provided to the JCPAA.

39. As the ANAO serves the Parliament rather than the executive government, the JCPAA may wish to consider if it currently has an appropriately well-defined role in informing the executive of the Parliament's view of the resourcing requirements of the ANAO when the executive is considering the ANAO budget. For example, the JCPAA could have an explicit role in providing the executive its view on proposals by the ANAO for change to its budget, at the time the request for supplementation or the impact of a budget change is under consideration by the executive.

40. Principle 2 of the Mexico Declaration requires that SAI heads such as the Auditor-General are independent, including that they are appointed, reappointed or removed by a process that ensures

[8] Para. 5.34 of JCPA 296: *The Auditor General: Ally of the People and Parliament; Reform of the Australian Audit Office*
https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=reports/1989/1989_pp40report.htm

independence from the Executive.

41. The current process for appointing the Auditor-General appears to have worked well, other than a delay in the appointment process in 2015, necessitating the appointment of the then Auditor-General as acting Auditor-General under Schedule 1 (clause 7) of the Act when the Deputy-Auditor-General was unable to act. However, the JCPAA could consider whether the perception of an Auditor-General's independence would be enhanced if their selection and appointment is not through the executive government. Principle 2 of the Mexico Declaration notes that SAI Heads should be appointed, reappointed, or removed by a process that ensures their independence from the executive.

42. In accordance with Schedule 1 of the Act, the Auditor-General is appointed by the Governor-General on the recommendation of the Prime Minister. Under section 8A of the *Public Accounts and Audit Committee Act 1951* (PAAC Act), the JCPAA must approve or reject the proposed recommendation for appointment of the Auditor-General within 14 days after receiving it. This means that the executive government proposes appointment and the JCPAA only has the ability to exercise a veto of the candidate put forward.

43. The JCPAA may also wish to consider whether the current appointment process would be appropriate if the ANAO became a Parliamentary Department. If the ANAO was to become a Parliamentary Department, an appointment process similar to the Parliamentary Budget Officer could be adopted, where an Auditor-General candidate is recommend by the Presiding Officers and the JCPAA continues to have the power to approve or reject appointments under section 8A of the PAAC Act.

44. An alternative model would be to reverse the process whereby the JCPAA receives a recommendation for appointment and approves or rejects that recommendation. The JCPAA could instead manage the recruitment process and make a recommendation to the decision maker—being either the Prime Minister through the Governor-General for an executive agency, or the Presiding Officers for a Parliamentary Department. This change would bring the Commonwealth in line with the Australian Capital Territory, New Zealand, the Northern Territory and Victoria where the appointment of an Auditor-General is made on a recommendation of the legislature or a Parliamentary Committee.

2. The Auditor-General's information gathering powers and confidentiality of information

Recommendations:
The ANAO recommends that the JCPAA consider:

1. amendments to the Auditor-General Act or *Freedom of Information Act 1982* to provide additional protections from freedom of information for ANAO documents held by other entities; and
2. if the Act should clarify the Auditor-General's ability to disclose information to integrity agencies.

45. Principle 4 of the Mexico Declaration requires that SAIs have unrestricted access to information which means "adequate powers to obtain timely, unfettered, direct, and free access to all the necessary documents and information, for the proper discharge of their statutory responsibilities".

46. Unrestricted access to information means that the ANAO has the power to access all available information when undertaking analysis, to ensure that the ANAO and Parliament can be confident that its audit conclusions have a complete evidentiary basis. Unrestricted access to information

does not, however, mean that this information is necessarily made public in audit reports. The legislative and policy framework in which the Auditor-General and ANAO operate, including the confidentiality obligations in the Act, reinforce that the Auditor-General and ANAO are custodians of documents belonging to others. In practical terms, the ANAO collects a wide range of documents from audited entities and uses these documents as audit evidence. Final audit reports are tabled in the Parliament and are therefore publicly available. However, unless the Auditor-General decides that audit evidence should be included in a public report, all audit evidence is kept confidential. This means that audited entities can be confident that the ANAO will treat them fairly and will protect the confidentiality of specific items of audit evidence.

47. For these reasons, strong information-gathering powers balanced by confidentiality obligations, are essential to the role of the Auditor-General. This balance allows the Parliament to have a high level of trust in ANAO audit conclusions, even if the Parliament never sees information that leads to those conclusions (as it may not be included, or may only be referred to in an audit report).

48. The ANAO considers that the Act currently sets the right balance in these areas and that this balance should not be upset. The Auditor-General's information-gathering powers in Division 1 of Part 5 of the Act provide the Auditor-General with the level of access to information required by the Mexico Declaration and are balanced by appropriate safeguards in sections 36 and 37. Section 36 provides a strict confidentiality requirement to restrict the Auditor-General and ANAO staff from disclosing information obtained from audited entities, while section 37 prohibits the Auditor-General from including information in a public report that, in the opinion of the Auditor-General, would be contrary to the public interest.

49. In relation to confidentiality, the ANAO proposes that the JCPAA consider two improvements, being application of the *Freedom of Information Act 1982* (FOI Act) to documents provided to audited entities by the ANAO, and the Auditor-General's ability to disclose information to integrity agencies.

50. In relation to the Auditor-General's information gathering powers, the ANAO has not encountered any major practical issues and does not consider that any changes are required to Division 1 of Part 5 of the Act. As the Act currently provides for an appropriate balance between access to information and confidentiality it is important to maintain this balance. The ANAO notes that from time to time other legislation is developed that does not consider the role of the Auditor-General and would have the effect of reducing the Auditor-General's access to certain information. While the ANAO has to date been able to raise these issues before legislation is considered by Parliament, the ANAO should be involved early in the creation of any new information regimes.

51. For completeness, the ANAO notes that it has internally considered whether the Auditor-General's information-gathering powers should be expanded, due to audited entities making increased use of non-traditional means of communication such as social media and messaging applications. The issue has been that audited entities have not been keeping records of communications using these applications. The ANAO notes that the *Archives Act 1983* is not limited by the format of information and therefore government use of social media and messaging applications creates Australian Government Records.

52. At this time, there are no obvious weaknesses in the Act relating to non-traditional communications. Should issues emerge in the future, the appropriate response could be a policy one of having audited entities focus on complying with the Archives Act. Consideration could also be given to policy requirements for Commonwealth entities to limit their use of applications that do not easily allow records to be kept and accessed as required by the Archives Act. Therefore the ANAO does not consider that any amendments to the Act are currently required in this area.

53. As discussed above, the legislative and policy framework in which the Auditor-General and ANAO operate reinforces that the Auditor-General and ANAO are custodians of documents belonging to

others. The Act currently establishes an appropriate balance between the requirement for access to information expressed in principle 4 of the Mexico Declaration, and confidentiality requirements that allow audited entities to trust that they will be treated fairly and that the ANAO will protect the confidentiality of specific items of audit evidence.

54. A critical part of this framework is that the Auditor-General is listed as an exempt agency in Schedule 2 of the FOI Act. The Australian Information Commissioner has decided that this exemption also applies to the ANAO.[9] This exemption means that any FOI request for audit evidence must be directed to the audited entity that is considered to own the documents. The Auditor-General and ANAO cannot be used as a 'backdoor' for the release of documents belonging to an audited entity.

55. While the Auditor-General's exemption from the FOI Act protects the independence of the Auditor-General, there is an issue with how the FOI Act treats documents prepared by the ANAO, including documents prepared in an audit or assurance process, such as working papers containing ANAO analysis and draft audit reports. Auditing is an iterative process and in the course of an audit, auditors provide working papers, report preparation papers and draft audit reports to audited entities. These ANAO generated documents frequently contain information that should be kept confidential until the Auditor-General has made a final decision on the contents of the public audit report. For example, the ANAO may include detailed sensitive information that is intended to test a hypothesis with the audited entity and is not intended to be included in a final report. Another example is that a draft audit report might contain draft findings that are later removed, when further evidence is obtained or the Auditor-General has considered the audit findings.

56. Due to the FOI exemption applying to the Auditor-General and ANAO, ANAO documents cannot be subject to FOI requests directed to the ANAO. However, the situation is less clear when FOI requests are submitted to audited entities that hold ANAO documents.

57. ANAO documents are not clearly exempt documents because they are neither exempt documents under subsection 7(2A) of the FOI Act, nor are they documents clearly expressed in either the Act or FOI Act as being exempt documents in accordance with section 38 of the FOI Act. This means that the starting point is that any audited entity receiving an FOI request that relates to ANAO documents must deal with the request in the context of ordinary FOI Act exemptions. This applies even where the document contains information protected by section 36 of the Act to which criminal penalties apply to persons who use or disclose the information.

58. Particular exemptions are likely to protect ANAO documents held by other entities in most cases, such as the conditional exemption in s 47E of the FOI Act in relation to impact on the performance of audit functions. However, it would be clearer and the risk reduced if ANAO documents were protected by either subsection 7(2A) or section 38 of the FOI Act.

59. For this reason it is proposed that the JCPAA consider amendments to the Auditor-General Act or FOI Act to provide additional protections for ANAO documents held by other entities.

60. Subsection 36(2) of the Act specifically allows the Auditor-General to disclose particular information to the Commissioner of the Australian Federal Police (AFP), if the Auditor-General is of the opinion that the disclosure is in the public interest. The ANAO understands that subsection 36(2) is primarily intended for clarification purposes, as the Auditor-General could also disclose information to the AFP and integrity agencies under other provisions such as section 23 of the Act. However, subsection 36(2) may allow slightly broader disclosures, as it is based on a public interest test.

61. For the avoidance of doubt and to potentially allow broader disclosures under a public interest

[9] Brett Goyne and Australian National Audit Office [2015] AICmr 9 (23 January 2015) http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AICmr/2015/9.html

test, it is proposed that the JCPAA consider if the Auditor-General's ability to disclose confidential information to the AFP Commissioner should be expanded to reference other heads of integrity agencies, such as Australian Commissioner for Law Enforcement Integrity, Inspector-General of Intelligence and Security, the Commonwealth Director of Public Prosecutions and any future Commonwealth Integrity Commission.

3. The interaction of the Act and other relevant legislation

Recommendations:
The ANAO recommends that the JCPAA consider:

1. options for improvements in relation to the interaction of the Act with the PGPA Act to ensure that these acts interact in a manner that supports the Auditor-General's mandate, information access and ability to report on audit work; and
2. three aspects of parliamentary privilege, being the application of parliamentary privilege to the Auditor-General's information-gathering powers, application of parliamentary privilege to draft audit reports and working papers, and application of parliamentary privilege to audit reports published on the ANAO website.

3.a Interaction of the Act with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act)

62. Principles 3, 4 and 5 of the Mexico Declaration set out the importance of a broad SAI mandate, unrestricted access to information, and the right and obligation of an SAI to report on its work. These principles are impacted by provisions of the PGPA Act, which applies to the Auditor-General and ANAO.

63. The ANAO has identified two specific issues requiring consideration against this term of reference, being the duty to keep the responsible Minister and Finance Minister informed under section 19 of the PGPA Act and the ability for the Finance Minister to determine, by written instrument, modifications of Part 2-3 of the PGPA Act in relation to designated activities of an intelligence, security or listed law enforcement agency.

64. As well as these issues specifically relevant to the PGPA Act other issues under terms of reference 4 and 5 also relate to the PGPA Act. In particular these are the technical mandate issues from paragraph 106, performance statement audits from paragraph 117 and accessibility of responses to and implementation of audit recommendation from paragraph 126.

Whether the Executive should retain the ability to demand reports, documents and information of the ANAO's activities under section 19 of the PGPA Act

65. Under section 19 of the PGPA Act, the Auditor-General as accountable authority of the ANAO has a duty to keep the responsible Minister and Finance Minister informed. This includes the ability for the responsible Minister (the Prime Minister) and Finance Minister to require that the Auditor-General provide the Minister with any reports, documents and information required by the Minister. Section 54 of the Act places limits on this duty by specifying that a requirement from a Minister is in writing, is reported to the JCPAA and is publicly reported through the ANAO's annual report.

66. Section 19 of the PGPA Act and section 54 of the Act could represent an independence risk as it is not clear to what extent they override the confidentiality obligation in section 36 of the Act. This could allow the Prime Minister or Finance Minister to obtain information in respect of Auditor-General functions, including reports, documents or information relating to audits that are in progress. Although the ANAO has no records of this power being used since the introduction of the PGPA Act, there is an inherent risk of conflict of interest and dilution of audit independence

because the ANAO's primary activity is to scrutinise the executive.

67. Subsection 19(2) of the PGPA Act clarifies that for Courts and Tribunals, subsection 19(1) only applies to activities, reports, documents, information or notifications about matters of an administrative nature.[10] A similar protection could be extended to the Auditor-General and ANAO.

Whether it is appropriate for information to be withheld from the ANAO or information removed from ANAO reports under PGPA Act s 105D

68. Principle 6 of the Mexico Declaration includes the freedom to decide the content of audit reports and principle 5 relates to the right and obligation of an SAI to report on its work. These principles are impacted by section 105D of the PGPA Act, which allows the Finance Minister to determine by written instrument modifications of Part 2-3 and 3-2 of the PGPA Act in relation to designated activities of an intelligence, security or listed law enforcement agency.

69. Section 105D does not affect the ability of the Auditor-General to conduct performance audits. However, an instrument made under this section could control and limit the Auditor-General's power to conduct an annual financial statement audit, given that Parts 2-3 and 3-2 of the PGPA Act include the requirements to prepare annual financial statements, provide them to the Auditor-General and for the Auditor-General to audit them under sections 43 and 99 of the PGPA Act. While it has not yet occurred, the independence risk with section 105D is that a section 105D instrument could be used to require the removal of information from a public audit report without redactions to show that it was removed. The Parliament and any other reader of a public report which has had information removed under section 105D would not be aware that information has been removed. This contrasts with the operation of section 37 of the Auditor-General Act, which does not preclude redactions being shown in a public audit report.

70. Further, section 105D instruments are not legislative instruments and therefore do not attract formal Parliamentary scrutiny. In permitting modifications to Parts 2-3 and 3-2 of the PGPA Act, the Auditor-General's mandate is unnecessarily exposed to restriction without a legislative instrument or Parliamentary oversight.

71. Section 105D of the PGPA Act should not be a vehicle to curtail the Auditor-General's ability to audit all use or management of public resources, or to require the removal of information from a public audit report. The Auditor-General should have the ability to audit all Commonwealth use or management of public resources, in order to provide assurance to Parliament that public resources are used efficiently, effectively, economically and ethically, and with a view to accountability and transparency. While it is appropriate to place some limits on the Auditor-General's ability to publicly disclose certain types of sensitive information, the matter is adequately addressed by the safeguards in section 37 of the Act. For example, the Auditor-General is already restrained from disclosing information where the public interest in publishing information is outweighed by the potential public interest detriment that would be caused by publishing information that would affect the security, defence or international relations of the Commonwealth. Section 37 also provides appropriate safeguards that are not provided by section 105D of the PGPA Act. The Auditor-General can, for example, prepare a non-public report under subsection 37(5) and where information is removed from an audit report due to a certificate being issued by the Attorney-General under paragraph 37(1)(b), the Auditor-General must state that information has been omitted and the reason in accordance with subsection 37(4).

72. Therefore section 105D of the PGPA Act should not apply to divisions 4 and 7 of part 2-3 of the PGPA Act or Division 3 of part 3-2, as the Act already provides appropriate limits on the Auditor-

[10] Subsection 19(2) of the PGPA Act is shown in Annexure 1

General's ability to publicly report such information, through the operation of section 37.[11]

3.b Interaction of the Act with the *Public Accounts and Audit Committee Act 1951*

73. The interaction of the Act with the PAAC Act was raised in the context of Issue 1 (above), particularly in relation to the appointment of the Auditor-General and the setting of the ANAO's budget, and is also discussed in the context of Issue 6 (below) which relates to the audit priorities of the Parliament. The ANAO does not wish to raise any other specific concerns regarding the interaction of the two Acts.

3.c Interaction of the Act with the *Freedom of Information Act 1982*

74. The interaction of the Act with the FOI Act was raised in the context of Issue 2 (above).

3.d Interaction of the Act with the *Parliamentary Privileges Act 1987*

75. The ANAO proposes that the JCPAA consider three aspects of parliamentary privilege, being the application of parliamentary privilege to the Auditor-General's information-gathering powers, application of parliamentary privilege to draft audit reports and working papers, and application of parliamentary privilege to audit reports published on the ANAO website. The ANAO does not consider that there is any need for major legislative change but the JCPAA may wish to consider these issues as it has been of interest to parliamentarians. One potential option for change that could provide further clarity and would follow issues raised in previous JCPAA inquiries would be to include a drafting note in the Act to make it clear that parliamentary privilege applies to draft ANAO reports and working papers.

Application of parliamentary privilege to the Auditor-General's information-gathering powers

76. Consistent with past JCPAA inquiries, the ANAO considers that the Act currently strikes an appropriate balance in relation to the application of parliamentary privilege and the Auditor-General's information-gathering powers. This balance is consistent with principle 4 of the Mexico Declaration, which requires unrestricted access to information (achieved in Australia by providing the Auditor-General with unrestricted access to the information of the executive government that is required for audits of the executive government) whilst respecting the privileges of parliament, especially in relation to 'judicial proceedings' under the Act.

77. While the ANAO sees no need for legislative or other change in this area, the ANAO acknowledges that the JCPAA may wish to consider this issue, including issues recently raised by Senator Paterson. Senator Paterson first raised this issue in the Finance and Public Administration Legislation Committee on 21 October 2019 and again in a letter to the Auditor-General on 29 November 2019. The Auditor-General responded to Senator Paterson on 20 December, also providing that response to the JCPAA Chair on the same day. Senator Paterson asked about these issues again in Senate Estimates hearings on 19 October 2020 in particular about the merits of having a memorandum of understanding between the Parliament and the ANAO in relation to parliamentary privilege and the ANAO. Senator Paterson pointed out that the Australian Federal Police has such an arrangement and the Auditor-General responded that such an issue may be dealt with as part of the JCPAA's inquiry into the Act.[12]

78. Except for information prepared by executive government for the parliament, such as financial and

[11] The ANAO also raised this issue in its submission of 10 November 2017 to the September 2018 *Independent review into operation of the Public Governance, Performance and Accountability Act 2013 and Rule*.
[12] Cth, Senate Finance and Public Administration Legislation Committee Hansard 19 October 2020 https://www.aph.gov.au/-/media/Estimates/fpa/bud2021/hansard/Finance_and_Public_Administration_Legislation_Committee_-_Proof_-_19_October_2020.pdf?la=en&hash=88C8B8BAF919DC44FC9C1B93DCEBBD776E6F1953

performance statements, the ANAO has limited need to access information protected by parliamentary privilege, as the ANAO audits the executive government and does not audit parliamentarians or their staff. As discussed further below, financial statements are a clear exemption because the PGPA Act requires that they are prepared for the Parliament, audited by the Auditor-General and tabled in Parliament (and are therefore privileged).

79. Paragraph 30(1)(a) of the Act states that the information-gathering powers in sections 32 and 33 are limited by parliamentary privilege. The ANAO considers that there are good policy reasons for this restriction in relation to 'judicial proceedings' under the Act. For example, section 14 of the Parliamentary Privileges Act should override the Auditor-General's information-gathering powers, to ensure that the Auditor-General can only direct a member of a House of Parliament to attend a judicial proceeding under paragraph 32(1)(b) of the Act, at a time that does not interfere with attendance in Parliament. It would also be inappropriate for the Auditor-General to serve a notice to attend a judicial proceeding, on a member of a House of Parliament, in the parliamentary precincts.

80. These types of restrictions need not inhibit the Auditor-General's access to information of the executive government in a manner that would infringe the requirement of principle 4 of the Mexico Declaration for unrestricted access to information. The ANAO has considered two specific aspects of this, being the Auditor-General's ability to gather information from Ministers and their staff and the Auditor-General's access to information protected by parliamentary privilege.

81. The JCPAA has previously formed the view that Ministers and their staff should be required to provide information about the activities of the executive government to the Auditor-General. That is, Ministers and their staff cannot avoid providing information about the executive government to the Auditor-General, simply because Ministers are also members of the Parliament protected by parliamentary privilege. This approach recognises that the Auditor-General cannot audit the Parliament but can audit Ministers and their staff performing executive functions of the government. This issue was last considered in JCPAA Report 419: Inquiry into the Auditor-General Act 1997, when the JCPAA considered a risk that the Auditor-General's information-gathering powers may not extend to Ministers and their staff. The ANAO obtained legal advice on this issue from Professor Dennis Pearce[13], which has been provided to the JCPAA and which confirmed that: provided the Auditor-General is careful and strategic in the use of those powers, the Auditor-General would avoid infringing parliamentary privilege in applying the information-gathering powers to Ministers and their staff. On this basis the JCPAA agreed with the ANAO that it was not necessary to change the Act.[14]

82. As discussed above, the Auditor-General does not generally seek out parliamentary information, as the Auditor-General's role is to audit the executive government. However, in fulfilling the Auditor-General's mandate, the Auditor-General does require access to some information protected by parliamentary privilege that has not been created by the ANAO. The best example is the annual financial statements of non-corporate Commonwealth entities, which are prepared for the purposes of tabling an annual report in the Parliament. The ANAO understands that while annual financial statements are privileged, paragraph 30(1)(a) of the Act does not prohibit the Auditor-General from obtaining financial statements. If the Auditor-General was prohibited from receiving them, it would be impossible to conduct the annual financial statement audits that the Auditor-General is mandated to perform by the PGPA Act. Further, in assisting the JCPAA with its inquiries into Auditor-General reports under paragraph 8(1)(c) of the PAAC Act, it is inevitable that there is an exchange of information between the JCPAA and ANAO that is protected by parliamentary privilege. For example, the ANAO will consider submissions prepared by audited

[13] Advice of 26 June 2009 titled *Scope of powers under section 32 of the Auditor-General Act 1997,* which is available at https://www.aph.gov.au/~/media/wopapub/house/committee/jcpaa/agact/subs/sub3_6_pdf.ashx
[14] Para. 3.126 of JCPAA Report 419 *Inquiry into the Auditor-General Act 1997.*

entities specifically for provision to the JPCAA. If this information exchange was prohibited, the degree of assistance that the ANAO can provide to the JCPAA would be reduced. There are sound reasons for not restricting Auditor-General access to this information, which is essential if the Auditor-General is to perform mandated audit functions and assist the Parliament.

83. Another issue that the JCPAA may wish to consider is that the ANAO may incidentally obtain privileged information due to increasing use of electronic communications. For example, the ANAO often obtains access to entire email accounts during performance audits and then uses data analytic techniques to isolate the information relevant to an audit. There is a chance that information protected by parliamentary privilege could be mixed in with information relating to the executive government, especially where Ministerial staff undertaking both parliamentary and executive functions have access to an executive government email address from their Minister's department. As the Auditor-General's mandate does not extend to auditing this parliamentary information, the Auditor-General cannot audit or disclose this information, which would be protected by the confidentiality obligations in the Act. Further, the ANAO understands that incidental ANAO access to such information would not offend paragraph 30(1)(a) of the Parliamentary Privileges Act, but wishes to make the JCPAA aware that this could occur given modern information sharing and record keeping arrangements. The ANAO considers that the risk that some parliamentary information may possibly be mixed in with executive information should not be a reason to limit ANAO access to all records of the executive government, as there are established legal and administrative mechanisms to prevent disclosure of that material should the risk materialise.

84. Finally, in considering ANAO access to privileged information, it is relevant that the Auditor-General is an independent officer of the Parliament, whose reports are prepared for the Parliament and are therefore protected by parliamentary privilege. As the Auditor-General operates under the umbrella of parliamentary privilege, any privileged information received by the Auditor-General remains under that umbrella. This means that many of the concerns that would apply to the provision of privileged information to other parts of the executive government do not necessarily apply to the Auditor-General.

85. If the ANAO was a Parliamentary Department (a matter discussed under Issue 1 above) it would be more obvious to persons not familiar with the ANAO's role that the ANAO comes under the umbrella of parliamentary privilege.

Application of parliamentary privilege to ANAO draft reports and working papers

86. While there has been no doubt in recent years that completed audit reports are protected by Parliamentary privilege, in the past there has been doubt as to whether Parliamentary privilege applies to ANAO draft reports, extracts of draft reports or ANAO working papers. While no major legislative change is required in this area, the JCPAA may wish to consider clarifying this position, for example by recommending insertion of a note.

87. In both of its two major reviews of the Act, the JCPAA considered the interaction of the Act with the Parliamentary Privileges Act in relation to application of parliamentary privileges to ANAO documents. This resulted in the JCPAA making recommendations in both JCPAA Report 419: Inquiry into the Auditor-General Act 1997 and JCPAA Report 386: Review of the Auditor–General Act 1997, that the issue be considered in more detail by the Privileges Committee of both the Senate and the House of Representatives.

88. Following the release of JCPAA Report 419, the Senate Privileges Committee sought the views of the Clerk of the Senate. In Senate Standing Committee of Privileges Advice no. 46[15], the Clerk of

[15] Senate Standing Committee of Privileges Advice no. 46 Application of parliamentary privilege to Australian National Audit Office (ANAO)

the Senate, Rosemary Laing, agreed with the conclusion that working papers created by the Auditor-General fell within the expression 'proceedings in Parliament' in subsection 16(2) of the Parliamentary Privileges Act, as this was consistent with the long-standing view of the Senate and the legislative regime provided by the Parliamentary Privileges Act. Ms Laing referred to her predecessor, Mr Harry Evans, who had considered an earlier claim by the Auditor-General that certain ANAO working documents were protected by parliamentary privilege. Mr Evans had stated that:

> "I advised that this claim was well founded, because the only purpose of an ANAO audit is to make a report to the Parliament, and the whole process of reporting to the Parliament is part of proceedings in Parliament. This distinguishes ANAO from other bodies whose reports may be presented to Parliament only incidentally."

89. While Ms Laing considered that the doubt about privilege of ANAO draft reports and working papers was overstated, she understood the desire for certainty. Ms Laing's concern was that clarifying the application of Parliamentary privilege to the ANAO could "raise an implication that documents produced by other agencies in similar circumstances might not be covered by privilege." For this reason Ms Laing considered that any amendment of the Act should be framed as an amendment "for the avoidance of doubt."

90. The issue was also considered by the Solicitor-General who advised that parliamentary privilege applied to ANAO working papers prepared for an audit but did not extend to general correspondence between the ANAO and audited entities. Following the advice of the Clerk of the Senate and Solicitor-General, no changes were made to the Act, suggesting that such clear advice was considered sufficient to settle the issue from the perspective of the Parliament and executive government.

91. On 29 January 2018, Thales Australia Limited applied to the Federal Court of Australia seeking orders to restrain the publication of particular information in the proposed performance audit report on the Army's Protected Mobility Vehicle—Light. The key issue in this matter was parliamentary privilege, as Thales Australia was effectively seeking to restrain the tabling of an audit report in the Parliament. The Federal Court action was dismissed by consent on 9 July 2018, shortly after the issuance of the Attorney-General's certificate (under section 37 of the Act) on 28 June 2018. As the Federal Court action was dismissed, there is no court decision that has definitively determined the application of parliamentary privilege to ANAO draft reports, extracts of draft reports or working papers.

92. The combination of the court action and Thales Australia's application for a section 37 certificate delayed the tabling of the audit report into Army's Protected Mobility Vehicle—Light[16] by around 9 months.

93. While no major legislative change is required, the JCPAA may wish to consider if the risk of future litigation delaying tabling of an audit report in Parliament would be reduced, if the Act more clearly clarified the application of parliamentary privilege to ANAO draft reports, extracts of draft reports and working papers. Consistent with the advice of the Clerk of the Senate, the JCPAA may wish to ensure that such clarification is clear that it does not change the position advised by the Solicitor-General and Clerk of the Senate, but simply clarifies the position for the benefit of any future reader, including a Court.

94. If the ANAO was a Parliamentary Department (as discussed in the context of the first term of reference in this submission) audited entities and Courts would be more likely to consider that

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https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/~/link.aspx?_id=382133A609D84CBBA4C68CBD2D90D553&_z=z

[16] Auditor-General Report No. 6 2018–19

ANAO draft reports, extracts of draft reports or working papers are covered by parliamentary privilege.

Application of parliamentary privilege to audit reports published on the ANAO website

95. In order to ensure their accessibility, after tabling in both Houses of Parliament, audit reports are published on the ANAO website. The ANAO notes that it is not beyond doubt that these copies of audit reports are not protected by parliamentary privilege, even though they contain material tabled in the Parliament and are published at the behest of an independent officer of the Parliament.[17]

96. The JCPAA may wish to consider whether it should clarify the application of parliamentary privilege to reports published on the ANAO website, either through the Act or a separate order of the JCPAA or a House of Parliament.

4. The Auditor-General's capacity to initiate audits into, and examine the performance of all entities in the Australian Government sector.

Recommendations:
The ANAO recommends that the JCPAA consider:

1. reissuing a similar recommendation to its recommendation 2 in Report 419, to provide the Auditor-General with the mandate to initiate the full range of audits of Commonwealth entities including performance audits, performance statement audits and assurance reviews of GBEs;
2. resolving the technical mandate issues that limit the Auditor-General's ability to conduct audits of some bodies; and
3. implementation of its recommendation in JCPAA Report 469 to enable mandatory annual audits of performance statements by the Auditor-General, following the completion of the pilot of assurance audits of entities' annual performance statements.

4.a Performance audits of Government Business Enterprises (GBEs)

97. Principle 3 of the Mexico Declaration provides that SAIs should have a sufficiently broad mandate and full discretion in the discharge of their functions, and should be empowered to audit: the use of public monies by any recipient; and the economy, efficiency and effectiveness of government or public entities' operations.

98. Subsection 17(2) of the Act prevents the Auditor-General from conducting performance audits of Commonwealth authorities that are Government Business Enterprises (GBEs) and wholly owned Commonwealth companies that are GBEs, without a request from the JCPAA. Subsections 18A(2) and 19A(2) impose similar restrictions in relation to the Auditor-General conducting performance statement audits or assurance reviews of GBEs. Similarly, paragraph 18B(1)(a) provides that a request of the responsible Minister or JCPAA is required to conduct a performance audit of a Commonwealth partner that is part of, or controlled by, a State or Territory Government.

[17] See page 5 of Australian Government Solicitor Legal Briefing 95: https://www.ags.gov.au/sites/default/files/br95_1.pdf

99. However, subsections 17(3), 18A(3), 19A(3) and 18B(9) make it clear that nothing prevents the Auditor-General from asking the JCPAA or Minister to make a particular request.

100. While not ideal, the ANAO is not concerned about requiring approval to conduct performance audits of Commonwealth partners that are part of, or controlled by State or Territory Governments. Such audits are not routine and would necessarily involve a range of sensitivities if conducted by the ANAO.

101. To date the JCPAA has requested the Auditor-General to conduct performance audits of GBEs whenever the Auditor-General has asked the JCPAA to make such a request[18]. The Auditor-General acknowledges the support received from the JCPAA. However, the Auditor-General's mandate does not extend to performance auditing of GBEs and this is inconsistent with Principle 3 of the Mexico Declaration, in that the Auditor-General does not have discretion to conduct performance audits of GBEs without approval.

102. In its report 419, the JCPAA recommended that the Act be amended to provide the Auditor-General with the authority to initiate performance audits of Commonwealth controlled GBEs.[19] The Government did not agree to the recommendation and the mandate remains limited. The position adopted by previous governments, to explain why the Auditor-General does not have the authority to initiate such performance audits, concerned the special position of GBEs. This was reinforced by the Explanatory Memorandum to the Auditor-General Amendment Bill 2011, which broadly expressed that GBEs are subject to competitive marketing pressures and disciplines that do not otherwise apply to other Commonwealth bodies and, to the greatest extent possible, should be subject to the same audit arrangements as their competitors.

103. When the JCPAA considered this issue in report 419, it was noted that the nature of GBEs was changing. In the past, GBEs had been companies like Qantas, the Commonwealth Bank and Telstra that were subject to competitive market pressures. However, these were being replaced by GBEs with less market significance. Since the last review of the Act, this trend has continued, with GBEs now operating for a public purpose and receiving government funding to implement projects for public benefit in which the private sector would not invest. Therefore while modern GBEs[20] may be subject to competitive marketing pressures not faced by other government entities, they often operate in areas where the private sector is unwilling to invest.

