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The Parliament of the Commonwealth of Australia

# **Report 386**

Review of the *Auditor–General Act 1997*

Joint Committee of Public Accounts and Audit

August 2001  
Canberra

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## Chairman's Foreword

The success of Australia's democracy owes much to the ability of the Parliament to scrutinise and hold executive government to account. This is a key feature of successful parliamentary democracies.

The Auditor-General, as an independent officer of the Parliament, plays a key role in the accountability framework by supporting the Parliament in its scrutiny function.

It is essential that the legislation underpinning the Auditor-General is current and provides the Australian National Audit Office (ANAO) with sufficient powers and privileges to scrutinise the administration of government agencies.

The *Auditor-General Act 1997* (the Act) came into effect on 1 January 1998. The Act provides for the Joint Committee of Public Accounts and Audit (JCPAA) to examine the budget estimates of the ANAO and to make recommendations to Parliament on the proper resourcing of the office. In addition, the JCPAA determines the audit priorities of the Parliament and advises the Auditor-General of those priorities.

The role of the JCPAA provides for a stronger and practical relationship between the Auditor-General and the Parliament.

Other features of the Act include a number of provisions which strengthen the Auditor-General's role as external auditor of Commonwealth agencies, authorities and companies and their subsidiaries. The Act provides the Auditor-General with a comprehensive mandate to conduct, with some limited exceptions, financial statement and performance audits of all government entities.

In view of the Committee's significant legislative responsibilities to guard the independence of the Auditor-General it was considered timely to conduct a review of the Act. The overall finding is that the Act provides an effective

framework for the ANAO to carry out its functions. The Committee has identified the following legislative amendments which will further enhance the Act:

- subsection 19(3) should be amended to provide the Auditor-General with the power to circulate extracts of draft reports where necessary;
- amendments to subsection 37(4) to ensure that it reflects the original intentions set out in the Explanatory Memorandum. The amendment will remove ambiguity in the event that the Attorney-General issues a certificate requiring certain information to be omitted from a public report;
- amendments to subsection 15(2) to provide the Auditor-General with the power to provide a copy of a completed report to a Minister who has a special interest in the report;
- amendment to subsection 19(4) to provide for the Auditor-General to include agency comments, in full, in a final report; and
- the Committee has resolved that, as part of its power to review and change the Annual Report Guidelines, it will require government agencies to include in their Annual reports:
  - ⇒ a list showing all contracts by name, value, and the reason why the standard access clause, which provides the Auditor-General with access to the premises of Commonwealth contractors, was not included in the contract.

The Committee is confident that these proposals will enhance the *Auditor-General Act 1997* and will ensure that the Australian National Audit Office can continue to perform efficiently and effectively.

In conclusion, and on behalf of the Committee, I would like to thank all those who have contributed to this inquiry.

**Bob Charles, MP**  
Chairman



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## Membership of the Committee

Chair Mr Bob Charles MP

Deputy Chair Mr David Cox MP

Members	Senator Helen Coonan	Mr Kevin Andrews MP
	Senator the Hon Rosemary Crowley (until 28/6/01)	Mr Malcolm Brough MP (until 7/3/00)
	Senator the Hon John Faulkner (until 12/10/00)	Mr Petro Georgiou MP
	Senator the Hon Brian Gibson AM	Ms Julia Gillard MP
	Senator John Hogg	Mr Alan Griffin MP (until 9/8/99)
	Senator Andrew Murray	Mr Peter Lindsay MP (from 7/3/00)
	Senator the Hon Nick Sherry (from 28/6/01)	Ms Tanya Plibersek MP (until 10/4/00)
	Senator John Watson	The Hon Alex Somlyay MP
		Mr Stuart St Clair MP
		Mr Lindsay Tanner MP (from 9/8/99)
		Mr Kelvin Thomson MP (from 10/4/00)



# Membership of the Sectional Committee

Chair Mr Bob Charles MP

Deputy Chair Mr David Cox MP

Members Senator Helen Coonan Mr Kevin Andrews MP  
Senator the Hon Rosemary Crowley Ms Julia Gillard MP  
(until 28/6/01)  
Senator Andrew Murray The Hon Alex Somlyay MP  
Senator John Watson

## Committee Secretariat

Secretary Dr Margot Kerley

Inquiry Secretary Mr Stephen Boyd

Research Officer Mr Ngan Thai

Administrative Officer Ms Maria Pappas



## Duties of the Committee

The Joint Committee of Public Accounts and Audit is a statutory committee of the Australian Parliament, established by the *Public Accounts and Audit Committee Act 1951*.

