

Committee Secretary
Joint Committee of Public Accounts and Audit
PO Box 6021
Parliament House
Canberra ACT 2600

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Inquiry into the Auditor-General Act 1997

This submission responds to the Committee's inquiring regarding the adequacy of general provisions in the *Auditor-General Act 1997* (Cth).

Summary

The *Auditor-General Act 1997* (Cth) has a fundamental accountability function in dealing with the integrity and efficiency of the Australian government. That function is more important than ever, given –

- the results from independent studies highlighting substantial ongoing declines in community trust of government and politicians,
- the incapacitation of watchdogs at the national and state/territory levels,
- substantive concerns regarding ministerial integrity, and
- increasing failures in program design and implementation (in particular information technology mega-projects).

It is necessary to strengthen the capacity of the ANAO through greater funding, addressing the growing tendency of Governments to punish the agency for providing politically inconvenient news.

It is also necessary to look beyond the Act, recognising that the Auditor-General's performance – and ultimately the performance of the national parliament – is complemented and strengthened by legislation such as the *Freedom of Information Act 1982* (Cth), *Public Interest Disclosure Act 2013* (Cth) and *Public Governance, Performance & Accountability Act 2013* (Cth).

Basis

The following pages reflect teaching and research into Australian law at Canberra Law School (University of Canberra), centred on questions about public access to information and regulatory incapacity. They also reflect publication regarding integrity and efficiency issues in the public and private sectors.

The submission is made on an independent basis. It does not reflect what would be reasonably construed as a conflict of interest.

Dr Bruce Baer Arnold
Asst Professor
Canberra Law School
University of Canberra

Inquiry into the Auditor-General Act 1997

This submission contextualises the Committee's Inquiry into the *Auditor-General Act 1997* (Cth). It then addresses the Inquiry's specific terms of reference.

Context

The Inquiry takes place at a time where there is –

- independent recognition of a deepening democratic deficit, in particular growing distrust across the Australian community regarding politicians, political parties and public administration
- scepticism about the efficiency of much public administration, evident in large-scale programs that under-perform, are over budget, are over deadline and that do not demonstrate a commitment to the ongoing performance improvement that the community expects of officials/contractors using taxpayer dollars
- disquiet about integrity failures at the ministerial and administrative level.

Democratic deficit

The ANU 2019 Australian Election Study reported that satisfaction with democracy is at its lowest level since the constitutional crisis of the 1970s, with trust in government having reached its lowest level on record.

Just 25% of Australians believe people in government can be trusted, 56% believe government is run for 'a few big interests' and only 12% believe the government is run for 'all the people'. That disquiet is increasing, with for example a 27% decline since 2007 in stated satisfaction with how Australia's democracy is working.

Overall trust in government has declined by nearly 20% since 2007; three quarters believe that people in government are looking after themselves.

That erosion of trust is unsurprising given

- a succession of media reports regarding infighting at the state/territory and national level within political parties (reflected in popular disquiet about the replacement of leaders and with leaked reports of what MPs say about members of their own party);
- indications of corruption at all levels of government;
- damning criticisms by courts of executive accountability, for example *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394 and *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732;
- disregard by Ministers of community expectations regarding probity, reflected in resignation of three South Australian ministers and the state's Legislative Council President over expenses, reporting by LNP MPs regarding their then leader Deb Freckleton and condemnation of the NSW Premier for an undisclosed relationship with an MP who has been characterised as a 'bagman';
- a failure on the part of Governments to address damning reports such as the Australian National Audit Office *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999* report;

- the superficiality of ‘Open Government’ initiatives at the national, state/territory and local government levels, reflected in international corruption barometers and in the frequent deployment by state and Commonwealth departments of Freedom of Information legislation as a weapon to deter transparency, rather than a supplementary tool in support of a default position of release of government information.
- government failure to learn from deficient programs, for example the Biometric Identification Services Project which the ANAO last year characterised as "deficient in almost every significant respect"
- the remorseless ‘pitbull’ approach of a highly partisan press that relentlessly attacks governments and individual politicians rather than merely reporting claims by political figures.

There is no single and immediate solution to an increasing democratic deficit, in which people respond by disengaging from conventional politics and the justice system (evident in the re-emergence of extremist fringe parties across the globe and in violent protests in Australian cities this year). However, a well-resourced Australian National Audit Office that is seen to be strongly endorsed by the Australian Parliament and by the Government of the day will go some way to reversing the accelerating decline in trust.

On that basis I suggest that the Committee in its report should provide a strong bipartisan affirmation of the role and operation of the Office.

Performance Improvement

The Auditor-General has two salient functions, both of which require strong endorsement on a bipartisan basis. That endorsement is a function of leadership, something that Australians value but often do not find in a political environment where the ‘Canberra Bubble’ emphasises obfuscation and rarely looks beyond the current electoral cycle.

One function is providing an accountability framework – alongside the *Public Governance, Performance & Accountability Act 2013* (Cth) – for public spending. Oversight and education is important in an environment where much service delivery involves contractors, where the higher levels of the government are politicised, and where spending is often so large that people forget the bucks come from the taxpayer. Overall the ANAO has performed well and there are no signs of the pervasive abuse of official roles that we see in parts of Europe, South America, Africa, Asia and the Middle East.