104. The ANAO's experience is that performance audits of GBEs have been substantially similar to performance audits of other Commonwealth entities, and that audits of GBEs do not appear to have a greater impact on the GBE than similar performance audits conducted on other Commonwealth entities. The ANAO has also not encountered any unique issues or difficulties that

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[18] The most recent GBE performance audits where the Auditor-General has asked the JPCAA to request the audit are: Report No. 31 of 2019-20 *Management of Defence Housing Australia*; Report No. 16 of 2019-20 *Western Sydney Airport procurement activities*; Report No. 15 of 2019-20 *National Broadband Network Fixed Line Migration — Service Continuity and Complaints Management*; Report No. 1 of 2019-20 *Cyber resilience of government business enterprises and corporate Commonwealth entities*; Report No. 9 of 2018-19 *Procurement processes and management of probity by the Moorebank Intermodal Company*; Report No. 23 of 2017-18 *Delivery of the Moorebank Intermodal Terminal*; Report No. 16 of 2017-18 *Administration of the National Broadband Network Satellite Support Scheme*; Report No. 11 of 2017-18 *Australia Post's Efficiency of Delivering Reserved Letter Services* and Report No. 9 of 2017-18 *Management of the Pre-Construction Phase of the Inland Rail Programme*

[19] See recommendation 2 in paragraph 3.24 of JCPAA 419: *Inquiry into the Auditor-General Act 1997* available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jcpaa/agact/report/index

[20] Current GBEs are ASC Pty Ltd; Australian Naval Infrastructure Pty Ltd; Australian Rail Track Corporation Limited; Australia Postal Corporation; Defence Housing Australia; Moorebank Intermodal Company Limited; NBN Co Limited; Snowy Hydro Limited and WSA Co Ltd

have arisen in these performance audits by virtue of GBE status.

105. Noting that the JCPAA previously recommended that the Auditor-General be able to conduct own-motion performance audits of GBEs, and given the changing nature of GBEs, the JCPAA may wish to consider providing the Auditor-General with the mandate to initiate the full range of audits of Commonwealth entities, including performance audits, performance statement audits and assurance reviews of GBEs.

4.b Technical mandate issues

106. As discussed above, Principle 3 of the Mexico Declaration provides that SAIs should have a sufficiently broad mandate, including the power to: audit the use of public monies by any recipient; and the economy, efficiency and effectiveness of government or public entities' operations.

107. There are several technical gaps in the Auditor-General's mandate which result from either historical reasons, or the PGPA Act using definitions in accounting standards designed for the private sector that don't take into account some public sector nuances.

108. Where the use and management of public resources is not subject to the Auditor-General's mandate, there is an increased risk that the resources will be used without adequate independent scrutiny of their efficiency, effectiveness, economy or ethical use.

109. The two identified gaps in the Auditor-General's mandate outlined below are considered to be unintended exceptions, rather than arrangements deliberately created to fall outside the Auditor-General's mandate.

110. To avoid further gaps in the future, the Act could usefully include a purposive statement to express the Parliament's intention that the Auditor-General is the auditor of all entities that are entirely funded by appropriations or controlled by the Commonwealth.

The Norfolk Island Health and Residential Aged Care Service

111. The Norfolk Island Health and Residential Aged Care Service (NI Health) is a body corporate established by the Norfolk Island Health and *Residential Aged Care Service Act 1985* (the NI Health Service Act). NI Health is funded and controlled by the Commonwealth as represented by the Department of Infrastructure, Regional Development and Cities (Infrastructure). As NI Health was established under the laws of Norfolk Island, before self-government on Norfolk Island was abolished, it is not a corporate Commonwealth entity and falls outside of the Auditor-General's mandate. This is a technical exclusion simply based on the fact that the PGPA Act defines Commonwealth entities as a body corporate that is established by a law of the Commonwealth.

112. Infrastructure has engaged the Auditor-General to audit NI Health under section 20 of the Act but there is no legal obligation that NI Health must be audited by the Auditor-General even though it is funded entirely through Commonwealth appropriations.

113. The JCPAA should consider potential solutions to this gap in the Auditor-General's mandate.

Entities jointly controlled by corporate Commonwealth entities

114. Entities jointly controlled by corporate Commonwealth entities also fall outside of the Auditor-General's mandate. This is because section 8 of the PGPA Act defines a subsidiary of a corporate Commonwealth entity or Commonwealth company, as an entity that is controlled by that corporate Commonwealth entity or Commonwealth company. The PGPA Act states that control has the meaning in the accounting standard that applies for the purpose of deciding whether a company has to prepare consolidated financial statements under the *Corporations Act 2001* (this is *AASB 10 Consolidated Financial Statements* (AASB 10)).

115. The AASB 10 definition of "control" is based on the concept applicable to Corporations Act companies that all entities have a single ultimate parent company. This concept is not always

applicable to corporate Commonwealth entities. For example, the National DAB Licence Company Limited (National DAB) is owned in equal shares by two corporate Commonwealth entities being the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS). Under the AASB 10 definition of control, neither the ABC or SBS controls National DAB and therefore despite 100% of its shares being held by corporate Commonwealth entities, it is not a subsidiary of a corporate Commonwealth entity and falls outside the Auditor-General's mandate.

116. In addition to a purposive statement being added to the Act, consideration should be given to whether the PGPA Act should be amended to clarify this issue.

4.c Performance statement audits

117. ANAO audits have consistently highlighted that the information presented in the performance statements falls short of fully meeting the object of the PGPA Act — to provide the Parliament and the public with meaningful information[21]. While the Auditor-General may conduct a performance audit at any time, section 40 of the PGPA Act constrains the Auditor-General's independence in conducting an audit of the annual performance statements of Commonwealth entities unless requested by either the Minister for Finance or the responsible minister. In August 2019, the Minister for Finance requested that the Auditor-General conduct a pilot program of audits of annual performance statements in consultation with the JCPAA. The pilot is currently underway and is considering 2019-20 performance statements of 3 entities. Following the completion of the pilot of assurance audits of entities' annual performance statements, the JCPAA should reconsider implementation of its recommendation in JCPAA Report 469 to enable mandatory annual audits of performance statements by the Auditor-General.

5. Accessibility and transparency of reports and audit conclusions, including the operation of section 37 of the Act

Recommendations:
The ANAO recommends that the JCPAA consider:

1. implementation of its recommendations in JCPAA Report 478; and
2. if amendments should be made in relation to the accessibility of audit responses and the implementation of audit recommendations by audited entities.

5.a Section 37 issues

118. Principle 6 of the Mexico Declaration provides that SAIs should have the freedom to decide the content and timing of audit reports. Therefore the principle should be that in general the Auditor-General has complete control over the content of audit reports.

119. While section 37 allows the Attorney-General to omit information from an audit report, the ANAO considers that section 37 serves its intended purpose of recognising that the Auditor-General should report independently and publicly to the Parliament in a manner that serves the public interest. The primary benefit of section 37 is that it provides a safeguard against the Auditor-General's extensive information-gathering powers, by limiting disclosures that would be contrary to the public interest. However, section 37 does this in a way that does not undermine the independence of the Auditor-General, by having a public interest test, having the Auditor-General make most public interest decisions under paragraph 37(1)(a) and by keeping this power within

[21] Auditor-General Report No 17 of 2018-19 Implementation of the Annual Performance Statements Requirements 2017-18

the Act. Therefore the ANAO considers that the fundamental principles behind section 37 are appropriate but that it could be improved through the changes suggested in the Auditor-General's first submission (First Submission to Report 478) to the JCPAA Inquiry into the issuing of a certificate under section 37 of the Act 1997 (see JCPAA Report 478)[22].

Background to section 37

120. As explained in the First Submission to Report 478, the Act sets out a framework which recognises that it is in the public interest for the Auditor-General to report independently and publicly to the Parliament. The Act therefore permits the Auditor-General to disclose information, as audit evidence, which might not otherwise be made public. This is consistent with principle 6 of the Mexico Declaration, which relates to freedom to decide the content of audit reports. Section 37 of the Act provides a check on this presumption of public disclosure, by setting out the limited circumstances in which there may be a countervailing public interest in the non-disclosure of particular sensitive information. Under subsection 37(1) the Auditor-General must not include particular information in a public report if either, the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest, or the Attorney-General issues a certificate to the Auditor-General that in the opinion of the Attorney-General disclosure of the information would be contrary to the public interest (see Annexure 6 for the relevant extracts from Report 478).

121. Since the introduction of the Act, only one certificate has been issued by the Attorney-General under paragraph 37(1)(b) of the Act, on 28 June 2018 which required the ANAO to omit material from the performance audit report of Army's Protected Mobility Vehicle—Light. Further information about the circumstances surrounding this certificate are provided in the First Submission to Report 478. In summary, the Auditor-General was especially concerned that the certificate was not limited to prevent the disclosure of 'particular information' but required the omission of ANAO analysis and part of the audit conclusion. The requirement to omit part of the audit conclusion had the effect of limiting the scope of the audit, as that part of the conclusion that could not be reported was pervasive to the overall objective of the audit. The Auditor-General was therefore unable to provide a report to the Parliament which met the auditing standards under which ANAO audits are conducted. Accordingly, the Auditor-General included a disclaimer of conclusion in the public report to the effect that he was unable to table a report that contained a clear expression of his conclusion against the audit objective

122. This was the first report for which a section 37 certificate has been issued by the Attorney-General and the first performance audit an Auditor-General has tabled with a disclaimer of conclusion.

Potential amendments to section 37

123. The ANAO undertook detailed consideration of section 37 issues as part of assisting the JCPAA with its Inquiry into the issuing of a certificate under section 37 of the Auditor-General Act 1997. The Auditor-General's First Submission to Report 478 sets out the ANAO's position in relation to section 37. The recommendations of JCPAA Report 478 and key further issues for consideration are summarised below.

124. In JCPAA Report 478: Issuing of a Certificate under section 37 of the Act 1997, the JCPAA made various recommendations to consider changes to section 37 that could be implemented to provide the JCPAA with greater oversight of matters involving sensitive information. The ANAO supports the amendment of the Act to implement the issues covered by those JCPAA recommendations which can be implemented through that Act, which were as follows:

[22] The submission is available at: https://www.aph.gov.au/DocumentStore.ashx?id=356d5611-a14d-4ae5-9c86-6b0cae879bca&subId=660739

Recommendation 2

2.34 The Committee recommends:

- That detailed consideration be given by the Committee to the proposal that a statutory timeframe be legislated in which the Attorney-General is required to make a decision in regards to a section 37 application, and included in this legislative amendment is a mechanism for the Attorney-General to self-execute time extensions for this decision, subject to notification of the extension to the Auditor-General and the Joint Committee of Public Accounts and Audit …

Recommendation 3

2.35 The Committee recommends that the other issues raised by the Auditor-General in his submission to this inquiry be referred for further consideration as part of the next periodic review of the Act, including:

- A provision for a confidential report to be provided to at least the Chair of the Joint Committee of Public Accounts and Audit along with relevant Ministers;
- That the Joint Committee of Public Accounts and Audit be consulted on a confidential basis if a proposed certificate affects the audit conclusion or information not otherwise prohibited from disclosure;
- To consider amendments to distinguish between types of certificates to at least require confidential consultation with the JCPAA before certificates are issued for non-national security matters; and
- That substantive reasons be provided when a certificate is issued …

125. The ANAO notes that in recommendation 3 of JCPAA Report 478, the JCPAA recommended consideration of all of the issues raised by the Auditor-General and drew particular attention to the following additional issues raised in the Auditor-General's First Submission to Report 478:

(a) The Parliament, through the JCPAA, could be consulted on a confidential basis before any decision is made by the Executive to issue a certificate for any of the reasons not related to national security set out in subsections 37(2)(c) to 37(2)(f) of the Act.
(b) Requiring that any application for a certificate directed to the Executive Government be first referred to the Auditor-General to consider the public interest under paragraph 37(1)(a). The Executive would only consider issuing a certificate under subsection 37(1)(b) of the Act after the Auditor-General has had an opportunity to consider any application for the omission of information in a public report, under subsection 37(1)(a).
(c) Transparency and accountability to the Parliament would be further strengthened if the Auditor-General were required to provide any confidential report to the JCPAA, in addition to Ministers. This approach would also ensure unfettered reporting from the Auditor-General to the Parliament.

5.b Accessibility of responses to audit recommendations and implementation of recommendations

126. Principle 7 of the Mexico Declaration requires that there are effective follow-up mechanisms for SAI recommendations. Specifically that SAIs submit their reports to the Legislature for review and follow-up on specific recommendations for corrective action.

127. Section 19 of the Act requires the Auditor-General to consult audited entities by sending draft performance audit reports and seeking comments on its recommendations. There is no

requirement for audited entities to provide comments in a particular form and there are no concrete legislative provisions which can be relied on to enforce the implementation of audit recommendations.

128. This means that at times audited entities have provided responses that do not state whether they agree or disagree with the audit recommendations and therefore it is more difficult for the JCPAA and Parliament to hold those entities to account for their implementation of audit recommendations. The JCPAA noted in its report 472 Commonwealth Procurement – Second Report that "The Committee agrees with the Auditor-General that, although Commonwealth entities are not required to indicate agreement or disagreement in this regard, this is not a 'desirable precedent'." Consideration could be given to whether the Act should include requirements for accountable authorities to be required to clearly state whether they agree or disagree with particular audit recommendations.

129. Consideration could also be given to whether the Act or the PGPA Act should bind accountable authorities to implement any audit recommendations that they have agreed to. Alternatively, the wording of provisions in the PS Act could be changed so that the duties and responsibilities of secretaries and agency heads require an additional obligation to be bound to written commitments made to implement agreed recommendations of the Parliament and the ANAO.

6. The Audit Priorities of the Parliament

Recommendations:
The ANAO makes no recommendations in relation to the audit priorities of the Parliament.

130. Principle 3 of the Mexico Declaration requires full discretion in relation to SAI functions and this includes being free to set audit priorities and methodologies. The Mexico Declaration elaborates that this requires that SAIs are free from direction or interference from the Legislature or the Executive in the selection of audit issues. Consistent with Principle 3, the ANAO considers that the general principle in relation to audit priorities is that the Auditor-General should be free to determine which audits will be conducted, while taking account of the audit priorities of the Parliament. This approach balances the requirement for audit independence and the Parliament's legitimate interest in the ANAO's future audit work program.

131. This view was entertained by the JCPA in its inquiry into the reform of the Australian Audit Office in 1989.[23] The JCPA recommendations in the report of that inquiry resulted in the current arrangements for audit priorities set out in the Act.

132. Paragraph 8(1)(m) of the PAAC Act provides that a duty of the JCPAA is to determine the audit priorities of the Parliament and to advise the Auditor-General of those priorities. Under section 10 of the Act, the Auditor-General must have regard to the audit priorities of the Parliament. The practical process for implementing these requirements has involved the ANAO providing the JCPAA with a draft list of potential audit topics and the JCPAA having time to coordinate a Parliamentary response on the audit priorities of the Parliament.

133. As well as the formal process of the JCPAA setting the audit priorities of the Parliament, the Auditor-General receives requests directly from members of Parliament to conduct an audit. The Auditor-General considers all of these requests seriously and publishes these requests and the

[23] Para. 5.10 of JCPA 296: *The Auditor General: Ally of the People and Parliament; Reform of the Australian Audit Office*
https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=reports/1989/1989_pp40report.htm

Auditor-General's response on the ANAO website.[24] The Auditor-General's consideration of these requests tends to be within the following hierarchy:

- the audit priorities of the Parliament, as set by the JCPAA;
- motions of a House;
- recommendations of a parliamentary committee (other than JCPAA); and
- requests from individual members of Parliament.

134. The ANAO notes that of the 39 performance audit requests from the JCPAA for the 2017-18 annual audit work program, the ANAO put 30 of these (76.9 %) into the 2017-18 annual audit work program and commenced 15 (50%) of these by the end of 2017-18. For the 2018-19 annual audit work program, the JCPAA requested 40 audits, 32 (80%) of which the ANAO had either already commenced, or included in the 2018-19 annual audit work program and 19 of these (59.4%) resulted in audits commencing by the end of 2018-19. For the 2019-20 annual audit work program, the JCPAA requested 43 audits, 40 (93%) of which the ANAO had either already commenced, were covered by the scope of existing underway audits or were included in the 2019-20 annual audit work program and 18 of these (45%) resulted in audits commencing by the end of 2019-20.

135. The fact that the ANAO has been able to action so many of the requested audits, suggests that the process of the JCPAA determining the audit priorities of the Parliament and the Auditor-General having regard to them is working well. The ANAO does note that in 2020-21 it will action less of the 59 requested performance audits than it has previously been able to, as the JCPAA requested 59 performance audit topics, which exceeds the 42 performance audits that the ANAO will be able to conduct within its existing budget.

136. The ANAO considers that the current provisions in the PAAC Act and the Act provide an appropriate mechanism, which allows the Parliament to determine its audit priorities whilst retaining the independence of the Auditor-General. For this reason the ANAO does not consider that any amendments are required at this time.

7. The role and appointment of the Independent Auditor

Recommendations:
The ANAO is not and should not be involved in the role and appointment of the Independent Auditor and therefore makes no recommendations in relation to this term of reference.

137. Part 7 of the Act sets out the role of the Independent Auditor and Schedule 2 sets out the appointment process and conditions of appointment. Functionally, the Independent Auditor performs a similar role for the ANAO as the Auditor-General performs for the executive government. That is, the Independent Auditor conducts financial statement and performance audits of the ANAO.

138. The appointment by the Parliament of an Independent Auditor is an important part of the Commonwealth accountability and transparency regime. The ANAO considers that it is appropriate that the ANAO is audited so that the Parliament obtains independent assurance in relation to the operations of the Auditor-General and ANAO to at least the same standard to which the ANAO provides assurance about the executive. For example, as the role of the Independent Auditor includes conducting performance audits, the ANAO is subject to at least the same level of performance audit coverage as any Commonwealth entity of its size.

139. In the same way that the Mexico Declaration requires that the ANAO be independent of the

[24] https://www.anao.gov.au/work-program/requests

entities that it audits, the Independent Auditor should be independent from the Auditor-General and the ANAO. For this reason it is not appropriate that the ANAO have influence over, or express a view about, the arrangements for the role and appointment of the Independent Auditor.

8. Any related matters.

Recommendations:
The ANAO recommends that the JCPAA:

1. note the ANAO's operationalisation of subsections 17(4) and 18(2) of the Act and consider if it has any concerns with current processes; and
2. consider reducing the section 19 consultation period to a standard of 21 days, with the ability for the Auditor-General to set a different consultation period of not less than 14 days.

140. The ANAO wishes to raise two related matters. Firstly the JCPAA may wish to consider the ANAO's current performance audit process and operationalisation of subsection 17(4) and 18(2). The ANAO is not proposing the consideration of legislative change but that the JCPAA consider this process and confirm whether it is considered appropriate or whether the JCPAA would prefer the ANAO to handle these matters differently.

141. The ANAO also asks that JCPAA revisit the issue of the consultation period for proposed performance audit reports, which has been the subject of previous JCPAA recommendations.

8.a The ANAO's operationalisation of subsections 17(4) and 18(2) of the Act through embargoed performance audit reports.

142. As soon as is practicable after completing a performance audit report, or a general performance audit report, the Auditor-General is required under subsection 17(4) or 18(2), to table the report in each House of the Parliament and give a copy of the report to a range of interested persons, including responsible Ministers and accountable authorities.

143. The ANAO has operationalised this process by providing reports to interested persons as an "embargoed report" up to two days before the reports are tabled in the Parliament. The interested persons include the responsible Ministers and entity accountable authorities who are required to receive a copy under subsections 17(4) and 18(2). To facilitate the provision of information to these persons (for example, by preparing internal briefings), a number of other persons are copied into the emails, such as the Prime Minister's Chief of Staff, the Secretary of the Department of the Prime Minister and Cabinet (PM&C), other senior PM&C officials and a range of senior officials within the audited entity that are not the accountable authority. An embargoed report is a final report which is marked as being under embargo, and each recipient is requested to protect the confidentiality of the report until it is tabled in the Parliament.

144. The JCPAA may wish to consider whether it is appropriate for other interested persons to receive embargoed reports before they are provided to the Parliament. The ANAO notes that the Parliament suggested approval of this process in the Explanatory Memorandum to the Auditor-General Amendment Bill 2008.[25] In that Bill, the Parliament introduced a requirement for the Auditor-General to give a copy of performance audit reports to the Chief Executives of agencies being audited. This was explained as providing "an opportunity for the Chief Executive to consider

[25] See Item 5 of the Explanatory Memorandum on page 3 available at: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s705_ems_37fc4e13-a2ab-4acf-84e1-1688963c119f/upload_pdf/08237em.pdf;fileType=application%2Fpdf

the content of the report and for briefing to be prepared for the responsible Minister prior to tabling."

8.b Time period for consultation on proposed reports

145. Under section 19 of the Act, the Auditor-General must give a copy of a proposed performance audit report to the accountable authority or governing body of the entity or entities to which the audit relates. These entities then have 28 days to provide comments on the proposed report and these comments are included in the final audit report. This is an important step consistent with natural justice principles as it gives audited entities an opportunity to provide comments on a proposed performance audit report.

146. The ANAO has been required to provide 28 days for comments since the introduction of the equivalent of performance audits into the Audit Act in 1979.[26] The 28 day time period was set as an appropriate timeframe before computers were commonly available in Commonwealth entities, and before the advent of e-mail. The 28 day period therefore does not take into account the efficiencies of electronic document production, review and communication.

147. The 28 day requirement contributes to delaying audit process and can cause challenges when audits are time sensitive, such as when a performance audit is conducted in response to a Parliamentary or Ministerial request.

148. It is also relevant that the proposed report is not the audited entity's first opportunity to see the report and the ANAO has a practice of providing report preparation papers for early consultation before providing proposed reports. Report preparation papers are early drafts of audit reports, but generally with extensive additional detail that would not be included in a final audit report. Report preparation papers help audited entities to see where an audit is headed and the additional detail shows the background analysis that has led to audit conclusions. In practice much of the substantial feedback is provided by audited entities in response to the report preparation paper and the consultation on the proposed report generally furnishes a formal response that is included in the audit report. Therefore audited entities should already know what many of their comments are likely to be before receiving the proposed report. Further, the Auditor-General can agree to a request from an audited entity for a consultation period greater than 28 days and the Auditor-General generally agrees to such requests when there is an appropriate justification for doing so.

149. All Australian Auditors-General have a similar performance audit consultation requirement to section 19, although almost all have much shorter consultation periods. The midpoint appears to be a 14 day consultation period with the ACT, Victoria and WA having either a 14 day or 10 business days consultation period. Three jurisdictions have shorter periods or allow the Auditor-General to decide, with Tasmania having the shortest period of 3 business days. The longest consultation periods are the Commonwealth and NSW with 28 days and Queensland 21 days.

150. The JCPAA may wish to consider reducing the section 19 consultation period to a standard 21 calendar days, with provision for the Auditor-General to set a different consultation period of not less than 14 days, provided that the Auditor-General provides reasons in the performance audit report for why a different consultation period was required. Reasons could include urgency relating to a Parliamentary or Ministerial request for an audit to be conducted. A standard period of 21 days would still be the equal second longest consultation period in Australia, although the Auditor-General could reduce this to 14 days if there is good reason to do so.

[26] Efficiency audits (currently known as performance audits) were introduced into the *Audit Act 1901* by the Amendment Act No. 155 of 1979

ANNEXURE 1 - Examples of legislation relevant to issues raised in Attachment A

Example Legislation relevant to JCPAA Terms of Reference issue 1

Extract from the Public Finance and Audit Act 1983 (NSW) No 152 relevant to ToR 1e

28 Appointment etc

(1) The Auditor-General is to be appointed by the Governor for a term of 8 years and is not eligible for re-appointment, including re-appointment after the end of that term.

(2) Part 1 of Schedule 1 has effect.

Schedule 1 The Auditor-General - Part 1 Appointment and terms of office

2 Disabilities

(1) The Auditor-General shall not, during continuance in office as Auditor-General, be capable of being a member of the Executive Council or of the Parliament of the Commonwealth or of a State of the Commonwealth.

(2) The Auditor-General is not to hold any other position in the public sector during his or her term of office as Auditor-General or after the expiration of that term, except with the consent of the Governor.

Example Legislation relevant to JCPAA Terms of Reference issue 3

Extract from PGPA Act relevant to ToR 3.a

19 Duty to keep responsible Minister and Finance Minister informed

(2) However, for a Commonwealth entity that is related to a court or tribunal, subsection (1) applies only to activities, reports, documents, information or notifications about matters of an administrative nature.

ANNEXURE 2 - Extracts from JCPA REPORT 346: Guarding the Independence of the Auditor-General, October 1996[27]

Chapter 1

1.28 The Committee believes that the community expects the Parliament to hold the Executive to account for the use of public funds: disclosures of profligacy or fraud in the use of public monies, and incompetence or inefficiency in the management of public services, naturally provoke public outrage.

1.29 The Parliament, in turn, relies on the Auditor-General to provide expert independent advice to help it to fulfil its function of scrutinising Executive agencies. The Auditor-General performs a function which makes an important contribution to effective Parliamentary scrutiny but which the Parliament itself lacks the technical expertise and resources to exercise.

1.30 If the Parliament cannot ensure the independence of the Auditor-General from the Executive, and if the Executive can effectively inhibit the effective discharge of audit functions by starving the Auditor-General of resources, then the chain of public accountability is broken.

1.31 The Parliament - and, in particular, Parliamentary committees which examine the financial affairs and the performance of government agencies in detail - are becoming increasingly reliant on the Auditor-General to hold the Government of the day to account. The increasing complexity of arrangements for government service delivery - particularly contracting out of public services to private enterprise - and the devolution of financial management to line managers, are challenges to public accountability that can only be met with the assistance of a well equipped and fiercely independent Auditor-General.

Chapter 2

2.60 The principal purpose of the Auditor-General obtaining information is to enable complete and accurate reporting to the Parliament.

2.61 The Committee believes that the Auditor-General should have a discretion not to disclose certain classes of sensitive·information to the Parliament.

2.62 However, the Committee considers the Auditor- General must not be unduly restricted by the Executive from reporting audit information to the Parliament.

2.63 The President of the Senate, Senator [the] Hon Margaret Reid, drew the Committee's attention to provisions in the Auditor-General Bill 1994 that, if enacted, would have restricted the ability of the Parliament to seek advice from the Auditor-General.

2.64 Clause 34 of the Auditor-General Bill 1994 provided that the Auditor-General could not release 'sensitive' information in a report to be tabled in Parliament if:

- the Auditor-General was of the opinion that release of the information would be contrary to the public interest; or
- if the Attorney-General had issued a certificate to the Auditor-General stating that release of the information would be contrary to the public interest.

[27] JCPA Report 346 is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=reports/1996/1996_pp135.pdf

2.65 Clause 34 provided for the Auditor-General to prepare an unabridged report (including 'sensitive' information) but distribution of the unabridged report was restricted to the Ministry.

2.66 The Bill defined 'sensitive' information as:

> ... information whose disclosure would be contrary to the public interest for any of the following reasons:
>
> a) it would prejudice the security, defence or international relations of the Commonwealth;
>
> b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;
>
> c) it would prejudice relations between the Commonwealth and a State;
>
> d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or a State to the Commonwealth;
>
> e) it would prejudice the commercial interests of any body or person;
>
> f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

2.67 The Committee could not visualise any form of moderately interesting information about the activities of government that would not fit into one or other of the categories above. In the context of this inquiry into the independence of the Auditor-General, the Committee is not concerned about the Auditor-General's discretion to restrict publication of audit information that might fit into any of the above categories.

2.68 However, the Committee is most concerned that it was intended to give the Attorney-General a similarly wide discretion. Clause 34, if enacted, would have compromised the Auditor-General's freedom to report to Parliament by giving the Executive a broad discretion to suppress 'sensitive' audit information from publication.

2.69 More disturbingly, the Bill did not provide any check whatsoever on the exercise of the Attorney-General's power to issue a certificate. The Parliament was not even to be informed that the Attorney-General had given a direction to the Auditor-General, let alone the reasons for the direction.

2. 70 The Committee suggests that the inclusion of the same provision in the Auditor-General Bill 1996 would be inappropriate.

2.71 If the Auditor-General Bill is to contain a provision allowing the Executive discretion to prevent the disclosure of audit information to the Parliament, then the Committee considers that:

- the Executive should only have discretion to order the Auditor-General to suppress information where disclosure would be likely to prejudice national security; and

- there must be a mechanism allowing Parliament to monitor the exercise of any such Executive discretion, to guard against the abuse of the discretion.

2.72 The Committee believes that an Audit Committee [of the Parliament] could monitor the exercise of Executive discretion to withhold audit information from the Parliament. The Committee considers that if the Executive has a legislative discretion to order the Auditor-General to withhold information from the Parliament, then the Audit Committee should have the right to receive a copy

of any suppressed information or an unabridged copy of the audit report from which 'sensitive' information has been excluded (see Recommendation 9).

Chapter 4

Role of the Audit Committee in monitoring the exercise of Executive discretion

4.40 As a matter of broad principle, the Committee considers that the Audit Committee of Parliament should play a role in monitoring the exercise of any Executive direction to the Auditor-General.

4.41 In Chapter 2, the Committee indicated its serious concerns about the broad and unfettered discretion that would have been given to the Executive, had the Auditor-General Bill 1994 been enacted, to exclude sensitive audit information from reports to Parliament.

4.42 The Committee accepts that the Executive will reserve the right to suppress the publication of audit information that would prejudice national security. However, the Committee considers that there must be a mechanism for the Parliament to check the exercise of Executive discretion in relation to directions to the Auditor-General to suppress audit information from the Parliament.

4.43 Recommendation 9

The Auditor-General Bill should provide that:

(a) the Executive may only direct the Auditor-General to exclude sensitive audit information from a report to the Parliament where disclosure of the information would be likely to prejudice national security;

(b) where the Executive orders the Auditor-General to suppress sensitive audit information on the grounds of national security, the Audit Committee should receive an unabridged copy of the audit report and/or a copy of the suppressed information; and

(c) where sensitive information is excluded from an audit report, the fact of the exclusion and the reasons for the exclusion should be reported to the Parliament in the audit report.

4.44 In his submission to this inquiry, the Auditor-General, Mr Pat Barrett, drew the Committee's attention to Clause 51 of the Financial Management and Accountability Bill 1994 which would have required the Auditor-General to provide information to the Minister for Finance on request. The Department of Finance informed the Committee that a special exemption had been included in the Auditor-General Bill 1994 to provide that the Auditor-General only had to comply with a request for information under Clause 51 if the chief executives of at least two other agencies also had to comply with the same request. The Committee considers this to be an inadequate safeguard in a situation where the potential for damage to the Auditor-General's independence has been acknowledged.

4.45 The Committee considers that this is another potential circumstance where it would be appropriate for the Audit Committee to be informed of the reasons for an Executive direction.

4.46 The Committee considers that the Parliament, and in particular its Audit Committee, should be informed—by the Minister responsible—of any Executive direction to the Auditor-General.

4.47 In light of the fact that the Committee has not seen the Auditor-General Bill 1996, the Committee cannot comment on specific provisions. However, the Committee states its in-principle

position that any exercise of Executive discretion in relation to the Auditor-General should be reported to the Audit Committee.

4.48 Recommendation 10

The Auditor-General Bill should require that:

If the Executive gives any direction to the Auditor-General, then:

(a) such direction should be in writing and should be reported to Parliament by inclusion in a schedule in the Annual Report of the Auditor-General; and

(b) the Executive should immediately report the substance of the direction, and the reasons for the direction, to the Audit Committee of Parliament.

ANNEXURE 3 – Extracts from JCPAA REPORT 386: Review of the Auditor-General Act 1997, August 2001[28]

Parliamentary Privilege

2.25 The audit process relies on a free flow of information on a continuous basis. The Committee recognises that the provision of Parliamentary privilege is an essential element in protecting the office of the Auditor-General from legal action so that it may provide a fearless account of the activities of executive government.

2.26 This inquiry revealed that there is some uncertainty as to whether Parliamentary privilege applies to Auditor-General working papers and draft reports. Recent advice from the Solicitor-General and the AGS suggested that it would be proper to proceed on the basis that Parliamentary privilege applies to draft reports, and working papers for the purpose of preparing audit reports. The AGS stated that 'unless and until a court decides to the contrary, the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of proceedings in Parliament'.

2.27 It should be noted that the Solicitor-General's advice focused on the creation of working papers for the purpose of preparing audit reports. The Committee notes that the Solicitor-General's advice did not comment on the application of Parliamentary privilege to working papers which are not directly linked to the creation of an audit report. The AGS stated that 'other material which has been prepared independently of the performance audit report but which is referred to in the report would not necessarily attract Parliamentary privilege.'

2.28 The AGS suggested that legislative amendments could be enacted to clarify the application of Parliamentary privilege to ANAO draft reports and working papers. The ANAO had reservations that legislative amendment was warranted. The Committee, however, believes that further Parliamentary scrutiny of this matter is warranted.

2.29 The Committee, based on the evidence provided, accepts that until a court decides to the contrary, it is proper for the Auditor-General to proceed on the basis that Parliamentary privilege does apply to ANAO draft reports and working papers created for the purpose of preparing audit reports or financial statement audit reports. The legal advice provided to the Committee, however, did not comment on the application of Parliamentary privilege to extracts of draft reports. The significance of extracts of draft reports is examined in the next section.

