

## Clarification of rights and responsibilities

### Introduction

- 3.1 The ANAO submits that the *Auditor-General Act 1997* has 'served the Parliament and the Office well'.<sup>1</sup> The Committee is also of the view that the fact that the inquiry received so few submissions from public sector agencies could also be taken to imply support for this idea.
- 3.2 That said, the regular revision of Acts of Parliament is important. As Professor Wanna states:
- I think we need to revise acts regularly, because if you look back at the audit acts from 1901 up to this act, you find that audit effectiveness was impeded by the acts not being regularly reviewed and revised and governments being reluctant to initiate changes to the act, through the parliament.<sup>2</sup>
- 3.3 It became clear over the course of the inquiry that there are a number of areas in the Act which remain somewhat ambiguous and in need of clarification. Some main areas of concern include: auditing Government Business Enterprises (GBEs); auditing performance indicators; and clarifying issues around legal professional privilege.
- 3.4 Some further areas of the Act that submitters suggested need clarification include:
- fees for financial statement audits;
  - acting as auditor under the *Corporations Act 2001*;

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1 Australian National Audit Office, sub 3, cover letter.

2 Professor John Wanna, transcript, 22 June 2009, p 31.

- clarifying the Auditor-General's responsibilities around the provision of advice and information;
- auditing standards;
- parliamentary privilege;
- exemptions from the *Freedom of Information Act 1982* and the *Privacy Act 1998*;
- defining 'persons' giving evidence;
- access to Cabinet documents;
- a role for the Auditor-General with regard to whistleblowers;
- dealing with comments on extract reports; and
- the possibility of a blanket reporting embargo during caretaker periods.

3.5 A question was raised about the provision of information and documents to the Committee and other parliamentary committees. This issue is also addressed in this chapter.

## **Government Business Enterprises**

3.6 In its inquiry into reform of the Australian Audit Office and subsequent report (i.e., *Report 296, The Auditor-General: Ally of the People and Parliament*) tabled in March 1989, the Joint Committee of Public Accounts recommended that the Auditor-General be reinstated as the external auditor of Government Business Enterprises.<sup>3</sup>

3.7 However, in its response to that report, the Government considered that there was little to be gained by subjecting GBEs to efficiency audits as they are subject to the commercial discipline imposed through the focus on targets and related performance measurement.<sup>4</sup>

3.8 In its 1996 consideration of appropriate measures to be incorporated into the Auditor-General Bill, the Joint Committee of Public Accounts again recommended that the Auditor-General be appointed as the auditor of all Commonwealth entities, and he/she have a mandate to initiate the full

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3 Joint Committee of Public Accounts, *Report 296, The Auditor-General: Ally of the People and Parliament*, p 107.

4 Government response to Joint Committee of Public Accounts, *Report 296, The Auditor-General: Ally of the People and Parliament*, p 11.

range of audits of Commonwealth entities including performance audits of Government Business Enterprises.<sup>5</sup>

3.9 Again, the Government of the day decided against subjecting GBEs to performance audits by the Auditor-General given that 'they are subject to the overlaying accountability framework that requires them to pursue optimal market performance and to improve the return to the Commonwealth as shareholder'.<sup>6</sup>

3.10 Consequently, subsections 16(2) and 17(2) of the *Auditor-General Act 1997* provide that the Auditor-General may only conduct audits of Commonwealth authorities that are GBEs, and wholly owned Commonwealth companies that are GBEs, if the responsible Minister, the Finance Minister or the Joint Committee of Public Accounts and Audit requests the audit. Subsections 16(3) and 17(3) of the Act also state:

Nothing prevents the Auditor-General from asking a responsible Minister, the Finance Minister or the Joint Committee of Public Accounts and Audit to make a particular request under subsection (2).<sup>7</sup>

3.11 The ANAO has no record of such a request to undertake a performance audit of a GBE since the Act came into effect.<sup>8</sup>

3.12 In the years since the Act was established in 1998 there have been changes to the number and character of GBEs. As the Auditor-General states:

...we probably had companies like Qantas, the Commonwealth Bank and even Telstra back then...with the passage of time our stable of GBEs is not what it used to be.<sup>9</sup>

3.13 As at May 2010, there were six GBEs falling under the *Commonwealth Authorities and Companies Act 1997* (CAC Act): ASC Pty Ltd; Australian Government Solicitor; Australian Postal Corporation; Australian Rail Track Corporation Limited; Defence Housing Australia; and Medibank Private Limited.<sup>10</sup>

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5 Joint Committee of Public Accounts, *Report 346, Guarding the independence of the Auditor-General*, p 21.

6 The Hon John Fahey, Second Reading Speech, House of Representatives Hansard, 12 December 1996, p 8341.

7 Subsections 16(3) and 17(3) of the *Auditor-General Act 1997* (Cth).

8 Australian National Audit Office, sub 3, p 5.

9 Mr Ian McPhee PSM, transcript, 22 June 2009, p 17.

10 Viewed at the Department of Finance and Deregulation <http://www.finance.gov.au/property/gbe/index.html> on 25 May 2010.

- 3.14 It is this reduction in market significance of the current GBEs as well as the centrality of the principle to the Auditor-General's mandate that he/she should have the authority to conduct performance audits in all Commonwealth entities that underpins the ANAO's argument that GBEs should be subject to performance audits conducted by the Commonwealth Auditor-General.<sup>11</sup>
- 3.15 Extending the Auditor-General's mandate to Commonwealth controlled GBEs received support from a number of submitters. For example, the Hon Dr Bob Such MP, Member for Fisher in the South Australian State Parliament states:
- There should be an amendment to the Act to permit the Auditor-General to have oversight of, and audit, the finances of all Government Business Enterprises, with the intention of greater openness and clarity.<sup>12</sup>
- 3.16 Similarly, from the Chief Executive Officer of the DMO, Dr Stephen Gumley AO:
- ...I suggest expanding section 16 of the Act to include all Government Agencies, including Government Business Enterprises...<sup>13</sup>
- 3.17 ACAG also submit that, like other jurisdictions, the Commonwealth Auditor-General should have the authority to conduct performance audits in GBEs:
- ..the [Auditor-General] should automatically be the auditor of all GBEs and their subsidiaries. All other Australian jurisdictions and New Zealand are the auditors of their GBEs, or equivalent entities, and of their subsidiaries.<sup>14</sup>
- 3.18 Having received no evidence to the contrary, the Committee believes it is appropriate that the Auditor-General be provided with the authority to conduct performance audits of Commonwealth wholly-owned GBEs.

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11 Australian National Audit Office, sub 3, p 5.

12 The Hon Dr Bob Such, sub 2, p 1.

13 Defence Materiel Organisation, sub 6, p 1.

14 Australasian Council of Auditors-General, sub 8, npn.

## Commonwealth controlled GBEs

- 3.19 On 7 April 2009, the Government announced a significant investment in delivering broadband to Australian homes and workplaces and a new company NBN Co Limited was established to build and operate the network.<sup>15</sup>
- 3.20 In its primary submission (no 3) and a supplementary submission (no 3.1), the ANAO uses the example of NBN Co Limited to propose that the Auditor-General should be able to conduct performance audits of GBEs in which the Commonwealth holds a majority interest. Although currently a wholly-owned Government Business Enterprise, a partial sale of NBN Co Limited remains a possibility. As the Auditor-General states:
- We are the auditor of NBN Co. Ltd and we have done the financial statement audit for the financial year just ended. We expect, obviously, that company to grow over time. But when we raised it in our submission, you may recall that the government was at least raising the possibility of partly selling down that company at some future stage.<sup>16</sup>
- 3.21 The Government investment in the National Broadband Network is considerable. The Committee agrees with the views expressed by the Auditor-General at the hearing on 19 October 2009 that this investment should be subject to performance audits by the Auditor-General:
- It raised for us the issue of knowing the public interest, if you like, in the broadband network, the significant investment of taxpayers' funds, and whether the act should allow the Auditor-General, at their discretion, to undertake a performance audit either of NBN Co. as a wholly owned government business enterprise or as a partially owned GBE.<sup>17</sup>
- 3.22 The Committee notes from the ANAO's supplementary submission 3.1 that there is no legal impediment to the Auditor-General's performance audit mandate being extended to Government Business Enterprises in which the Commonwealth holds a majority interest.<sup>18</sup>

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15 Viewed at Department of Broadband, Communications and the Digital Economy, [http://www.dbcde.gov.au/broadband/national\\_broadband\\_network](http://www.dbcde.gov.au/broadband/national_broadband_network) on 22 January 2010.