Section 8(1) of the Act describes the Committee's duties as being to:

- (a) examine the accounts of the receipts and expenditure of the Commonwealth, including the financial statements given to the Auditor-General under subsections 49(1) and 55(2) of the *Financial Management and Accountability Act 1997*;
- (b) examine the financial affairs of authorities of the Commonwealth to which this Act applies and of intergovernmental bodies to which this Act applies;
- (c) examine all reports of the Auditor-General (including reports of the results of performance audits) that are tabled in each House of the Parliament;
- (d) report to both Houses of the Parliament, with any comment it thinks fit, on any items or matters in those accounts, statements and reports, or any circumstances connected with them, that the Committee thinks should be drawn to the attention of the Parliament;
- (e) report to both Houses of the Parliament any alteration that the Committee thinks desirable in:
  - (i) the form of the public accounts or in the method of keeping them; or
  - (ii) the mode of receipt, control, issue or payment of public moneys;

- (f) inquire into any question connected with the public accounts which is referred to the Committee by either House of the Parliament, and to report to that House on that question;
- (g) consider:
  - (i) the operations of the Audit Office;
  - (ii) the resources of the Audit Office, including funding, staff and information technology;
  - (iii) reports of the Independent Auditor on operations of the Audit Office;
- (h) report to both Houses of the Parliament on any matter arising out of the Committee's consideration of the matters listed in paragraph (g), or on any other matter relating to the Auditor-General's functions and powers, that the Committee considers should be drawn to the attention of the Parliament;
- (i) report to both Houses of the Parliament on the performance of the Audit Office at any time;
- (j) consider draft estimates for the Audit Office submitted under section 53 of the *Auditor-General Act 1997*;
- (k) consider the level of fees determined by the Auditor-General under subsection 14(1) of the *Auditor-General Act 1997*;
- (l) make recommendations to both Houses of Parliament, and to the Minister who administers the *Auditor-General Act 1997*, on draft estimates referred to in paragraph (j);
- (m) determine the audit priorities of the Parliament and to advise the Auditor-General of those priorities;
- (n) determine the audit priorities of the Parliament for audits of the Audit Office and to advise the Independent Auditor of those priorities; and
- (o) undertake any other duties given to the Committee by this Act, by any other law or by Joint Standing Orders approved by both Houses of the Parliament.



## **Terms of reference**

The Committee will inquire into and report on the adequacy of the *Auditor-General Act 1997* focusing on:

- the Auditor-General's information gathering powers;
- the confidentiality of information;
- the application of parliamentary privilege to draft reports, extracts of draft reports, and reports;
- access by relevant parties to draft Auditor-General reports;
- procedural fairness;
- a comparison of State Auditor-General provisions to the Commonwealth Auditor-General Act; and
- any other aspects of the *Auditor-General Act 1997* that require attention.





## List of abbreviations

Act	<i>Auditor-General Act 1997</i>
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
Committee	Join Committee of Public Accounts and Audit
CPA	Certified Practising Accountants - Australia
CTC	Competitive Tendering and Contracting
Defence	Department of Defence
DEH	Department of Environment and Heritage
DETYA	Department of Education, Training and Youth Affairs
DFAT	Department of Foreign Affairs and Trade
DoFA	Department of Finance and Administration
EM	Explanatory Memorandum
FaCS	Department of Family and Community Services
JCPA	Joint Committee of Public Accounts
JCPAA	Joint Committee of Public Accounts and Audit