2.30 The Committee considered that there may be justification for amending legislation to provide certainty that draft reports and extracts of draft reports would attract privilege when they are circulated in accordance with the Act. The principal reason for wanting to provide this certainty is to remove the opportunity for a person who might be adversely referred to in a draft report or extract of a draft report, to use the threat of litigation in an attempt to influence the final form of the Auditor-General's findings. The Committee also considered that there is an argument for giving the Auditor-General certainty as to their privileged status, since the Act requires that they be circulated. The Committee was not persuaded of any need for legislation to give greater clarity to the privileged status of working papers or draft reports and extracts of draft reports before they are circulated. The work of the Auditor-General is critical to the operation of good government and is a key accountability mechanism which supports the Parliament's scrutiny of Executive Government. Therefore, the Committee believes that it is appropriate that the Privileges Committees of both the Senate and the House of Representatives examine, in more detail, the application of Parliamentary privilege to ANAO draft reports, extract[s] of draft reports and working papers.

[28] JCPAA Report 386 is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/auditor-generalactreview/contents.htm

2.31 The work of the Auditor-General is critical to the operation of good government and is a key accountability mechanism which supports the Parliament's scrutiny of Executive Government. Therefore, the Committee believes that it is appropriate that the Privileges Committees of both the Senate and the House of Representatives examine, in more detail, the application of Parliamentary privilege to ANAO draft reports, extract[s] of draft reports and working papers.

2.32 The purpose of making the following recommendation, is to ensure that the Privileges Committees of both the Senate and the House of Representatives can participate in the debate about the application of Parliamentary privilege to ANAO draft reports, extracts of draft reports and working papers.

2.33 *Recommendation 1*

The Committee suggests that the Privileges Committees of both the Senate and the House of Representatives examine whether Australian National Audit Office draft reports and extracts of draft reports attract Parliamentary privilege, and if they do not, should they attract Parliamentary privilege.

Attorney-General's Certificate – section 37(1)(b)

4.7 A certificate issued by the Attorney-General is a safeguard to prevent the Auditor-General from publishing sensitive information in an audit report. If the Attorney-General considers that the information in a proposed audit report is too sensitive to be published, the Attorney-General can issue a certificate preventing the Auditor-General from publishing the information.

4.8 The Attorney-General's certificate is governed by section 37(2) of the Act and clarified in the Explanatory Memorandum (EM). The EM states where:

> … the Attorney-General has issued a certificate to the Auditor-General stating that disclosure would be contrary to the public interest, the Auditor-General must not include that information in a report which is to be tabled in either House of the Parliament.

4.9 The ANAO raised a concern during the inquiry that there is an inconsistency between section 37(1)(b) and section 37(4) of the Act. Section 37(1)(b) specifies that the Auditor-General must not include particular information in a public report if the Attorney-General has issued a certificate to the Auditor-General stating that disclosure of the information would be contrary to the public interest.

4.10 However, section 37(4), states that 'If the Auditor-General decides to omit particular information from a public report because the Attorney-General has issued a certificate…' The use of the words *If* and *decides* suggests that the final determination whether to include sensitive information in a report rests with the Auditor-General. To remove the uncertainty, the Auditor-General suggested that the Act be amended to make the power of the Attorney-General consistent with the intentions expressed in the EM.

4.11 In considering the Auditor-General's proposal, the Committee noted that the Victorian Auditor legislation gives 'unfettered discretionary authority to the Victorian Auditor-General on the reporting of any material (deemed to be specially confidential or otherwise) to Parliament.' In terms of comparison, the Victorian approach does not include any 'statutory prescription of the evaluative criteria to be applied by the Victorian Auditor-General to disclosure questions.' The Victorian legislation also does not have 'provision for the direct involvement of a representative of the Executive Government in decisions impacting on the reporting of audit findings.'

4.12 The Committee sought comment from the Auditor-General about the alternative approach applying to the Victorian Auditor-General. The Auditor-General stated:

> I have discussed this issue with the Victorian Auditor-General. I come back to basic principles, and the basic principle that I come up with is, in terms of government responsibility, the government has access to the widest possible range of information, from the Public Service and elsewhere, on what issues may impact on the question of secrecy and security—particularly the security aspect, which, in many instances, an Auditor-General, no matter what their background and experience, is not necessarily across.

4.13 Similarly, DoFA commented that the Attorney-General could advise the Auditor-General that something may in fact have a security implication.

4.14 From a practical perspective, the Auditor-General commented that even when examining sensitive issues 'we have been able to get the major issues across to the parliament without having to run the gauntlet of disclosing unnecessarily confidential and/or secure information.'

Accountability mechanisms for the Attorney-General

4.15 The Attorney-General is part of executive government. One of the roles of the Auditor-General is to review the activities of executive government. Therefore, the Attorney-General may have a conflict of interest, when determining that certain information should be restricted from public access under section 37(1)(b). In view of this, the Committee examined the constraints that apply to the Attorney-General.

4.16 The Committee received advice from the Australian Government Solicitor which indicated that the Attorney-General's Certificate was subject to review under the *Administrative Decisions (Judicial Review) Act 1977*. However, the Auditor-General stated that this processes would be 'unduly bureaucratic'. The Auditor-General concluded:

> … it would be a very brave Attorney-General and government if an Auditor-General put a fairly persuasive case in the public interest and we could not get satisfactory resolution.

4.17 The Auditor-General and DoFA noted that there are other mechanisms to question the appropriateness of the Attorney-General in issuing a certificate to prevent the Auditor-General from reporting. The Auditor-General stated:

> What the Auditor-General would do would be to simply say in the report that this element had been excised on the basis of a decision made by the Attorney-General. Then the Attorney-General would be subject to questioning in the House.

4.18 Similarly, DoFA stated:

> … the Auditor-General still has the right to advise parliament that in fact parts of his report or parts of the information have actually been deleted for reasons that by the Attorney-General has. The Attorney-General is then accountable to parliament directly for that decision making process.

Conclusions

4.19 The Auditor-General proposed that section 37(4) of the Act be amended to reflect the intentions expressed in the Explanatory Memorandum. The Committee agrees with this position.

4.20 The Committee acknowledges that the Victorian model provides the Victorian Auditor-General with more discretion and freedom to determine what to report. However, the Committee considers it appropriate to have the Attorney-General provide a safeguard given that, in the context of the Commonwealth Government's broader responsibilities, there may be exceptional circumstances relating to such issues as defence and national security which require the input of executive government.

4.21 The Committee notes that there are several accountability mechanisms to ensure that the Attorney-General's certificate is subject to scrutiny. These include the:

- Attorney-General's certificate being subject to the *Administrative Decisions (Judicial Review) Act 1977*;
- Attorney-General being subject to questions in Parliament; and
- the risk of public dissent if the Auditor-General put forth a strong case for reporting certain information, and the Attorney-General restricted publication.

4.22 In view of this, the Committee considers that the original intention of section 37(1)(b), as expressed in the EM, should be confirmed through amendment to section 37(4). The Auditor-General supports this amendment.

Recommendation 4

4.23 The Committee recommends that the Government amend section 37(4) of the Auditor-General Act 1997, to read:

> *[If]* ***When*** *the Auditor-General [decides to]* ***is required to*** *omit particular information from a public report because the Attorney-General has issued a certificate under paragraph (1)(b) in relation to the information, the Auditor-General must state in the report:*
>
> *(a) that information (which does not have to be identified) has been omitted from the report; and*
>
> *(b) the reason or reasons (in terms of subsection (2)) why the Attorney-General issued the certificate.*

ANNEXURE 4 – Extracts from JCPAA REPORT 419: Inquiry into the Auditor-General Act 1997, December 2010[29]

Parliamentary privilege

3.96 Parliamentary privilege refers to the special rights and immunities that belong to both Houses of Parliament, their committees and their Members. These rights are considered essential for the proper operation of the Parliament. These rights and immunities allow the Houses, their committees and Members to carry out their proper roles without obstruction or fear of prosecution.

3.97 In its 2001 review of the Act, the JCPAA reported:

> The tabling of a performance audit report or financial statements audit report in Parliament becomes part of 'proceedings in Parliament' and attracts the protection of Parliamentary privilege. The Auditor-General and ANAO officers cannot be found liable in respect of statement[s] contained in a tabled report.

3.98 However, there was a lack of clarity around whether ANAO draft reports, extracts of draft reports and working papers attract parliamentary privilege given these documents are not tabled and hence may not be considered 'proceedings in Parliament'.

3.99 The JCPAA recommended, therefore, that the Privileges Committee of both the Senate and the House of Representatives examine this question.

3.100 To date, this recommendation has not been taken up by either committee.

3.101 This issue was raised at the hearing on 19 October 2009. At that hearing, Mr Russell Coleman indicated that this is an issue that does 'come up...from time to time', legal advice having been sought in the past by the ANAO:

> There are often issues in relation to that as to whether that information subject to a discovery motion could be subject to parliamentary privilege. Some years ago, we did get advice from the then Solicitor-General. He at the time concluded that the relevant provisions of the relevant act ... should be read widely. Therefore, not only our reports but also effectively our working papers were subject to parliamentary privilege. I think he also concluded that it was not beyond doubt. The courts generally do not rule on this matter.

3.102 The point was also made at that hearing that while it is unclear whether privilege is attached to draft reports and extracts of draft report[s] there are penalties for not adhering to the relevant confidentiality requirements.

Committee comment

3.103 While there is no urgency attached to addressing this issue, the Committee reiterates the relevant comments its predecessor made in Report 386:

> The audit process relies on a free flow of information on a continuous basis ... the provision of Parliamentary privilege is an essential element in protecting the office of the Auditor-

[29] JCPAA Report 419 is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/agact/report.htm

General from legal action so that it may provide a fearless account of the activities of executive government.

3.104 The Committee again recommends that this issue be taken up by the Privileges Committees.

Recommendation 8

3.105 The Committee suggests that the Privileges Committee of both the Senate and the House of Representatives examine in more detail the application of parliamentary privilege to ANAO draft reports, extracts of draft reports and working papers, noting the Auditor-General's status as an 'independent officer of the Parliament'.

ANNEXURE 5 – Extracts from JCPAA REPORT 469: Commonwealth Performance Framework, December 2017[30]

Executive Summary

1.5 In the current inquiry, the Committee was strongly of the view that, to build on momentum in the implementation of the Commonwealth performance framework, the provisions of the PGPA Act need to be amended to require the Auditor-General to conduct annual audits of performance statements. Mandatory audits will provide the necessary incentive in the system to ensure the quality of that reporting is of the required standard. The Parliament and the Australian public would then receive the same assurance on non-financial performance reporting as on financial reporting, where an independent audit is mandatory.

1.6 A key Committee recommendation in this report is therefore that the Australian Government amend the PGPA Act to enable mandatory annual audits of performance statements by the Auditor-General, with Commonwealth entities to be consulted on the implementation timeframe.

1.7 The Committee acknowledges the Auditor-General's observation that moving towards a mandatory system similar to financial auditing will take time, to enable entities to build capability, and establish effective systems and processes. The Committee seeks to establish the framework, including through amendment of the relevant legislation, to enable this transition process to commence. The Committee believes that taking this action now is critical to implementing an effective Commonwealth performance framework for the future.

1.8 The Committee supports the Auditor-General's position that, in the interim, the Australian National Audit Office (ANAO) should continue to build on its audit methodology in this area such that the ANAO is positioned to be able to audit the annual performance statements of Commonwealth entities in a similar way to the audit of financial statements, when required to do so. Pending this requirement, the ANAO would continue to consider entities' implementation of the PGPA Act through its annual work program.

1.9 The Committee has also recommended action on the following matters, as set out in Chapters 2 and 3:

- that the ANAO consider conducting an audit of one complete Commonwealth performance reporting cycle
- that the four audited Commonwealth entities from Audit Report No. 54 report back to the Committee on how their senior management teams are working to further embed the corporate planning requirements in future cycles
- that the Australian Government amend the PGPA Rule and guidance to clarify the functions and charter of entity audit committees, to reflect their role in assurance of the appropriateness of performance reporting
- that the Department of Finance (Finance) Finance undertake a more comprehensive monitoring and evaluation program for the ongoing implementation of the Commonwealth performance framework
- that the Department of Education and Training conduct a review on whether non-financial performance reporting and evaluation requires strengthening as a training and research

[30] JCPAA Report 469 is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/CPF/Report_1

discipline, with relevant lead agencies to report back to the Committee on progress in developing capacity training in this area for Commonwealth entities

- that Finance report back to the Committee on its project management arrangements for implementation by Commonwealth entities of a more mature approach to risk management and 'joined up' government

1.10 The Independent Review of the PGPA Act, in progress at the time of the Committee tabling its report, will also cover a range of matters relevant to the Committee's inquiry. The Committee has made some recommendations for the attention of the review, but the Committee's primary focus will be to monitor implementation of the review recommendations by Finance and other agencies, noting also that the review's comprehensive terms of reference were developed in consultation with the JCPAA.

3. Annual Performance Statements

3.1 Chapter 3 sets out the findings of the Joint Committee of Public Accounts and Audit (JCPAA) inquiry into the Commonwealth performance framework, based on Audit Report No. 58 (2016-17), *Implementation of the Annual Performance Statements Requirements 2015-16*. The objective of the audit was to assess Commonwealth entity progress in implementing the annual performance statements requirement under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and PGPA Rule 2014.

3.2 The Australian Federal Police (AFP) and the Department of Agriculture and Water Resources (Agriculture) were the audited agencies. AFP and Agriculture were selected for the first audit of the annual performance statements as they demonstrated better practice that might assist other Commonwealth entities.

3.3 The Australian National Audit Office (ANAO) reviewed one purpose statement from these agencies' 2015-16 Annual Performance Statements and all performance criteria established to demonstrate progress against the following strategic objectives:

- AFP—Federal policing and national security
- Agriculture—Building successful primary industries

3.4 The audit scope also included reviewing the role of the Department of Finance (Finance) in administration of the annual performance statements requirements.

3.5 Chapter 3 comprises:

- Committee conclusions and recommendations
- Review of evidence

Committee conclusions and recommendations

3.6 The Committee makes a number of recommendations on related matters in this chapter and Chapter 2. The Independent Review of the PGPA Act, in progress at the time of the Committee tabling its report, will also cover a range of matters relevant to the Committee's inquiry. The Committee has made some recommendations for the attention of the review, but the Committee's primary focus will be to monitor implementation of the review recommendations by Finance and other agencies, noting also that the review's comprehensive terms of reference were developed in consultation with the JCPAA.

3.7 Improving the Commonwealth performance framework—and, in particular, the quality of performance information to focus on outcomes and strengthen accountability—has been a long-term focus of the JCPAA. A number of significant points related to this matter were discussed at the Committee's public hearing—in particular, the need:

- to use a mix of quantitative and qualitative performance information, along with relevant contextual information and analysis, to focus on entity impacts and outcomes (reflecting the move away from key performance indicators based solely on measuring inputs and outputs)
- for narrative utilised as part of qualitative performance information to be evidence-based, reliable and robust
- for further work on measurement methodologies for qualitative performance information, drawing on local and international research and practice in this area
- for further collaborative work on measuring and articulating performance outcomes, to build consistency and maximise reporting efficiencies
- for methodologically robust attribution of entity activities to outcomes that makes accountabilities clear

3.8 The Committee makes a number of recommendations below to address these matters.

3.9 The Committee notes the better practice across most areas demonstrated by the two audited agencies, AFP and Agriculture, in implementing the requirements for the first annual performance statements under the PGPA Act and PGPA Rule. These examples of better practice will assist other Commonwealth entities in implementing the requirements, and the Committee appreciates the commitment by AFP and Agriculture to continuous improvement. Both entities met the minimum preparation and publication requirements for the annual performance statements.

3.10 The Committee commends the ANAO for its development of an effective audit methodology to assess the relevance, reliability and completeness of performance information, and combined prior work by the ANAO and Finance in developing these criteria.

3.11 The Committee also commends Finance for its effective support to entities on the annual performance statements requirements through a range of activities, including Communities of Practice groups, 'Lessons learned' publications and updated guidance. These consultative mechanisms are fundamental to driving improvements under the Commonwealth performance framework. The Committee notes that Finance guidance is included in the terms of reference for the Independent Review of the PGPA Act.

3.12 The Commonwealth performance framework aims to ensure a clear read of performance information across corporate plans, Portfolio Budget Statements (PBSs), annual reports and annual performance statements, to improve line of sight between the use of public resources and the outcomes achieved by Commonwealth entities. The Committee notes the ANAO finding that, although the information published in corporate plans and PBSs provides a foundation for reporting in the annual performance statements, there is scope to improve how material is presented to achieve a clearer 'line of sight' across performance reporting documents.

Recommendation 5

3.13 The Committee recommends that the Australian National Audit Office consider conducting an audit of one complete Commonwealth performance reporting cycle, including whether a clear read of performance information has effectively been established, with consistent terminology and improved line of sight across performance reporting documentation.

3.14 The Committee heeds the timely warning of the Auditor-General that 'past experience demonstrates leaving external review to periodic performance audits is unlikely to drive the desired level of improvement. This in turn may result in the current reform agenda for performance reporting going the same way as previous ones, with modest improvement and ongoing frustration of the parliament with the quality of performance reporting by entities'.

3.15 The Committee is strongly of the view that, to build on momentum in the implementation of the Commonwealth performance framework, the provisions of the PGPA Act need to be amended to require the Auditor-General to conduct annual audits of performance statements. Mandatory audits will provide the necessary incentive in the system to ensure the quality of that reporting is of the required standard. The Parliament and the Australian public would then receive the same assurance on non-financial performance reporting as on financial reporting, where an independent audit is mandatory. (Mandatory audits will also address some of the matters raised above by the Committee.)

3.16 The Committee agrees that the growing maturity of Commonwealth entities' annual financial statements can be attributed to the regular external audit scrutiny applied by the ANAO, and that the introduction of mandatory annual audits of performance statements could be expected to lead to similar improvements in the maturity of entity performance statements.

3.17 The Committee supports the Auditor-General's position that, in the interim, the ANAO should continue to build on its audit methodology in this area such that the ANAO is positioned to be able to audit the annual performance statements of Commonwealth entities in a similar way to the audit of financial statements, when required to do so.8 Pending this requirement, the ANAO would continue to consider entities' implementation of the PGPA Act through its annual work program.

3.18 In terms of the requirements in moving to a mandatory system of annual audits of performance statements, the Committee acknowledges the Auditor-General's observation that to 'move towards a mandatory system similar to financial auditing would take a number of years, for a number of reasons':

> *Firstly, you would want to provide agencies with time to get the quality of their underlying systems and processes into place where an external audit review wouldn't just be, effectively, qualifying everything that happens because of lack of assurance. So I think an appropriate approach would be to implement such a framework in a gradual way in order to build up the underlying competence in the systems and processes across the sector in order to allow that to happen. I think there are obviously resourcing issues around moving to such a framework, which would need to have consideration as well, and probably ones around capability across the sector. All of those issues would mean that such a move shouldn't be implemented other than through a transition process.*

3.19 Noting the Committee's legislative oversight role, the ANAO may wish to consider providing the Committee with a briefing on resource implications and its broad preferred timeline for implementation of mandatory annual audits of annual performance statements.

3.20 In terms of building the skills base in this area, the Committee notes that financial reporting falls largely under one professional stream (accounting) but that non-financial performance reporting is more complex in this regard.

Recommendation 6

3.21 The Committee recommends that:

- the Australian Government amend the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), and the accompanying rules and guidance as required, as a matter of priority, to enable mandatory annual audits of performance statements by the Auditor-General of entities selected by the Auditor-General for review, with the Department of Finance (Finance) to report back to the Committee on progress on this matter, including consultation with the Auditor-General and Commonwealth entities on implementation timeframes and capacity building
- Finance note that the Committee also refers the above matter to the attention of the Independent Review of the PGPA Act

Recommendation 7

3.22 The Committee recommends that the Australian Public Service Commission (APSC), in consultation with the Department of Finance, the Australian National Audit Office and the Department of Education and Training, conduct a review on whether non-financial performance reporting and evaluation as a training and research discipline requires strengthening, with the APSC to report back to the Committee on progress on this matter.

Recommendation 8

3.23 The Committee recommends that the Department of Finance, in consultation with the Australian Public Service Commission and the Australian National Audit Office, jointly develop Commonwealth capacity training for non-financial performance reporting and evaluation, as a parallel for existing capacity training for accountancy/financial reporting, and report back to Committee on this matter.

3.24 The Committee regards audit committees as providing Commonwealth entities with an invaluable source of independent assurance and advice. The Committee emphasises that all entities need to give further consideration to the role and functions of their audit committee to ensure that the requirements of the Commonwealth performance framework are met, noting the ANAO's finding for Agriculture and AFP that neither audit committee could fully demonstrate compliance with the PGPA Rule in terms of reviewing the appropriateness of the annual performance statements. In its response to the ANAO report, Agriculture disagreed with this finding. However, the Committee notes that Agriculture has now agreed to implement the finding, following Finance's clarification of the audit committee role. The Committee welcomes Agriculture's concession on this matter. In addition, audit committee charters did not highlight that there must be a mix of relevant skills and experience, including in performance measurement and reporting, within the committee. The Committee emphasises that an audit committee's charter, and any certification by the audit committee discharging its performance reporting function, should reflect this requirement.

Recommendation 9

3.25 The Committee recommends that:

- the Australian Government amend, as necessary, the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), and accompanying rules and guidance, to clarify that the functions and charter of Commonwealth entity audit committees need to reflect their role in assurance of the appropriateness of performance reporting, as well as specifying that some members must have skills in performance measurement and reporting, with the Department of Finance (Finance) to report back to the Committee on progress on this matter
- Finance note that the Committee also refers the above matter to the attention of the Independent Review of the PGPA Act

3.26 The Committee notes that AFP and Agriculture had established or adapted existing systems and processes to meet the requirements of the PGPA Act and the PGPA Rule for the annual performance statements. The Committee also notes that the majority of results presented in the annual performance statements of AFP and Agriculture were supported by complete and accurate records, as required by the PGPA Act and PGPA Rule.

3.27 The ANAO made no recommendations in its audit but identified a range of matters that warranted further attention by AFP and Agriculture, as well as some key learnings of relevance to all Commonwealth entities in preparing their annual performance statements. Both entities provided an update on their implementation progress regarding the audit findings, and the Committee acknowledges their progress in this regard.

3.28 The Committee again commends the ANAO and Finance for their work in identifying comprehensive 'key learnings', 'opportunities for improvement' and 'lessons learnt' from each corporate plan and annual performance statements cycle, providing entities with an invaluable reference source. The Committee points to the usefulness of a consolidated reference to such material, to assist with further embedding these findings and drive continuous improvement.

ANNEXURE 6 – Extracts from JCPAA REPORT 478: Issuing of a Certificate under section 37 of the Auditor-General Act 1997, December 2010[31]

Committee conclusions and recommendations

2.4 Section 37 of the *Auditor-General Act 1997* (the Act) provides for a balance to be reached between the public interest in not disclosing information and the broader public interest that is served by the Auditor-General's reporting to the Parliament.

2.5 In considering the merits of these proposals, the Committee recommends these proposals be given detailed consideration on the next occasion when section 37 is utilised or on the occasion of the next review of the *Auditor-General Act*. The Committee notes that periodic reviews of the *Auditor-General Act* have taken place at approximately ten-year intervals and would expect the next review to take place during the course of the 46th Parliament.

2.6 The Committee notes that the Auditor-General agreed during the inquiry that section 37 of the Act permits the Attorney-General to issue a certificate, and confirmed that there is no suggestion that the Attorney-General's actions went beyond the powers available to him. The Attorney-General's Department described the power to issue a certificate under section 37(1)(b) as 'discretionary and is an independent decision for the Attorney-General'.

2.7 The Attorney-General's Department (AGD) submitted that section 37 operated as it was intended to when enacted. The Auditor-General argued that, 'in its first use of section 37, the Executive has adopted an unexpectedly broad interpretation of this provision'.

2.8 There was agreement, however, that 'particular information', as described in section 37, is not limited to information obtained during the course of an audit, but can also apply to ANAO analysis or conclusions.

2.9 A key issue for the ANAO was the implications for accountability and transparency to the Parliament when its analysis or conclusions cannot be disclosed. The Auditor-General was unable during the public hearings to respond to questions relating to the effectiveness and value for money of this procurement. The inability to provide assurance to the Parliament on whether the procurement was effective and achieved value for money is an issue of concern to the Committee.

2.10 While the Committee was kept informed by the Auditor-General of key events during the course of the audit, consideration should be given to how a higher level of assurance and greater transparency could be provided to the Parliament in relation to future audit reports where a certificate is issued.

2.11 A range of matters that might strengthen the operation of section 37 were raised by the Auditor-General for the Committee's consideration. Many of these proposals warrant consideration in future instances when section 37 is utilised.

2.12 The Committee agrees that it would be a matter of serious concern should section 37 be used by organisations in an attempt to simply prevent negative commentary, findings or conclusions from being publicly reported. The Committee notes in particular the Auditor-General's statement that 'the certificate creates uncertainty in all future audits of Defence acquisition and sustainment' and that 'any actual or perceived negative comment, will almost always be seen by the private partner as prejudicing their commercial interest'.

[31] JCPAA Report 478 is available at: https://aph.gov.au//Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/AuditReportNo6/Report_478

2.13 It emerged through the inquiry that no national security classified material was proposed to be published against the wishes of Defence. Instead the reason for issuing a certificate reliant on the 'Defence, security and international relations' head of power was because:

> *…the impact that the parts of the report over which [Defence] had concerns would have on that sovereign industrial capability and how that might relate to that broad concept of the security, defence and international relations of the Commonwealth and indeed the commercial interests of any party.*

2.14 Defence advised that around ten sovereign industrial capabilities have been designated. The Auditor-General stated that 'about half of the audits on our current-year program would be related to items that are within that category.

2.15 The Auditor-General advised that 'the work undertaken in this audit wasn't unusual…nor were the conclusions drawn from it.' The Committee would be extremely concerned if the application of section 37 as occurred in this instance established a precedent that prevents future robust scrutiny of defence acquisition or sustainment.

2.16 Auditor-General noted his concern that the issuing of a certificate in this instance 'establishes a precedent which, if repeated, may affect Parliament's scrutiny of the Executive by limiting the Auditor-General's independent public reporting to the Parliament on the procurement and sustainment activities of Commonwealth entities'.

2.17 The Committee notes, however, that the two agencies that have subsequently flagged potential use of section 37 have advised their reasons in correspondence to the Auditor-General. The audit process in one case is ongoing; the other was tabled in December 2018 with no certificate issued. Further, as of 21 November 2018, the Auditor-General advised that no additional notifications had been received.

2.18 That this is the first certificate issued since 1997 suggests that the ANAO and audited entities have effectively negotiated thus far what information is included or excluded from an audit report in almost all audit reports during that period.

2.19 Further, the Committee expects that, in reaching a decision upon any application under section 37, the Attorney-General would request advice from departments and the Auditor-General so as to ensure his or her decision is fully informed.

2.20 In addition to periodic reviews of the Act, the Committee recommends that the JCPAA initiate an inquiry on every future occasion that a section 37 certificate is issued. While any such inquiry may not necessarily go to the information omitted from the report, it provides an opportunity for ongoing parliamentary scrutiny of the exercise of this legislated authority.

2.21 Further, the Committee considers it would be helpful if the Auditor-General could provide any observations, as appropriate, on the operation of section during his regular appearances before this Committee and during Senate Estimates hearings.

2.22 While the Committee notes the Auditor-General's concern that the lack of a statutory timeframe impacts on his obligation to table a report as soon as practicable, the Committee considers it is essential that any consideration of a certificate be conducted as thoroughly as possible. At the same time, the Committee sees merit in a statutory timeframe that includes a formal mechanism so that the Attorney-General can report that any request is under active consideration.

2.23 A self-executing provision to obtain additional time should a timeframe be unable to be met would appear to be an appropriate means to address any concerns about a statutory obligation. This is a matter that the Committee of the 46th Parliament could consider.

2.24 In its 1996 report on the independence of the Auditor-General, the Committee stated that 'as a matter of broad principle, the Committee considers that the Audit Committee of Parliament should

play a role in monitoring the exercise of any Executive direction to the Auditor-General'. The Committee is of the view that a statutory notification requirement could be considered. This might be modelled on processes that already exist for other parliamentary committees.

2.25 A notification requirement would serve the dual purpose of ensuring the Parliament is informed and allowing the Joint Committee of Public Accounts and Audit (JCPAA) to monitor the process as it proceeds. Should the Committee have concerns, it would be open to it to write to the Attorney-General if further information is required.

2.26 The Committee has previously expressed the view that where confidential documents that the Committee considers relevant to an inquiry are required, they can be made on a restricted and in-camera basis. The Committee maintains that confidential documents and briefings can be provided to the Committee.

2.27 In previous reports, the Committee has commented upon parliamentary privilege in the context of the Auditor-General's responsibilities. For example, in its 2001 review of the operation of the Act, the Committee stated:

> *The audit process relies on a free flow of information on a continuous basis. The Committee recognises that the provision of Parliamentary privilege is an essential element in protecting the office of the Auditor-General from legal action so that it may provide a fearless account of the activities of executive government.*

2.28 In that review, the Committee examined the application of parliamentary privilege to the Auditor-General's working documents and commented:

> *The Committee, based on the evidence provided, accepts that until a court decides to the contrary, it is proper for the Auditor-General to proceed on the basis that Parliamentary privilege does apply to ANAO draft reports and working papers created for the purpose of prepared audit reports or financial statement audit reports.*

2.29 The Committee notes more recent advice from the Clerk of the Senate about the application of parliamentary privilege to the Auditor-General's working papers. In this advice, the Clerk stated that:

> *The question whether privilege applies to the Auditor-General's working papers hinges on the extended definition of 'proceedings in parliament' in s 16(2) of the Parliamentary Privileges Act 1987; the proceedings include 'acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House' [emphasis added]. This is a question of fact for courts to determine in deciding whether to allow material into evidence.*

2.30 The Clerk summarised previous advice provided to the Senate Standing Committee of Privileges on this issue and noted that the long-standing view that working papers 'created by the Auditor-General for the purposes of preparing audit reports or financial statement audit reports fall within the expression "proceedings in Parliament" as used in s16(2) of the Parliamentary Privileges Act' was consistent with the recent decisions of the Federal Court in *Carrigan v Cash* [2016] FCA 1466 and [2017] FCAFC 86.

2.31 The Clerk further noted that 'unless and until a court makes a decision in a relevant case, there will be a degree of uncertainty about the scope of privilege here'.

2.32 The Committee reaffirms the view of previous Committees in recognising that the provision of parliamentary privilege is an essential element in protecting the office of the Auditor-General. The Committee considers that the privileges committees should consider the matter in more detail, including the possibility of legislative amendments to seek to put the matter beyond doubt.

Recommendation 1

2.33 The Committee recommends that the Joint Committee of Public Accounts and Audit undertakes an inquiry on each occasion a certificate is issued under section 37 of the *Auditor-General Act.*

Recommendation 2

2.34 The Committee recommends:

- That detailed consideration be given by the Committee to the proposal that a statutory timeframe be legislated in which the Attorney-General is required to make a decision in regards to a section 37 application, and included in this legislative amendment is a mechanism for the Attorney-General to self-execute time extensions for this decision, subject to notification of the extension to the Auditor-General and the Joint Committee of Public Accounts and Audit; and
- That this proposal be examined on the next occasion a certificate is issued under section 37 of the *Auditor-General Act* or at the next review of the *Auditor-General Act*, whichever is the earlier.

Recommendation 3

2.35 The Committee recommends that the other issues raised by the Auditor-General in his submission to this inquiry be referred for further consideration as part of the next periodic review of the *Auditor-General Act*, including:

- A provision for a confidential report to be provided to at least the Chair of the Joint Committee of Public Accounts and Audit along with relevant Ministers;
- That the Joint Committee of Public Accounts and Audit be consulted on a confidential basis if a proposed certificate affects the audit conclusion or information not otherwise prohibited from disclosure;
- To consider amendments to distinguish between types of certificates to at least require confidential consultation with the Joint Committee of Public Accounts and Audit before certificates are issued for non-national security matters; and
- That substantive reasons be provided when a certificate is issued.

Recommendation 4

2.36 The Committee recommends the referral to the privileges committees of both the Senate and the House of Representatives the question of whether the draft reports and working papers of the Auditor-General are subject to parliamentary privilege.

Operation of section 37 of the Auditor-General Act 1997

2.56 The Auditor-General 'regularly' considers matters relating to commercial interest, security interest or cabinet-in-confidence interest when forming an opinion on whether disclosure of information would be contrary to the public interest. The Auditor-General noted that:

> *We regularly make decisions along the way to exclude information, which are, effectively section 37 decisions made collaboratively through a process. That probably happens on 60 per cent of Defence audits, something like that, and on a lot of other audits as well.*

2.57 The power to issue a certificate under section 37(1)(b) is a 'discretionary' and 'independent' decision for the Attorney-General.