16 Mr Ian McPhee PSM, transcript, 19 October 2009, p 5.

17 Mr Ian McPhee PSM, transcript, 19 October 2009, p 5.

18 Australian National Audit Office, sub 3.1, p 1.

- 3.23 The Committee also notes that any recommendation to extend the Auditor-General's mandate in such a way would not result in the requirement for additional resources as per the following advice contained in supplementary submission 3.4:

A decision to provide the Auditor-General with the authority to conduct performance audits of Government Business Enterprises would, in practice, not have a significant impact on the ANAO's performance audit work program and therefore would not require budget supplementation.<sup>19</sup>

## **Recommendation 2**

- 3.24 **That the Act be amended to provide the Auditor-General with the authority to initiate performance audits of Commonwealth controlled Government Business Enterprises.**

### **Auditing performance indicators**

- 3.25 Measuring key aspects of an agency's performance is a critical part of the Government's Outcomes Framework<sup>20</sup> and recently, the Department of Finance and Deregulation has increased its focus on agency performance and results. This renewed emphasis is reflected in the revised format of the Portfolio Budget Statements (PBS), which now necessitates increasingly detailed key performance indicators which should clearly identify how they will contribute to achieving outcomes.<sup>21</sup>
- 3.26 According to the ANAO, performance indicators should be a mix of quantitative and qualitative measures, incorporate a range of better practice characteristics, and be cost-effective to collect, analyse and report against.<sup>22</sup>

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19 Australian National Audit Office, sub 3.4, npn.

20 Australian National Audit Office, Report 23 2006-07, *Application of the Outcomes and Outputs Framework*, 2006-07, p 25.

21 Senator Andrew Murray, *Review of Operation Sunlight: Overhauling Budgetary Transparency*, pp 88-89.

22 Australian National Audit Office, Report 23 2006-07, *Application of the Outcomes and Outputs Framework*, 2006-07, p 25.

- 3.27 Currently, the ANAO reviews performance indicators only in the context of individual programs or activities.<sup>23</sup> Mr McPhee described the current coverage of performance indicators as 'by exception...if it is important to the objectives [of the audit]'.<sup>24</sup>
- 3.28 ANAO performance audits of public sector agencies frequently refer to performance indicators as an 'area that warrants improvement'.<sup>25</sup> For example, in its report No 23 2006-07 *Application of the Outcomes and Outputs Framework*, the ANAO states:
- ...over a third of the surveyed agencies with administered items indicated that none of their indicators addressed the effectiveness, quality or cost of their administered items.<sup>26</sup>
- 3.29 Additionally:
- ...many indicators did not incorporate targets or benchmarks and other better practice characteristics...[in] particular, the majority of surveyed agencies considered that not all their [indicators] were measurable.<sup>27</sup>
- 3.30 On the basis of its work, the ANAO argues that auditing performance indicators will contribute to an increase in the quality of the information that would become available:
- ...it is evident that the systematic or periodic review of the appropriateness of performance indicators, as well as the accuracy and timeliness of an agency's reporting against them, contributes to an overall increase in the quality and credibility of the indicators themselves and the reliance that can be placed on agencies' reporting against them.<sup>28</sup>
- 3.31 The Committee notes the view expressed by ACAG below and also believes it is appropriate that the Auditor-General play a role in auditing performance information:
- In the event that Commonwealth entities are required to include in annual reports performance information, then ACAG believes it

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23 Australian National Audit Office, sub 3, p 4.

24 Mr Ian McPhee PSM, transcript, 16 September 2009, p 15.

25 Australian National Audit Office, sub 3, p 4.

26 Australian National Audit Office, Report 23 2006-07, *Application of the Outcomes and Outputs Framework*, 2006-07, p 25.

27 Australian National Audit Office, Report 23 2006-07, *Application of the Outcomes and Outputs Framework*, 2006-07, p 25-26.

28 Australian National Audit Office, sub 3, p 4.

should be a requirement that such information is audited. This would enable users of such annual reports to be assured that the performance information reported is relevant to stated objectives, appropriate for assessing performance and whether or not information reported fairly represents actual performance.<sup>29</sup>

3.32 Additionally, the Committee notes the following evidence from Mr McPhee that in jurisdictions that provide for the auditing of performance indicators, this has led to positive outcomes more generally:

...in talking to state auditors generally...and the Auditor-General in New Zealand, they do believe that providing an audit focus to performance information does result in an increase in the quality and the integrity of the information presented.<sup>30</sup>

3.33 The Committee is aware of the utility of being able to develop performance information that would provide benchmarks and comparative information across jurisdictions.

3.34 At the hearing on 8 February 2010, Dr Andrew Pope referred to the difficulties in assessing programs when performance measures are lacking:

One of the issues that is reasonably common across a lot of things is a lack of a baseline set of data. Particularly the further back you go into programs you are not sure what the situation was at the time, and so it is very hard now to look at current performance information and then determine what the impact has been.<sup>31</sup>

3.35 As a result of its own practical experience monitoring accountability across public sector agencies through the work of the ANAO, the Committee is fully supportive of these views expressed by Dr Pope.

3.36 The ANAO put forward three options to enhance audit coverage of performance indicators. These options are as follows:

- (a) the conduct of a periodic review of indicators as part of the ANAO's performance audit program; or
- (b) a review of an agency's compliance with its performance indicator responsibilities as an adjunct to the audit of an agency's financial statements in a similar way to that undertaken by the Western Australian Auditor-General;

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29 Australasian Council of Auditors General, sub 8, npn.

30 Mr Ian McPhee PSM, transcript, 8 February 2010, pp 7-8.

31 Dr Andrew Pope, transcript, 8 February 2010, p 7.



(further details are included in paragraph 4 of the Appendix);  
or

- (c) a review of an agency's compliance with its responsibilities for a sub-set of indicators which the Parliament and/or the Government considers relate to critical programs or areas of public administration including, for example, environmental sustainability. This review would be undertaken as an adjunct to the audit of an agency's financial statements.<sup>32</sup>

3.37 At the public hearing on 16 September 2009, the Committee canvassed these options with the Auditor-General.

3.38 Option (a) is the most similar to current arrangements. If this option was to be adopted, where currently performance indicators are audited by exception they would become a 'specific focus of an audit'.<sup>33</sup> As Mr McPhee states:

...At the moment it tends to [be] by exception if it is significant, if it is important to the objectives whereas under proposal (a) we would make it a mandatory part of the objective and make sure we did cover it as a part of the performance audit.<sup>34</sup>

3.39 Although there may be some refocussing of some performance audit resources, there would be no need for budget supplementation should option (a) be adopted.<sup>35</sup>

3.40 If option (b) were to be incorporated into the Act it seems clear that this would provide a high level of assurance to the Parliament as is the case in Western Australia.<sup>36</sup> As the Auditor-General explains:

...at the same time as you do your financial statement audit you could look at all of the performance indicators and provide an opinion in relation to the completeness, accuracy, et cetera, of indicators.<sup>37</sup>

3.41 However, while the Committee agrees that option (b) might provide 'more focused assurance to the Parliament'<sup>38</sup> it is resource intensive, particularly in light of the ANAO's indicative budget supplementation in the vicinity

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32 Australian National Audit Office, sub 3, p 4.