# List of recommendations

## 2 Section 19 – Comments on proposed reports

### Recommendation 1

The Committee suggests that the Privileges Committees of both the Senate and the House of Representatives examine whether Australian National Audit Office draft reports and extracts of draft reports attract Parliamentary privilege, and if they do not, should they attract Parliamentary privilege. [Paragraph 2.33]

### Recommendation 2

The Committee recommends that the Government amend section 19(3) of the *Auditor-General Act 1997*, to read:

■ After preparing a proposed report on an audit under sections 15, 16, 17 or 18, the Auditor-General ~~may~~ *must* give a copy *or an extract* of the proposed report to any person who, in the Auditor-General's opinion, has a special interest in the report.

The Government will need to ensure that all consequential amendments arising from this amendment are made. [Paragraph 2.52]

### Recommendation 3

Subsection 19(4) of the *Auditor-General Act 1997* should be amended to read:

■ If the recipient of the proposed report gives written comments to the Auditor-General within 28 days after receiving the proposed report, the Auditor-General must consider, *and include*, those comments, *in full*, ~~before preparing a~~ *in the* final report and any summary documents. [Paragraph 2.68]

### 3 Sections 32 and 33 – Access Powers of the Auditor-General

#### Committee resolution

The Committee has resolved that, as part of its power to review and change the Annual Report Guidelines, it will require government agencies to include in their Annual Reports:

- a list showing all contracts by name, value, and the reason why the standard access clause, which provides the Auditor-General with access to the premises of Commonwealth contractors, was not included in the contract.

### 4 Section 37 – Sensitive information not to be included in reports

#### Recommendation 4

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

- ~~If~~ *When the Auditor-General decides to* is required to omit particular information from a public report because the Attorney-General has issued a certificate under paragraph (1)(b) in relation to the information, the Auditor-General must state in the report:

(a) that information (which does not have to be identified) has been omitted from the report; and

(b) the reason or reasons (in terms of subsection (2)) why the Attorney-General issued the certificate.

### 5 Other issues

#### Recommendation 5

The Committee recommends that the Government amend section 15(2) of the *Auditor-General Act 1997*, to read:

- As soon as practicable after completing the report on the audit, the Auditor-General must:

⇒(a) cause a copy to be tabled in each House of Parliament; ~~and~~

⇒(b) give a copy to the responsible Minister; *and*

⇒(c) *to any other Minister who, in the Auditor-General's opinion, has a special interest in the report.*



# Introduction

## Background

- 1.1 A fully functioning and successful parliamentary democracy owes much to the accountability mechanisms that are in place to provide transparency for scrutiny of its operations. The Auditor-General, as an independent officer of the Parliament, plays a key role in the accountability framework by supporting the Parliament in its scrutiny of executive government. The *Auditor-General Act 1997* sets out the powers and functions of the Auditor-General. It is a critical piece of legislation and, therefore, requires periodic review to ensure that it is achieving its objectives.
- 1.2 On 29 November 2000 the Joint Committee of Public Accounts and Audit (the Committee) resolved to conduct an inquiry into the adequacy of the *Auditor-General Act 1997* (the Act).
- 1.3 The Act came into effect on 1 January 1998 and replaced the *Audit Act 1901*. The current legislative review is the culmination of a series of reviews by the Committee which first began in 1988. In 1994 the then Joint Committee of Public Accounts, in Report 331, reviewed the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994. Report 331 also examined a proposal to establish an Audit Committee of the Parliament.<sup>1</sup>

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<sup>1</sup> Joint Committee of Public Accounts, Report 331, *An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of the Parliament*, Canberra, September 1994.

- 1.4 In 1996 the Committee, in Report 346, proposed a series of measures that could be incorporated into the Auditor-General Bill to support the functional independence of the Auditor-General.<sup>2</sup> A key element of achieving functional independence was the creation of an audit committee of the Parliament.