2.58 The Attorney-General's Department noted that section 37(1)(b) requires a balance to be achieved between two types of public interest:

…the specific public interest in not publishing particular information for the reasons set out in section 37(2), in a context where other parts of the Auditor-General Act 1997 recognise the general public interest in the Auditor-General disclosing performance audit findings and material which the Auditor-General considers is relevant to those findings.

2.59 The Auditor-General argued that the operation of section 37 'lacks transparency':

Section 37 does not include any process or timeframe for the Executive's consideration of applications for a certificate, there is no requirement to consult with the Parliament or the Auditor-General in the Executive's deliberations, and there is no process for Parliamentary scrutiny of the certification process other than strictly formal reporting to the Parliament as provided for under subsection 37(4) of the Act.

2.60 The Auditor-General put forward several suggestions for changes to the operation of section 37, including:

- consultation with the JCPAA prior to the issuing of certificate in the following circumstances:
    - prior to a decision to issue a certificate for any of the reasons in paragraphs 37(2)(c) to 37(2)(e),
    - where a certificate affects the Auditor-General's audit conclusion or requires the omission of information which is not otherwise prohibited from public disclosure;
- a requirement to inform the Parliament and the Auditor-General of all applications for a certificate under section 37;
- on receipt of any application, a requirement to ask the Auditor-General to first consider the public interest under paragraph 37(1)(a) and to advise the Parliament, the applicant and the Executive of the outcome;
- placing a time limit on the Attorney-General's decision making;
- a requirement to provide substantive reasons to the JCPAA for the issuing a certificate;
- where a confidential report is prepared, requiring the Auditor-General to provide the report to the JCPAA in addition to the Ministers listed in subsection 37(5); and
- confidential briefings for the JCPAA on information relevant to any inquiry.

2.61 Evidence received by the Committee on these matters is discussed further below.

ANNEXURE 7 – Extracts from REPORT 296: The Auditor General: Ally of the People and Parliament; Reform of the Australian Audit Office, April 1989[32]

Chapter 5 INDEPENDENCE AND ACCOUNTABILITY

5.1 It is meaningful to discuss the independence of the Australian Audit Office in terms of the independence of the Auditor-General. The independence of the Auditor-General arises from the legislative basis in Part II of the Audit Act 1901 for the creation of the position.

5.2 The status and importance of the role is suggested by the method of appointment, which is made by the Governor-General on the advice of the Prime Minister, (section 3). The Auditor-General cannot be a member of the Executive Council of the Commonwealth or any State or a member of any House of Parliament. The appointment is until the incumbent reaches the age of sixty-five years. He can be removed from office in two ways, as follows, (section 7):

simultaneous requests from both Houses of Parliament; and

suspension by the Governor-General for incompetence or misbehaviour on the advice of the appropriate minister.

5.3 The Auditor-General has the authority to appoint staff to inspect, examine and audit any accounts, records or stores required by the Audit Act 1901, (section 11). This provision enables the Auditor-General to create an Office for the exercise of his duties. It is his responsibility to draw to the attention of the appropriate minister such matters arising from the exercise of his powers which he deems sufficiently important. Where the matter involves an efficiency audit, he must also draw the matter to the attention of the Prime Minister and the minister administering the department where the audit is conducted, (section 12).

5.4 His powers are extensive, in that he may request persons to appear before him and to produce all accounts and records necessary for an audit, (section 13). Also, he may search and take extracts from any records in or in any public office. He or his staff is entitled to have access to all accounts and records of public moneys, (section 14).

5.5 The Auditor-General determines the nature and scope of audit activity appropriate for the exercise of his responsibilities. In other words, he determines audit standards, methodologies, and the extent of audit coverage necessary to form an opinion.

5.6 The Auditor-General has the authority of a secretary of a government department under the Public Service Act in relation to staff appointments. Also, as in government departments, the Department of Industrial Relations and the Public Service Commission exercise statutory functions in personnel management in the AAO, including setting of terms and conditions of employment and salaries.

5.7 Another important similarity with government departments is that the AAO's annual resource estimates are scrutinised and negotiated with the Department of Finance. The AAO's estimates are included with those of the Minister for Finance's portfolio. For administrative purposes other than budgetary arrangements the AAO is attached to the Prime Minister's portfolio.

[32] JCPA Report 296 is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=reports/1989/1989_pp40report.htm

The Prime Minister's department is responsible for administering sections 3-9A of the Audit Act relating to the Auditor-General's appointment.

5.8 The Auditor-General reports to Parliament on his audit of the receipt and expenditure of public moneys by the executive arm of government. He audits government moneys according to legislation and regulations determined by Parliament which is his client. Government departments and other bodies which he audits, and which are called auditees, are not his clients.

5.9 In order that the Auditor-General's audits and reports be accepted as valid, it is essential that the Auditor-General should not be subject nor be suspected of being subject to pressure from the executive or legislative arms of government to report in one way or another. In other words, his independence is fundamental to the objectivity of his judgements and acceptance of the latter. Without statutory independence there could be doubts over whether he impartially exercised his functions.

International Views on Independence

5.10 Concerning the independence of national audit office, the International Organisation Institutions, INTOSAI, argued that:

> complete independence is neither possible nor desirable, but an adequate degree of independence from the legislature and executive is essential for conduct of the audit and to the latter's credibility;
>
> independence from political influence is essential for impartial audits. The national audit office should not be responsive to particular political interests;
>
> the national audit office must be free to set its own audit priorities and methodologies;
>
> the legislature can set minimum reporting requirements, but the national audit office should have much discretion on the content and timing of reports;
>
> the national audit office assists the executive by drawing attention to deficiencies in administration and recommending improvements; and
>
> maintenance of the auditor's independence does not preclude the executive from requesting particular audits.

5.11 The United Nations stated the following in regard to independence of the national audit office:

> independence is the most crucially important auditing standard;
>
> audit objectivity is not possible without independence;
>
> government is an interested party in auditing. Therefore, there are incentives for biases in presentation of information;
>
> independence of the auditor is maintained by recourse to auditing standards and to a code of professional ethics; and
>
> ultimately, the auditor's independence depends on the environment for accountability.

INTOSAI-P 10

Mexico Declaration on SAI Independence

INTOSAI principles are issued by the International Organisation of Supreme Audit Institutions, INTOSAI, as part of the INTOSAI Framework of Professional Pronouncements. For more information visit www.issai.org

INTOSAI

INTOSAI

INTOSAI, 2019

1) Formerly known as ISSAI 10: Mexico Declaration on SAI Independence
2) Declaration endorsed in 2007
3) Preamble amended in 2018
4) With the establishment of the Intosai Framework of Professional Pronouncements (IFPP), relabeled as INTOSAI-P 10 with editorial changes in 2019

INTOSAI-P 10 is available in all INTOSAI official languages: Arabic, English, French, German and Spanish

FOREWORD

The 1977 Lima Declaration was the first INTOSAI document to comprehensively set out the importance of Supreme Audit Institution (SAI) independence, by reminding INTOSAI members that SAIs can only be objective and effective if they are independent from the audited entity and are protected from outside influence. The course was set, and, in the years that followed, the subject of independence would come up at a variety of INTOSAI events.

At the 44th meeting of the INTOSAI Governing Board, in Montevideo, Uruguay, a task force was established and was originally headed by my predecessor. The mandate of the task force was to examine the independence of SAIs and recommend ways to bring about realistic improvements in this area.

The task force on SAI independence completed its work and issued its final report on 31 March 2001. In its report, the task force presented eight core principles for dealing with SAI independence. In the report's preamble, the chair reminded SAIs that they play an important role in holding governments to account for the use of public funds and that they can provide independent views on the quality of public sector management. As the current chair, I reiterate that this is still the case, even more so today given the increasing public demand for oversight and accountability.

One of the task force's recommendations was that a subcommittee be established to promote SAI independence and to develop guidance for SAIs. In 2001, I became chair of this subcommittee, which was made up of the SAIs that were members of the task force: Austria, Antigua and Barbuda, Cameroon, Egypt, Portugal, Saudi Arabia, Sweden, Tonga, and Uruguay. The first thing the subcommittee was asked to do was take stock of the parameters around independence, while considering the different regimes and legal frameworks.

From 2001 to 2004, the subcommittee worked on application provisions (examples) that would illustrate what was meant by SAI independence. A survey was conducted to assess the degree of compliance by SAIs with the eight core principles. At the UN/INTOSAI seminar in Vienna, Austria, in 2004, the many heads of SAIs who were present discussed the independence of SAIs in detail.

Since 2004, the subcommittee has worked on a charter on SAI independence and has developed guidelines for implementing the eight core principles, taking

into account the different types of SAIs. Extensive consultation with SAIs greatly contributed to the quality of the documents.

I have the honour of reporting that the subcommittee has completed its work. I wish to thank the members of the subcommittee, for their effort and dedication, as well as all SAIs that have contributed to our work.

Sheila Fraser, FCA

Chair

Subcommittee on Independence

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MEXICO DECLARATION ON SAI INDEPENDENCE

PREAMBLE

The United Nations General Assembly (UNGA) in its Resolutions 66/209 of 2011 and 69/228 of 2014 has recognized the important role of supreme audit institutions (SAIs) in promoting the efficiency, accountability, effectiveness and transparency of public administration, which is conducive to the achievement of national development objectives and priorities as well as the internationally agreed development goals.

In the Addis Ababa Action Agenda on Financing for Development, endorsed by UNGA Resolution 69/313 from 2015, Member States commit themselves to strengthening national control mechanisms, such as supreme audit institutions, and to fostering the mobilization and effective use of domestic public resources.

This pledge derives from the clear acknowledgement in Resolution 69/228 of the role SAIs have in fostering governmental accountability for the use of resources and their performance in achieving development goals. To ensure that SAIs are able to deliver on this aspiration, the document encourages Member States to give due consideration to the independence and capacity building of SAIs in a manner consistent with their national institutional structures.

Aware that independence should remain an overarching goal of all SAIs, the resolutions also take note and encourage Member States to apply in a manner consistent with their national institutional structures, the Lima Declaration of Guidelines on Auditing Precepts of 1977 and the Mexico Declaration on Supreme Audit Institutions Independence of 2007, which follows:

From the XIX Congress of the International Organization of Supreme Audit Institutions (INTOSAI) meeting in Mexico:

Whereas the orderly and efficient use of public funds and resources constitutes one of the essential prerequisites for the proper handling of public finances and the effectiveness of the decisions of the responsible authorities.

Whereas the INTOSAI-P 1 - The Lima Declaration (Guidelines on Auditing Precepts) states that Supreme Audit Institutions (SAIs) can accomplish their tasks only if they are independent of the audited entity and are protected against outside influence.

Whereas, to achieve this objective, it is indispensable for a healthy democracy that each country have a SAI whose independence is guaranteed by law.

Whereas the Lima Declaration recognizes that state institutions cannot be absolutely independent, it further recognizes that SAIs should have the functional and organizational independence required to carry out their mandate.

Whereas through the application of principles of independence, SAIs can achieve independence through different means using different safeguards.

Whereas application provisions included herein serve to illustrate the principles and are considered to be ideal for an independent SAI. It is recognized that no SAI currently meets all of these application provisions, and therefore, other good practices to achieve independence are presented in the accompanying guidelines.

» RESOLVES:

To adopt, publish, and distribute the document entitled “Mexico Declaration on Independence”.

GENERAL

Supreme Audit Institutions generally recognize eight core principles, which flow from the Lima Declaration and decisions made at the XVIIth Congress of INTOSAI (in Seoul, Korea), as essential requirements of proper public sector auditing.

PRINCIPLE 1

The existence of an appropriate and effective constitutional/statutory/legal framework and of de facto application provisions of this framework

Legislation that spells out, in detail, the extent of SAI independence is required.

PRINCIPLE 2

The independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties

The applicable legislation specifies the conditions for appointments, reappointments, employment, removal and retirement of the head of SAI and members of collegial institutions, who are:

- appointed, reappointed, or removed by a process that ensures their independence from the Executive (see GUID 9030: Good Practices Related to SAI Independence);
- given appointments with sufficiently long and fixed terms, to allow them to carry out their mandates without fear of retaliation; and
- immune to any prosecution for any act, past or present, that results from the normal discharge of their duties as the case may be.

PRINCIPLE 3

A sufficiently broad mandate and full discretion, in the discharge of SAI functions

SAIs should be empowered to audit the:

- use of public monies, resources, or assets, by a recipient or beneficiary regardless of its legal nature;
- collection of revenues owed to the government or public entities;
- legality and regularity of government or public entities accounts;
- quality of financial management and reporting; and
- economy, efficiency, and effectiveness of government or public entities operations.

Except when specifically required to do so by legislation, SAIs do not audit government or public entities policy but restrict themselves to the audit of policy implementation.

While respecting the laws enacted by the Legislature that apply to them, SAIs are free from direction or interference from the Legislature or the Executive in the

- selection of audit issues;
- planning, programming, conduct, reporting, and follow-up of their audits;
- organization and management of their office; and
- enforcement of their decisions where the application of sanctions is part of their mandate.

SAIs should not be involved or be seen to be involved, in any manner, whatsoever, in the management of the organizations that they audit.

SAIs should ensure that their personnel do not develop too close a relationship with the entities they audit, so they remain objective and appear objective.

SAI should have full discretion in the discharge of their responsibilities, they should cooperate with governments or public entities that strive to improve the use and

management of public funds.

SAI should use appropriate work and audit standards, and a code of ethics, based on official documents of INTOSAI, International Federation of Accountants, or other recognized standard-setting bodies.

SAIs should submit an annual activity report to the Legislature and to other state bodies - as required by the constitution, statutes, or legislation - which they should make available to the public.

PRINCIPLE 4

Unrestricted access to information

SAIs should have adequate powers to obtain timely, unfettered, direct, and free access to all the necessary documents and information, for the proper discharge of their statutory responsibilities.

PRINCIPLE 5

The right and obligation to report on their work

SAIs should not be restricted from reporting the results of their audit work. They should be required by law to report at least once a year on the results of their audit work.

PRINCIPLE 6

The freedom to decide the content and timing of audit reports and to publish and disseminate them

SAIs are free to decide the content of their audit reports.

SAIs are free to make observations and recommendations in their audit reports,

taking into consideration, as appropriate, the views of the audited entity.

Legislation specifies minimum audit reporting requirements of SAIs and, where appropriate, specific matters that should be subject to a formal audit opinion or certificate.

SAIs are free to decide on the timing of their audit reports except where specific reporting requirements are prescribed by law.

SAIs may accommodate specific requests for investigations or audits by the Legislature, as a whole, or one of its commissions, or the government.

SAIs are free to publish and disseminate their reports, once they have been formally tabled or delivered to the appropriate authority—as required by law.

PRINCIPLE 7

The existence of effective follow-up mechanisms on SAI recommendations

SAIs submit their reports to the Legislature, one of its commissions, or an auditee's governing board, as appropriate, for review and follow-up on specific recommendations for corrective action.

SAIs have their own internal follow-up system to ensure that the audited entities properly address their observations and recommendations as well as those made by the Legislature, one of its commissions, or the auditee's governing board, as appropriate.

SAIs submit their follow-up reports to the Legislature, one of its commissions, or the auditee's governing board, as appropriate, for consideration and action, even when SAIs have their own statutory power for follow-up and sanctions.

PRINCIPLE 8

Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources

SAIs should have available necessary and reasonable human, material, and monetary resources - the Executive should not control or direct the access to these resources. SAIs manage their own budget and allocate it appropriately.

The Legislature or one of its commissions is responsible for ensuring that SAIs have the proper resources to fulfill their mandate.

SAIs have the right of direct appeal to the Legislature if the resources provided are insufficient to allow them to fulfill their mandate.

United Nations A/RES/66/209

General Assembly

Distr.: General
15 March 2012

Sixty-sixth session
Agenda item 21

Resolution adopted by the General Assembly on 22 December 2011

[*on the report of the Second Committee (A/66/442)*]

66/209. Promoting the efficiency, accountability, effectiveness and transparency of public administration by strengthening supreme audit institutions

The General Assembly,

Recalling Economic and Social Council resolution 2011/2 of 26 April 2011,

Recalling also its resolutions 59/55 of 2 December 2004 and 60/34 of 30 November 2005 and its previous resolutions on public administration and development,

Recalling further the United Nations Millennium Declaration,[1]

Emphasizing the need to improve the efficiency, accountability, effectiveness and transparency of public administration,

Emphasizing also that efficient, accountable, effective and transparent public administration has a key role to play in the implementation of the internationally agreed development goals, including the Millennium Development Goals,

Stressing the need for capacity-building as a tool to promote development, and welcoming the cooperation of the International Organization of Supreme Audit Institutions with the United Nations in this regard,

1. *Recognizes* that supreme audit institutions can accomplish their tasks objectively and effectively only if they are independent of the audited entity and are protected against outside influence;

2. *Also recognizes* the important role of supreme audit institutions in promoting the efficiency, accountability, effectiveness and transparency of public administration, which is conducive to the achievement of national development objectives and priorities as well as the internationally agreed development goals, including the Millennium Development Goals;

3. *Takes note with appreciation* of the work of the International Organization of Supreme Audit Institutions in promoting greater efficiency,

[1] See resolution 55/2.

accountability, effectiveness, transparency and efficient and effective receipt and use of public resources for the benefit of citizens;

4. *Also takes note with appreciation* of the Lima Declaration of Guidelines on Auditing Precepts of 1977 [2] and the Mexico Declaration on Supreme Audit Institutions Independence of 2007,[3] and encourages Member States to apply, in a manner consistent with their national institutional structures, the principles set out in those Declarations;

5. *Encourages* Member States and relevant United Nations institutions to continue and to intensify their cooperation, including in capacity-building, with the International Organization of Supreme Audit Institutions in order to promote good governance by ensuring efficiency, accountability, effectiveness and transparency through strengthened supreme audit institutions.

91st plenary meeting
22 December 2011

[2] Adopted by the Ninth Congress of the International Organization of Supreme Audit Institutions, Lima, 17–26 October 1977.

[3] Adopted by the Nineteenth Congress of the International Organization of Supreme Audit Institutions, Mexico City, 5–10 November 2007.

United Nations A/RES/69/228

General Assembly

Distr.: General
28 January 2015

Sixty-ninth session
Agenda item 21

Resolution adopted by the General Assembly on 19 December 2014

[*on the report of the Second Committee (A/69/470)*]

69/228. Promoting and fostering the efficiency, accountability, effectiveness and transparency of public administration by strengthening supreme audit institutions

The General Assembly,

Recalling its resolution 66/209 of 22 December 2011,

Recalling also the commitments in the outcomes of all the major United Nations conferences and summits in the economic, social and environmental fields, including the outcome document of the United Nations Conference on Sustainable Development entitled "The future we want",[1] the United Nations Millennium Declaration,[2] the 2005 World Summit Outcome,[3] the Monterrey Consensus of the International Conference on Financing for Development,[4] the Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus,[5] the outcome document of the high-level plenary meeting of the General Assembly on the Millennium Development Goals,[6] the outcome document of the special event to follow up efforts made towards achieving the Millennium Development Goals,[7] the Programme of Action of the International Conference on Population and Development,[8] the key actions for the further implementation of the Programme

[1] Resolution 66/288, annex.

[2] Resolution 55/2.

[3] Resolution 60/1.

[4] *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18–22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex.

[5] Resolution 63/239, annex.

[6] Resolution 65/1.

[7] Resolution 68/6.

[8] *Report of the International Conference on Population and Development, Cairo, 5–13 September 1994* (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex.

of Action of the International Conference on Population and Development[9] and the Beijing Declaration[10] and Platform for Action,[11]

Recalling further its resolutions 67/290 of 9 July 2013 and 68/1 of 20 September 2013, and the ministerial declaration of the high-level segment of the 2014 session of the Economic and Social Council and the high-level political forum on sustainable development,[12]

Recalling its resolution 68/309 of 10 September 2014, in which it welcomed the report of the Open Working Group on Sustainable Development Goals[13] and decided that the proposal of the Open Working Group contained in the report shall be the main basis for integrating sustainable development goals into the post-2015 development agenda, while recognizing that other inputs will also be considered, in the intergovernmental negotiation process at the sixty-ninth session of the General Assembly,

Emphasizing the need to improve the efficiency, accountability, effectiveness and transparency of public administration,

Emphasizing also that efficient, accountable, effective and transparent public administration has a key role to play in the implementation of the internationally agreed development goals, including the Millennium Development Goals,

Stressing the need for capacity-building as a tool to promote development, and welcoming the cooperation of the International Organization of Supreme Audit Institutions with the United Nations in this regard,

1. *Recognizes* that supreme audit institutions can accomplish their tasks objectively and effectively only if they are independent of the audited entity and are protected against outside influence;

2. *Also recognizes* the important role of supreme audit institutions in promoting the efficiency, accountability, effectiveness and transparency of public administration, which is conducive to the achievement of national development objectives and priorities as well as the internationally agreed development goals;

3. *Takes note with appreciation* of the work of the International Organization of Supreme Audit Institutions in promoting greater efficiency, accountability, effectiveness, transparency and efficient and effective receipt and use of public resources for the benefit of citizens;

4. *Also takes note with appreciation* of the Lima Declaration of Guidelines on Auditing Precepts of 1977[14] and the Mexico Declaration on Supreme Audit Institutions Independence of 2007,[15] and encourages Member States to apply, in a

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[9] Resolution S-21/2, annex.

[10] *Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995* (United Nations publication, Sales No. E.96.IV.13), chap. I, resolution 1, annex I.

[11] Ibid., annex II.

[12] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 3* (A/69/3/Rev.1), chap. VI, sect. F.

[13] A/68/970 and Corr.1.

[14] Adopted by the Ninth Congress of the International Organization of Supreme Audit Institutions, Lima, 17–26 October 1977.

[15] Adopted by the Nineteenth Congress of the International Organization of Supreme Audit Institutions, Mexico City, 5–10 November 2007.

manner consistent with their national institutional structures, the principles set out in those Declarations;

5. *Encourages* Member States and relevant United Nations institutions to continue and to intensify their cooperation, including in capacity-building, with the International Organization of Supreme Audit Institutions in order to promote good governance at all levels by ensuring efficiency, accountability, effectiveness and transparency through strengthened supreme audit institutions, including, as appropriate, the improvement of public accounting systems;

6. *Acknowledges* the role of supreme audit institutions in fostering governmental accountability for the use of resources and their performance in achieving development goals;

7. *Takes note* of the interest of the International Organization of Supreme Audit Institutions in the post-2015 development agenda;

8. *Encourages* Member States to give due consideration to the independence and capacity-building of supreme audit institutions in a manner consistent with their national institutional structures, as well as to the improvement of public accounting systems in accordance with national development plans in the context of the post-2015 development agenda;

9. *Stresses* the importance of continuing international cooperation to support developing countries in capacity-building, knowledge and best practices related to public accounting and auditing.

75th plenary meeting
19 December 2014

Attachment E

ACAG
AUSTRALASIAN COUNCIL
OF AUDITORS GENERAL

Independence of Auditors General

A 2020 update of a survey of Australian and New Zealand legislation

Dr Gordon Robertson, PhD, PSM March 2020

COMMISSIONED BY **THE AUSTRALASIAN COUNCIL OF AUDITORS GENERAL**

Contents

Summary and Conclusions

Independence of Auditors General

The International Organization of Supreme Audit Institutions (INTOSAI) has declared that eight core independence principles are essential requirements for effective public sector auditing:

1. An effective statutory legal framework;
2. Independence and security of tenure for the head of the audit institution;
3. Full discretion to exercise a broad audit mandate;
4. Unrestricted access to information;
5. A right and obligation to report on audit work;
6. Freedom to decide the content and timing of audit reports and to publish them;
7. Appropriate mechanisms to follow-up on audit recommendations;
8. Financial, managerial and administrative autonomy and availability of appropriate resources.

Survey of Australian and New Zealand Legislation

In 2009 the legislative frameworks that then existed in New Zealand, in the Commonwealth of Australia, and in each Australian State and Territory were surveyed for key 'factors' that contributed to each INTOSAI independence principle. The extent to which each factor was subject to the control of Executive government was given a score ranging from zero, where legislation was silent or where the factor was directly controlled by Executive, to ten, where the factor was embedded within the jurisdiction's Constitution. The scores were aggregated to give an overall indication of the extent to which each jurisdiction's legislative framework enhanced independence and reduced the opportunity for Executive government to influence the Auditor General.

The survey was updated in 2013 to assess the effect legislative amendments in the intervening years had had on the extent of protection from Executive influence in each jurisdiction.

Since the 2013 survey, the legislation governing Auditors General has been amended in several jurisdictions. The survey has therefore again been repeated to assess the extent of protection from Executive influence in the legislation that exists in 2020.

Summary of Legislative Changes

Jurisdiction	Survey	Brief summary of Amendments since 2009	Impact on Independence
ACT	2013	Minor amendments: definitions and terms used (consequential to amendments in other legislation). The Auditor General is now referred to as the responsible director-general of a directorate.	No effect
	2020	Major amendments: Auditor General is now an Officer of the Legislative Assembly appointed by the Speaker, extensive amendments to the role of the Parliamentary Committee, remuneration determined by an independent body, other paid employment constrained, not subject to direction of anyone and discretion mandated, improved managerial autonomy, statutory review of functions and performance conducted once in each Parliamentary Term.	Substantial increase
Aus	2013	Major amendments: expanded mandate to include performance audits of "Commonwealth partners", to audit performance indicators and to conduct assurance reviews. Significant amendments to reporting procedures and other consequential amendments to auditing standards, use of information gathering powers, confidentiality of information and information sharing. Constitutional safety net provision added.	Substantial increase
	2020	Some amendments concerning guaranteed availability of appropriations	No effect
NSW	2013	Few amendments: review of audit office from once every 3 years to once every 4 years. Definitions of statutory bodies and controlled entities clarified. New provision relating to defraying cost of audits requested by Parliament or a Minister.	No change
	2020	Financial management matters being moved into *Government Sector Finance Act 2018. Public Finance and Audit Act 1983* to be renamed Government Sector Audit Act 1983	Increased
NT	2013	Extensive amendments: term of appointment and explicitly mandating independence of Auditor General. Mandate for special audits and audit of performance management systems expanded to include Territory controlled entities. Significant amendments to reporting procedures.	No net effect
	2020	Extensive amendments: extensive amendments to appointment and immunity but since most decisions are taken by Executive they had little effect on independence score expanded ineligibility to include local government Council, members of judiciary, recent political affiliation, expanded grounds for suspension, removal requires 2/3 majority of Legislative Assembly, remuneration now protected, but Minister may allow other employment	Minor increase
NZ	2013	Few amendments: requirements for publishing auditing standards and new provisions ensuring persons or firms appointed as auditors for financial report audits meet minimum required standards. New provision for external quality assurance reviews of Issuers.	No change
	2020	Few amendments: none impacted on independence	No change

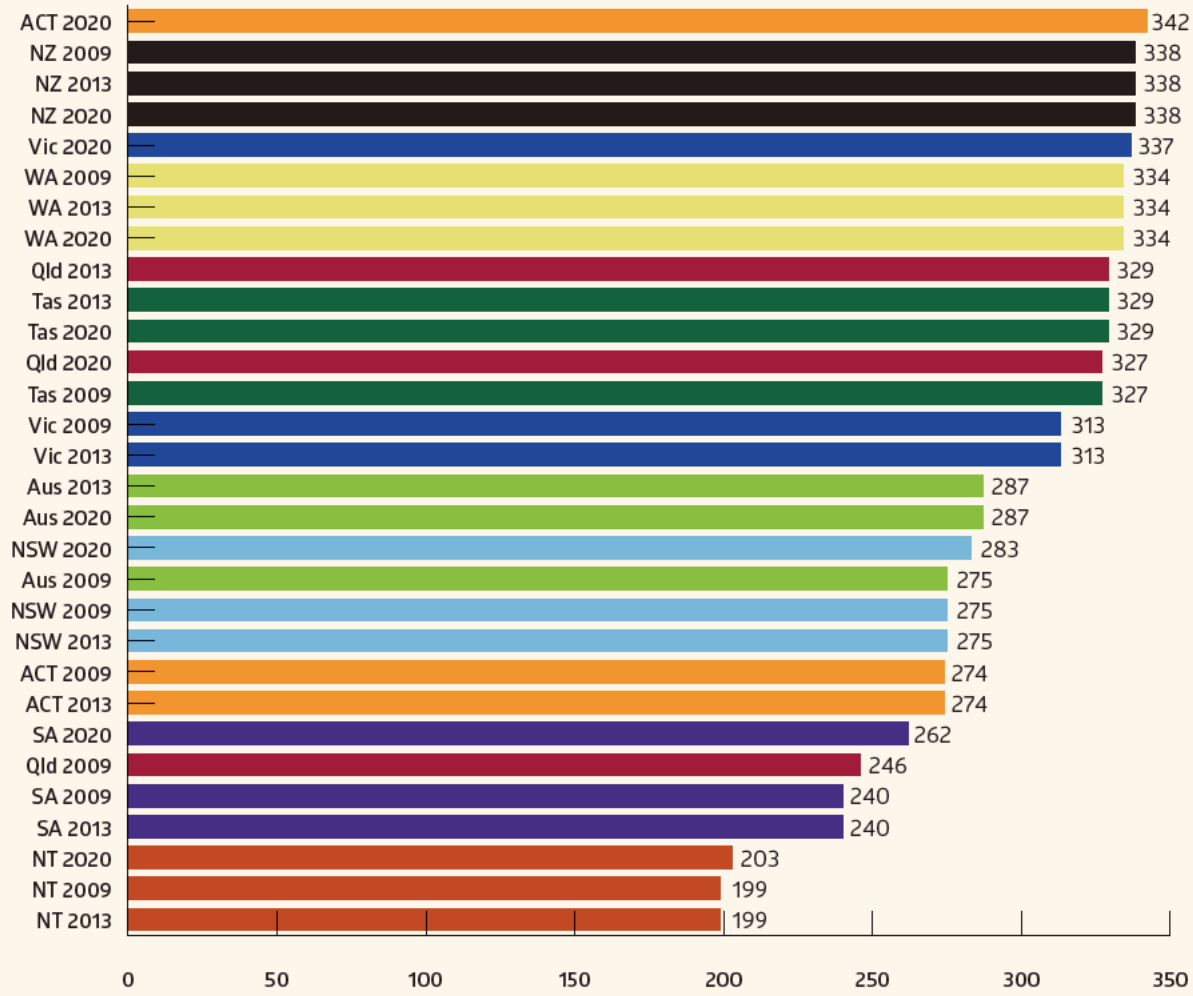
Jurisdiction	Survey	Brief summary of Amendments since 2009	Impact on Independence
Qld	2013	Major amendments: term of appointment and declaration of interests of Auditor General and Deputy; substantial changes to mandate including audit of public property given to a non-public sector entity, performance audits of most public sector entities and audit of performance management systems and performance measures of government-owned corporations, and to conduct joint or collaborative audits with the Commonwealth or another State.	Substantial increase
	2020	Amendments that enable the Auditor General to disclose confidential audit information to Executive Government impacted adversely on independence	Small decrease
SA	2013	Minor amendment: description of administrative unit established to provide assistance to the Auditor General	No change
	2020	Substantial amendments: mandate expanded to include examination of effectiveness and Auditor General may now initiate examination of publicly funded bodies; legislation mandates that reports are to be published	Significant increase
Tas	2013	A number of amendments: expanded coverage mandate to include local government and the mandate for investigations and examinations; new provision enabling audits in collaboration with the Commonwealth, other State of Territory; amended reporting lines and new provisions for non-disclosure of sensitive information and for confidentiality of information.	Small increase
	2020	Few amendments: none impacted on independence	No change
Vic	2013	Extensive amendments: largely associated with a new Victorian integrity system and the introduction of a new oversight body (the Victorian Inspectorate). Significant effect on the way in which power to call for persons and documents is exercised that affects a wide range of audit activities.	Potential effects unclear
	2020	*Audit Act 1994* extensively amended in 2016: expanded with respect to performance audits by the definition of an "associated entity" which means any person or body that provides services or performs functions for, on behalf of a public body, or on behalf of the State; significant checks and balances and oversight of new powers by Victorian Inspectorate. In 2019 *Audit Act 1994* completely restructured: mandate slightly expanded by a new definition of *"public body"* and extensive access now provided to premises through "Entry Notice"; removal of some of the checks and balances by the Victorian Inspectorate that do not relate to coercive powers	Significant increase Slight Increase
WA	2013	Minor amendment: (consequential to amendment of other legislation)	No change
	2020	No significant amendments	No Change

Overall Independence Scores

The overall scores obtained from the 2009, 2013 and 2020 surveys are summarised below:

Figure 1 Overall independence scores in each of the Surveys

Total Independence Scores for Each Jurisdiction



Overall, the 2020 survey found that, under the scoring system used:

- The Auditor General of the Australian Capital Territory now has the highest overall independence score, followed by New Zealand and Victoria.
- Western Australia and Tasmania have maintained strong overall independence scores, but Queensland has become more vulnerable to Executive influence.
- The independence score for Northern Territory's Auditor General has improved slightly but continues to be the most vulnerable to Executive influence of all the jurisdictions surveyed.