33 Mr Ian McPhee PSM, transcript, 16 September 2009, p 15.

34 Mr Ian McPhee PSM, transcript, 16 September 2009, p 15.

35 Australian National Audit Office, sub 3.4, npn.

36 Australian National Audit Office, sub 3, p 11-12.

37 Mr Ian McPhee PSM, transcript, 16 September 2009, p 16.

38 Australian National Audit Office, sub 3, p 4.

of \$2.8 and \$4.05 million per annum.<sup>39</sup> The Committee also notes the Auditor-General's comment that this option may not be 'entirely necessary'.<sup>40</sup>

- 3.42 In the Committee's view, the third option proposed in the Auditor-General's submission would provide adequate assurance around the integrity of performance information attached to programs or areas the Parliament sees as a priority.
- 3.43 As the Auditor-General states, this option means that should the Parliament and its committees have a particular interest in any particular areas of public administration, programs or portfolios, the ANAO could focus on those interests.<sup>41</sup> For example, examining performance information related to environmental sustainability across all performance audits in any given year.
- 3.44 To that end, the Auditor-General should identify possible agency performance indicators to be audited and consult with the Parliament, through the JCPAA. This process should be conducted in the same way the Auditor-General currently consults with the Parliament about his performance audit priorities.<sup>42</sup>
- 3.45 The Committee notes that by increasing audit coverage in this way additional budget supplementation would be required. The Committee also notes that while the actual level of resourcing required would be dependent upon the number and nature of the performance indicators involved, the ANAO has provided an indicative figure of up to \$2 million per annum.<sup>43</sup>

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39 Australian National Audit Office, sub 3.4, npn.

40 Mr Ian McPhee PSM, transcript, 16 September 2009, p 16.

41 Mr Ian McPhee PSM, transcript, 8 February 2010, p 32.

42 Each year, the JCPAA advises the Auditor-General on those areas which the Parliament particularly believes need to be audited. The JCPAA performs this function by writing to all other parliamentary committees asking for their advice on any programs or functions within their portfolio area they believe should be audited. Those suggestions are then forwarded to the Auditor-General for his consideration in preparing his work program for the next financial year. By law the Auditor-General is free to reject proposed audit topics. However, he responds to all proposals so that committees can be advised of the status of their suggestions.

43 Australian National Audit Office, sub 3.4, npn.

### Recommendation 3

3.46 **That the Act be amended as necessary to enable the Auditor-General to review an agency's compliance with its responsibilities for a sub-set of performance indicators. Proposed performance indicators to be audited should be identified annually by the Auditor-General and forwarded to the Parliament, via the JCPAA for comment, in a manner similar to the annual performance audit work program for the ANAO.**

**The Auditor-General should be resourced appropriately to undertake this function.**

### Legal professional privilege

3.47 Legal professional privilege is a rule of law that preserves the confidentiality of communications between a lawyer and a client. In ordinary circumstances, parties to legal proceedings must disclose to other parties and the court any documents which are relevant to the matter in issue in the proceedings. However, if 'legal professional privilege' is attached to a document, the document need not be produced in connection with legal proceedings, or in other circumstances, such as on receipt of a search warrant from the police or a mandatory notice for production from a regulator.<sup>44</sup>

3.48 Confidential communications between lawyers and their clients which are made for the dominant purpose of giving or obtaining legal advice or in connection with existing or anticipated legal proceedings generally attract legal professional privilege.<sup>45</sup>

3.49 Through section 32 of the Act, the Auditor-General has broad access powers to information and documents. Documents protected by legal professional privilege do not limit that access.<sup>46</sup>

3.50 Despite possessing that authority, the ANAO submits that there are occasions when agencies claim that documents protected by legal professional privilege should not be accessible by the Auditor-General. This can lead to protracted negotiations and subsequent delays in the

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44 Viewed at University of Sydney, Office of General Counsel  
[http://www.usyd.edu.au/generalcounsel/faq/professional\\_privilege.shtml](http://www.usyd.edu.au/generalcounsel/faq/professional_privilege.shtml) on 29 July 2009.

45 Viewed at University of Sydney, Office of General Counsel  
[http://www.usyd.edu.au/generalcounsel/faq/professional\\_privilege.shtml](http://www.usyd.edu.au/generalcounsel/faq/professional_privilege.shtml) on 29 July 2009.

46 Australian National Audit Office, sub 3, p 2.

audit process and, at times, can require legal intervention to reach a resolution.<sup>47</sup>

3.51 The ANAO argues that were the Act to be amended or an appropriate reference made in the Explanatory Memorandum to make explicit reference to legal professional privilege in the context of the Auditor-General's information gathering powers (as is the case in other Acts such as the *Ombudsman Act 1996*), this would enhance clarity around the issue.<sup>48</sup>

3.52 It is clear from the evidence that the issue of legal professional privilege is not straightforward. As Mr Russell Coleman, Principal Auditor with the ANAO states:

...there has been a lot of case history in relation to legal professional privilege. There are a lot of court cases in relation to various aspects of it. Therefore, not surprisingly, there are a variety of interpretations placed on those court cases.<sup>49</sup>

3.53 Mr Coleman further describes how the ANAO has received conflicting advice about access to documents protected by legal professional privilege and disagreements about whether legal professional privilege will be waived as a result of providing the Auditor-General with such access. The question of whether Commonwealth agencies can indeed claim legal professional privilege against another arm of the Commonwealth has also resulted in some differing opinions.<sup>50</sup>

3.54 Despite these difficulties, Mr McPhee reported that his office had never been refused access to information.<sup>51</sup>

3.55 A number of issues were brought to light during the discussion around amending the Act to contain an explicit reference to the Auditor-General's power to access documents protected by legal professional privilege.

3.56 First, as mentioned above, is the issue of whether such an amendment would result in a waiver of legal professional privilege over those documents. Second, questions were raised about ANAO publication of material protected by legal professional privilege.<sup>52</sup>

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47 Australian National Audit Office, sub 3, p 3; see also sub 3.3, npn.