## **The Auditor-General Act 1997**

- 1.5 The Auditor-General Act, together with two companion Acts, came into effect on 1 January 1998 and replaced the *Audit Act 1901*. The other pieces of legislation include the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*. This accountability framework is principles based and widely acknowledged as representing best practice. The ANAO commented that the implementation of 'this new financial legislative framework on 1 January 1998 represented a significant milestone in public sector administration.'<sup>3</sup>
- 1.6 At the same time that these Acts came into effect, the then Joint Committee of Public Accounts (JCPA) became the audit committee of the Parliament through legislative amendments to the then *Public Accounts Committee Act 1951*. Through these changes, the Committee examines the budget estimates of the Australian National Audit Office (ANAO) and makes recommendations to Parliament on the proper resourcing of the office. In addition, the Committee determines the audit priorities of the Parliament and advises the Auditor-General of those priorities. Another important function conducted by the Committee is the approval or rejection of recommendations for appointment of the Auditor-General and Independent Auditor.
- 1.7 This role of the Joint Committee of Public Accounts and Audit provides for a stronger and practical relationship between the Auditor-General and the Parliament.

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2 Joint Committee of Public Accounts, Report 346, *Guarding the Independence of the Auditor-General*, Canberra, October 1996.

3 Australian National Audit Office, *Submission No.6*, p. 2.

1.8 The main features of the Auditor-General Act include:

- the number of specific provisions which strengthen the independence of the office of the Auditor-General and the ANAO. In particular, the Act makes the Auditor-General an independent officer of the Parliament;
- the strengthening of the Auditor-General's role as external auditor of Commonwealth agencies, authorities and companies and their subsidiaries. The Act provides the Auditor-General with a comprehensive mandate to conduct, with some limited exceptions, financial statement and performance audits of all government entities; and
- clarification of the Auditor-General's mandate and powers.<sup>4</sup>

1.9 The functional independence of the Office of the Auditor-General, created through the Act, is a critical feature of the ability of the office to conduct its scrutiny and accountability role. The then Minister for Finance, the Hon John Fahey, MP, in his second reading speech introducing the Bill, stated:

The Auditor-General Bill 1996 is designed to achieve a number of related purposes: foremost, the re-establishment of the Office of the Auditor-General of the Commonwealth of Australia, but in a way that both symbolically and practically strengthens the functional independence of the office beyond that available under current laws. The bill declares the Auditor-General to be an 'independent officer of the parliament', as an expression of the primary and unique relationship which the office has with the parliament. In keeping with the government's publicly stated commitment to confer genuine functional independence on the Auditor-General, a range of statutory safeguards are included in the bill to prevent inappropriate influence being exerted on the Auditor-General by either the executive or the parliament.<sup>5</sup>

1.10 The work of the then JCPA is largely responsible for the establishment of the Auditor-General as an independent officer of the Parliament, and the inclusion of other significant features in the Act. For example, in 1989 the JCPA called for the *Audit Act 1901* to be repealed and be replaced with a Financial Administration Act and an Audit Act.<sup>6</sup> In addition, the JCPA

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4 Australian National Audit Office, *Submission No.6*, p. 2.

5 The Hon John Fahey, MP, Minister for Finance, Second Reading Speech, Auditor-General Bill 1996, House of Representatives, *Hansard*, 12 December 1996, p. 8341.

6 Joint Committee of Public Accounts and Audit, Report 296, *The Auditor-General: Ally of the People and Parliament*, Canberra, March 1989, p xvii.

recommended that the Auditor-General should be referred to as an officer of the Parliament in order to emphasise the Auditor-General's relationship with Parliament.

- 1.11 Also in 1989 the JCPA recommended that an Audit Committee be established to advise the Auditor-General on Parliament's audit priorities.<sup>7</sup> The valuable work of the JCPA was acknowledged by the Minister in his second reading speech. The Minister stated:

Many of the provisions in this bill reflect the significant and valuable work of the Joint Committee of Public Accounts in pressing for a strengthening of the role of the Auditor-General.