Independence of Auditors-General:

A 2020 update of a survey of Australian and New Zealand legislation

Background

In 2009, the Victorian Auditor General's Office commissioned a survey on behalf of the Australasian Council of Auditors General to identify and compare the range of independence safeguards for Auditors General in the legislative frameworks that then existed in New Zealand, in the Commonwealth of Australia, and in each Australian State and Territory.

The survey was based upon the International Organization of Supreme Audit Institutions (INTOSAI) *Mexico Declaration on SAI Independence* which recognised eight core principles as being essential requirements for effective public sector auditing. These principles are:

1. The existence of an appropriate and effective constitutional/statutory/legal framework and of de facto application provisions of this framework
2. The independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties
3. A sufficiently broad mandate and full discretion, in the discharge of SAI functions
4. Unrestricted access to information
5. The right and obligation to report on their work
6. The freedom to decide the content and timing of audit reports and to publish and disseminate them
7. The existence of effective follow-up mechanisms on SAI recommendations
8. Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources.

Factors Contributing to Independence

The 2009 survey identified 60 key legislative components or 'factors' that contributed to each INTOSAI independence principle and the extent to which each factor was subject to the control of Executive government was assessed.

No attempt was made to weight the factors in terms of their relative importance, but each factor was given an Executive Influence Score based on the extent to which the factor is distanced from the control of Executive government according to the following scale:

0. Silent or Executive decides – the legislation is either silent about the factor or the factor is under the direct control of the Executive.

1. Parliament consulted – the Executive is required to consult a Committee of Parliament and/or the leader of each political party within the Parliament before deciding about the factor. This mechanism improves transparency but does not shift decision making power and the decision still rests with the Executive.

2. Parliament veto – the Parliament or a Committee of Parliament can veto a proposal from the Executive about the factor. This introduces some level of Parliamentary control, although any decision about what to propose rests with the Executive.

3. Parliament recommends – the Parliament or a Committee of Parliament makes recommendations to the Executive about the factor. This enables Parliament to take the initiative but the final decision rests with Executive, which may reject the recommendation.

4. Parliament decides – any decision about the factor is made by the Parliament or a Committee of Parliament. This places control within the Parliament itself where it is transparent and more difficult for Executive to influence.

5. Independent body decides – any decision about the factor is made by another independent body, outside of the control of the Executive. This should remove partisan politics, although the independent body itself may or may not be subject to Executive influence.

6. **Auditor General decides** – any decision about the factor is made by the Auditor General, free from Executive influence.

8. **Legislation mandates** – the factor is explicitly addressed in the legislation. Any variation would require legislative amendment and Parliamentary debate and is therefore protected from Executive influence.

10. **Constitution mandates** – the factor is embedded in the Constitution. An amendment to the Constitution would require a large Parliamentary majority and/or referendum. This gives the highest possible protection from Executive influence.

The Executive Influence scores for each of the factors examined for each INTOSAI Principle were aggregated to give an overall score for each INTOSAI Principle, which were then aggregated to give an overall independence score.[1]

Findings from previous surveys

The 2009 survey found that all jurisdictions had well established legislative frameworks governing their respective Auditors General. However, there was considerable variation in the independence safeguards provided for Auditors General and in the extent to which they, or the role they performed, could be influenced by the Executive government of the jurisdictions concerned.

In several jurisdictions there was room for improvements in the legislative framework especially with respect to:

- the extent to which the Executive government could influence aspects of the Auditor General's appointment and security of tenure
- the extent of the Auditor General's functional role and mandate to scrutinise new mechanisms being used by Executive government to effect delivery of publicly funded services; and
- the Auditor General's financial, managerial and administrative autonomy.

The survey was repeated in 2013. In the intervening period, major amendments had been made to the legislation in the Commonwealth of Australia and Queensland and extensive amendments had also been made to the legislation in the Northern Territory, Victoria, and Tasmania. Relatively few, more minor amendments had been made to the legislation in New South Wales, New Zealand, South Australia and Western Australia.

Overall, the 2013 survey found that, under the scoring system used:

- New Zealand's Auditor General continued to have the highest overall independence score, followed by Western Australia and Tasmania.
- Queensland's overall independence score had substantially improved, and the Commonwealth had also improved its position significantly.
- Despite amendments to the Northern Territory's legislative framework, its Auditor General continued to be more vulnerable to Executive influence than those in other jurisdictions.

2020 Survey

The 2020 survey aimed to update the findings of the 2009 and 2013 surveys by examining the legislative frameworks **in effect in each jurisdiction as at March 2020** to again identify and compare the range of safeguards that exist to support the independence of Auditors General.

The same factors and scoring system were used. It should be noted that, as in the 2009 and 2013 surveys, the full range of scoring is not applicable to all the factors examined.

It should also be noted that the scores assigned for some factors during the 2009 and 2013 surveys have been amended to correct some scoring errors or inconsistencies.

1 In the 2009 survey, the ranking for each of the factors examined for each INTOSAI Principle were aggregated then adjusted to reflect the number of factors grouped under each Principle to give an 'adjusted Principle score'. This adjustment was not applied in either the 2013 survey or the 2020 survey.

Summary of legislative changes since 2009

Jurisdiction	Survey	Summary of Amendments since 2009	Impact on Independence
ACT[2]	2013	**Minor amendments** • Definitions and terms used consequential to amendments in other legislation. • Is referred to as the responsible director-general of a directorate.	No effect
ACT[3]	2020	**Major amendments** • The Auditor General is now an Officer of the Legislative Assembly responsible to the Legislative Assembly • Not subject to direction of anyone • Remuneration determined independently and appropriated • Other employment constrained and declaration of interests required • Greatly expanded role of Speaker and Public Accounts Committee • Expanded mandate • Improved follow-up of reports requiring a formal Ministerial response • Improved managerial independence with respect to staff, finances and office autonomy	Substantial increase
Aus[4]	2013	**Major amendments** • Expanded mandate - performance audits of "Commonwealth partners" - audit of performance indicators - Conduct of assurance reviews. • Significant amendments expanding the list of persons or bodies who must or may receive copies or extracts of a proposed report and who may provide comments thereon. All comments received must be included in the final report. • Consequential amendments to auditing standards, use of information gathering powers, confidentiality of information. New section to allow information sharing. • Constitutional safety net provision added.	Substantial increase
Aus[5]	2020	**Some amendments** • Most amendments do not impact on independence - Guaranteed availability of appropriation - Protection from reduction of appropriations to the Audit Office	No effect

2 Australian Capital Territory. *Auditor-General Act 1996*, Republication No 11 Effective 1 July 2012
3 Australian Capital Territory *Auditor-General Act 1996* A1996-23, Republication No 20, Effective: 22 November 2018
4 Australia. *Auditor-General Act 1997*, Compilation prepared on 4 October 2012
5 Australia *Auditor-General Act 1997* No. 151, 1997 Compilation No. 17 Compilation date: 21 February 2018

Jurisdiction	Survey	Summary of Amendments since 2009	Impact on Independence
NSW[6]	2013	**Few amendments** • Amended review of audit office from once every 3 years to once every 4 years. • Definitions of statutory bodies and controlled entities clarified. New provision relating to defraying cost of audits requested by Parliament or a Minister, but at discretion of the Treasurer.	No effect
NSW[7]	2020	**Few amendments relating to audit** • Term of appointment increased to 8 years • Mandate has been expanded under separate legislation to include local government • Financial management aspects of legislation have been removed to *Government Sector Finance Act 2018* • Legislation renaming the *Public Finance and Audit Act 1983* to *Government Sector Audit Act* has passed but has yet to commence.	Increased
NT[8]	2013	**Extensive amendments** • New definitions of "organisation" and modified definition of "Territory controlled entity" amended from 7 year fixed term to 5 year renewable term. • New explicit independence mandate, but subject to Ministerial direction provisions. Mandate for special audits and audit of performance management systems expanded to include Territory controlled entities. • Significant amendments expanding the list of persons or bodies who must or may receive copies or extracts of a proposed report and who may provide comments thereon, and who must or may receive copies of final reports.	No net effect
NT[9]	2020	**Extensive amendments** • Extensive amendments to appointment and immunity but most decisions are still under control of Executive government • Noteworthy amendment to ineligibility for appointment. Now excludes - members of local government Councils - members of a political party - recent political affiliation including reportable donations • Remuneration is protected for the term of office • Minister may authorise the Auditor General to engage in other paid employment	Small increase
NZ[10]	2013	**Few amendments** • New interpretation definitions of "auditing and assurance standards", "financial reporting standards" and "Issuer" from Financial Reporting Act 1993 • New provision for external quality assurance reviews of Issuers. • Amended requirements for publishing auditing standards. • New provisions ensuring persons or firms appointed as auditors for financial report audit meet minimum required standards.	No change
NZ[11]	2020	**Few amendments** • No impact of independence	No change

6 New South Wales. Public Finance and Audit Act 1983, Current version for 4 January 2013
7 New South Wales *Public Finance and Audit Act 1983* No 152, Current version for 20 December 2019 to date
8 Northern Territory of Australia. *Audit Act 1995*. As in force at 21 September 2011
9 Northern Territory of Australia *Audit Act 1995*, As in force at 10 August 2019
10 New Zealand. *Public Audit Act 2001* Reprinted as at 1 July 2012
11 New Zealand *Public Audit Act 2001* No 10, Reprint as at 21 March 2017

Jurisdiction	Survey	Summary of Amendments since 2009	Impact on Independence
Qld[12]	2013	**Major amendments** • Duration of appointment is for a fixed, non-renewable term of 7 years. • Changes to declaration of interest and new section on conflicts of interest for both Auditor-General and Deputy. • Substantial changes to mandate: - Discretion to exempt entities from audit. - New provision to conduct an audit of property given to a non-public sector entity (but limited to assessment of efficiency and effectiveness). - New provision to conduct performance audits (but government owned corporations only at the request the Legislative Assembly, Parliamentary committee, Treasurer, or appropriate Minister). - New discretionary power to conduct an audit of performance management systems and performance measures of government-owned corporations. - New provision for the conduct of joint or collaborative audits with the Commonwealth or another State with power to disclose protected information. • New requirement for a 3-year strategic audit plan for performance audits. • Consequential amendments to reporting provisions	Substantial increase
Qld[13]	2020	**Few amendments** • May disclose information (including "private information and otherwise "protected information") about departments or other prescribed entities to the Treasurer or Treasury for financial and economic analysis and budgeting purposes	Small decrease
SA[14]	2013	**Minor amendment** • Description of administrative unit established to provide assistance to the Auditor General	No effect
SA[15]	2020	**Significant amendments** • Mandate has been expanded to include examination of effectiveness as well as economy and efficiency. • The auditor general may now initiate audits or examinations of publicly funded bodies • New requirement to describe the outcomes of examinations • Legislation mandates that reports are published	Significant increase
Tas[16]	2013	**Several amendments** • New definitions introducing "Employer" from State Services Act 2000 and "Joint Committee" from Integrity Commission Act 2009 and expanding meaning of "State entity" to include entities defined by Local Government Act 1993. • Mandate for investigations and examinations expanded to include local government, Employer under State Services Act 2000. • New provisions enabling Integrity Commission to request audits and Employer to request investigations. • New provision enabling audits in collaboration with the Commonwealth, other State of Territory. • Amendments to reporting lines • New provisions for non disclosure of sensitive information and for confidentiality of information.	Minor effect
Tas[17]	2020	**Few amendments** • None impact on independence	No change

12 Queensland. Auditor-General Act 2009 Current as at 9 September 2011
13 Queensland Auditor-General Act 2009 Current as at 17 June 2019
14 South Australia. Public Finance and Audit Act 1987 ,Version: 15.2.2013
15 South Australia Public Finance and Audit Act 1987 Version: 13.9.2018
16 Tasmania. *Audit Act 2008*, Tasmanian Legislation Online, Consolidated:17 May 2013
17 Tasmania *Audit Act 2008* Contents (2008-49) 2/13/2020 View – Tasmanian Legislation Online

Jurisdiction	Survey	Summary of Amendments since 2009	Impact on Independence
Vic[18]	2013	**Extensive amendments.** • New definitions associated with the recently established Victorian integrity system • A suite of new provisions relating to obligations the integrity system imposes, including the introduction of a new oversight body (the Victorian Inspectorate) and mandatory reporting/notification of various matters to integrity bodies and provision of information to law enforcement agencies. • Significant changes to the way in which coercive powers to call for persons and documents can be exercised with consequential amendments that affect a wide range of audit activities, including those of the independent auditor of the audit office. • New provision prohibiting the disclosure of certain information in reports.	No effect
Vic[19]	2020	**Extensive amendments** • *Audit Act 1994* was extensively amended in 2016 and was further amended and completely restructured in 2019. • Mandate has been significantly expanded: – with respect to performance audits by the definition of an "*associated entity*" which means any person or body that provides services or performs functions for, on behalf of a public body, or on behalf of the State – new definition of "*public body*" now captures community health centres • Access to information substantially expanded: – "Information Gathering Notice" can require persons to produce documents and to attend and be questioned under oath – "Entry Notice", gives the power to enter public body premises for the purpose of financial audit or performance audit and may also enter premises of an associated entity for a performance audit – Penalties have been increased for non-compliance with these new information gathering powers • Content of reports: – Expanded opportunity to comment on any proposed report consistent with the expanded mandate – Comments must be either included in full or a summary in a form agreed between the Auditor General and the entity	
WA[20]	2013	**Minor amendment** • Consequential to amendment of Public Sector Management Act 1994	No change
WA[21]	2020	**No amendments**	No change

18 Victoria. *Constitution Act 1975* Version incorporating amendments as at 15 May 2013; *Audit Act 1994* Version incorporating amendments as at 11 February 2013
19 Victoria *Constitution Act 1975* Version No. 221 Version incorporating amendments as at 1 March 2019
Victoria *Audit Act 1994* No. 2 of 1994 Version No. 066 Version incorporating amendments as at 1 July 2019
20 Western Australia. *Auditor General Act 2006*, As at 01 Dec 2010
21 Western Australia *Auditor General Act 2006* unchanged from 1 Dec 2010

Overall Assessment of Independence

Overall Independence Factor Scores

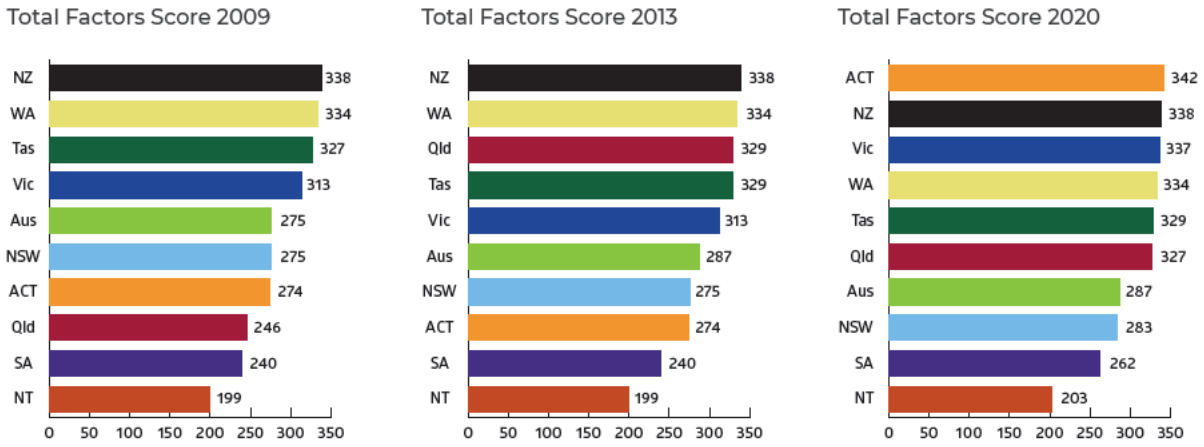
The jurisdictions surveyed continued to show wide variation in extent to which their legislative frameworks safeguarded the independence of Auditors General with respect to the principles outlined by INTOSAI.

Based on the scoring system used:

- The Australian Capital Territory now has the strongest independence safeguards as a result of the major amendments to its legislative framework.
- New Zealand strong independence score is now followed by Victoria as a result of recent extensive amendments to Victoria's legislation.
- The Australian States of Western Australia, Tasmania, and Queensland also have strong independence scores.
- Amendments to the legislative framework have potentially weakened financial independence of the Commonwealth Auditor General.
- Independence safeguards continue to be less well developed in New South Wales and, although recently somewhat improved, in South Australia.
- Despite changes to its legislative framework, the Auditor General for the Northern Territory continues to be more vulnerable to Executive influence than Auditors General in other jurisdictions.

The overall scores obtained from the 2009, 2013 and 2020 surveys are represented graphically and summarised below:

Figure 2 Overall independence scores for each jurisdiction22



Survey	ACT	Aus	NSW	NT	NZ	Qld	SA	Tas	Vic	WA
2009	274	275	275	199	338	246	240	327	313	334
2013	274	287	275	199	338	329	240	329	313	334
2020	342	287	283	203	338	327	262	329	337	334

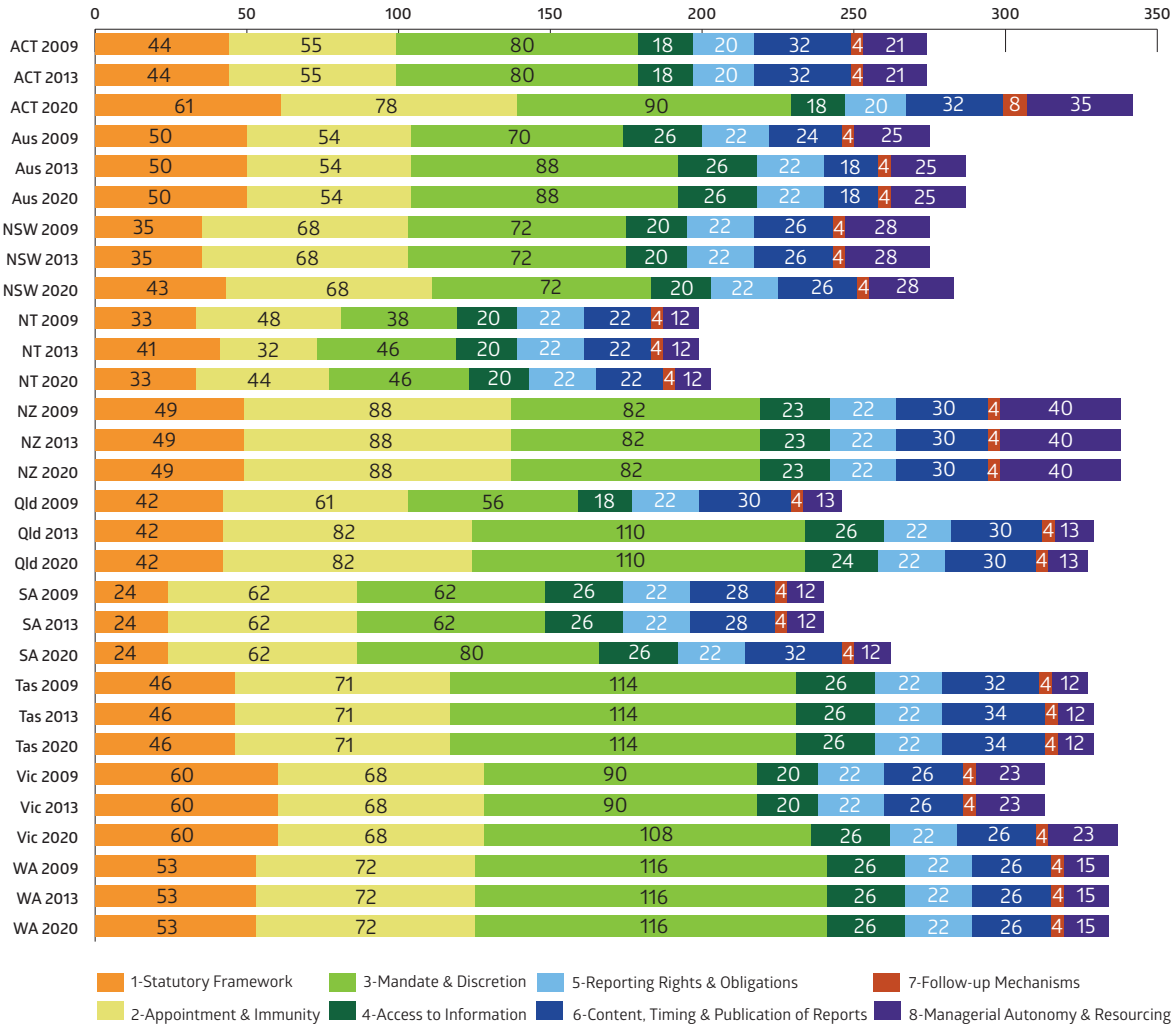
22 The overall scores reported for the 2009 and 2013 surveys have been amended to correct some scoring errors or inconsistencies in the scores assigned to some factors.

Factors Contributing to Individual Principles of Independence

The factors scores contributing to each of the INTOSAI Principles of Independence are illustrated in Figure 3.

- The Australian Capital Territory has substantially improved safeguards in its statutory framework, appointment and immunity, mandate and discretion, follow-up mechanisms and office autonomy.
- New Zealand's overall position continues to be strongly supported by its safeguards over appointment and immunity, wide mandate, and office autonomy whereas
- Victoria retains its constitutional protection from Executive influence and has added new protections through its significantly expanded mandate and greater access to information
- Western Australia, Tasmania and Queensland gain most from their wide mandate and discretion.

Figure 3 Overall independence scores for each INTOSAI Principle



The variations between jurisdictions in relation to each INTOSAI Principle are discussed in more detail below.

Statutory Framework

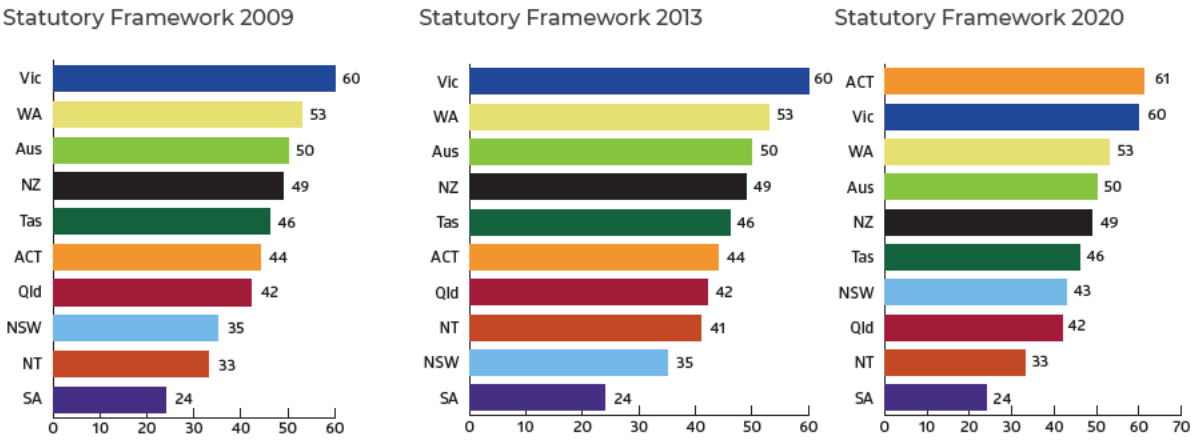
INTOSAI Principle 1. The existence of an appropriate and effective constitutional/ statutory/legal framework and of de facto application provisions of this framework.

Overall Independence Score for Statutory Framework

In the overall assessment of independence safeguards in statutory frameworks:

- The Australian Capital Territory has greatly strengthened independence safeguards in the statutory framework, overtaking the strong position of Victoria.
- The Northern Territory improved its position in 2013 by explicitly mandating the independence of the Auditor General in legislation but its position has since been weakened by enabling the Minister to approve other paid employment.
- In New South Wales the *Public Finance and Audit Act 1983* is in the process of being separated into the *Government Sector Finance Act 2018* and the *Government Sector Audit Act*.
- Most other jurisdictions are unchanged.
- South Australia remains the most vulnerable to Executive influence.

Figure 4 Overall scores for Statutory Framework



Survey	ACT	Aus[23]	NSW	NT	NZ	Qld	SA	Tas	Vic	WA
2009	44	50	35	33	49	42	24	46	60	53
2013	44	50	35	41	49	42	24	46	60	53
2020	61	50	35	33	49	42	24	46	60	53

Factors Surveyed

Nine key legislative factors affecting independence were identified within the statutory frameworks of the jurisdictions reviewed in 2009 and again used in the 2013 survey. These are:

1. Whether constitutional provisions and/or enabling legislation exists which specifically address the establishment, status, mandate and powers of the Auditor General, as opposed to establishment by Executive action?
2. Whether there is separate audit legislation to ensure that Parliamentary debate is focused on the Auditor General's role, functions and independence rather than being diluted by broader debate on wider financial legislation;

23 The scores recorded for the Commonwealth in the 2009 and 2013 surveys have been amended to correct an error which omitted the score assigned for rank and status in those surveys.

3 Whether there is an oath or affirmation of office that reinforces the independence of the Auditor General and his or her relationship with the Parliament and before whom the oath is sworn, or the affirmation is made;

4. Whether the independence of the Auditor General is explicitly mandated and/or stated as a requirement or obligation;

5. Whether the status and/or rank of the Auditor General is established to ensure that the independence and authority of the role is recognised and respected by other parts of government;

6. Whether the mechanism for determining the remuneration (a key determinant of status and/or rank) of the Auditor General is established and protected from Executive influence;

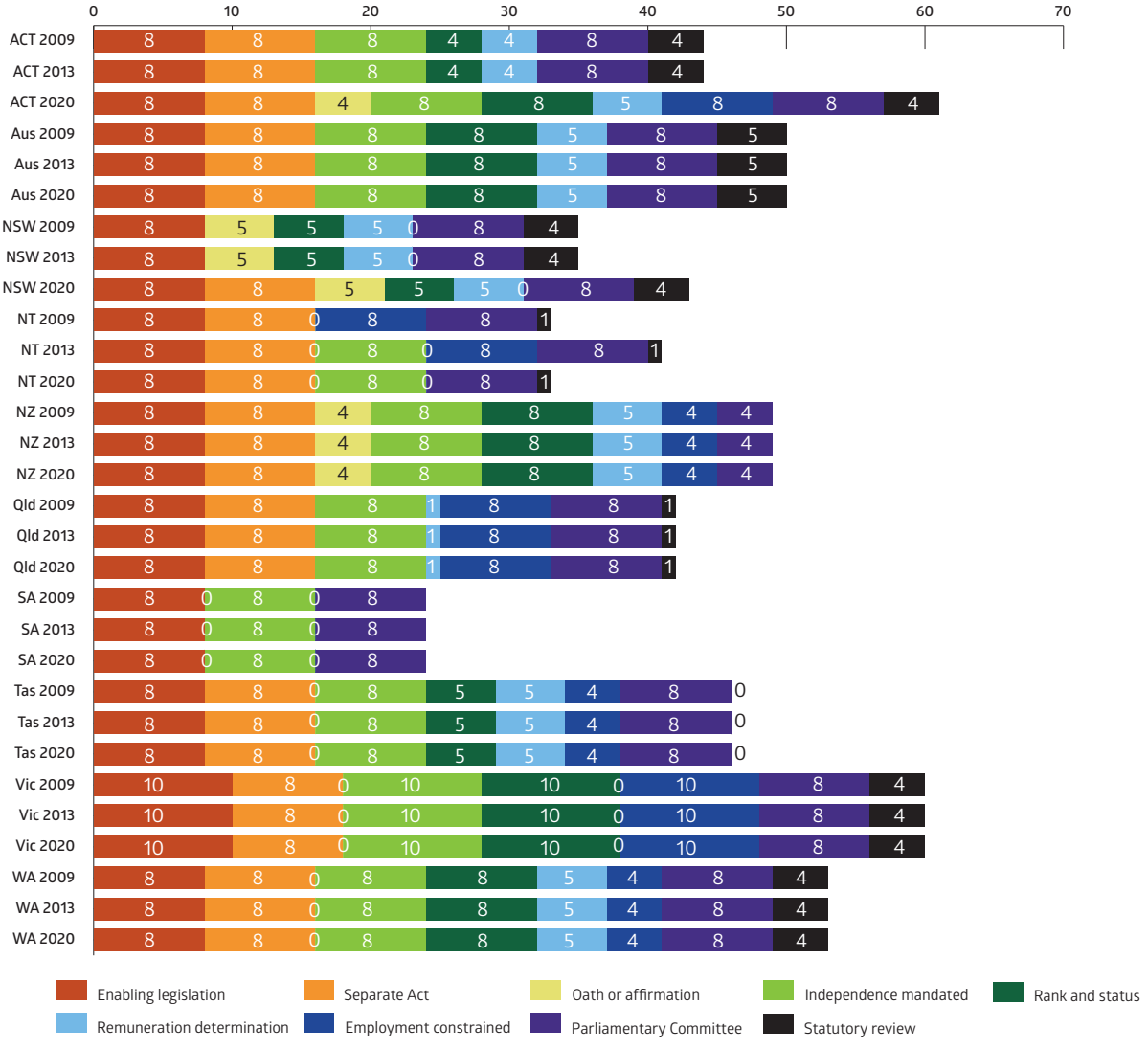
7. Whether the Auditor General is constrained from holding other positions or gaining remuneration from other forms of employment or, where this is permitted, whether the Executive is involved in giving permission;

8. Whether there is oversight of the Auditor General's role by a Parliamentary Committee to ensure that the role is seen to be accountable to the Parliament;

9. Whether there is a statutory requirement for a periodic review of the performance of the Auditor General's role and the extent of Executive influence in determining the terms of reference or in receiving the report of the review.

Figure 5 Assessment of factors impacting on Statutory Framework

Factor Scores for Statutory Framework



Analysis and Discussion

Enabling Legislation / Separate Legislation

In all the jurisdictions surveyed, the Auditor General continues to be created by statute, not by administrative action.

In Victoria the Auditor General remains embedded in the Constitution as an 'independent officer of the Parliament', clearly establishing his or her independence and giving the office a high status.

Since the Constitution can only be amended through a motion passed by a large majority in both Houses and by a majority of voters at a referendum, including the Auditor General in the Constitution also gives the office strong protection from the Executive. Although relatively rare in Westminster-style governments, constitutional provision is used much more widely internationally. An INTOSAI survey[24] found that 79 of 113 Supreme Audit Institutions are established and have the mandates enshrined in their countries' Constitution.

- Most jurisdictions have a separate audit Act ensuring that any Parliamentary debate on the legislation has been focussed on the audit role rather than being subsumed in broader debate about wider financial management legislation.
- At the time of the 2020 survey New South Wales is in the process of separating financial management and audit legislation. Non-audit aspects such as budgeting, expenditure, financial management, performance information, banking and finance, delegations and roles and responsibilities etc have been removed from the *Public Finance and Audit Act 1983* and are now all in the *Government Sector Finance Act 2018*. Legislation renaming the *Public Finance and Audit Act 1983* to the *Government Sector Audit Act 1983* and further amending that Act has passed but at the time of the survey, had not commenced.[25]
- South Australia continues to have the role and functions of the Auditor General defined within legislation governing broader aspects of financial management.
- In all of the jurisdictions the enabling legislation clearly specifies the functions and powers of the Auditor General, although these continue to vary considerably between jurisdictions. The legislation also specifies the manner of appointment and provides for the circumstances under which an appointee can be removed.

Independence Mandated, Oath or Affirmation of Office

Fundamental to the effective functioning of an Auditor General is the capacity to execute the role independently and free from influence. Legislation that explicitly mandates the independence of the office is therefore an essential component of an effective legislative framework.

- The term 'independent officer of the Parliament' is used in Victoria's Constitution and in the enabling legislation in New Zealand, the Commonwealth, Western Australia, and now the Australian Capital Territory, making clear both the importance placed on the independence of the office and the special relationship it holds with the Parliament, rather than Executive government.
- In many jurisdictions, independence is stated as a requirement or obligation on the Auditor General. Some jurisdictions also include a 'duty to act independently' and/or explicitly state that the Auditor General 'is not subject to the direction of anyone' with respect to the exercise of his or her functions.
- Between the 2009 and 2013 surveys, the Northern Territory amended its legislation to mandate the independence of its Auditor General.
- Since the 2013 survey, Australian Capital Territory has amended the mandated independence from being not subject to direction of Executive or Minister to being not subject to direction of anyone.

An oath or affirmation of office can be used to reinforce the Auditor General's personal commitment to independence and impartiality and may also serve to emphasise the special relationship of the office holds with the Parliament.