48 Australian National Audit Office, sub 3, p 3.

49 Mr Russell Coleman, transcript, 16 September 2009, p 5.

50 Mr Russell Coleman, transcript, 16 September 2009, p 5.

51 Mr Ian McPhee PSM, 16 September 2009, pp 4.

52 See transcripts, 22 June 2009, p 16 and transcript 16 September 2009, p 6.

- 3.57 With regard to the first question, the Committee notes that in the context of disclosure within the Commonwealth, disclosure of legal advice to another *Financial Management and Accountability Act* agency, such as the ANAO, does not amount to a waiver of legal professional privilege. However, there appears to be less certainty where disclosure involves a Commonwealth body that is a separate entity.<sup>53</sup>
- 3.58 The ANAO sought legal advice on this issue, and provided the following information to the Committee:
- We were...asked to consider an amendment of the Auditor-General Act that, while putting beyond doubt that legal professional privilege does not prevent access by the Auditor-General to documents and records, it would ensure the provision of documents or records to the Auditor-General would not result in the waiver of legal professional privilege by persons providing them to the Auditor-General.
- Based on the legal advice we have received, the ANAO suggests that this could be achieved through the inclusion in the Act of a specific power that allows the Auditor-General to access material over which entities claim legal professional privilege but this access does not amount to a waiver of this privilege by the entities concerned.<sup>54</sup>
- 3.59 The ANAO further advised that a provision along the lines of that included in the *Inspector-General of Taxation Act 2003* would satisfy this objective.<sup>55</sup>
- 3.60 As referred to above, questions were also raised about the publication of material protected by legal professional privilege in public reports. The Committee notes that under the current legislation, the Auditor-General has discretion, subject to section 37 of the Act (see paragraph 3.64 below), to include information subject to legal professional privilege in public reports.<sup>56</sup>
- 3.61 On the face of it, this legislative provision appears to warrant some concern. In particular, that decisions which may affect the legal professional privilege attached to certain documents are ultimately the

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53 Australian National Audit Office, sub 3.3, npn.

54 Australian National Audit Office, sub 3.2, p 4.

55 See Australian National Audit Office, sub 3.2, pp 4-5.

56 Australian National Audit Office, sub 3.2, p 5.

responsibility of the Auditor-General thereby exposing the Government to risk associated with potential litigation.<sup>57</sup>

3.62 However, the Auditor-General outlined to the Committee not only the high degree of caution that is applied to the publication of sensitive information but additionally, the authority the Attorney-General already has to override such power.

3.63 Specifically, in response to a question about whether he would publish documents that are the subject of legal professional privilege the Auditor-General stated:

The answer is: we have not. The reason is because I am very mindful of the legal advice provided to the Commonwealth. In many cases, as important as it is, it is not central to the individual issue. We would normally try to draft around sensitive legal positions. However, if it happened to be an issue which was front and centre in an audit, we may take a different attitude. But...I am very sensitive to legal advice, the Commonwealth's position, and very careful not to explicitly bring harm to the Commonwealth unless I thought it was significant in terms of the audit that we were doing.<sup>58</sup>

3.64 More significantly, built into the legislation (section 37 of the Act) is a mechanism which overrides that power in certain circumstances. Section 37 of the Act states, in part:

- (1) The Auditor-General must not include particular information in a public report if:
  - (a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or
  - (b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).
- (2) The reasons are:
  - (a) it would prejudice the security, defence or international relations of the Commonwealth;

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57 See discussion in transcript, 16 September 2009, pp 8-9.

58 Mr Ian McPhee PSM, transcript, 16 September 2009, p 7.

- (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 by a State to the Commonwealth;
- (e) it would unfairly prejudice the commercial interests of any body or persons;
- (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.<sup>59</sup>

- 3.65 The ANAO submits that claims of legal professional privilege are covered in subsection 37(2)(f) set out above. The ANAO suggests, therefore, that the existing provisions are adequate for addressing the issue of whether information that is subject to a claim of legal professional privilege can be included in a public report.<sup>60</sup>
- 3.66 In practice, section 37 provides 'a body of protection dealing with this public interest consideration'.<sup>61</sup> By way of example, if a Department relinquished documents protected by legal professional privilege to the Auditor-General and the Auditor-General was of a mind to publish that material in his/her report, the Department, having become aware of that report in the statutory process of providing comments on the draft, would then be in a position to petition the Attorney-General to intervene.<sup>62</sup>
- 3.67 The Committee notes that while there have been three situations recently where agencies have raised concerns about both providing to the ANAO and the ANAO publishing documents protected by legal professional privilege,<sup>63</sup> there has been no occasion, under the current legislation, where the Attorney-General has intervened.<sup>64</sup>

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59 Subsections 37(1)-(2) of the *Auditor-General Act 1997* (Cth).

60 Australian National Audit Office, supplementary sub 3.9, npn.

61 Mr Ian McPhee PSM, transcript, 16 September 2009, p 10.

62 See transcript 16 September 2009, p 10.

63 Australian National Audit Office, supplementary sub 3.3, npn.

64 Mr Russell Coleman, transcript, 8 February 2010, p 18.

- 3.68 The Committee also notes that Mr Pat Barrett AO, a former Auditor-General, supports the idea that there should not be a detailed prescription of what the Auditor-General can or cannot do and that he/she is guided by 'public interest' considerations.<sup>65</sup>

#### **Committee comment**

- 3.69 The Committee believes that as an independent officer of the Parliament the Auditor-General should not be constrained in the conduct of his or her work on behalf of the Parliament.
- 3.70 Additionally, the Committee notes that by including a specific provision in the Act that makes explicit that the Auditor-General has access to material over which legal professional privilege is claimed, and clarifying that such access does not amount to a waiver of such privilege, no additional powers are being conferred on the Auditor-General.
- 3.71 The Committee accepts that efficiency is diminished when the Auditor-General and his officers are engaged in time-consuming invalid negotiations about the provision of privileged documents.

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#### **Recommendation 4**

- 3.72 **That the Act be amended to make clear that claims of legal professional privilege do not override the Auditor-General's information gathering powers. The Act should also be amended to make clear that access to documents upon which legal professional privilege is claimed does not amount to a waiver of such privilege.**

#### **Fees for financial statement audits**

- 3.73 Agencies that fall under the *Financial Management and Accountability Act 1997* do not pay fees for financial statement audits. Agencies are advised of the cost of the audit and it is reported in their financial statements but this is a notional figure which is not actually paid.<sup>66</sup>
- 3.74 On the other hand, under section 14 of the Act, Commonwealth authorities and subsidiaries and Commonwealth companies and subsidiaries are required to pay audit fees for financial statements.

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65 Mr Pat Barrett AO, sub 1, p 1.

66 Mr McPhee PSM, transcript, 19 October 2010, p 21.



- 3.75 In 2008-09, a total of \$8.141 million was received in audit fees from bodies that fall under the *Commonwealth Authorities and Companies Act 1997* (CAC Act).<sup>67</sup> It is important to note that this revenue is returned to the budget and not made available to the ANAO.
- 3.76 The ANAO advises that under the existing Act, the payment of audit fees only applies to Commonwealth authorities and companies that fall under the ambit of the CAC Act. There are a small number of bodies (including the High Court of Australia, the Commonwealth Superannuation Scheme, and the Public Sector Superannuation Scheme) where 'their enabling legislation is silent on the issue of audit fees'<sup>68</sup> and accordingly they pay none.
- 3.77 The ANAO submits that it would be appropriate to clarify whether the Auditor-General should charge statutory authorities and other bodies that fall outside the ambit of the CAC Act fees for financial statement audits.<sup>69</sup>
- 3.78 The Committee was in receipt of no evidence to suggest that the Act should not be amended to provide some consistency in relation to the collection of audit fees.