The JCPA following its comprehensive 1988 inquiry into the operations of the Auditor-General, produced report 296 entitled *The Auditor-General Ally of the People and Parliament*. The committee recommended profound changes to the Auditor-General's operations, including that the Audit Act be replaced by more modern legislation.<sup>8</sup>

## Reasons for the inquiry

- 1.12 In view of the Committee's significant legislative responsibilities to guard the independence of the Auditor-General, the Committee believes that it must be satisfied that the Act is achieving its stated intentions. The Act has been operating for just over three years which is sufficient time to review its effectiveness and, where necessary, suggest amendments.
- 1.13 In March 2000, for example, the Committee reported on its review of the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities Act 1997*. These Acts also came into effect on 1 January 1998 and this length of operation was sufficient time for the Committee to provide an adequate assessment through its inquiry.<sup>9</sup>
- 1.14 During the previous three years, the Committee has had the opportunity to observe and to explore its responsibilities in relation to the operation of the Act. This experience places the Committee in a very good position to review its operation. For example, the Committee's role in scrutinising the
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7 *ibid.*, pp. xvii-xviii.

8 The Hon John Fahey, MP, Minister for Finance, Second Reading Speech, Auditor-General Bill 1996, House of Representatives, *Hansard*, 12 December 1996, p. 8341.

9 Joint Committee of Public Accounts and Audit, Report 374, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, Canberra, March 2000.

reports of the Auditor General gives it an effective knowledge of how the Act provides the framework for the Auditor-General's performance audit function. In particular, the Committee has examined whether the information gathering powers of the office of the Auditor-General are sufficient for it to conduct its scrutiny role.

## **Objectives, scope and focus**

- 1.15 The Committee's main objective is to provide an assurance function and test whether the functions of the Act are being properly fulfilled. This examination has identified a number of sections of the Act that could be enhanced through legislative amendment. These sections, which are reflected in the chapter outline, are discussed briefly in the sections that follow.

### **Section 19 – Comments on proposed reports**

- 1.16 Section 19 of the Act provides the framework for the circulation of proposed reports on an audit of an agency conducted under section 15 of the Act. Section 15 relates to the conduct of performance audits on agencies.
- 1.17 Section 19, therefore, is an essential part of the operation of the Act relating to the conduct of performance audits. It is the process through which agencies have the opportunity to examine draft audit reports and make comments, if necessary, within 28 days.
- 1.18 Section 19(1) states that the Auditor-General 'must give a copy of the proposed report to the Chief Executive of the Agency.' Section 19(3) states that, in addition, the Auditor-General 'may give a copy of the proposed report to any person who, in the Auditor-General's opinion, has a special interest in the report.'
- 1.19 Some groups, in evidence to the inquiry, suggested section 19(3) should be amended to ensure that the Auditor-General must give a copy of a draft report to parties that have been subject to sections 32 or 33. Section 32 and 33 set out the powers of the Auditor-General to obtain information and access premises.
- 1.20 The Auditor-General proposed that section 19 be amended to provide for the circulation of extracts of reports rather than just the circulation of the full report. These issues are examined in Chapter 2.



## Sections 32 and 33 – Information gathering powers

- 1.21 Sections 32 and 33 of the Act provide the key information gathering powers of the Auditor-General, including the power to obtain information and access Commonwealth premises.
- 1.22 With the trend towards more outsourcing of government services, the role of contractors is becoming more critical. In reports 368 and 379, the Committee recommended that the Auditor-General have the power to access the premises of Commonwealth government contractors.<sup>10</sup> This is in order to preserve the integrity of documenting audit trails and ensure accountability standards are maintained in a devolved environment.
- 1.23 In response to the Committee's recommendations, the Government indicated that it will include advice in the Commonwealth Procurement Guidelines that agencies should give consideration to including standard clauses in their contracts that provide the Auditor-General with the power to access contractors' premises. As part of this inquiry, the Committee reviews the appropriateness of this approach, and suggests ways to ensure that agencies give serious attention to including access clauses in their contracts.