- Since the 2013 survey the Australian Capital Territory has joined New Zealand in requiring an oath or affirmation before the Speaker or the Clerk of the Parliament, symbolically strengthening the relationship between the Auditor General and the Parliament.
- In New South Wales the declaration of office is made before a Supreme Court Judge.

24 The Independence of SAIs – Final Task Force Report. International Organization of Supreme Audit Institutions, 2001.
25 *Government Sector Finance Legislation (Repeal and Amendment) Act 2018* as at 1 March 2020

- In four jurisdictions an oath, affirmation or declaration of office is given before the Governor or the Governor in Council, which does not serve to reinforce the independence of the Auditor General from the Executive.
- The legislation continues to be silent regarding an oath or affirmation in Queensland and the Commonwealth.

Rank and Status

The of the Auditor General relative to other parts of the government or public sector is of considerable importance in determining his or her authority and the extent to which the role is acknowledged, accepted and supported by all of the parties involved (government, public servants, legislators and the public at large).

If rank or status can be degraded by the Executive, the effectiveness of the Auditor General could be seriously undermined.

- Some jurisdictions explicitly mandate status or rank (for example 'independent officer of the Parliament' in the five jurisdictions mentioned above).
- New South Wales and Tasmania do so indirectly by mandating salary relativities to other high-ranking positions.
- In others the legislation is silent regarding rank and status.

Remuneration Determination

Remuneration and the determination of other terms and conditions of employment is considered among the statutory safeguards because it is a key determinant of status and rank, and has a major impact on the calibre of persons who might be attracted to the role. Reducing remuneration could be used to effectively downgrade the status of the Auditor General. The capacity of the Executive to influence remuneration is therefore of importance, as is the transparency of the process by which remuneration is determined.

- Since the 2013 survey, the Australian Capital Territory has amended legislation so that remuneration is no longer determined by a Parliamentary resolution.
- In New Zealand, the Commonwealth, New South Wales, Western Australia and now the Australian Capital Territory, remuneration is determined by an independent tribunal.
- In Tasmania remuneration is determined by a statutory tie to Auditors General in other jurisdictions
- In Queensland, the Executive is obliged to consult the Parliamentary Committee before determining remuneration.
- However, the Executive continues to have direct control over remuneration in other jurisdictions, including Victoria where the Constitution mandates that remuneration is determined by the Governor in Council.

Other Employment Constrained

Constraints on the Auditor General holding other positions or gaining remuneration from other forms of employment is commonly included in legislation to ensure that the incumbent devotes his or her full attention to the statutory role and to reduce the opportunity for a conflict of interest.

- Since the 2013 survey, the Australian Capital Territory has amended legislation from previously being silent to now prohibit the Auditor General from engaging in other paid employment or engaging in unpaid activity inconsistent with functions. It has also introduced a requirement for disclosure of interests.
- In Queensland the Auditor General cannot hold any other office for profit and cannot engage in remunerative employment. Queensland also requires its Auditor General to make a declaration of interests which may be released to Queensland's Crime and Misconduct Commission or Integrity Commissioner. Queensland also require the Auditor General to declare conflicts of interest that may arise in the discharge of his or her responsibilities.
- Legislation regarding constraints on other employment in other jurisdictions continues to vary considerably:

  - In most jurisdictions, any other occupation for reward is prohibited and may be grounds for removal from office.
  - In others it may be permitted subject to approval. Where such approval can only be given by Speaker, as in New Zealand or the Parliament, as in Western Australia it could be expected to be relatively difficult to obtain and transparency of approval is ensured.
  - However, where approval may be sought from Executive, as in South Australia and, as a result of a recent amendment to Northern Territory legislation, it could enable covert pressure to be applied to the Auditor General.
- Legislation remains silent in the remaining jurisdictions.

Parliamentary Committee

The relationship between the Auditor General and the Parliament he or she supports is of considerable importance. A strong relationship will permit the Auditor General to operate more effectively since it is through the Parliament that the Executive is publicly held to account.

Although usually dominated by the Government of the day, Parliamentary Committees may be given specific responsibilities with respect to the Auditor General under legislation or through Parliamentary Standing Orders.

Parliamentary Committees are also used to enhance the accountability of the Auditor General himself/herself. Accountability is needed to ensure that an Auditor General continues to operate as intended and makes effective and efficient use of his or her resources.

- All jurisdictions continue to have Parliamentary Committees charged with considering reports from their Auditor General.
- Since the 2013 survey, the Australian Capital Territory legislation has extensively amended legislation regarding the role of its Public Accounts Committee.
- Several jurisdictions have given Parliamentary Committees an active or consultative role in the appointment of Auditors General and establishing terms of conditions for employment.
- Several jurisdictions enable the Parliamentary Committee to direct or request the Auditor General to undertake an audit, and in some the Auditor General is unable to undertake certain audits unless directed or requested to do so by the Parliamentary Committee.
- Several jurisdictions also give their Parliamentary Committee a role in developing and communicating Parliament's audit priorities. The Auditor General is required to have regard for these priorities when developing his or her annual work plan and may be required to consult with the Committee about the content and timing of these plans.
- In several jurisdictions, Parliamentary Committees play an active role in advising, recommending or even determining budgets for the Auditor General.
- Parliamentary Committees may undertake periodic reviews of audit legislation, either as a statutory requirement or on their own initiative and are commonly involved in periodic reviews of the efficiency and effectiveness of the Auditor General and his or her office.

Since the 2013 survey, the Australian Capital Territory has extensively amended references to its Public Accounts Committee which receives and examines Auditor General's Reports, receives any reports of sensitive information from the Auditor General. The Committee must agree with appointment, suspension, etc. It may request a performance audit of a non-public sector entity, may request the independent auditor of the Auditor-General to conduct a performance audit of the Office and must conduct a review of the Auditor General at least once in each Assembly Term.

The recently amended *Audit Act 1994* in Victoria continues the extensive involvement the Parliamentary Committee has in that jurisdiction. Not only is the Committee involved in appointment of the Auditor General and periodic review of his or her operations, but the legislation also requires that the Auditor General's annual budgets and annual plans to be developed in consultation with the Committee. Similarly, the legislation requires that the number and frequency with which performance audits of authorities may be undertaken and even that the specifications for each individual performance audit are to be developed in consultation with the Committee and the relevant authority before such an audit can proceed. Victoria gives its Parliamentary Committee responsibility to monitor reports from the Victorian Inspectorate about the Auditor General, the Victorian the Auditor General's Office and members of that office.

Statutory Review

A periodic review is a key control over the continuing effectiveness of the Auditor General's function. Where there is a capability for reviews to be undertaken, the selection of, and terms of reference for, the reviewer, and/or reporting line for the review outcome may become important because a review mechanism could allow an Executive to apply inappropriate pressure to its Auditor General.

- In Western Australia, the legislation mandates a five-yearly review of the Auditor General Act 2006 itself with the review to be conducted by the Joint Standing Committee on Audit.
- Several jurisdictions have introduced a statutory requirement for a review of the Auditor General and his or her Office:
  - Some require a specially appointed reviewer to conduct a review of efficiency and effectiveness of the Auditor General and his or her office on a fixed term periodic basis (now every four years for the Victorian Auditor General and every five years for the Tasmanian and Queensland Auditors General).
  - Between the 2009 and 2013 surveys, New South Wales amended its legislation to increase the interval between reviews from once every three years to once every four years. However, the reviews in New South Wales remain confined to a review of compliance with practices and standards.
  - Since the 2013 survey, the Australian Capital Territory has amended legislation to require a strategic review of the Auditor General's functions and performance at least once in each term of the Legislative Assembly.
  - Other jurisdictions enable the Auditor General's external auditor to conduct performance audits of the Office. However, ad hoc performance audits by the external auditor do not match the accountability imposed by a scheduled, comprehensive review of the Auditor General's function by an independent person specifically tasked with conducting a statutory review.

The selection of, and terms of reference for, the reviewer, and/or reporting line for the review outcome continues to vary widely between jurisdictions:

- Appointment and establishment of terms of reference by a Parliamentary Committee with a reporting line to the Committee, the Speaker or to Parliament.
- Appointment and establishment of terms of reference by the Executive, either with or without consulting the Parliamentary Committee and/or the incumbent Auditor General, but usually with a reporting line to the Committee.
- Specifically excluding the Auditor General's office from reviews or inquiries that may be instigated under other public service legislation by the Minister responsible for public service departments.

Since the 2013 survey:

Victoria has amended its legislation. The Parliamentary Committee appoints an independent performance auditor to conduct the periodic review of the Auditor General and the Victorian Office of the Auditor General and the Committee prepares a specification for the performance audit in consultation with the Auditor General. The amended legislation continues to apply the same obligations and constraints that apply to the Auditor General's use of coercive powers to the independent reviewer.

The Australian Capital Territory has amended legislation to ensure that the reviewer is engaged by the Speaker at the request of the Public Accounts Committee and reports to the Speaker. Terms of reference are decided by the Committee after consultation with the Minister.

Appointment and Immunity

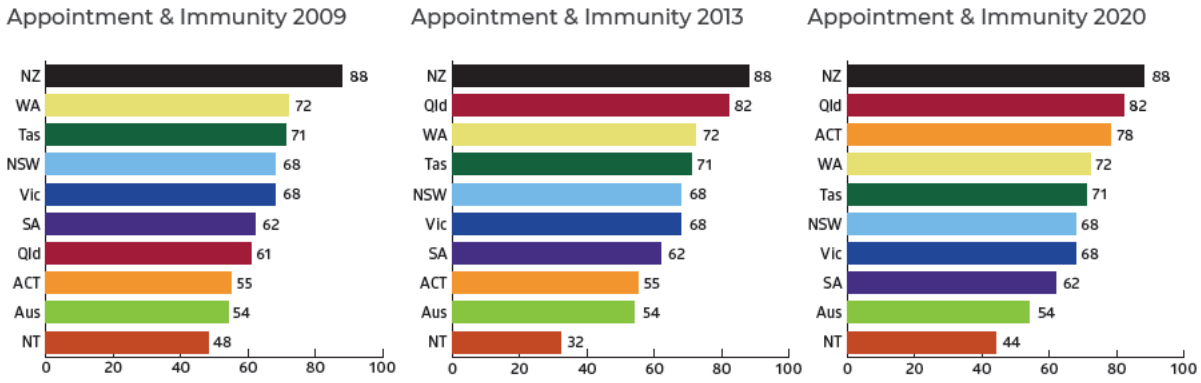
INTOSAI Principle 2. The independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties.

Overall Independence Score for Appointment and Immunity

In the overall assessment of appointment and immunity factors:

- New Zealand continued to have the strongest independence safeguards over factors examined for appointment and immunity.
- Queensland has moved from seventh to second position because the opportunity for Executive to influence reappointment and term of appointment has been removed.
- The Australian Capital Territory has moved from seventh to third position as a result of extensive amendments to legislation that remove the opportunity for Executive influence.
- In the Northern Territory the appointment may now be made only after receiving a recommendation of the Legislative Assembly.
- The scores for other jurisdictions remain unchanged.

Figure 6 Overall scores for Appointment and Immunity



Survey	ACT	Aus	NSW	NT	NZ	Qld	SA	Tas	Vic[26]	WA
2009	55	54	68	48	88	61	62	71	68	72
2013	55	54	68	32	88	82	62	71	68	72
2020	78	54	68	44	88	82	62	71	68	72

Factors Surveyed

The key legislative components that affected these aspects of independence in the legislation reviewed were as follows:

1. Who makes the appointment decision and the extent of Parliamentary involvement?
2. Whether the appointment process was independently supervised to increase transparency and reduce the risk of political patronage and partisan appointments;
3. Whether certain persons are ineligible for appointment as Auditor General;

26 The scores recorded for Victoria in the 2009 and 2013 surveys have been amended to correct an error in the scores assigned for how an Auditor General suspended from office is restored to office. The provision in the Victorian *Constitution Act 1975* was incorrectly recorded as legislation mandates instead of Constitution mandates.

4. How and by whom the term of appointment is determined;
5. Whether reappointment is possible and if so how and by whom the decision to reappoint is made;
6. Whether the Auditor General's remuneration is protected from being reduced during his or her term of office;
7. Whether remuneration is automatically appropriated to preclude Executive or bureaucratic interference;
8. Whether there is a statutory Deputy Auditor General;
9. How and by whom decisions are made about the appointment of an acting Auditor General, to reduce the risk of untoward Executive influence when there is a vacancy in the office;
10. How an Auditor General may resign and to whom the resignation is submitted to reduce the risk of Executive influencing the resignation or the timing thereof;
11 How and by whom an Auditor General can be suspended;
12. How and by whom a suspended Auditor General can be restored to office;
13 How and by whom an Auditor General can be removed from office; and
14. Whether the Auditor General is provided with some form of legal immunity in the normal discharge of the role.

Figure 7 Assessment of factors impacting on Appointment and Immunity

Factor Scores for Appointment & Immunity

Analysis and Discussion

Appointment by Whom, External Supervision, Ineligibility

The Auditor General's independence is compromised from the beginning if the selection and appointment is by the Executive itself.

In many jurisdictions it is customary for the Governor-General or the Governor to make appointments to public offices. Because the 'Governor' is usually interpreted to mean the Governor acting on advice of the Executive Council, appointment by the Governor enables the Executive to determine who will be appointed, opening the way for political patronage or appointment of a partisan government-friendly Auditor General.

Some form of consultation with leaders of political parties or Committees of the Parliament and/or the Speaker and the President during the appointment process encourages bipartisan/multi-partisan support for the appointees and reduces the risk of partisan appointments and in many jurisdiction such consultation may have been undertaken through convention in the past.

More recently there has been a clear trend to introduce stronger, statutory mechanisms to ensure some form of Parliamentary involvement in the appointment process. Alternatives include:

- A requirement for the Executive **to consult** with leaders of political parties and/or a Committee of Parliament and/or a Committee of Parliament as well as the Speaker and President; or
- Capacity for Parliament or a Committee of Parliament **to veto** an appointment proposed by the Executive;
- Capacity for Parliament or a Committee of Parliament **to recommend** an appointment to the Executive;
- Appointment **directly by the Parliament** or a Committee of Parliament;
- The appointment is made from candidates recommended by **an independent external body**. (Not used in Australian or New Zealand jurisdictions but becoming more prevalent elsewhere).

If the appointment is made directly by or on the recommendation of the Parliament or a Committee of Parliament, it ensures that the appointee has the confidence of the Parliament and enhances the transparency of the appointment process.

There have been significant changes in the legislative frameworks governing appointment in two jurisdictions since the 2013 survey.

- The Australian Capital Territory and the Northern Territory have joined New Zealand and Victoria as the only jurisdictions that ensure that the appointment is made on a recommendation of the legislature or a Parliamentary Committee.
- The Commonwealth and New South Wales continue to enable a Parliamentary veto of an appointment proposed by Executive.
- Queensland, Tasmania and Western Australia continue to mandate Parliamentary consultation before a decision is made by Executive.
- South Australia is now the only jurisdictions where the appointment is entirely in the hands of the Executive government.

External supervision of the appointment process by an independent body can help to ensure that prospective appointees are widely canvassed, that due process is followed and that a short list of suitable candidates is presented for final selection.

The extent to which the jurisdictions examined use external supervision of the appointment varies. In some, the legislation continues to explicitly remove the office of Auditor General from this form of supervision (which may be applied in other parts of the public sector). However, as mentioned above:

- New Zealand and Victoria the appointment process is undertaken and supervised by a Parliamentary Committee.
- Queensland requires the Executive to consult with a Parliamentary Committee about the process to be used in making the appointment.
- The Australian Capital Territory now mandates that the appointment must be in accordance with an open and accountable selection process.

Acting Appointment, Statutory Deputy

Appointing an individual to act as Auditor General during the temporary absence or following the death, removal or suspension of an incumbent can provide an opportunity for the Executive to influence the position. The Acting appointment could be for an extended period if there are significant delays in filling the permanent role although some jurisdictions have imposed some form of time constraints upon the duration of an acting appointment.

The adverse impact that Executive appointment can have on the independence of the acting appointee has been recognised in some jurisdictions by providing for a Statutory Deputy to automatically act as Auditor General during such periods.

There is some variation in the legislative frameworks governing acting appointments and/or the role of a statutory deputy:

- New Zealand appoints the Deputy Auditor General as an Officer of the Parliament who will Act in the absence of the Auditor General.
- In Queensland, South Australia, Tasmania, Victoria and Western Australia a Deputy Auditor General is recognised in legislation and appointed by the Auditor General. Although the Statutory Deputy would normally act in the absence of the Auditor General, in Victoria and Western Australia the Executive may appoint an Acting Auditor General after consulting with the Parliamentary Committee.
- In the Australian Capital Territory, an Acting Auditor General is appointed by the Speaker although the Auditor General may, in consultation with the Speaker, appoint an Acting Auditor General for periods of approved leave.
- In the Commonwealth, New South Wales and the Northern Territory, an Acting Auditor General may be appointed by the Executive.

Term of Appointment, Eligibility for Reappointment

The duration or term of appointments is a significant contributor to independence. The term needs to be long enough to enable the development of independence and to enable the incumbent to effectively 'steer' the Audit Office. There is also a case to be argued for keeping the term short enough to avoid the incumbent becoming complacent or 'stale' in the role and to enable the introduction of contemporary thinking. Another consideration is the length of the term in relation to the Parliamentary electoral cycle. In most jurisdictions the term has been set to exceed at least one, if not two electoral cycles.

All the legislation examined continues to specify the term of appointment of the Auditor General:

- South Australia retains the formerly common practice of appointing the Auditor General until retirement at age 65.
- The Commonwealth, Tasmania and Western Australia mandate a ten-year fixed term of appointment.
- New South Wales mandates an eight-year fixed term of appointment.
- The Australian Capital Territory, and Queensland mandate a seven-year fixed term.
- Victoria has mandated the fixed term of seven years in its Constitution.
- Queensland has amended the term of appointment its legislation from up to seven years, with the ability to renew appointment up to a total of seven years, to a fixed term of seven years.
- The Northern Territory has amended the term of appointment from seven years non- renewable to five years, with the possibility of renewal for a further five years at the discretion of the Executive.

Eligibility for reappointment has been recognised as an undesirable practice by INTOSAI because it might compromise independence. Where an incumbent is eligible for reappointment, as the time for reappointment approaches, the incumbent could become reluctant to criticise, or seek prominence by being overly critical or controversial. An option for reappointment could also enable the Executive to exert pressure on an incumbent. This is more likely if the Executive makes the appointment, and less so where the appointment is made through a more public Parliamentary appointment process.

There has been a clear trend against the eligibility for reappointment of an incumbent:

- All of the jurisdictions examined except Victoria (where eligibility for reappointment is mandated in the Constitution) and the Northern Territory, the Auditors General are now ineligible to be reappointed after the expiration of their term.

Removal, Suspension, Restoration, Resignation

Protection from removal from office at the whim of the Executive is paramount to security of tenure and independence. This has long been recognised and there have been no changes in the legislative frameworks of the jurisdictions in the survey.

- In all the jurisdictions the legislation continues to mandate some form of Parliamentary involvement in removal of the Auditor General from office. Most jurisdictions also prescribe the grounds for removal.
- Several jurisdictions continue to have legislation that also prescribes the circumstances under which the Auditor General can be suspended from office. These usually include ill health, mental capacity, bankruptcy, misconduct or incompetence.
- In some jurisdictions power to suspend has been left in the hands of the Executive, leaving open the opportunity for Executive to suspend or threaten to suspend an Auditor General it finds troublesome.

However, several jurisdictions further prescribe that the Auditor General will be automatically restored to office unless the Parliament either confirms the suspension or requires the removal of the Auditor General. In Victoria such a provision is mandated in the Constitution Act 1975.

- In New Zealand, the legislation mandates that if the Governor General suspends the Auditor General, he or she is restored to office two months after the next session of Parliament commences.
- Most other jurisdictions have similar provisions for automatic restoration after suspension unless Parliament takes action to remove the Auditor General. The Northern Territory has recently amended its legislation to align with this provision.
- Tasmania is unusual, not because the Executive is able to suspend the Auditor General at any time the Parliament is not sitting, but because the Auditor General is automatically removed from office unless the Parliament requests that the Auditor General be restored.

All the jurisdictions examined provide for the resignation of the Auditor General, but:

- Most require the resignation to be directed to the Governor General or Governor, leaving open the possibility of Executive interference with the resignation process or delay in informing Parliament. The Northern Territory has amended its legislation to remove the option of the resignation being directed to the Minister.
- Only New Zealand and the Australian Capital Territory ensure that the Auditor General's resignation is directed to the Speaker. Queensland requires the resignation is directed to both the Governor and the Speaker or Clerk.

Remuneration Protection and Appropriation

The security and independence of the Auditor General is enhanced if his or her remuneration is protected from any possible influence or control by the Executive, or by the Treasury and other parts of the bureaucracy. Most jurisdictions provide this protection by appropriating the remuneration in either the enabling legislation or in the determining Tribunal legislation. In Victoria, the Constitution mandates appropriation of the Auditor General's remuneration.

Similarly, to prevent the Executive from 'punishing' the Auditor General, his or her remuneration is protected from being diminished during his or her term of office by legislation in most of the jurisdictions examined.

- In six jurisdictions the legislative framework prohibits the rate of an Auditor General's remuneration from being reduced.
- In Victoria, the Constitution protects the Auditor General's remuneration from being reduced.
- Queensland allows it to be reduced with the Auditor General's consent.

- In the Australian Capital Territory terms and conditions are now determined by the Remuneration Tribunal.
- The Northern Territory has amended its legislation so that the Auditor General's conditions of office cannot provide any conditions (for example as to remuneration) that are contingent upon the Auditor-General's performance in office and cannot be varied during the Auditor-General's term in office.
- The legislation is silent in the Commonwealth.

Protecting remuneration from being reduced still leaves open the possibility that, where the remuneration is determined by, or is subject to the influence of, the Executive the Executive could freeze remuneration, which could adversely affect an incumbent, especially during periods of high inflation.

Moreover, as mentioned previously, this form of remuneration protection also leaves open the possibility that where the remuneration is determined by, or is subject to the influence of, the Executive the Executive , the remuneration offered to an incoming Auditor General could be reduced relative to other positions thereby lowering the overall status of the office.

Immunity

The threat of litigation could weaken the independence of the Auditor General. Similarly, litigation could be used to divert attention from the Auditor General's function.

There have been no changes to the legislative frameworks in this area since the 2009 survey.

- All jurisdictions continue to afford their Auditor General immunity, indemnity, or protection from liability for anything done or omitted when performing the functions of the Auditor General.
- Such indemnity or immunity is also extended to the independent auditor of the Auditor General in all the jurisdictions examined.

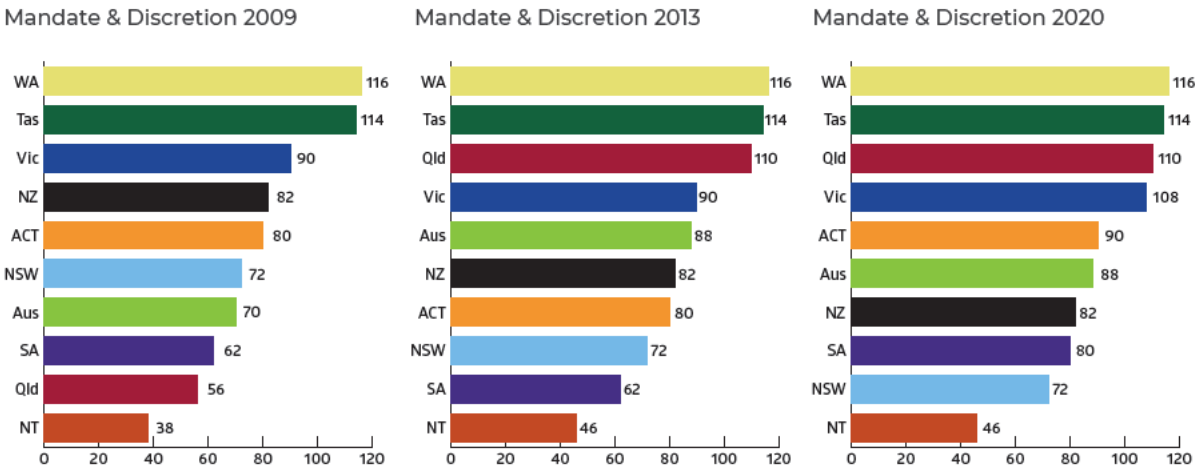
Mandate and Discretion

INTOSAI Principle 3. A sufficiently broad mandate and full discretion, in the discharge of SAI functions

Overall Independence Score for Mandate and Discretion

- Overall, the strongest and most comprehensive mandates continue to be provided by the legislation in Western Australia and Tasmania.
- Queensland has moved from ninth to third position.
- Since the 2013 survey, the mandates of Victoria the Australian Capital Territory have significantly expanded.
- South Australia has also been given a wider mandate.
- The New South Wales mandate now includes local government.
- Although the Northern Territory expanded the mandate between the 2009 and 2013 surveys there has been no more recent change and it remains the most constrained of all the jurisdictions surveyed.

Figure 8 Overall scores for Mandate and Discretion



Survey	ACT	Aus	NSW[27]	NT	NZ	Qld	SA	Tas	Vic	WA
2009	80	70	72	38	82	56	62	114	90	116
2013	80	88	72	46	82	110	62	114	90	116
2020	90	88	72	46	82	110	80	114	108	116

27 The scores recorded for the New South Wales in the 2009 and 2013 surveys have been amended to correct an error in the scores assigned for Deemed Entities which were overlooked in those surveys.

Factors Surveyed

The key legislative components identified in the 2009 survey that relate to mandate and discretion included the Auditor General's:

Functional mandate, which identifies the type of audit work that the Auditor General can undertake. To have a full and effective audit mandate, the Auditor General should have a functional mandate to undertake audit work that includes:

1. **Financial statements/accounts** – audit opinions that provide assurance about financial statements or accounts;
2. **Compliance with statutory obligations** – providing assurance or directly determining whether an agency has complied with its financial and non-financial statutory obligations
3. **Management reporting systems** – providing assurance about the effectiveness of management reporting systems for financial and/or non financial reporting;
4. **Performance indicators and/or performance reports** – providing assurance about performance indicators and/or performance reports;
5. **Performance audits/examinations** – directly examining or investigating any aspect of an entity's operations and/or the economy efficiency and effectiveness with which its functions were performed.

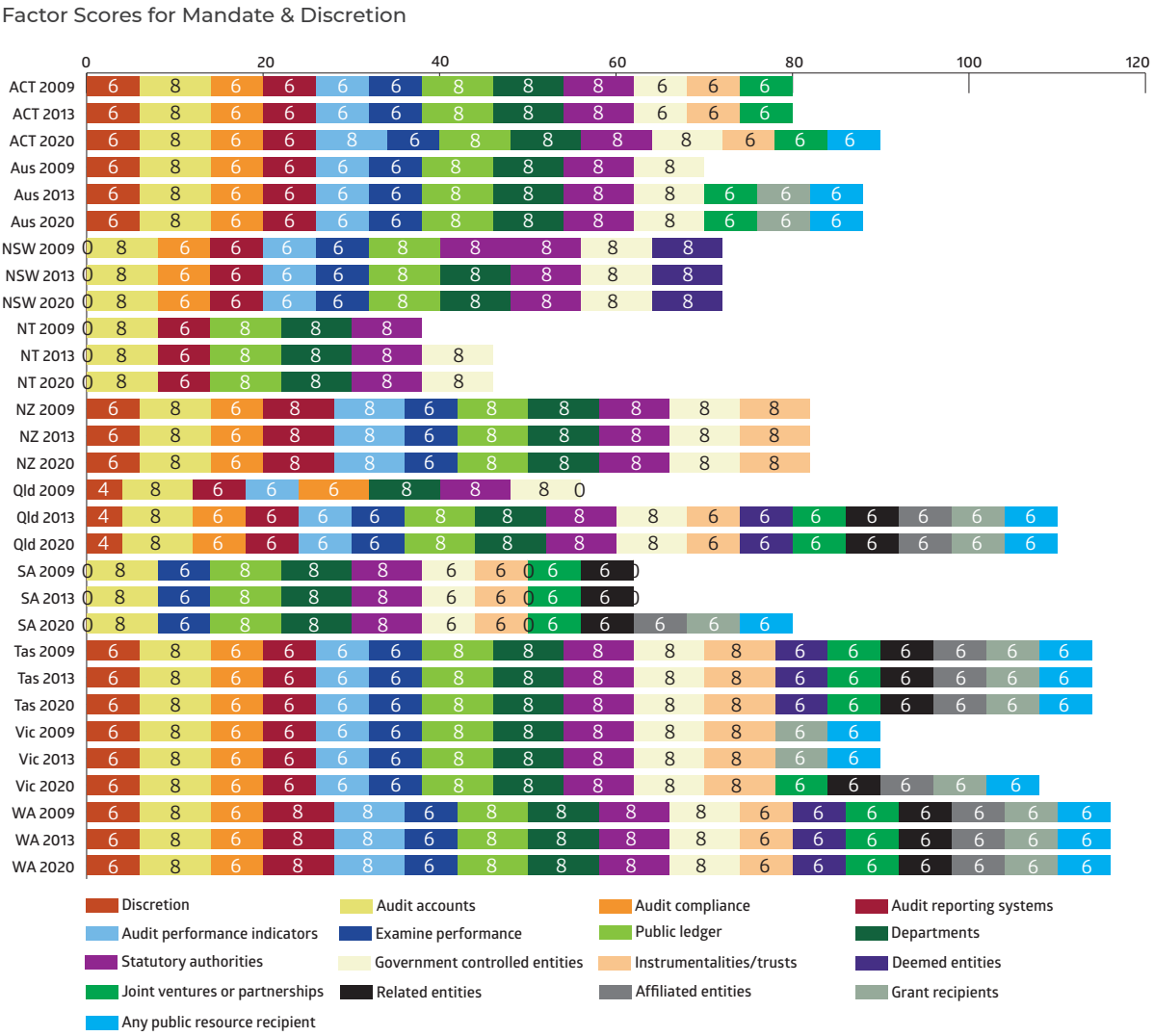
Coverage mandate, which defines the types of statements, entities, bodies, or persons or establishes other circumstances under which the Auditor General's functional mandate may be exercised. The following aspects of coverage were examined in the survey of legislation:

6. **Public ledger/whole of government finances** (audit of whole of government public ledger and/or budgets;
7. **Government departments** (audit of the use of public money, resources or assets by government departments);
8. **Statutory authorities** (audit of the use of public money, resources or assets by government statutory authorities);
9. **Instrumentalities and trusts** (audit of the use of public money resources or assets by other instrumentalities or trusts);
10. **Government owned or controlled entities** (audit of the use of public money, resources or assets by government owned business enterprises, corporations and subsidiaries);
11. **Deemed entities** (audit of entities deemed by government to be public entities because of the use of public resources whatever the extent of control);
12. **joint-venture or partnerships** (audit of public-private partnerships or joint endeavours that used significant public resources, or gain significant benefit there from);
13. **Related entities** (audit of bodies or entities that are financially dependent upon public resources and subject to operational public control);
14. **government affiliated entities** (audit of entities financially dependent upon public resources but independently controlled);
15. **Grant recipients** (audit of recipient of grants of public resources to determine if the resources have been used for the intended purposes);
16. **Beneficiaries or recipients of any public resources** (audit of the use of public money, resources or assets by a recipient or beneficiary regardless of its legal nature).

Discretion for the Auditor General to undertake audits, examinations or investigations or to otherwise exercise the mandate provided.

17. The key factor examined for discretion is whether the Auditor General is **subject to direction**, and **if so by whom**.

Figure 9 Assessment of factors impacting on Mandate and Discretion



Analysis and Discussion

Functional Mandate

The independence of an Auditor General is significantly influenced by the type of audit work enabled by the legislation. There has been a strong international trend to broaden the powers of Auditors General so that they can audit the use to which public monies, resources, or assets have been put in a way that extends well beyond the traditional role or providing assurance about the financial statements issued by various types of entities.

Financial Statements/Accounts

All jurisdictions continue to mandate a major role for their Auditor General in providing audit assurance and issuing formal audit opinions about the accounts and financial statements of government and public sector entities.

Compliance with Statutory Obligations

The ability to audit the legal regularity and compliance of government spending and revenue collection and compliance with statutory obligations generally (beyond compliance with financial obligations) continues to vary across jurisdictions.

- Western Australia mandates the requirement of a formal audit opinion on compliance with financial controls.

- Most other jurisdictions (including Western Australia but excluding South Australia and the Northern Territory) enable compliance with broader statutory obligations to be examined under a performance audit mandate.

Management Reporting Systems

The function of auditing performance management systems to determine if they enable an entity to assess whether its objectives are being achieved economically, efficiently and effectively is usually available in all jurisdictions where that Auditor General has a mandate to conduct broader performance audits.

However, a specific mandate for this type of audit has been used in some jurisdictions to constrain the extent to which the Auditor General is able to audit the non-financial performance of an entity.