### Recommendation 5

- 3.79 **That subject to consultation with affected bodies, consideration be given to amending the Act so that all statutory authorities or other bodies that fall outside the ambit of the CAC Act are liable to pay audit fees for financial statements.**

### Acting as auditor under the *Corporations Act*

- 3.80 The Auditor-General seeks a technical amendment relating to section 21 of the Act.<sup>70</sup>
- 3.81 Section 21 of the Act provides for the Auditor-General to accept appointment under the *Corporations Act 2001* as the auditor of:
- (a) a subsidiary of a Commonwealth authority;
  - (b) a Commonwealth company; or

67 Australian National Audit Office, *2009-10 Portfolio Budget Statements*, p 99.

68 Australian National Audit Office, sub 3, p 3.

69 Australian National Audit Office, sub 3, p 3.

70 Australian National Audit Office, sub 3, p 3.

(c) any other company in which the Commonwealth has a controlling interest.<sup>71</sup>

- 3.82 The intent of this section is to allow the Auditor-General to accept appointment under the *Corporations Act* as auditor of all Commonwealth entities that are subject to the *Corporations Act*.<sup>72</sup>
- 3.83 The ANAO submits that when the *Auditor-General Act* was drafted, the CAC Act defined a Commonwealth company as 'a Corporations Act company in which the Commonwealth has a controlling interest'. However, as a result of recent amendments to the CAC Act related to the definition of 'control', subsection 21(1)(c) of the Act should be amended to read 'any subsidiary of a Commonwealth company'.<sup>73</sup>
- 3.84 The purpose of this amendment is simply to make clear that the Auditor-General should audit any Commonwealth controlled companies and their subsidiaries.<sup>74</sup>
- 3.85 The Committee notes that the proposed amendment simply provides legislative certainty to existing arrangements. As such, there are no resourcing implications associated with making this amendment.<sup>75</sup>

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## **Recommendation 6**

- 3.86 **That section 21 of the Act be amended to reflect that the Auditor-General is able to audit any Commonwealth-controlled entity including Commonwealth-controlled companies and their subsidiaries.**

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71 Australian National Audit Office, sub 3, p 3.

72 Australian National Audit Office, sub 3, p 4.

73 Australian National Audit Office, sub 3, p 4

74 Mr Ian McPhee PSM, transcript, 19 October 2009, p 26.

75 Australian National Audit Office, sub 3.4, npn.

## Providing advice and information

3.87 Evidence from the ANAO suggests that section 23 of the Act (set out below) which deals with the provision of advice or information is somewhat 'restrictive':<sup>76</sup>

### 23 Provision of advice or information

(1) The Auditor-General may provide advice or information to a person or body relating to the Auditor-General's responsibilities if, in the Auditor-General's opinion, it is in the Commonwealth's interests to provide the information or advice.

(2) In this section:

**Auditor-General's responsibilities** means:

(a) the Auditor-General's functions and powers; and

(b) any matter which the Auditor-General could consider when exercising those functions and powers.<sup>77</sup>

3.88 The Auditor-General's preference would be for the Act to expressly recognise that the functions of the Auditor-General include the promotion of public accountability in the public sector and the authority to do anything incidental or conducive to any of the Auditor-General's audit responsibilities.<sup>78</sup>

3.89 The relevant Australian Capital Territory legislation (i.e., *Auditor-General Act 1996*) is cited as an example which provides greater clarity around these issues.<sup>79</sup>

### Committee comment

3.90 The Committee acknowledges and appreciates the wide range of activities (e.g., seminars, better practice guides, capacity building) that are undertaken by the Auditor-General and his office to improve public accountability and administration both nationally and internationally.

3.91 However, it is the Committee's view is that rather than being restrictive, section 23 as it stands is broad in scope. Additionally, it is not clear what practical difference this amendment would make to the Auditor-General's

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76 Mr Russell Coleman, transcript, 19 October 2009, p 21.

77 Subsections 23(1)-(2) of the *Auditor-General Act 1997* (Cth).

78 Australian National Audit Office, sub 3, p 2.

79 Australian National Audit Office, sub 3, p 2; Mr Russell Coleman, transcript, 19 October 2009, p 22.

functions.<sup>80</sup> The Committee does not recommend any amendment to this section of the Act.

## Auditing standards

- 3.92 The Australian Auditing and Assurance Standards Board develops standards for both audits and other assurance engagements<sup>81</sup> yet section 24 of the Act requires the Auditor-General to set auditing standards only.<sup>82</sup>
- 3.93 The Auditor-General submits, and the Committee concurs, that it is proper for the Act to use the same terminology that the profession uses both nationally and globally.<sup>83</sup>
- 3.94 Additionally, given the Committee's first recommendation outlined in chapter 2 above, (i.e., that the Auditor-General be provided with the express authority to conduct assurance activities) it is appropriate to update the Act.<sup>84</sup>

## Recommendation 7

- 3.95 **That the Act be amended to require the Auditor-General to set auditing and assurance standards.**

## 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.<sup>85</sup>
- 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

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80 See transcript 19 October 2009, p 21.

81 Mr Ian McPhee PSM, transcript, 19 October 2009, p 25-26.

82 Australian National Audit Office, sub 3, p 2.

83 Mr McPhee PSM, transcript, 19 October 2009, p 26; see also transcript, 8 February 2010, p 20.

84 Mr McPhee PSM, transcript, 8 February 2010, p 20.

85 Extracted from *House of Representatives Practice*, 5th edn 2005, p 707.

Parliament' and attracts the protection of Parliamentary privilege. The Auditor-General and ANAO officers cannot be found liable in respect of statement contained in a tabled report.<sup>86</sup>

- 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'.<sup>87</sup>
- 3.99 The JCPAA recommended, therefore, that the Privileges Committee of both the Senate and the House of Representatives examine this question.<sup>88</sup>
- 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',<sup>89</sup> 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.<sup>90</sup>

- 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 there are penalties for not adhering to the relevant confidentiality requirements.<sup>91</sup>

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86 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 11.

87 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 11.

88 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 18.

89 Mr Russell Coleman, transcript, 19 October 2009, p 25.

90 Mr Russell Coleman, transcript, 19 October 2009, p 25.

91 Mr Russell Coleman, transcript, 19 October 2009, p 25.

### 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-General from legal action so that it may provide a fearless account of the activities of executive government.<sup>92</sup>

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

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### 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'.**

### Exemptions from FOI and the Privacy Act

- 3.106 Although not a matter requiring amendment to the *Auditor-General Act*, the issue of the Auditor-General being exempt from the *Freedom of Information Act 1982* (FOI Act) (Schedule 2 exemption) and largely exempt from the *Privacy Act 1998* was raised over the course of the inquiry.<sup>93</sup>

### Exemption from the FOI Act

- 3.107 The FOI Act gives individuals the right to:
- see documents held by federal government Ministers, their departments and most statutory authorities;
  - ask for information concerning them to be changed, if it is incomplete, out of date, incorrect or misleading; and

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92 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 16.

93 See transcript 22 June 2009, p 12.

- appeal against a decision not to grant access to a document or amend or annotate a personal record.<sup>94</sup>
- 3.108 Federal government agencies are also required to make available detailed information about the way they are organised, their functions and decision-making processes and the documents they hold under the FOI Act.<sup>95</sup>
- 3.109 As referred to above, the ANAO is exempt from all provisions of the FOI Act and in response to a Committee request for the rationale behind this exemption, the Auditor-General provided a summary of the reasons (see supplementary submission 3.2 for more detail):
- The Auditor-General, through the conduct of audits and related activities, is responsible for providing to the Parliament an independent assessment of the operations of public sector entities. The Auditor-General is an independent Officer of the Parliament, performs no executive functions, and makes no decisions or recommendations that directly affect members of the public. The outcome of all audit and related functions are publicly available, thereby achieving the objective of public accountability that is also an objective of the FOI Act.
  - The majority of documents in the possession of the ANAO are obtained from agencies, or are generated by the ANAO for the purposes of producing an audit report or forming an audit opinion that is tabled in the Parliament. Requests to access agency documents are able to be made directly to the agency concerned. Where documents are provided to the ANAO in confidence, it is important that their confidentiality is maintained.
  - The general principle of confidentiality of information obtained during the course of an audit is reinforced by the *Code of Ethics for Professional Accountants*<sup>96</sup> and by sub-section 36(1) of the *Auditor-General Act 1997*.
  - The FOI exemption for the Auditor-General at the federal level is consistent with the position for Auditors-General in the majority of States and Territories.<sup>97</sup>

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94 Viewed at the Department of Prime Minister and Cabinet <http://www.dpmc.gov.au/foi/legislation.cfm> on 7 May 2010.