The second function is, in practice, more important. The ANAO is a agency for fostering systemic improvement in public sector operation at the Commonwealth level. It does so through independent investigations and reports that are available to agencies, the Parliament and the community at large. There is a fundamental need for systemic scrutiny and improvement of the operation of Australian Public Service agencies and other bodies. That is particularly the case given –

- the size of spending on many government programs, often in the hundreds of millions or billions over several years
- the impact of those programs on Australian families, business and the environment (exemplified by the RoboDebt program, one that directly affected the lives of many law-abiding people but whose failure was recurrently denied by senior officials and ministers)
- demonstrable inadequacies in the design, implementation and review of major programs – often obfuscated through ministerial statements regarding

information technology mega-projects that are not founded on independent evaluation

- the failure of ministers and officials to learn from past policy and administrative failures

Watching government disregard warnings and make the same mistakes year after year results in community distrust. Performance failures are contrary to community expectations regarding a respectful and accountable government, something that should not be obfuscated by ministerial promises of ‘digital transformation’, ‘smart government’ and ‘faster seamless services’.

There is thus a need for hard-hitting and comprehensive analysis by the ANAO of government programs. That requires adequate resourcing. It is not offset by specific reviews by other agencies, notably the Productivity Commission’s major review of Australia’s failed arrangements to support defence service veterans and their families.

Corruption

A range of studies have highlighted community wariness – and in some instances visceral distaste, contempt and hostility – regarding Parliament’s acceptance of pork-barrelling and the Government’s unwillingness to address what the community plausibly suspects is corruption at the ministerial and official levels regarding water rights and property deals. As Transparency International noted last year, at least 85% of Australian adults believe that at least some members of the national parliament are corrupt.

Parliament has not meaningfully reformed electoral funding and shifted the disclosure of MP’s private interests to best practice (ie comprehensive, timely, readily searchable and underpinned by sanctions for non-compliance). As noted below it has not required the public service to actively embrace the stated Objects of the Freedom of Information Act and there was no condemnation when the former Public Service Commissioner guided officials by damning that Act as pernicious, costly and unnecessary. The proposed national integrity commission appears likely to be ineffective in building trust regarding ministerial misconduct.

As legal analysts and civil society advocates recurrently note, sunlight is the best disinfectant to misplaced fears and well-founded suspicions. The ANAO is an integral part of an information ecosystem that both minimises opportunities for corruption and serves to build trust in the integrity of government.

Given the statistics noted above the time has come for Parliament to adopt a more coherent, proactive and effective approach to the minimisation of corruption within the Australian Public Service and among Ministers and ministerial staff. That involves strengthening capacity of the ANAO and of bodies such as the Office of the Australian Information Commissioner.

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

The expectation is that the Auditor-General and Australian National Audit Office will be vigorous, capable and independent in reporting to the Australian Parliament. Its legitimacy is safeguarded both by –

- the reporting to Parliament (rather than to the Minister for Finance or the Secretary of a Department, both of whom often occupy office for only a short period and preoccupied by maximising opportunities under the electoral cycle) and

- community perceptions that its operation is independent.

That trust in a key watchdog – an agency that will bark loudly and quickly and persuasively if it encounters wrongdoing – fosters trust in parliament and broader democratic processes.

Those processes and trust in MPs as a privileged class (people who act responsibly in holding the Executive to account) are subverted by –

- incapacitation of the ANAO through budget constraints – noted below
- agency-level disregard of the clear expectation in the Freedom of Information Act that information about public policy-making and administration will be readily available, recalling that under that Act the default position – consistent with High Court judgments over three decades – is that public information will be available unless there is a persuasive reason for restriction
- incapacitation of other agencies such as the Office of the Australian Information Commissioner through ongoing budget cuts
- the stance of Ministers that has led the Federal Court to use characterisations such as ‘contempt’ and reliance on ‘prejudice to investigations’ as an excuse for not providing embarrassing information to Senate committees.

The ANAO does not perform all work inhouse. It is subject to the ‘Efficiency Dividend’, which in practice is a budget cut (ironically at a time where inefficient agencies are gaining extra funding). A salient indicator of incapacitation, noted by the Independent Auditor in that entity’s September 2020 report on the ANAO, is the decline in the number of performance audits from 59 in 2016-17 to 44 in 2019-203. The Independent Auditor notes that ANAO has predicted that this number may fall to 38 by 2023-24.

Observers correctly consider the cut is a matter of politics: the Auditor-General is being punished in the finest tradition of *Yes Minister* for bringing bad news about deficient public administration. The Government is unwilling to face the opprobrium that would be evident if it simply abolished the Auditor-General and may well recall the unsuccessful attempt by then Attorney-General George Brandis to abolish the Information Commissioner’s Office on the basis that it was not necessary, saving around \$11m.

Such punishment of the Auditor-General is deeply concerning. It is unjustified. It should be regarded as a contempt of Parliament worthy of strong condemnation on a bipartisan basis.