- At the time of the 2009 survey the Auditor General for Queensland and the Northern Territory had this type of audit function. Queensland specifically excluded government owned corporations from this type of audit.
- The Northern Territory has retained this type of audit for most government entities, but has amended its legislation to enable the Minister to direct the Auditor General to undertake such an audit of an organisation if the Minister believes that a [government] agency has paid the organisation for delivering projects or services that could be delivered by the agency.
- Queensland amended its legislation prior to the 2013 survey to enable full performance auditing of most types of entities but now permits the Auditor General to undertake a management system type of audit of its government-owned corporations.

Performance Indicators and/or Performance Reports

The function of auditing performance indicators of efficiency or effectiveness and/or other non-financial performance information reported by management varies widely between jurisdictions.

At the time of the 2009 survey:

- Western Australia, legislation mandated an annual audit opinion about the relevance, appropriateness and fair representation of agency's performance indicators. New Zealand similarly mandated auditing of 'other information' that is required to be audited whilst in Victoria the Auditor General had discretionary power to audit any performance indicators in the report on operations of a [public] authority.
- Queensland enabled the audit of performance measures of public sector entities, but specifically excluded government owned corporations from this type of audit.
- In other jurisdictions the audit of performance indicators was not explicitly provided for but was possible in those that had a broader performance audit mandate.

By the time of the 2013 survey:

- The Commonwealth had amended its legislation to provide for the Auditor General to audit performance indicators of Commonwealth agencies, authorities or companies, at the discretion of the Auditor General. However, the Auditor General is only able to audit performance indicators of the Commonwealth's Government Business Enterprises if requested to do so by the Parliamentary Committee.
- Queensland has amended its legislation to enable its Auditor General to audit performance measures of government owned corporations.
- Other jurisdictions enable entity performance indicators to be examined as part of a performance audit, at the discretion of the Auditor General.
- South Australia and the Northern Territory do not have a mandate to audit performance indicators although as mentioned above, the Northern Territory can audit the management systems that underpin such information.

Since the 2013 survey:

- The Australian Capital Territory Financial Management Act 1996 now requires each directorate (except the Office of the Legislative Assembly or Officers of the Assembly) to produce a Statement of Performance and the Auditor-General must issue a report on the Statement which must be included in the directorate's Annual Report.
- The Commonwealth has amended provisions for Annual Performance Statement Audits, at request of the Minister OR as part of a performance audit.

Performance audits or examinations

The functions that enable the Auditor General to directly review, examine or investigate aspects of an entity's operations are referred to as **performance audits** in many of the jurisdictions in the survey. Performance auditing usually includes the ability to assess waste of public resources, the economy, efficiency, and effectiveness with which resources have been used in achieving the purpose for which they were allocated, compliance with statutory obligations and many or any other aspect of an entity's operations. Performance audits may be conducted of an entity, of part of an entity or of some or any functions that an entity performs. They may also be conducted across a range of entities.

At the time of the 2009 survey:

- The Auditors General in all jurisdictions except Queensland and the Northern Territory had varying abilities to conduct performance audits, with South Australia being confined to examinations of economy and efficiency.

By the time of the 2013 survey:

- Queensland has amended its legislation to include a mandate for the Auditor General to conduct performance audits, with the object of deciding whether the objectives of the public sector entity are being achieved economically, efficiently and effectively and in compliance with all relevant laws.

Since the 2013 survey:

- South Australia's performance audit mandate has been expanded to include effectiveness as well as economy and efficiency, and the Auditor General may decide which bodies will be audited. However, the audit must be undertaken if requested by the Treasurer.
- Commonwealth legislation has been amended to enable performance audits of any Commonwealth entity, company or subsidiary, and may be whole or part of the Commonwealth public sector [but GBE's only if requested by the Joint Committee of Public Accounts and Audit].

Jurisdictions continue to vary as to the types of government-controlled entities that may be subjected to performance audits. These are discussed in more detail under the coverage mandate below.

Other functional mandates

Several jurisdictions have now introduced even wider mandates for their Auditors General.

- Western Australia and Tasmania both have legislatively empowered their Auditors General **to examine or investigate any matter** relating to public money, other money or statutory authority money or relating to public property or other property. This is discussed further below.
- The Australian Capital Territory remains the only jurisdiction to have empowered the Auditor General to consider and assess **environmental issues and economically sustainable development**.
- Both the Commonwealth and Victoria have introduced provisions to conduct assurance reviews.

Coverage Mandate

Ideally, in accordance with INTOSAI Principle 3, the Auditor General should be empowered to audit the use of public moneys, resources, or assets by any recipient or beneficiary regardless of its legal nature.

There is little point in providing wide functional powers to an Auditor General if these powers can be circumvented by the types of entities he or she is empowered to audit, or if the Executive is able to exempt certain entities from the Auditor General's coverage.

The extent of the coverage mandate continues to be a vexed area and one that is quite difficult to unravel. It remains the area where there is greatest variation between jurisdictions, and the area that enables Executive to influence to what extent they can be held accountable for their use of public resources.

This has become increasingly important as new forms of public sector management, joint ventures, outsourcing, and so on, have changed the way the public sector operates, creating a need for new ways of making both agencies and governments accountable for what they do.

In many jurisdictions, the legislative framework enables the Auditor General to exercise his or her functional mandate only over entities the government owns or controls. However, governments have increasingly adopted new mechanisms for service delivery that result in public resources being used in joint ventures, partnerships and contracting of arrangements, often using entities that the

government does not control. It has become increasingly difficult for Auditors General to assist their Parliaments to hold Executive accountable for the proper use of public resources when these mechanisms are used.

Some legislation deliberately excludes certain types of government entities from the scrutiny of the Auditor General, whilst in others the Executive has the capacity to either exclude or include entities or parts of entities at its whim.

- Queensland's Auditor General may only conduct a performance audit of a government owned corporation (GOC) or a government controlled entity if requested to do so by a resolution of the Legislative Assembly or by written request of a Parliamentary Committee, the Treasurer or an appropriate Minister.
- The Commonwealth has similar constraints on performance auditing of its government business enterprises (GBE) but has amended its legislation since the 2009 survey to enable such audits only at the request of the Joint Committee of Public Accounts and Audit (removing the previous provision for the responsible Minister or the Minister for Finance to make such a request).

At the time of the 2009 survey, the legislation in only two Australian jurisdictions was close to the ideal expressed in INTOSAI Principle 3.

- Western Australian and Tasmanian legislation includes a provision that enabled the Auditor General to **examine** or **investigate any matter** relating to public resources of any kind.

It is important to note that these investigative provisions do not depend on the Auditor General becoming the 'auditor of the entity' in the traditional sense.

Instead, they take account of the changes in the way significant quantities of public resources are being deployed by governments and address some of the more recently developed service delivery mechanisms and structures to which governments either commit public resources or forego other public benefits.

  - In essence, the legislation in these jurisdictions enables their Auditors General to **'follow the money'** wherever it has gone regardless of the legal nature of any recipient or beneficiary.
  - In Western Australia and Tasmania, if an agency performs any of its functions in partnership or jointly with another person or body; through the instrumentality of another person or body; or by means of a trust, the person, body or trust becomes a **"related entity"**.
- The Auditor General for Western Australia may audit the accounts and financial statements of a related entity of an agency to the extent that they relate to functions that are being performed by the related entity and may examine the efficiency and effectiveness with which a related entity of an agency performs functions.
- Tasmania has similar provisions for examining efficiency, effectiveness and economy of performance of functions by related entities.
- South Australia had provisions in its legislation that require the Auditor General to examine the accounts of publicly funded bodies or publicly funded projects to determine the efficiency and economy of publicly funded bodies or the efficiency and cost effectiveness of the publicly funded projects. However, this power remained firmly under the control of the Executive. Such audits could only be undertaken if requested by the Treasurer.

Between the 2009 and 2013 surveys:

- The Commonwealth amended its legislation to enable the Auditor General to 'follow the money' to some extent. The new provisions enable the Auditor General to conduct
  - a performance audit of a **Commonwealth partner** – a person or body to whom the Commonwealth has provided money for a Commonwealth purpose or who has directly or indirectly received such money, either through a contract or other means. The performance audit is limited to assessing the extent to which the operations of the partner have achieved the Commonwealth purpose.
  - The new Commonwealth partner provisions could have Constitutional implications when a Commonwealth partner is, is part of, or is controlled by a government of an Australian State or Territory. The amended legislation only allows a performance audit to be undertaken of these partners at the request of the responsible Minister or the Joint Committee of Public Accounts and Audit. In addition, a constitutional 'safety net' has been included in the amended legislation to address potential issues arising from these or other provisions in the Commonwealth's audit legislation.

- Queensland amended its legislation to enable its Auditor General to conduct an **audit of a matter** relating to property that is, or was, held or received by a public sector entity and given to a non-public sector entity with the object of the audit including deciding whether the property has been applied economically, efficiently and effectively for the purposes for which it was given to the non-public sector entity.
- Victoria had provision in its legislations that enabled the Auditor General to conduct any audit he or she considers necessary to determine whether a financial benefit given by the State or an authority to a person or body that is not an authority has been applied economically, efficiently and effectively for the purposes for which it was given. However, at that time the Victorian legislation specifically excluded a financial benefit received by a person or body as consideration for goods or services provided by them under an agreement entered into on commercial terms, which could potentially be used to preclude examination of contracted service provision.

Since the 2013 survey:

- South Australia's has amended its legislation to enable the Auditor General to initiate audits or examinations of effectiveness as well as economy and efficiency of publicly funded bodies, publicly funded projects, and local government indemnity schemes, even where the body, project or scheme has ceased to exist, and must do so if requested by the Treasurer or the Independent Commissioner Against Corruption.
- Victoria has substantially amended its legislation.
  - The mandate was expanded in 2016 with respect to performance audits by the definition of an **"associated entity"** which means any person or body that provides services or performs functions for, on behalf of a public body, or on behalf of the State for which a public body is responsible. This includes:
    - a contracted service provider or sub-contractor of the public body;
    - an agent or delegate of the public body;
    - the holder of a concession granted by the public body;
    - a trustee of the public body;
    - a person or body that has entered into—
      - a partnership; or
      - an arrangement for sharing of profits; or
      - a union of interest; or
      - a co-operative arrangement; or
      - a joint venture; or
      - a reciprocal concession—
    - with the public body;
    - a third party contractor;
  - The mandate also enables any performance audit to be undertaken where any financial benefit or property has been given to an entity that is not a public body.
  - The mandate was further expanded in 2019 by the new definition of **"public body"** which now includes inter alia a public sector body, a corporate or unincorporated body established for a public purpose, an entity which the State or another public body has sole or joint control, a State owned enterprise, a variety of trusts, regional libraries, registered community health centres, registered aged care service providers and other prescribed entities, but specifically excludes performance audits of the Victorian Inspectorate
- Other jurisdictions continue entity-focussed audits of government departments, statutory authorities and/or other predetermined types of public sector entities.

Discretion

To be fully independent, in accordance with INTOSAI Principles 2 and 3, an Auditor General requires complete discretion in exercising his or her powers and in the way his or her functions are carried out. Importantly, the Auditor General should not be subject to direction from anyone as to whether an audit is to be conducted, how audits are conducted, or the priority any audit work is given.

Whilst all the jurisdictions examined impose legislative obligations on Auditors General to undertake certain audits, the discretion he or she is afforded to exercise functions as he or she sees fit is an important component of independence.

In some circumstances, it may be appropriate that the independent scrutiny of the Auditor General can be brought to bear on matters of public concern by providing the capacity to request that the Auditor General examine the matter and report the findings to the Parliament. However, where the Executive can direct the Auditor General to undertake specific tasks it can lead to the perception that the Auditor General is simply another part of Executive government. A direction could also be used to divert attention and/or resources from the exercise of other independent audit functions.

There is considerable variation among jurisdictions about whether the Auditor General can be directed or requested to undertake specific audit tasks, and if so by whom.

- Several jurisdictions require the Auditor General to consider or have regard to audit priorities of Parliament or Parliamentary Committees when developing annual audit plans.
- Victorian legislation requires an annual plan of proposed work to be submitted to the Parliamentary Committee and the Auditor General must consider the Committee's comments when finalising the plan and must indicate any changes suggested by the Committee that have not been adopted. The legislation also requires consultation on draft specifications for individual performance audits which set out the objectives, entity coverage and issues to be considered are similarly submitted to the Parliamentary Committee and to the entities to be the subject of the audit for comment before the specifications are finalised.
- Tasmania has amended its legislation to extend the list of bodies that may request the Auditor General to undertake a specific audit or investigation. In addition to requests from the Treasurer, the Public Accounts Committee and the Ombudsman, requests for audits or investigations may now also emanate from the Integrity Commission and Integrity Tribunal or from the Employer under the *State Service Act*. However, in all cases the discretion is left with the Auditor General, who may undertake the requested audit or investigation. Western Australia has similar provisions concerning request audits although the list is less extensive.
- The Commonwealth has amended its legislation to remove some of the powers of Executive to request the Auditor General to undertake an audit whilst retaining the provisions for the Parliamentary Committee to request audits.
- In Queensland, the Auditor General must conduct audits if requested by the Legislative Assembly.
- Although the Northern Territory has amended its legislation since the 2009 survey to mandate the independence of its Auditor General, it has also strengthened provision for the Minister to direct the Auditor General to undertake certain types of audits which the Auditor General must carry out within a time frame specified by the Minister.
- South Australia and New South Wales also enable the Executive to direct the Auditor General to undertake specific audit tasks.
- New South Wales is the only jurisdiction to make provision for additional resources to be made available for directed audits, but at the discretion of the Treasurer.

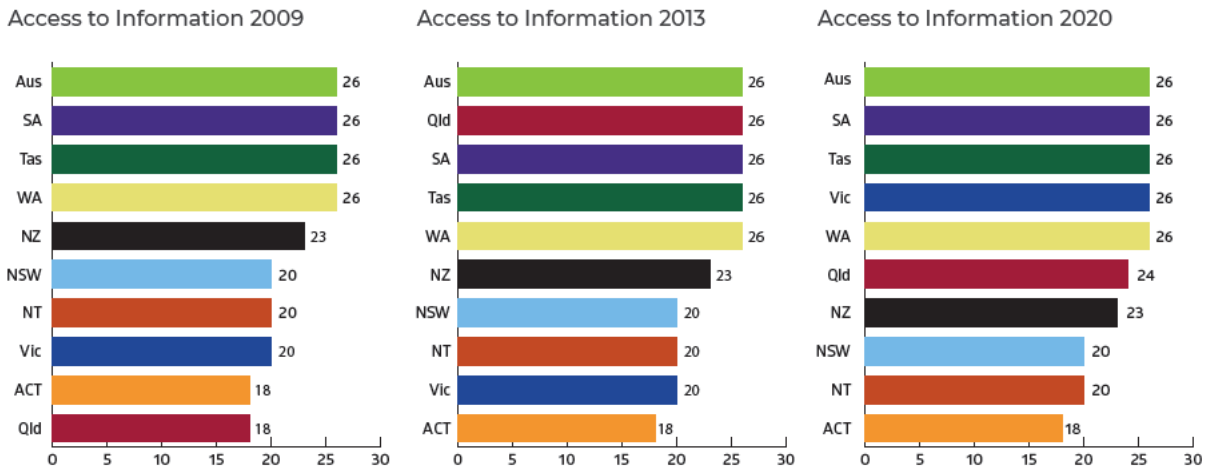
Access to Information and Confidentiality

INTOSAI Principle 4. Unrestricted access to information.

Overall Independence Scores for Access to Information and Confidentiality

- Victoria now has powers to enter premises.
- Queensland weakened confidentiality of information by enabling audit information to be shared with the Treasurer or Queensland Treasury.
- The Australian Capital Territory confidentiality remains vulnerable to Executive

Figure 10 Overall scores for Access to Information and Confidentiality



Survey	ACT	Aus	NSW	NT	NZ	Qld	SA	Tas	Vic	WA
2009	18	26	20	20	23	18	26	26	20	26
2013	18	26	20	20	23	26	26	26	20	26
2020	18	26	20	20	23	24	26	26	26	26

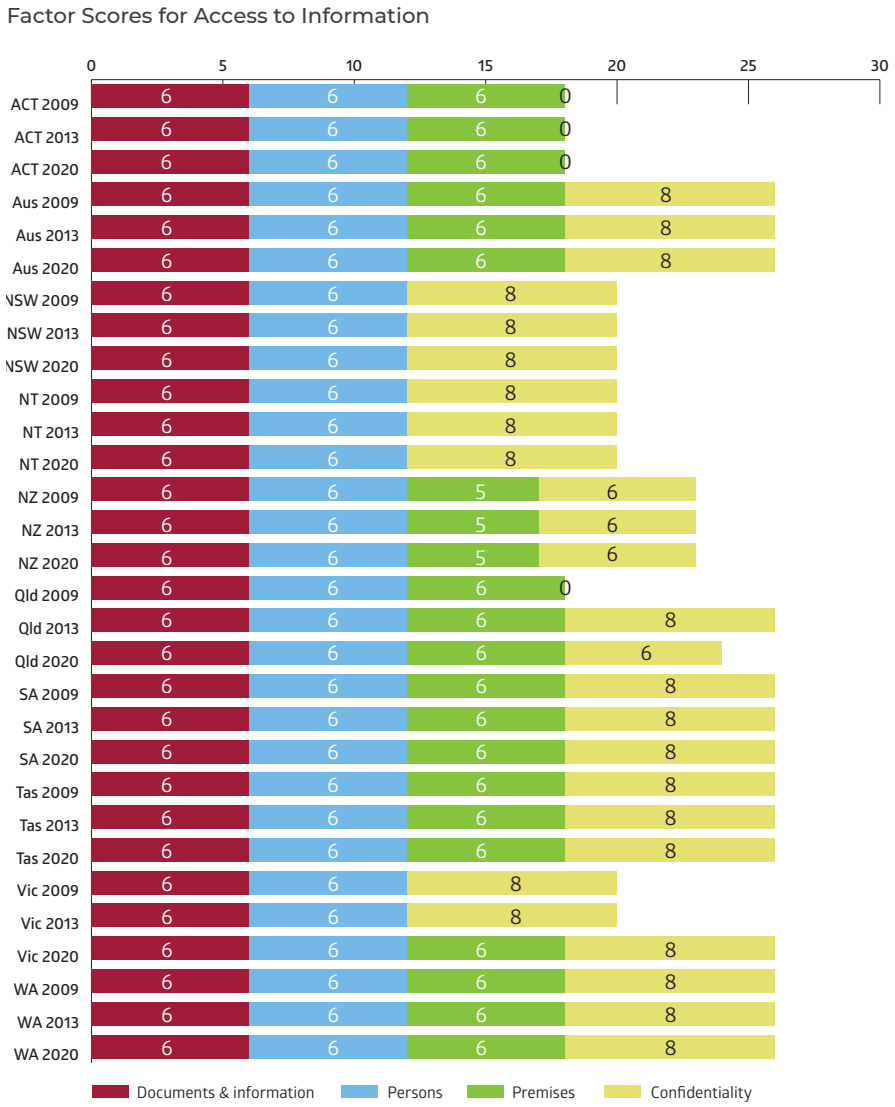
Factors Surveyed

Auditors General should have adequate powers to obtain timely, unfettered, direct, and free access to all the necessary documents and information for the proper discharge of their statutory responsibilities. The information they obtain using their information gathering powers should be protected from inappropriate disclosure.

The key legislative components identified in the legislation reviewed with respect to access to information were:

1. The ability **to access documents** or information in any form that is relevant to an audit;
2. The ability **to call persons** to produce documents, give evidence orally, in writing or under oath;
3. The ability **to access premises** and to examine, make copies of or extracts from documents or other records; and, additionally,
4. The extent to which **confidentiality of information** obtained by the Auditor General is preserved and protected from inappropriate disclosure.

Figure 11 Assessment of factors impacting on Access to Information and Confidentiality



Analysis and Discussion

Access to Documents, Persons and Premises

All jurisdictions have empowered their Auditor General to have access to documents and persons who may have information of value to their enquiries. Some also enable the Auditor General access to premises for inspection of documents or other things relevant to an audit.

However, as with the coverage mandate mentioned above, some jurisdictions have yet to adapt the powers of their Auditor General to recent developments in the way the public sector operates.

In several jurisdictions, the Auditor General only has access to information held by government agencies or to persons employed within the public sector and to premises under the control of government entities.

Wider powers are necessary where the coverage mandate of the Auditor General encompasses examination or investigation of any use of public resources, which may extend beyond the traditional confines of the public sector.

At the time of the 2009 survey:

- Only the most recent legislation in some jurisdictions was explicit in giving the Auditor General access to any information, any person, or any premises, land or place that is relevant to an audit, examination or investigation.

By the time of the 2013 survey:

- Queensland had amended legislation constraining access to premises and information when exercising new powers to audit non-public sector entities.

Since the 2013 survey

- Victoria's *Audit Act 1994* has been amended to introduce extensive new coercive powers consistent with the greatly expanded audit mandate described earlier.
  - The Auditor General or an authorised auditor may serve an **"Information Gathering Notice"** which can require persons to provide any relevant information, to produce any relevant documents in the person's possession custody or control and/or to attend and give evidence and be questioned under oath. The amended legislation contains extensive provisions relating to secrecy and confidentiality of information as well as checks, balances and safeguards when these powers are used.
  - The Auditor General or an authorised auditor may serve an **"Entry Notice"** which gives power to enter and remain on premises owned or occupied by a **public body** to inspect the premises and any document or thing if it is necessary for the purpose of a financial audit or performance audit and, for a performance audit, gives power to enter, remain on and inspect the premises of an **associated entity** that are used for providing services or functions on behalf of the State or which contain property of a public body or the State.
  - Penalties for non-compliance with these new information gathering powers have been increased and may include imprisonment for two years.
  - The Auditor General is required to report each instance where such powers are exercised to the Victorian Inspectorate, which also has the power to monitor compliance and to investigate complaints about the Auditor General or the staff of the Victorian Auditor General's Office, reporting findings to the Parliamentary Committee. No other jurisdiction has embedded such oversight provisions in its audit legislation.
  - Notwithstanding the information gathering powers in the Victorian audit legislation, access to information is not necessarily completely unfettered. The provisions of the *Audit Act 1994* can and have been explicitly overridden in other legislation.

Confidentiality

It is important to protect the working papers that are involved in the development of the view ultimately taken by the Auditor General, and to ensure that the Auditor General's information gathering powers are not used to provide a 'back door' to sensitive information.

- Most jurisdictions provide for the information gathered by their Auditor General to be kept confidential. Most jurisdictions also provide for confidentiality or secrecy of information gathered during an audit.
- Several jurisdictions have exempted the Auditor General from Freedom of Information legislation for this reason, although New Zealand does allow access to certain information about individuals through its privacy legislation.
- Several jurisdictions also forbid persons who are entitled to be asked to comment on draft reports or extracts of draft reports during the final stages of a report's preparation from releasing the draft report or the extract of the draft report.
- Several jurisdictions enable information gathered during the course of an audit that would not otherwise be made public, to be provided to Parliamentary Committees, Police, various forms of integrity or misconduct bodies, other investigating bodies and the Courts.
- Recent amendments to audit legislation in some jurisdictions also enable certain information sharing to take place, for example in the course of a joint audit with another jurisdiction.
- Victoria's legislation enables collaboration and information sharing with the Auditor General of another jurisdiction but does not empower the Auditor General to conduct a joint audit.

- The legislation in the Australian Capital Territory is unusual in that the Minister may direct the disclosure of the Auditor General's 'protected information' if the Minister considers it to be in the public interest to do so.
- Between the 2009 and 2013 surveys, a similar public interest provision in Queensland's former *Freedom of Information Act 1992* was removed in the new *Right to Information Act 2009*, providing better protection for the Auditor General's confidential information.
- However, in 2019, Queensland's Auditor-General Act 2009 was amended to enable sharing audit information with the Treasurer or Queensland Treasury. The Auditor General may now disclose any information about departments or other prescribed entities (including 'personal information' and otherwise 'protected information') obtained during an audit to the Treasurer or Treasury who may use the information only for conducting economic and financial analysis or for budgeting purposes.
- Although the Queensland Auditor General has the discretion to decide whether to share, what to share, how to share and when and how often to share information, these amendments create an expectation that information can, and in the normal course of events will, be disclosed. The amendments could therefore provide Executive Government with a 'back door' to information that would otherwise be confidential. This has the potential to undermine trust in the audit process and has a negative impact on independence.

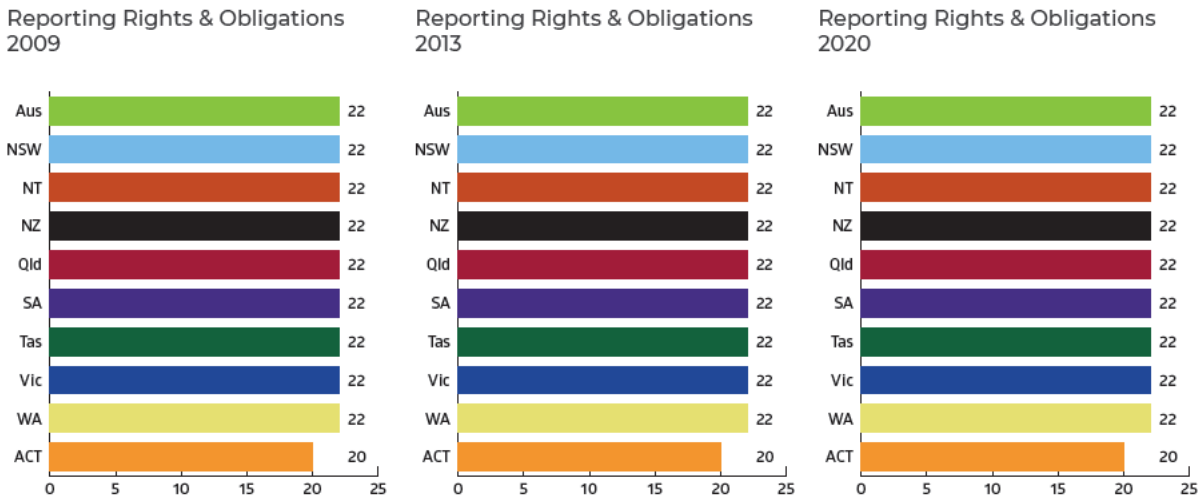
Reporting Rights and Obligations

INTOSAI Principle 5. The right and obligation to report on their work.

Overall Independence Score for Reporting Rights and Obligations

All the jurisdictions surveyed continue to have reporting rights and obligations consistent with INTOSAI Principle 5 embedded in their legislative frameworks.

Figure 12 Overall scores for Reporting Rights and Obligations



Year	ACT	Aus	NSW	NT	NZ	Qld	SA	Tas	Vic	WA
2009	20	22	22	22	22	22	22	22	22	22
2013	20	22	22	22	22	22	22	22	22	22
2020	20	22	22	22	22	22	22	22	22	22

Factors Surveyed

Openness and transparency in reporting are fundamental to the independence of the Auditors General and to their role in the overall integrity system. Auditors General should not be restricted from reporting the results of their audit work.

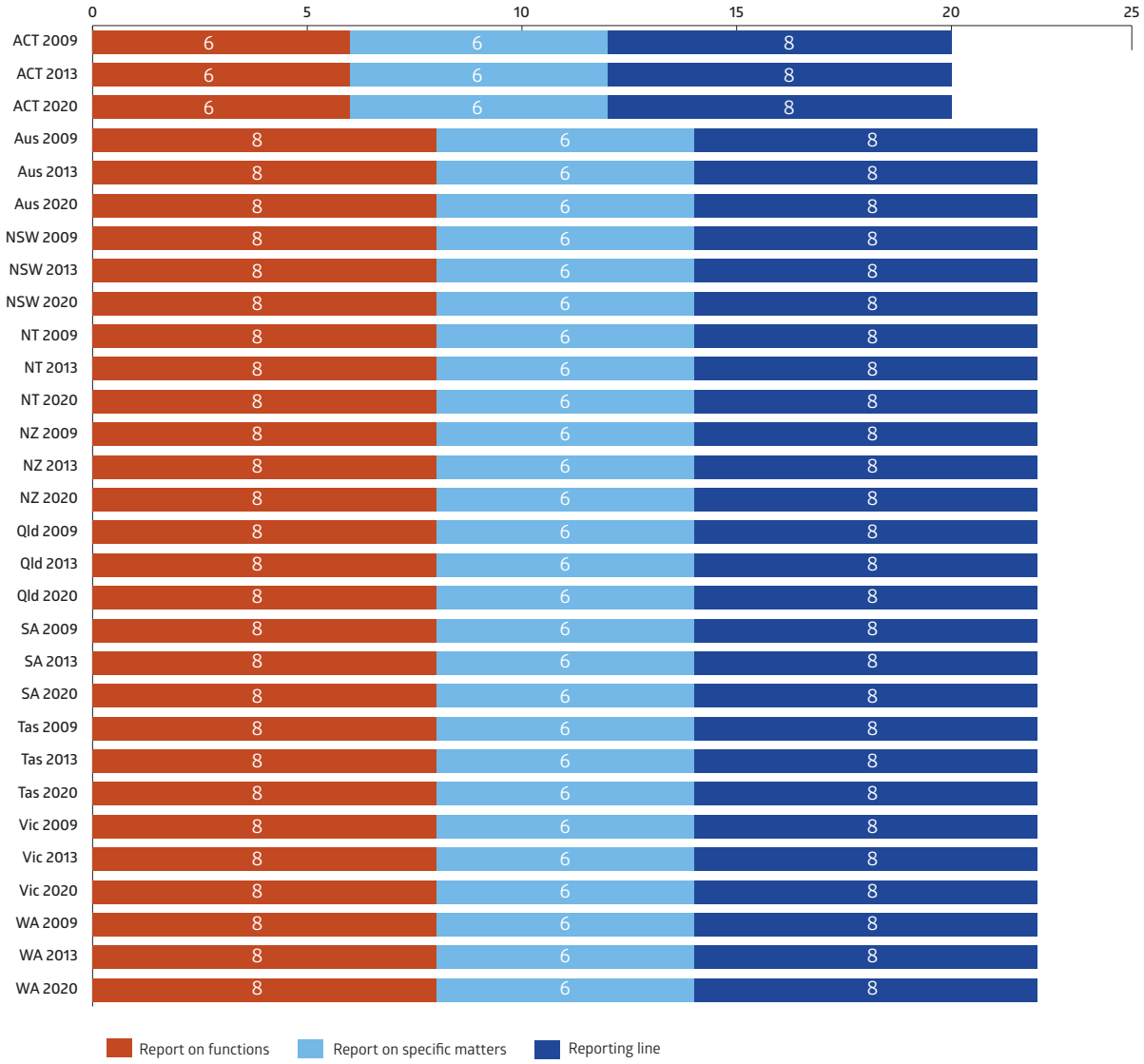
Auditors General should be required to report on the outcome of their work and should also be able to report significant findings at any time. The reports should be presented directly to the Parliament and should be published. The transparency this brings to accountability forms a vital part of the overall integrity of the system of government.

The key legislative components identified in the legislation reviewed with respect to reporting rights and obligations were:

1. The obligation to report to Parliament on the discharge of functions generally;
2. The ability to produce separate reports on any matter the Auditor General considers warranting such a report; and
3. The ability or requirement to report directly to the Parliament.

Figure 13 Assessment of factors impacting on Reporting Rights and Obligations

Factor Scores for Reporting Rights & Obligations



Analysis and Discussion

- In most jurisdictions, legislation requires the Auditor General to report on the discharge of his or her functions and the results of audit work at least annually.
  - In the Australian Capital Territory reporting the results of audit work is at the Auditor General's discretion.
  - South Australia has amended its legislation to introduced new provisions to describe the outcomes of any examinations of publicly funded bodies and projects and local government indemnity schemes.
- All jurisdictions also enable the Auditor General to prepare reports on specific matters at any time.
- In all jurisdictions the Auditor General has a direct reporting line to the Parliament and reports are either tabled or, if the Parliament is not sitting, are treated by the Clerks of the Parliament is if they have been tabled.

However, several jurisdictions enable or require the Auditor General to direct reports elsewhere when sensitive information is involved.

- Some jurisdictions provide the Auditor General with the discretion to report only to a Committee of Parliament, to a Minister, to an entity or to some other person.
- Tasmania has amended its legislation to require sensitive information to be reported to the Public Accounts Committee.