95 Viewed at the Department of Prime Minister and Cabinet <http://www.dpmc.gov.au/foi/legislation.cfm> on 7 May 2010.

96 This Code is issued by the Accounting Professional and Ethical Standards Board and is applicable to all staff undertaking financial statement and performance audits.

97 For a fuller explanation please see Australian National Audit Office, supplementary sub 3.2, p 2.

- 3.110 The ANAO's exemption from the provisions of the FOI Act raised concerns amongst some Committee members who believed the Auditor-General should be subject to the provisions of the FOI Act in the same way that other agencies, also holding sensitive information, are.<sup>98</sup>
- 3.111 One of the Auditor-General's primary concerns about releasing information is related to the protection of confidentiality (as set out in the second bullet point above). This point was reiterated by the Auditor-General at the public hearing on 22 June 2009 as follows:
- If the protections can go to maintaining the confidences of individuals who have talked to us in a confidential manner for the purposes of furthering the audit then I think the proposal is worthy of looking at. But I would just say to you that it is important not to underestimate the importance of retaining some confidentiality.<sup>99</sup>
- 3.112 The Committee notes the Auditor-General put forward an option for consideration by the Committee that the ANAO, in the context of its administrative functions only, be subject to the provisions of the FOI Act. The Committee can see no real benefit to be gained by adopting such an approach.
- 3.113 The Committee has little evidence on which to suggest that any changes to the ANAO's exemption from the FOI Act are warranted. However, the Committee notes that the current Government conducted a review of Australia's Freedom of Information laws. As a result of that review two bills, the *Australian Information Commissioner Bill 2010* and the *Freedom of Information Amendment (Reform) Bill 2010*, passed through the Parliament on 13 May 2010.<sup>100</sup>
- 3.114 These bills provide for the establishment of the Office of the Australian Information Commissioner and two new independent office holders, the Australian Information Commissioner and the FOI Commissioner. The Commissioners are described by the Government as having 'wide ranging FOI functions to promote openness and transparency as intended by the Government reforms'.<sup>101</sup>

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98 See transcript 22 June 2009, p 4.

99 Mr Ian McPhee PSM, transcript, 22 June 2009, p 4.

100 Viewed at Department of Prime Minister and Cabinet, [http://www.dpmc.gov.au/consultation/foi\\_reform/index.cfm](http://www.dpmc.gov.au/consultation/foi_reform/index.cfm) on 26 May 2010.

101 Senator the Hon Joe Ludwig, media release, 13 May 2010.



- 3.115 The Committee believes that the appropriateness of the current exemptions from FOI could be examined in the context of that ongoing reform process.

### **Exemption from the *Privacy Act 1998***

- 3.116 The *Privacy Act 1998* regulates information privacy. More specifically, it regulates how the personal information of individuals (including sensitive information) is collected, used and disclosed, and the accuracy of that information. It also regulates the manner in which the personal information of individuals is kept and their access to that information. The *Privacy Act* also covers the use of tax file numbers and credit worthiness information.<sup>102</sup>
- 3.117 The *Privacy Act* sets out principles about the way in which personal information should be handled rather than being prescriptive. Each agency applies the principles to its own situation.<sup>103</sup>
- 3.118 The Committee was interested in the application of the *Privacy Act 1998* to the ANAO. In response the ANAO informed the Committee that on the basis of advice it had received, the Auditor-General is largely exempt from the provisions of the *Privacy Act 1998*. This is as a consequence of its exemption from the FOI Act. However, the advice also notes:
- ...that the application of the Privacy Act to the Auditor-General and the ANAO is in some respects uncertain, and legislative clarification would be warranted.<sup>104</sup>
- 3.119 Based on advice from the Australian Government Solicitor, the ANAO also submitted that in broad terms the access and confidentiality provisions of the *Auditor-General Act* would take precedence over the majority of the provisions of the *Privacy Act* that relate to the activities of agencies that collect or receive personal information.
- 3.120 In summary, the ANAO suggest that while, again, ANAO administrative functions could be subject to the *Privacy Act* there would be little or no public benefit in amending the current arrangements.<sup>105</sup>

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102 Viewed at the Office of the Privacy Commissioner  
<http://www.privacy.gov.au/aboutprivacy/snapshot> on 7 May 2010.

103 Viewed at the Office of the Privacy Commissioner  
<http://www.privacy.gov.au/aboutprivacy/snapshot> on 7 May 2010.

104 Australian National Audit Office, supplementary sub 3.2, p 4.

105 Australian National Audit Office, supplementary sub 3.2, p 4.

- 3.121 Like the question of the ANAO exemption from the FOI Act, the Committee has little evidence on which to suggest that any changes to the ANAO's exemption from the *Privacy Act* are warranted.

### Definitions of 'persons' giving evidence

- 3.122 In its submission to the inquiry, the Institute of Public Administration Australia raise the definition of the term 'person' in section 32 of the Act which sets out the power of the Auditor-General to obtain information. Section 32 states (in part):
- (1) The Auditor-General may, by written notice, direct a person to do all or any of the following:
    - (a) to provide the Auditor-General with any information that the Auditor-General requires;
    - (b) to attend and give evidence before the Auditor-General or an authorised official;
    - (c) to produce to the Auditor-General any documents in the custody or under the control of the person.<sup>106</sup>
- 3.123 The IPAA raise this issue because Ministers and their staff could prove to be valuable witnesses in the context of audits yet the operation of section 32 is limited by section 30 of the Act, which states that the power of the Auditor-General to obtain information is limited by the laws of the Commonwealth relating to the powers, privileges and immunities of the Parliament and Parliamentarians.<sup>107</sup>
- 3.124 Evidence from the Auditor-General and Mr Russell Coleman taken at the hearing on 19 October 2009 suggests that the IPAA is mistaken in its assumption that Ministers and/or their staff are not subject to section 32 of the Act:
- The Acts Interpretation Act [1901] clarifies the definition of persons. From memory, it is very broad. Generally, again, my understanding is that the Acts Interpretation Act is the relevant act you go to, which expands on things like the wording of persons and bodies and those sorts of things. It is not usually put into specific individual pieces of legislation. The master legislation is

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<sup>106</sup> Subsection 32(1) of the *Auditor-General Act 1997* (Cth).

<sup>107</sup> Institute of Public Administration Australia, sub 5, npn.

the Acts Interpretation Act. We believe it is covered sufficiently in that act.<sup>108</sup>

...

My understanding is that we are quite clear about the powers already under the act...It applies to everyone.<sup>109</sup>

- 3.125 Supplementary submission 3.6 provided to the Committee contains legal advice on the question of the Auditor-General's access powers in section 32 of the Act. On the basis of this legal advice the ANAO submits the following:

The advice does not suggest that any amendments to the existing access powers contained in the *Auditor-General Act 1997* are necessary.<sup>110</sup>

- 3.126 The Committee agrees that it is not necessary to amend the Act in this respect.

## Explicit access to Cabinet documents

- 3.127 The Australasian Council of Auditors-General submit that the Act could be clarified with regard to the Auditor-General's right to access cabinet documents.<sup>111</sup> However, very straightforward evidence was received from Mr McPhee that there is no requirement for an amendment in this respect:

It is understood. The cabinet issue is understood...[O]n cabinet papers, everyone within the system understands we do have access to them.<sup>112</sup>

- 3.128 The Committee believes that there is no need for amendment to clarify this aspect of the Act.