## Section 37 – Sensitive information not to be included in public reports

- 1.24 Section 37 sets out a framework for ensuring that sensitive information is not included in a public report. The framework provides for the Attorney-General to issue a certificate restricting the publication of information. The explanatory memorandum (EM) to the Act indicated that when the Attorney-General issues a certificate regarding the disclosure of certain information then the Auditor-General must not include that information in a report. The Auditor-General, however, suggests that there is ambiguity in the Act regarding this matter, and that amendment is necessary to reflect the intentions set out in the EM. The Committee reviews this matter.

## Other issues

- 1.25 The final part of the report brings together a range of issues focusing on parts of the Act, and on aspects of the operation and procedures of the

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<sup>10</sup> Joint Committee of Public Accounts and Audit, *Report 368, Review of Audit Report No. 34, 1997-98, New Submarine Project, Department of Defence*, June 1999; *Report 379, Contract Management in the Australian Public Service*, October 2000.

Australian National Audit Office (ANAO). For example, the circulation of audit reports to Ministers with a special interest in the report, and the Auditor-General's powers in regard to the actions of Ministers are examined.

## Conduct of the inquiry

- 1.26 The terms of reference for the inquiry were publicised in February 2001. In addition, a range of government agencies and private sector organisations were sent the terms of reference and invited to provide submissions. The terms of reference and other information about the inquiry were also advertised on the Committee's internet homepage at:
- <http://www.aph.gov.au/house/committee/jpaa/index.htm>
- 1.27 Eleven submissions were received which are listed at Appendix A. The Committee also received 3 exhibits which are listed at Appendix B.
- 1.28 Evidence was taken at a public hearing in Melbourne on 15 May 2001. A list of witnesses appearing at the hearing can be found at Appendix C.
- 1.29 Copies of the transcript of evidence from the public hearing and the submissions can be obtained through the Committee's website, and for inspection at the National Library of Australia.

## Report structure

- 1.30 The report structure reflects the key inquiry objectives. Chapter 2 examines the operation of section 19 of the Act which relates to the circulation of Auditor-General draft reports.
- 1.31 Chapter 3 reviews the information gathering powers of the Auditor-General. In particular, the Committee examines the use of contract model clauses by which agencies provide access for the Auditor-General to the premises of government contractors.
- 1.32 Chapter 4 examines section 37 of the Act which provides the framework for ensuring that sensitive information is not included in public reports.
- 1.33 The final chapter addresses a range of issues that were raised focusing on parts of the legislation and ANAO practise.

## **Section 19 – Comments on proposed reports**

### **Introduction**

- 2.1 A key function of the Auditor-General is to conduct performance audits of government agencies. Performance audits primarily seek to examine the efficiency and effectiveness of program administration and, where necessary, make recommendations to improve performance. The findings of a performance audit are often complex and, in some cases, contentious.
- 2.2 Therefore, natural justice demands that the Auditor-General, in conducting a performance audit, gives agencies the opportunity to comment on the findings that are presented in a proposed report.
- 2.3 Section 19 of the Act provides the framework for ensuring that a proposed report is provided to an agency and, where necessary, persons with a special interest in the report. These groups have 28 days to respond with written comments and the Auditor-General must consider those comments before preparing a final report.
- 2.4 Evidence to the inquiry suggested that section 19 could be enhanced through some minor amendments. In particular, the Auditor-General suggested that the Act be amended to allow extracts of proposed reports, rather than the full report, to be provided to persons with a special interest. This chapter examines this and other matters, and proposes legislative amendments where necessary.

## Section 19 – Overview

- 2.5 The Auditor-General’s legislative power to conduct performance audits is set out in Part 4, Division 2 of the Act. Sections 15, 16 and 17 set out performance audit responsibilities in relation to agencies, Commonwealth authorities and subsidiaries, and Commonwealth companies and subsidiaries. Section 18 provides the power to perform general performance audits of the whole or part of the Commonwealth public sector.
- 2.6 The circulation of proposed reports through Section 19 assists both the Auditor-General and the audited agency. The process helps to ensure that information presented as factual in the report is correct, and provides for natural justice to apply by giving agencies the opportunity to respond to recommendations and differences in opinion. Section 19 is divided into four sub-sections shown, in full, below:

### **19 Comments on proposed reports**

- (1) After preparing a proposed report on an audit of an Agency under section 15, the Auditor-General must give a copy of the proposed report to the Chief Executive of the Agency.*
  - (2) After preparing a proposed report on an audit of a body under section 16 or 17, the Auditor-General must give a copy of the proposed report to an officer of the body.*
  - (3) After preparing a proposed report on an audit under section 15, 16, 17 or 18, the Auditor-General may give a copy of the proposed report to any person who, in the Auditor-General’s opinion, has a special interest in the report.*
  - (4) If the recipient of the proposed report gives written comments to the Auditor-General within 28 days after receiving the proposed report, the Auditor-General must consider those comments before preparing a final report.*
- 2.7 There are certain risks in circulating proposed reports of the Auditor-General. First, as the findings in the proposed report are only of a preliminary nature and have not been presented to the Parliament, it is essential that confidentiality be maintained. For example, it would be very serious and may undermine the findings of the Auditor-General if findings in a proposed report were made public. To help protect against this, section 19 of the Act is linked to section 36(3).

- 2.8 Section 36(3) states that ‘a person who receives the report under section 19 must not disclose any of the information in the report except with the consent of the Auditor-General’. The maximum penalty for breach of this section is imprisonment for two years.

## Parliamentary Privilege

- 2.9 The term parliamentary privilege refers to the special rights enjoyed by each of the Houses and their Members to enable them to discharge their functions. The *Parliamentary Privileges Act 1987* clarifies these matters and provides that, except to the extent that the Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the Members and the committees of each House, continue as under section 49 of the Constitution.
- 2.10 The tabling of a performance audit report or financial statements audit report in Parliament becomes part of ‘proceedings in Parliament’ and attracts the protection of Parliamentary privilege. The Auditor-General and ANAO officers cannot be found liable in respect of statements contained in a tabled report.<sup>1</sup>
- 2.11 The Auditor-General makes recommendations which affect a wide range of government departments, agencies and potentially Ministers and private contractors. In some cases the findings may be contentious. Parliamentary privilege ensures that the office of the Auditor-General can present its findings to the Parliament without fear or favour.
- 2.12 The major concern raised during the inquiry is whether Parliamentary privilege applies to ANAO working papers and draft reports. As indicated in the previous section, draft reports are provided to agencies and persons with special interests under section 19 of the Act. However, these documents have not been tabled in Parliament and, therefore, there is concern that these documents may not be part of ‘proceedings in Parliament.’
- 2.13 The Auditor-General suggested that it would be desirable for audit working documents and draft reports to attract parliamentary privilege. The Auditor-General stated:

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1 Australian National Audit Office, *Submission No. 6*, p. 5.

There would be an advantage to the office. The legal opinion seems to suggest that there might be some difficulties in actually getting that kind of clarification. The legal opinion that we have... suggests that there is some protection of parliamentary privilege that goes back through the draft reports to working papers. That is about as far as we can go with our legal advisers, but there is a question of whether we will go one step further to actually try to get advice that makes it somewhat clearer.<sup>2</sup>

2.14 On 20 February 2001 the ANAO received advice from the Australian Government Solicitor (AGS) about the application of Parliamentary privilege to performance audits and financial statement audits.<sup>3</sup> The key parts of the AGS's summary of advice is reproduced, below:

- 'the actual tabling of a performance audit report or financial statements audit report in Parliament is part of 'proceedings in Parliament' and attracts the protection of Parliamentary privilege. The Auditor-General and ANAO officers would not be found liable in respect of statements contained in the tabled report;
- the extent to which the protection of Parliamentary privilege extends, and how it extends, to earlier steps in the performance audit or financial statements audit process is less certain. Where a step in the audit process is not protected by Parliamentary privilege, there is scope for that step to be challenged in court and to give rise to legal liability;
- although the position is not clear, unless and until a court decides to the contrary, the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of 'proceedings in Parliament', thereby attracting the protection of Parliamentary privilege, with the result that the Auditor-General and ANAO officers could not be found liable in respect of statements contained in those draft reports and statements;
- however, because the extent to which the protection afforded by Parliamentary privilege applies to steps earlier than the

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2 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.26.