Content, Timing and Publication of Reports

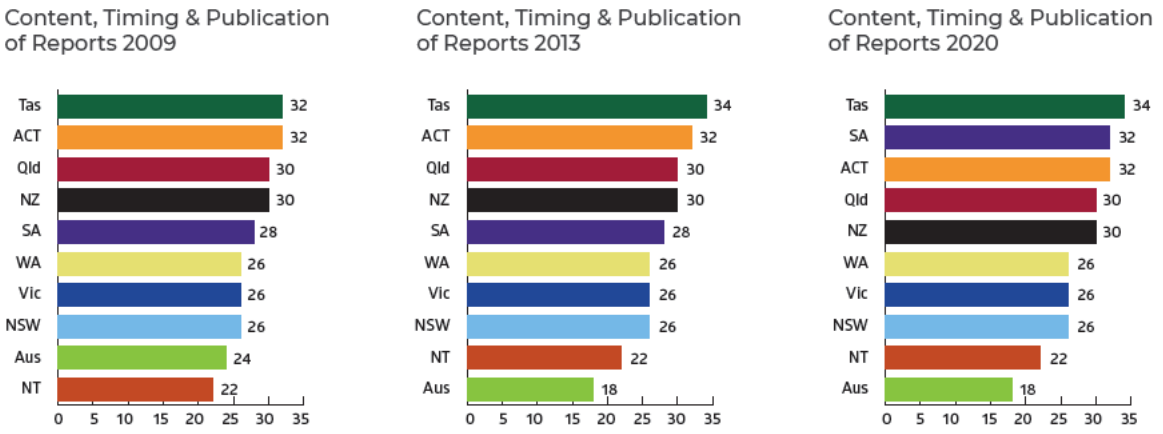
INTOSAI Principle 6. The freedom to decide the content and timing of audit reports and to publish and disseminate them

Overall Independence Score for Content, Timing and Publication of Reports

Independence scores for INTOSAI Principle 6 continue to vary considerably between jurisdictions.

- Victoria and Tasmania have amended legislation to prohibit certain information from being included in public reports.
- The Commonwealth, Northern Territory and Tasmania have amended legislation relating to responses of audited entities.

Figure 14 Overall scores for Content, Timing and Publication of Reports



Year	ACT	Aus	NSW[28]	NT	NZ	Qld	SA	Tas	Vic	WA
2009	32	24	26	22	30	30	28	32	26	26
2013	32	18	26	22	30	30	28	34	26	26
2020	32	18	26	22	30	30	32	34	26	26

Factors Surveyed

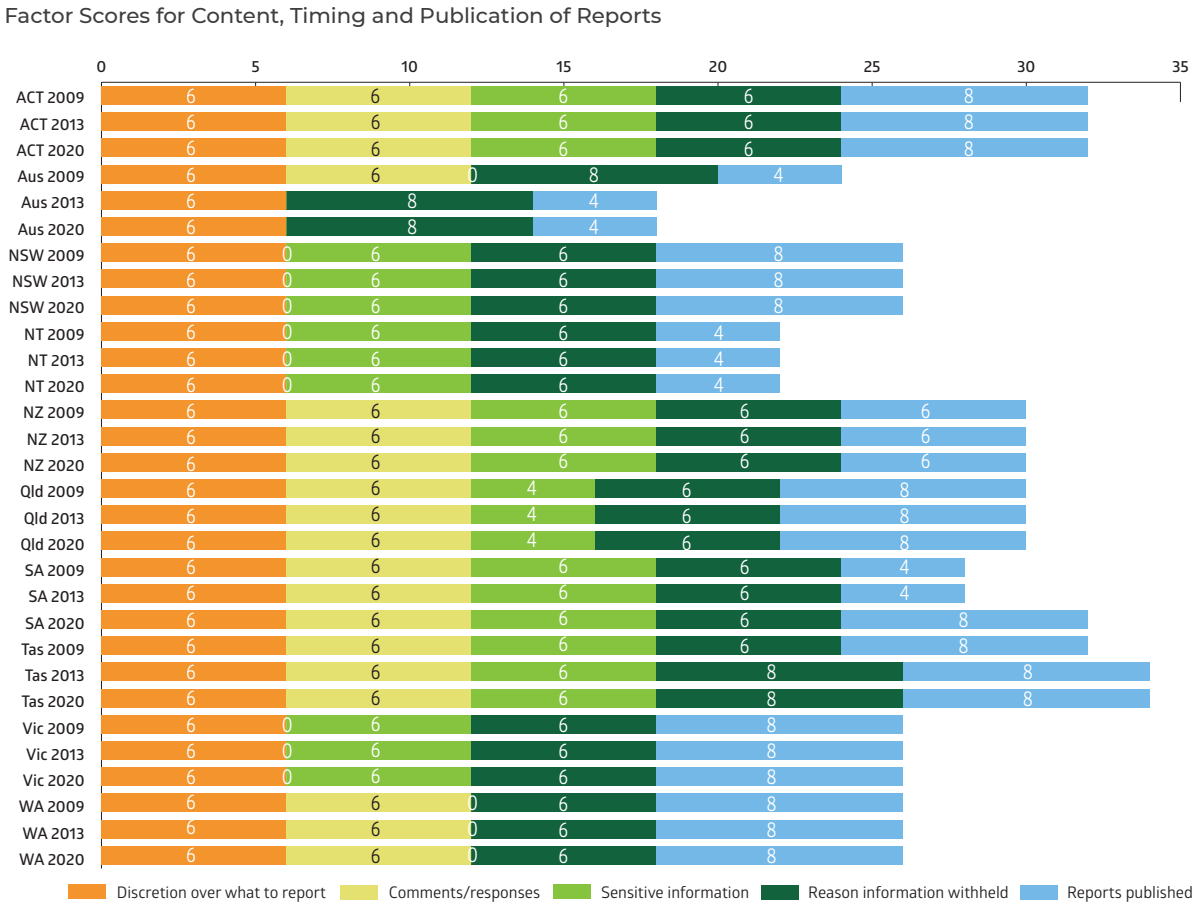
The ability to decide the content and timing of their reports is an important aspect of the independence of Auditors General. Publication of these reports is a fundamental element of transparency.

The key legislative components identified in the legislation reviewed that related to Principle 6 were:

1. Whether the Auditor General has complete discretion over **when to report** and **what to include in, or exclude from**, a report;
2. Whether the Auditor General is required to provide audited entities or persons with an **opportunity to comment** on a proposed report consider responses of and whether they have **discretion to fairly summarise any responses** received so that the extent and form of a response cannot be used to subvert or divert attention from audit findings;
3. Whether **'sensitive' information** may be included in the Auditor General's report;
4. Whether the **reason for withholding** 'sensitive' information may be disclosed; and
5. Whether the Auditor General's **reports are published** for general distribution to the public.

28 The scores recorded for New South Wales in the 2009 and 2013 surveys have been amended to correct errors in the scores assigned for two factors in those surveys. Publication of reports is legislative mandated but was incorrectly recorded as Parliament Decides. The score for Responses of audited entities was also amended to be consistent with scores assigned in other jurisdictions.

Figure 15 Assessment of factors impacting on Content, Timing and Publication of Reports



Analysis and Discussion

Discretion over when to report, what to include in, or exclude from, a report

All jurisdictions in the survey provide discretion to their Auditor General to decide the content and timing of their reports.

Responses from audited entities

In preparing a report, it is a natural justice requirement that Auditors General should take into consideration the views of the audited entity about the findings contained in a report.

- Most jurisdictions have provisions that require a proposed report or a relevant extract of a proposed report to be provided to representative of relevant entities or persons affected by the report.
- Most jurisdictions also prescribe timeframes for comments to be provided, and sanctions to ensure that confidentiality of the proposed report is preserved.
- Most jurisdictions require that the Auditor General considers the responses received and usually require that the comments or a *fair summary* of them is included in the Auditor General's report.
  - New South Wales[29], Victoria and the Northern Territory require the Auditor General to either include comments and responses or an *agreed summary* of them.
  - The Commonwealth Auditor General *must include all written comments* received in the final report.

29 In previous surveys, New South Wales this factor was scored as 'AG decides'. This was incorrectly based on a score for reports prepared under s52 where the Auditor- General *may include* any comments. The Auditor General *is to include* in a report on performance audits prepared under 38C any comments or a summary in an agreed form. The scores have been reduced to 'Executive decides' to be consistent with other jurisdictions where similar provisions apply.

The need to reach agreement about the form and content of the summary of comments or to include all comments received essentially places this segment of an Auditor General's report under the control of the Executive (or any other persons consulted in the course of report preparation). These mechanisms therefore make what is published in an Auditor General's report vulnerable to Executive manipulation.

Sensitive information

Some jurisdictions impose constraints on the publication of 'sensitive' information, requiring exclusion of certain information from reports for reasons such as: national security, defence or international relations; deliberations of Cabinet; Commonwealth-State or intergovernmental relations; information provided by another party in confidence where disclosure is unfairly prejudicial to the commercial interests or a particular person or body; or where information relates to matters subject to criminal investigations or judicial proceedings.

- The Commonwealth Attorney-General can issue a certificate prohibiting the release of information if the Attorney-General considers that it is not in the public interest to release it but in that case the Commonwealth Auditor General is to include in the report the reasons that the certificate was issued. The Auditor General may also prepare a report on the matters not disclosed and may provide that report to the Prime Minister, the Treasurer and to any responsible Minister.
- Similar provisions apply in Western Australia where the Minister may prohibit disclosure of information if the Minister decides its release is not in the public interest and issues a notice under provisions of the Financial Management Act 2006. The Western Australian audit legislation is silent about whether reasons for withholding information can be disclosed by the Auditor General although the Minister is separately required to disclose reason for issuing a notice.
- In Queensland, sensitive information may be withheld if the Auditor General decides that it is in the public interest to withhold it, but if information is withheld, it must be included in a report to the Parliamentary Committee. Queensland's legislation is silent about whether the Parliamentary Committee can then release the information.
- Tasmania prohibits disclosure of sensitive information when the Auditor General considers its release would be against the public interest, but the Auditor General must disclose the reasons why information has been withheld. Such information is strongly protected and must not be disclosed to a House of Parliament, a member of a House or any Committee of Parliament. However, the Tasmanian Auditor General may decide to prepare a report that includes the information withheld and may provide the report to the Treasurer and to the Parliamentary Committee. Either may act on the information so provided, but the Committee can also choose to release the information if a 2/3 majority of the Committee believes it is in the public interest to do so.
- Victoria has amended its legislation regarding "certain commercial or protected information" which must not be disclosed unless in the Auditor General's opinion it is relevant and in the public interest to do so.

In all other jurisdictions, the legislation is silent with respect to reporting reasons for withholding information, which essentially leaves reporting of reasons that information has been withheld to the discretion of the Auditor General.

Reports published

In all jurisdictions there is provision for the Auditor General to provide reports to, and usually table reports in Parliament, which may then order that the reports to be published.

- Most jurisdictions have explicit provisions for the reports to be published or made available to the public if Parliament is not sitting[30]. South Australia has recently amended its legislation to require that the Auditor General's reports, and other annexed documents be published.
- Legislation in the Commonwealth and the Northern Territory is silent on the matter of publication.

30 The scores for New South Wales have been corrected in all surveys to take note of the provision in s63C

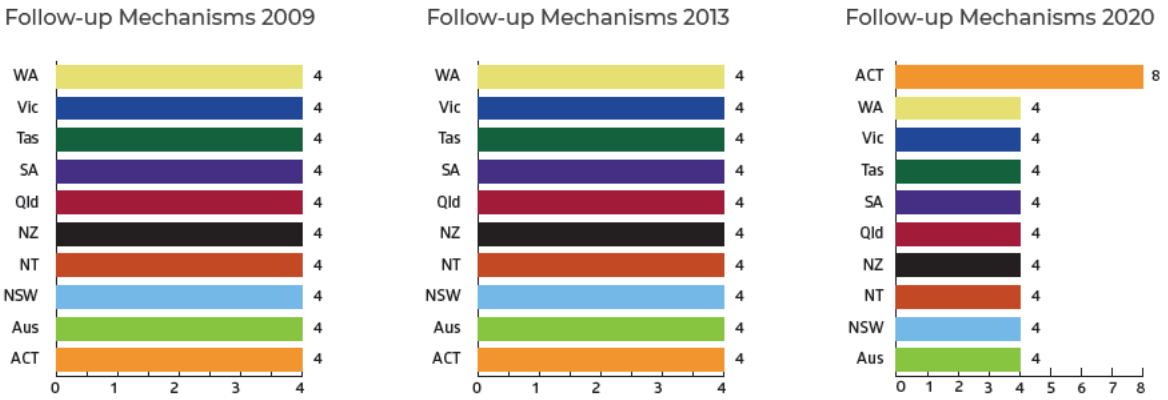
Follow-Up Mechanisms

INTOSAI Principle 7. The existence of effective follow-up mechanisms on SAI recommendations

Overall Independence Score for Follow-up mechanisms

- The Australian Capital Territory has amended legislation to require a response from the Minister. There have been no changes to the overall independence scores for this Principle

Figure 16 Overall Scores for Follow-up Mechanisms



Survey	ACT	Aus	NSW	NT	NZ	Qld	SA	Tas	Vic	WA
2009	4	4	4	4	4	4	4	4	4	4
2013	4	4	4	4	4	4	4	4	4	4
2020	8	4	4	4	4	4	4	4	4	4

Factors Surveyed

The key legislative component identified in this area is **whether the Parliament has some mechanism for considering the Auditor General's findings,** for holding the government to account and **for following up on recommendations**.

Analysis and Discussion

In all jurisdictions examined, a Parliamentary Committee has an active involvement in receiving and considering recommendations contained within reports from their Auditor General.

- Some jurisdictions mandate this role in legislation, while in others the role is included in the Committee's terms of reference under Parliamentary Standing Orders.
- Queensland has amended its legislation to create Portfolio Committees which have responsibilities for considering the annual and other reports of the Auditor General for the Committee's portfolio area.

These mechanisms ensure that Parliament scrutinises the Auditor General's reports and any recommendations the Auditor General may have made and may call the Executive to account.

- The Australian Capital Territory has amended its legislation to require the Minster to prepare a written response to an Auditor General's report within 4 months after the day the report is presented to the Assembly.
- None of the other jurisdictions examined contained explicit legislative requirements for recommendations to be followed up, this being decided by the Parliament and/or its Committees.

Similarly, none of the jurisdictions contained provisions requiring an Auditor General to follow-up on any recommendations made. Nonetheless, in some jurisdictions, the Auditor General may conduct follow-up audits to determine if previously identified issues have been resolved.

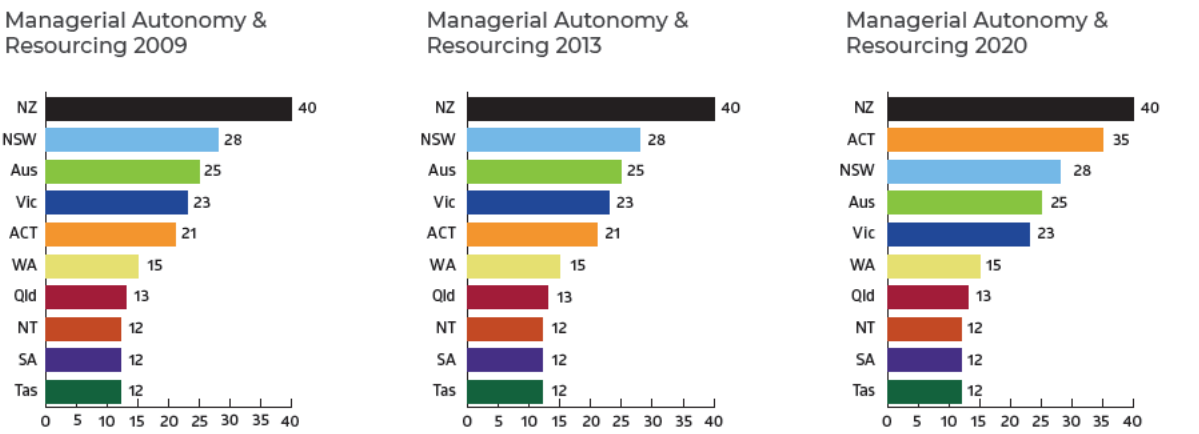
Managerial Autonomy and Resourcing

INTOSAI Principle 8. Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources.

Overall Independence Score for Managerial Autonomy and Resourcing

- New Zealand continues to be the leader among the jurisdictions examined in terms of the managerial and autonomy and financial independence of its Auditor General.
- The Australian Capital Territory has made extensive amendment to legislation as a consequence of the creation of the Auditor General as an Officer of the Assembly.
- The overall independence scores regarding managerial autonomy and resourcing of the other jurisdictions remain unchanged.
- In a number of Australian jurisdictions the Auditor General remains vulnerable to decisions of the Executive.

Figure 17 Overall scores for Managerial Autonomy and Resourcing



Survey	ACT	Aus	NSW	NT	NZ	Qld	SA	Tas	Vic	WA
2009	21	25	28	12	40	13	12	12	23	15
2013	21	25	28	12	40	13	12	12	23	15
2020	35	25	28	12	40	13	12	12	23	15

Factors Surveyed

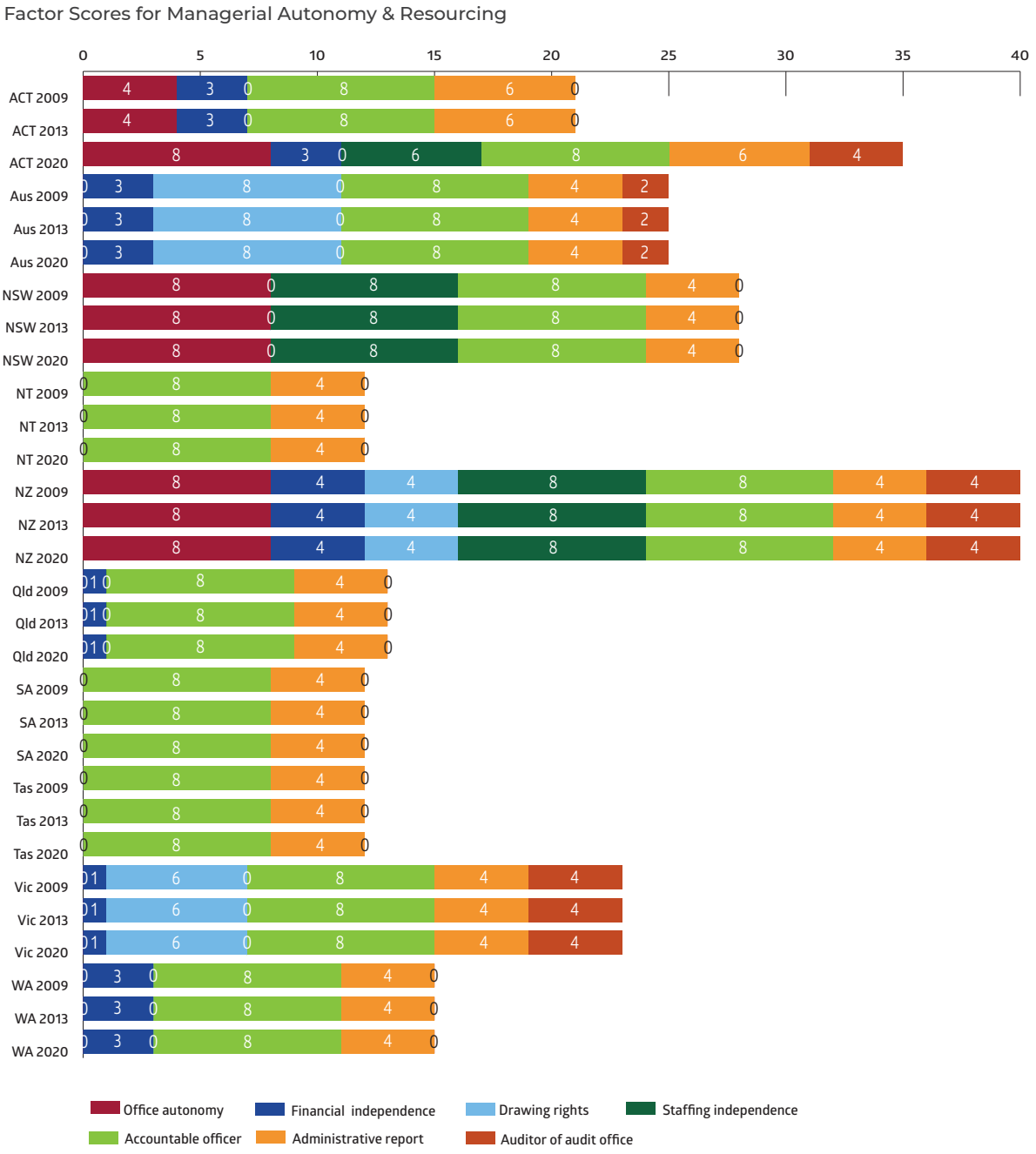
The importance of managerial autonomy and independent resourcing for preserving the independence of Auditors General was first recognised in legislation 30 years ago when the United Kingdom established the *National Audit Act 1983*. The model developed in the United Kingdom included mechanisms designed to ensure both financial independence from the Treasury and staffing independence from the civil service.

The key legislative components identified in the legislation reviewed that contribute to managerial and resourcing independence are:

1. **Staffing autonomy** or the independence from the Executive control of the public service;
2. **Financial autonomy** or the independence of the process for of establishing the budget for the Auditor General from the Executive;

3. **Drawing rights** on appropriated resources and to whom resources are appropriated and its independence from the Executive;
4. **Office autonomy** or the independence of the structure supporting the Auditor General from Executive control;
5. Whether the Auditor General is the chief executive or accountable officer with **administrative control of and accountability** for his or her office;
6. Whether the Auditor General is required to produce **an annual administrative report** and financial statements; and
7. Whether the appointment, terms of reference, and reporting line of the **auditor of the Auditor General's office** is subject to Executive control.

Figure 18 Assessment of factors impacting on Managerial Autonomy and Resourcing



Analysis and Discussion

Although a great deal of attention has been paid to assuring the independence of the Auditors General themselves, less attention has been paid to their financial independence and their capacity to manage independently.

Staffing Independence

The capacity to employ staff is fundamental to the resources available to the Auditor General.

- The legislation in all jurisdictions makes provision for staff and the Auditor General is usually the employing authority, albeit of a department, office or unit of the public service in all jurisdictions other than New Zealand and New South Wales.
- In most jurisdictions, the Executive and/or the public service bureaucracy can influence or indeed control the number, classification and remuneration and other conditions of the Auditor General's staff.
- Many jurisdictions also enable the Auditor General to use contracted professional services and some enable secondment of staff from other public sector organisations (often requiring approval from the Minister).
- New South Wales remains the only Australian jurisdiction to have removed all employees of the Audit Office, including its senior executives, from the public service. This is more closely aligned to the truly independent staffing models adopted by the United Kingdom and New Zealand.

Since the 2013 survey:

- In the Australian Capital Territory, as a statutory officer holder with the powers of a director-general, the Auditor General is empowered to employ staff on behalf of the Territory and although staff must be employed under the *Public Sector Management Act 1994*, the *Audit Act 1996* has been amended to specify that such staff are not subject to direction of anyone other than the Auditor General or an authorised member of the Auditor-General's staff in relation to the exercise of the Auditor General's functions.

Financial Independence

The usual Westminster appropriation process requires the Government to be held accountable for the budget and that it therefore should determine the budget's overall make-up and composition. However, leaving the budget for the Auditor General in the hands of the Executive could enable the Executive to starve the Auditor General of financial resources, thereby rendering him or her ineffectual.

In the United Kingdom, as part of the reforms introduced in 1983, and continued under more recent legislation, the Comptroller and Auditor General presents the National Audit Office budget to the Public Accounts Commission. The Treasury is able to make submissions to the Commission about the budget, but it is the Commission that makes a recommendation to the House of Commons about whether to accept the budget.

- In New Zealand, the Parliament decides on the level of funding for the Auditor-General, who submits his or her annual budget through the Speaker to Parliament directly. As in the United Kingdom, this approach reverses the decision-making process, with the Parliament making the decision after considering submissions from the Executive. Further, under the New Zealand approach, the Speaker is the "Vote Minster" responsible for the Auditor General's appropriation, ensuring that the Executive is not able to constrain the use of the appropriation.

The New Zealand model provides much stronger protection to the financial independence of the Auditor General.

None of the Australian jurisdictions have adopted this level of separation of the budget from the control of the Executive. In a number of jurisdictions, the financial resources available to the Auditor General are entirely controlled by the Executive, but some more recent legislation has introduced requirements that the Parliament or a Committee of Parliament can have some input into the budget process, either being consulted about or empowered to recommend on the Audit Office budget.

- In the Commonwealth the Joint Committee of Public Accounts and Audit is required to consider the draft estimates of the Auditor General and to make recommendations to both Houses of Parliament and to the Minister who administers the *Auditor-General Act 1997*.

- In the Australian Capital Territory, the Public Accounts Committee through the Speaker recommends financial appropriation the Officers of the Parliament and if the Appropriation Bill is less than the recommended appropriation the Treasurer must present a statement to the Assembly on the reasons. The Committee may also recommend additional amounts if the Auditor General is of the opinion that the appropriated funds are insufficient to enable certain audits to be undertaken promptly.
- In Western Australia, regard is to be had for any recommendations as to the budget made to the Treasurer by the Joint Standing Committee on Audit.
- In Victoria the Auditor General's budget is determined in consultation with the Parliamentary Committee, and, despite anything to the contrary in the *Financial Management Act 1994* or in regulations or directions under that Act but subject to any relevant appropriation Act, the Auditor-General may incur any expenditure or obligations necessary for the performance of the functions of the Victorian Auditor-General's Office.
- In Queensland the Treasurer must consult the Parliamentary Committee in developing the proposed budget of the Audit Office.
- In other jurisdictions the legislation is silent regarding budget for the audit office, leaving it under the direct control of the Executive.

Notwithstanding the budget allocation, most jurisdictions do not protect the Auditor General's drawing rights on his or her appropriation.

- In Victoria, the Auditor General is empowered to incur any expenditure obligations necessary for the performance of the function of his or her office, subject to the annual appropriation.
- Only the Commonwealth *Auditor General Act 1997*:
  - guarantees availability of the full amount of the parliamentary appropriations to the Audit Office[31]
  - ensure that provisions of an Appropriation Act that authorises the Finance Minister to determine that a departmental item or an administer item is to be reduced do not apply to the Audit Office
  - gives the Auditor General the authority to approve a proposal to spend money under an appropriation for the Audit Office.

Office Autonomy

Departments, staffed by public servants, have traditionally been created to support the Auditor General and these remain the most common form of administrative unit within the Australian jurisdictions. A disadvantage of the departmental structure is that it is usually subject to overarching legislation developed for the public service at large.

Typically, this legislation includes mechanisms to govern the classification of the staff, the flexibility of staff deployment, and the method of recruitment, selection and appointment of staff. It may also bring into play whole-of-government policy directives which may enable either the Executive or the public service bureaucracy to exert more subtle control over the Auditor General. Such bureaucratic intervention into managerial or administrative matters has the potential to be misused to constrain and/or frustrate the activities of the Auditor General.

The importance of freeing the Auditor General from potential managerial or administrative interference was recognised in the United Kingdom when the National Audit Office was established in 1983. It was seen to be important to free the NAO from the influence of the civil service (particularly the Treasury) that it was required to scrutinise. The NAO is not part of the civil service and civil servants must resign from the service before taking up employment with the NAO.

- New Zealand has ensured a similar structural independence for its Auditor General, whose office is established as **a corporation** to which the New Zealand's *State Sector Act* does not apply.
- New South Wales remains the only Australian jurisdiction to have removed its Audit Office

31 Since the 2013 survey the Commonwealth *Auditor-General Act 1997* has been amended to reflect reforms to the Commonwealth resource management framework under the *Public Governance, Performance and Accountability Act 2013* The previous reference to drawing rights has been substituted with new wording. Although the Finance Minister can issue directions that set the amounts in which and times at which an appropriation will be paid, this is described as administrative in nature and involves determining a schedule for the release of funds to allow the Auditor-General and his organisation to meet their liabilities as they fall due, with the sum of the amounts to equal the total approved by Parliament.

from the public service and created it as **a statutory body**. The Audit Office is also defined as a "**separate GSF agency**" under the *Government Sector Finance Act 2018*. Being defined as a separate GSF agency brings with it an ability to not comply with a direction from the Treasurer or a Minister if the Auditor-General considers that the requirement is not consistent with the exercise of the statutory functions of the agency.

- In the Australian Capital Territory, the Auditor General is an Officer of the Legislative Assembly responsible to the Legislative Assembly rather than a Minister.
- In other jurisdictions the responsible Minister through whom the Auditor General reports administratively is part of Executive government.

Some Australian jurisdictions have developed mechanisms to partially protect the Auditor General's office from overarching public service legislation or policy directives

- Victoria enables the Parliamentary Committee to, by resolution, free the Auditor General of certain requirements of that State's *Public Administration Act* and *Financial Management Act*.
- In Queensland all general rulings under the *Public Service Act* made by the industrial relations Minister or the chief executive of the Public Service Commission apply to the audit office, but specific rulings for the audit office can only be made with the consent of the Auditor General. Management reviews of the audit office under that Act can only be undertaken at the request of the Auditor General.

Annual (Administrative) Report

The overall situation regarding the annual administrative reporting remains unchanged.

- In each of the jurisdictions examined, the Auditor General is administratively responsible for his or her supporting office structure and is required to report annually to Parliament on the administration and operations of his or her office.
- However, in the Australian Capital Territory if the Auditor General considers that compliance with the *Annual Reports (Government Agencies) Act 2004* would prejudice the Auditor General's independence, the Auditor General is not required to comply with that Act to that extent.

Auditor of the Auditor General

In all jurisdictions a separate, independent auditor is appointed to audit the annual financial statements of the office of the Auditor General. The independent auditor may be confined to financial statement audits of the Auditor General's office but in some jurisdictions, may have a wider performance audit role or a separate appointment may be made to audit or review the performance of the Auditor General.

The mechanisms of the auditor's appointment (by whom) as well as the reporting line of the auditor are of importance in assuring independence, not only of the auditor, but also of the Auditor General, especially when performance audits may be conducted.

- In New Zealand, the independent auditor of the Auditor General is appointed each year by resolution of the House of Representatives.
- Although the independent auditor of the Commonwealth Auditor General is appointed by the Governor General on the recommendation of the Minister, the Joint Committee of Public Accounts and Audit must approve the appointment of the independent auditor giving it a veto power over the appointment.
- In Tasmania, the Treasurer must consult with the Auditor General before appointing the auditor of the Tasmanian Audit Office.
- In other jurisdictions, the Executive makes the appointment of the independent auditor.

Since the 2013 survey:

- In the Australian Capital Territory, the legislation has been amended
  - the auditor of the Audit Office is appointed by the Speaker instead of the Minister
  - a statutory review of functions and performance conducted once in each Parliamentary Term

- In Victoria, the *Audit Act 1994* has been amended and restructured
  - The independent financial auditor of the Auditor General's accounts is appointed by resolution of the Legislative Council and Legislative Assembly on the recommendation of the Parliamentary Committee.
  - Victoria separately appoints, also by resolution of the Legislative Council and Legislative Assembly on the recommendation of the Parliamentary Committee, a person to conduct the independent performance audit of the Auditor General and the Victorian Auditor General's Office.
  - The frequency of the performance audit has been amended to four-yearly.
  - Similar controls to those applying to the Auditor General over the use of coercive powers by now apply to both the independent financial auditor and the independent performance auditor of the Victorian Auditor General's Office.

Summary and Conclusions

The wide variation in the independence safeguards embedded in the legislation reviewed from the various Australian and New Zealand jurisdictions observed during the 2009 and 2013 surveys continue to be evident in the legislative frameworks in effect at the time of the present survey.

Although there has been further improvement, several jurisdictions continue to exhibit weaknesses in the overall statutory frameworks governing their Auditors General.

The Australian Capital Territory's overall independence score now exceeds, and Victoria has strengthened its score to approach New Zealand's overall independence score.

At the time of the 2009 survey, only a few jurisdictions had adapted the coverage mandate of their Auditors General to take account of the changing way the public sector is operating. In most jurisdictions, the ability to scrutinise the use of public resources was largely focused on the entities the government controlled, and only three jurisdictions had provisions that enabled them to audit the use of public monies, resources, or assets, by a recipient or beneficiary regardless of its legal nature.

Western Australia and Tasmania continue to have the broadest functional mandate to investigate any matter relating the use of public resources. However, since the 2009 survey, Victoria and Queensland have significantly expanded the functional mandate given to their Auditors General and the mandates of both the Commonwealth and South Australia have also been improved

Weaknesses in the functional mandate of the Auditor General in New South Wales and the Northern Territory continue to constrain the role their Auditors General can perform. The jurisdictions that remain focussed on public sector entities run a significant risk that the Executive will not be adequately held to account for the use of public resources.

Whilst most jurisdictions have continued to provide their Auditor General with adequate powers to obtain information, some still lack power to enter premises should the need arise. Victoria has substantially improved access to information and premises with much stronger coercive powers It remains the only jurisdiction in which a separate body oversights the use of these powers.

Only a few jurisdictions have responded to the financial and managerial vulnerability of their Auditors General that was recognised in the United Kingdom almost 40 years ago, by providing adequate protection from Executive influence on these important aspects of independence.

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