## Whistleblowers

- 3.129 In her submission to the inquiry, the Acting Commonwealth Ombudsman, Dr Vivienne Thom, considered there is a case for 'providing the Auditor-General with an express role in relation to any new whistleblowing scheme'.<sup>113</sup>

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108 Mr Russell Coleman, 19 October 2009, p 27.

109 Mr Ian McPhee PSM, 19 October 2009, p 26.

110 Australian National Audit Office, supplementary sub 3.6, p 1.

111 Australasian Council of Auditors-General, sub 8, npn.

112 Mr Ian McPhee PSM, transcript, 19 October 2009, p 22.

113 Commonwealth Ombudsman, sub 4, npn.

3.130 Currently, the *Public Service Act 1999* and supporting legislation provide a framework for the reporting of breaches or suspected breaches of the Code of Conduct so as to protect the 'whistleblower' from victimisation or discrimination.<sup>114</sup>

3.131 The Auditor-General, having been invited to provide his views on this matter, provided a sensible rationale for his exclusion from any participation in a whistleblowing scheme as follows:

To preserve the Auditor-General's independence, it is generally accepted that it is not appropriate for the Auditor-General to perform executive functions. In the past, the Auditor-General has been involved from time to time in performing executive functions such as in relation to electoral redistribution committees and tax agents' registration boards. Previous governments, with the strong support of the ANAO, have removed these executive responsibilities from the Auditor-General.<sup>115</sup>

3.132 Moreover, the ANAO suggests that any specific role in a government scheme might be incompatible with its central auditing responsibilities.<sup>116</sup>

3.133 The Committee concurs with this view and notes the following comment made by Professor John Wanna when asked for IPAA views on the potential for the Auditor-General to be involved in any whistleblowing scheme:

I think there is a danger in too many people being responsible for whistleblowing. The next generation in the whistleblowing area will be better supported with places to which they can go to receive that support and where they can be protected. Bringing the Auditor-General into that just muddies that water rather than helps clarify.<sup>117</sup>

3.134 The Committee also notes that no role was identified for the Auditor-General in the House of Representatives Standing Committee on Legal and Constitutional Affairs report entitled *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*.<sup>118</sup>

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114 Viewed at the Australian Public Service Commission at <http://www.apsc.gov.au/employmentpolicy/whistleblowing.htm> on 7 May 2010.

115 Australian National Audit Office, supplementary sub 3.2, p 5.

116 Australian National Audit Office, supplementary sub 3.2, p 6.

117 Professor John Wanna, transcript, 22 June 2009, p 34.

118 The Government released its response to this report on 17 March 2010.

- 3.135 The Committee does not believe it would be appropriate for the Auditor-General to be involved in any public sector whistleblower scheme.

### Comments on reports and extracts of reports

- 3.136 Section 19 of the Act provides that all written comments received from recipients of either a full proposed audit report or an extract of a proposed audit report are required to be included in the final report.<sup>119</sup>
- 3.137 The requirement to include these comments came about as a result of a recommendation made by the Committee in its 2001 review of the *Auditor-General Act*.<sup>120</sup>
- 3.138 The intention of the JCPAA in 2001 was, in the interests of natural justice, to include comments in full to 'avoid disputes about the representation of agency views'.<sup>121</sup> The ANAO submits that this intention has been realised with the amendments that were made to the legislation as a result of that recommendation.<sup>122</sup>
- 3.139 However, the ANAO also submits that there are now practical issues around the inclusion of comments received on extracts of reports which could be addressed in the context of this inquiry.<sup>123</sup>
- 3.140 In particular, the ANAO has expressed concern that on occasion comments received from non-auditees such as contractors, sub-contractors and former Australian Public Service personnel may not be directly relevant to the audit findings or the extract of the report provided to them. This sometimes results in extended consultations with the parties concerned and the need for the ANAO to provide further comment on comments received. Delays become inevitable and additional resources required. Moreover, the ANAO states:

The inclusion of such comments, particularly lengthy comments, can also have the unintended effect of distracting from the central focus of the audit, which is administration by the responsible agency or agencies of the program or activity subject to audit.<sup>124</sup>

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119 Section 19 of the *Auditor-General Act 1997* (Cth).

120 Joint Committee of Public Accounts and Audit. *Report 386: Review of the Auditor-General Act 1997*, p 26.

121 Joint Committee of Public Accounts and Audit. *Report 386: Review of the Auditor-General Act 1997*, p 26.

122 Mr Stephen Chapman, transcript, 19 October 2009, p 28.

123 Australian National Audit Office, supplementary sub 3.1, p 1.

124 Australian National Audit Office, supplementary sub 3.1, p 2.

- 3.141 The ANAO argues that while the Act should still require that the Auditor-General include in the final report any comments received from Australian Government entities that are the subject of the audit, other comments should be included at the discretion of the Auditor-General.<sup>125</sup>

We would like discretion so that for non-auditees the Auditor-General has discretion to identify relevance in including the extract in the report. Certainly we would be taking account of the comments.<sup>126</sup>

### **Committee comment**

- 3.142 The Committee is of the view that non-auditees are entitled to natural justice and as such should continue to be provided with extracts of the proposed reports where necessary and permitted to comment on those extracts.
- 3.143 The Committee is sympathetic to the argument made by the Auditor-General in supplementary submission 3.1 and at the hearing on 19 October 2009;<sup>127</sup> however, in the interests of transparency the Committee believes that all comments received from recipients of extracts of proposed audit reports should continue to be published in full in the audit report.
- 3.144 That said, it is important that recipients of extracts of proposed audit reports be formally made aware of the expectations around, and implications of, their comments.
- 3.145 The ANAO currently provides guidance that asks:
- ...any comments you have on the report extract be directly relevant to the matters referred to in the extract and be reasonably succinct.<sup>128</sup>
- 3.146 The Committee recommends that the Auditor-General should also inform recipients of report extracts of the potential implications and/or complications of naming others in those comments.

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125 Australian National Audit Office, supplementary sub 3.1, npn.

126 Mr Stephen Chapman, transcript, 19 October 2009, p 28.

127 See transcript, 19 October 2009, p 28-29.

128 Australian National Audit Office, exhibit 1, npn.

## Recommendation 9

- 3.147 **That the Auditor-General continue to provide the recipients of extracts of proposed audit reports with clear guidelines to clarify expectations around the submission of comments (e.g., the importance of brevity and clarity) and also the implications for naming other persons/entities /organisations in those comments which are published in full.**

### Tabling embargo during the caretaker period

- 3.148 The timing of the conduct of performance audits is at the discretion of the Auditor-General. However, subsection 18(2) of the Act requires that as soon as practicable after completing the report on an audit the Auditor-General must cause a copy of the report to be tabled in each House of Parliament.<sup>129</sup>
- 3.149 There has been some controversy in the past regarding the tabling of audit reports during the caretaker period.<sup>130</sup> The question of whether it would be appropriate to incorporate a blackout on tabling during this time was raised both at an Estimates hearing in February 2008<sup>131</sup> and during this inquiry.
- 3.150 At the public hearing on 22 June 2009, the Auditor-General indicated that while he did not see any problem with the imposition of a tabling blackout during the caretaker period should the Committee recommend one, he is comfortable with the current arrangements:

Let us face it, the caretaker period is primarily focused on the current government not really locking in a possible change in government in terms of policy positions or major contracts, so it is a forward-looking consideration. My role and my reporting is very much about accountability for performance of the current government's programs so I am comfortable with making the judgement about whether to table or not in the caretaker period.<sup>132</sup>

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129 Subsection 18(2) of the *Auditor-General Act 1997* (Cth).