Independent scrutiny and encouragement of performance improvement is fundamental in a sector where billions of dollars of public money are used, sometimes in programs where there is clearly scope for major efficiencies. Rather than incapacitating the watchdog – starving it, demoralising it, encouraging agencies to disrespect it – Parliament should be insisting that it gains extra funding and is encouraged to take more initiative. Doing so will be good for trust and for program design, implementation and improvement. The ‘smart’ government referred to by the Digital Transformation Agency and Services Australia (both models of underperformance) is more about learning from mistakes than it is about doubling up on unacknowledged mistakes. Empowering the ANAO is one basis for learning.

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

Two matters are relevant – the *Freedom of Information Act 1982* (Cth) and the *Public Interest Disclosure Act 2013* (Cth).

If administered as intended the three enactments, alongside the *Public Governance, Performance and Accountability Act 2013* (Cth), provide the basis for appropriate access by the Auditor-General to information required for investigation/advice and for access by independent entities such as journalists to matters that are in the public interest.

I referred earlier in this submission to the then Public Service Commissioner's signal to public service agencies that Freedom of Information was not to be respected or otherwise taken seriously. That disrespect might be bureaucratically convenient but is directly contrary to the stated Objects in the Act and thus contrary to what the Australian Parliament clearly intended when the Act was amended several years ago. The Auditor-General does not need to rely on the Act. Journalists and others who identify harms and evaluation performance do however need the Act. They typically face obstruction – inordinate delays, obfuscation, inappropriate charges – for access.

That erosion of transparency under the Act is significant in the context of incapacitation of the ANAO through budget cuts. If the ANAO cannot carry out its job the community must rely on whistleblowing and on access to information under the Freedom of Information regime, both of which are eroded through bureaucratic passive aggression and on occasion through outright ministerial contempt.

That problem is systemic. I have elsewhere commented that it is deeply disquieting that in practice The Guardian and Australian Broadcasting Corporation (the latter again hit by savage budget cuts) are proving to be more effective in safeguarding Australians' privacy through timely investigation than the underfunded Office of the Australian Information Commission.

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

The various enactments are not necessarily in conflict. They should be construed as aspects of an accountability ecosystem, to use the sort of jargon adopted by many Australian Public Service executives and accountants. Independent scrutiny tends to validate findings by the Auditor-General and may usefully focus the Auditor-General's attention. That process is analogous to what we see with parliamentary committees and royal commissions, where someone shines a light on an issue or problem and investigation takes place, extending and deepening both public and government understanding.

I have suggested above that the challenge facing the Auditor-General centres on funding. The challenge facing the Committee in the current Inquiry – and by extension facing the Australian Parliament – is to ensure that any Government does not erode the Auditor-General's performance. More broadly, it is time for MPs to engage in self-reflection (perhaps the most difficult task in political life) and call out what appears to be egregious misbehaviour by the Attorney-General and peers such as Ministers Tudge and Dutton regarding public administration and behaviour while in office.

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

As noted above, ongoing budget reductions demonstrably reduce the Auditor-General's capacity to initiate and effectively audits regarding the performance of all entities in the Australian Government sector.

The Auditor-General should be empowered and encouraged to undertake own-motion investigations on a strategic basis, drawing for example on the strategic direction statements

used by the Australian Competition & Consumer Commission in targeting specific sectors and behaviours on a priority basis.

It may be thought that the Auditor-General might somehow have a rush of blood to the head and go on an investigative frolic. Such a fear is unrealistic. Empowerment might have prevented the substantial cost to the Australian economy, alongside loss of life and livelihood, attributable to ongoing underperformance by APRA and ASIC that resulted in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. It might also have saved us from RoboDebt and encouraged Ministers to learn from mistakes rather than engaging in egregious denial.

Ultimately Australians do not expect governments to be perfect. They do however expect governments to be accountable. Accountability is the *raison d'être* for the Auditor-General.

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

The Auditor-General should be commended for efforts to alert the community to audit reports and to present them in ways that are accessible by officials and community members. There is little point undertaking investigations if the results of those investigations are unfindable or – like the Office of the Australian Information Commissioner – comprise little more than an indication that investigation took place.

In building a learning culture within the Australian public sector it is essential that performance be held up to public scrutiny. That means that the Auditor-General should clearly and consistently highlight where past findings and recommendations have been disregarded. The Auditor-General cannot direct a Minister or agency. Those entities can and should, however, be held up to the light.

Reports should be full and frank, with an emphasis on scope for learning by agencies and ministerial staff. They may on occasion refer, as is the practice of the ANAO and integrity bodies such as the NSW Independent Commission Against Corruption, to matters that referable for public prosecution. Ministers should however be wary of obfuscating politically inconvenient information, as in the current Leppington Triangle controversy, by claiming that documents uncovered in the course of an ANAO investigation and referred to in the Auditor-General's corresponding report cannot be provided to a parliamentary committee. Committees have on occasion considered national security and other matters in camera: action to empower committees alongside the Auditor-General is legitimate.