130 The ANAO's *Performance Audit of the Regional Partnerships Programme* was tabled on 15 November 2007 during the caretaker period for the 2007 election campaign.

131 Senate Standing Committee on Finance and Public Administration, transcript, 19 February 2008, p 11-15.

132 Mr Ian McPhee PSM, transcript, 22 June 2009, p 21-22.

3.151 Additionally:

...if you have a long caretaker period and you had a blackout, it would mean that the Auditor-General would be required to sit on that report and potentially table it a week after an election. If it were a contentious report, I am not sure that that is in the best interests of the community or the public.<sup>133</sup>

**Committee comment**

3.152 The Committee is of the view that the disclosure of information regarding government performance is always in the public interest. It does not, therefore, propose to make any recommendation in this respect.

**Provision of information to committees**

3.153 Section 49 of the Australian Constitution confers on both Houses of Parliament the powers, privileges and immunities possessed by the United Kingdom House of Commons in 1901. Under Section 50 each House has the right to make rules or orders concerning its powers and conduct of business. This power is delegated to a committee by the Standing Orders, by the Resolution of Appointment, or by the relevant statute.<sup>134</sup>

3.154 One significant power delegated to parliamentary committees is the power to compel the attendance of witnesses, the giving of evidence and the production of documents.<sup>135</sup> In the case of this Committee, section 13(1) of the *Public Accounts and Audit Committee Act 1951* explicitly provides it with the power to summon a person to appear before it to give evidence and produce documents.<sup>136</sup>

3.155 This authority reflects the significant role committees play in, amongst other things, oversight and scrutiny of the Executive on behalf of the Parliament. The power to access information in order to perform its role is something taken very seriously by this Committee.

3.156 On occasion, claims that information should be withheld from disclosure to a parliamentary committee are made by the Executive on the grounds of public interest (i.e., claims of public interest immunity). Grounds for making a claim of public interest immunity may relate to national

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133 Mr Ian McPhee PSM, transcript, 22 June 2009, p 22.

134 Extracted from *House of Representatives Practice, 5th edn 2005*, pp 643–4.

135 Extracted from *Odgers' Australian Senate Practice*, p 59.

136 *Public Accounts and Audit Committee Act 1951*, p 10.



security, or the harm that may result from the disclosure of commercially sensitive information. Such claims are normally made by the responsible Minister in consultation with the Attorney-General and the Prime Minister.<sup>137</sup> However, it is accepted practice that an alternative means for providing the information in question to the Committee (such as on a confidential basis or *in camera*) should be explored prior to making a claim of public interest immunity.<sup>138</sup>

3.157 Section 36 of the *Auditor-General Act 1997* relates to protection of the confidentiality of information. It provides that information obtained in the course of the performing an Auditor-General function can only be disclosed in particular circumstances. Section 36 states, in part:

(1) If a person has obtained information in the course of performing an Auditor-General function, the person must not disclose the information except in the course of performing an Auditor-General function or for the purpose of any Act that gives functions to the Auditor-General.

...

(2) Subsection (1) does not prevent the Auditor-General from disclosing particular information to the Commissioner of the Australian Federal Police if the Auditor-General is of the opinion that the disclosure is in the public interest.<sup>139</sup>

3.158 At the same time as this inquiry was being conducted, the Committee was also conducting an inquiry into the role of the Auditor-General in scrutinising government advertising campaigns. During that inquiry there was a great deal of discussion about the degree to which the Auditor-General should be required to provide internal documents to the Parliament via the Committee.

3.159 Committee members were interested, first, in the extent to which the confidentiality requirements set out in Section 36 of the Auditor-General Act limit the Auditor-General's ability to disclose material it has in its possession to the Committee<sup>140</sup> and second, whether this potential 'grey area' is an one that might be clarified by amending the Act.<sup>141</sup>

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137 Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989*, p 8.

138 Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989*, p 8.

139 Subsections 36(1)-(2) of the *Auditor-General Act 1997* (Cth).

140 See transcript, 8 February 2010, p 22.

141 See transcript, 8 February 2010, p 24.

- 3.160 With regard to the first question, it is important to note that the ANAO's interaction with the Committee is reasonably considered 'as being part of performing [an Auditor-General function]'.<sup>142</sup> More significantly, it is also important to note that statutory secrecy provisions such as those provided in section 36 of the Act are not considered binding on parliamentary committees. The law of parliamentary privilege provides absolute immunity to the giving of evidence and the disclosure of information to parliamentary committees cannot therefore be prevented unless the legislation expressly states as such.<sup>143</sup>
- 3.161 In a supplementary submission to the inquiry the Auditor-General acknowledged the degree of uncertainty between relevant legislation and parliamentary Standing Orders and advised that, to date, the ANAO's approach to providing information to parliamentary committees has been guided by 'custom and practice'.<sup>144</sup>
- 3.162 At the hearing on 8 February 2010, the Auditor-General outlined the matters he takes into consideration when disclosing documents to the Committee as follows:
- I guess broadly it is under the public interest umbrella that drives [considerations about disclosing information to the Committee]... I have always worked to provide the committee with whatever information it wanted, but I do have to keep an eye on the integrity of the audit process itself. We have people who communicate with us openly, directly and in confidence. It is always a judgment as to how...much we provide to committees of the parliament, because I am concerned that if we go too far in that people will not be as open with us about their views on particular aspects, and that will impair the audit process. I believe as Auditor-General that I have an obligation to weigh that consideration as well.<sup>145</sup>
- 3.163 In order to provide some clarity around this issue, the Auditor-General proposes that an appropriate amendment to the Act would be one that explicitly requires him/her to consider the public interest in providing information or documents to parliamentary committees. According to the Auditor-General:

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142 Mr Russell Coleman, transcript, 8 February 2010, p 25.

143 Extracted from *Odgers' Australian Senate Practice*, p 51.

144 Australian National Audit Office, supplementary sub 3.9, npn.

145 Mr Ian McPhee PSM, transcript, 8 February 2010, p 22.

Such an amendment would not diminish the Auditor-General's accountability for the audit conclusions and opinions that are issued and are publicly available. Further, it is the ANAO's understanding that responding to requests for information and documents, where appropriate, is an integral part of performing an Auditor-General function.<sup>146</sup>

### **Committee comment**

- 3.164 The Committee acknowledges that differing claims of public interest by the Parliament and the Executive (or the Auditor-General in this case) may, on occasions, come into conflict. The Committee also acknowledges that there may be occasions when it is in the public interest that certain information not be disclosed. However, it is the Committee's view that any legislative change would inevitably result in the Parliament being seen to diminish in its capacity to scrutinize the performance of the ANAO and other agencies. This is a situation which is not acceptable to the Committee nor indeed in the public interest.
- 3.165 A key question of interest to the Committee is whether the decision not to disclose certain information to committees in the public interest should be one that is left to the Auditor-General.
- 3.166 Upon consideration of this issue, the Committee believes that were the legislation amended so as to constrain the Auditor-General from making decisions about disclosing information in the public interest, or to stipulate that such claims may only be made by a Minister, this would not only result in the potential for interference in the audit process by parliamentary committees but ultimately have a detrimental impact on the independence of the office of the Auditor-General.
- 3.167 It is the Committee's view, therefore, that the most appropriate course of action would be to retain the current arrangements. In this way, individual issues would be resolved on a case by case basis by negotiation or ultimately by the Houses of Parliament, as is currently the case.

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<sup>146</sup> Australian National Audit Office, supplementary sub 3.9, npn.