3 Australian Government Solicitor, Performance Audits and Financial Statements Audits by the Auditor-General: Application of Parliamentary Privilege, Exhibit 1.

tabling of reports is unclear, and how that protection extends to those steps is also unclear, it would be prudent for the Auditor-General and ANAO officers to proceed on the basis that their conduct of a performance or financial statements audit is capable of being challenged and of giving rise to legal liability'.<sup>4</sup>

2.15 The AGS advice confirms that while the tabling of a report in Parliament attracts the protection of Parliamentary privilege, the 'earlier steps in the performance audit or financial statements audit process is unclear.' Dot point three above, however, concludes that although, 'the position is not clear, unless and until a court decides to the contrary, the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of proceedings in Parliament'.

2.16 The AGS did place a caveat on the application of Parliamentary privilege to ANAO working papers. The AGS stated:

We note for completeness that it does not follow, of course, that every document in the possession of the Auditor-General that relates to a particular performance audit report would reasonably be argued to attract parliamentary privilege. In order for privilege to be attracted it is necessary that the document be prepared or dealt with in circumstances that attract the privilege. Thus, other material which has been prepared independently of the performance audit report but which is referred to in the report would not necessarily attract parliamentary privilege.<sup>5</sup>

2.17 The AGS advice suggested that the Parliament could enact legislative amendments to clarify the application of Parliamentary privilege. The AGS stated that the 'Parliament could, subject to any applicable constitutional limits, clarify either or both:

- the scope of the application of Parliamentary privilege in relation to the audit process (eg. the extent to which the privilege applies to draft reports and working papers; and

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4 Australian Government Solicitor, Performance Audits and Financial Statements Audits by the Auditor-General: Application of Parliamentary Privilege, Exhibit 1, pp. 1-2.

5 Australian Government Solicitor, Performance Audits and Financial Statements Audits by the Auditor-General: Application of Parliamentary Privilege, Exhibit 1, p. 6.

- the nature of the protection or immunity conferred by that privilege (eg. whether it precludes review by a court to determine whether a report was being, or had been, prepared in accordance with administrative law requirements).<sup>6</sup>

2.18 The ANAO was not supportive of legislative amendment. The ANAO commented that while ‘it may be desirable to achieve a greater degree of certainty around the extent to which the protection of Parliamentary privilege extends to the audit process, the ANAO has reservations that legislative amendment is warranted.’<sup>7</sup>

2.19 Following the advice from the AGS, the ANAO received advice from the Solicitor-General, dated 1 June 2001, about the application of Parliamentary privilege to performance audits and financial statement audits by the Auditor-General.<sup>8</sup> The ANAO asked five questions of the Solicitor-General which are reproduced, in full, below:

- 1. Does parliamentary privilege apply to a report, such as the financial statement audit report, which is first provided to the Agency or Commonwealth body for inclusion in an annual report which is then given to a Minister for tabling in Parliament?  
⇒ Yes, such a report falls within the meaning of the expression ‘proceedings in Parliament’ in s.16(2) of the *Parliamentary Privileges Act*.
- 2. Do working papers created by the Auditor-General for the purposes of preparing performance audit reports or financial statement audit reports fall within the expression ‘proceedings in Parliament’?  
⇒ Yes.
- 3. Does the High Court’s decision in *Ainsworth v Criminal Justice Commission* affect the availability of parliamentary privilege?  
⇒ No.

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6 Australian Government Solicitor, Performance Audits and Financial Statements Audits by the Auditor-General: Application of Parliamentary Privilege, Exhibit 1, p. 23.

7 Australian National Audit Office, *Submission No. 6*, p. 6.

8 Correspondence from the Solicitor-General to the ANAO dated 1 June 2001.



- 4. What steps should be taken by the Auditor-General when preparing a financial statement audit report or a performance audit report?
  - ⇒ Despite my conclusions, it is desirable that the Auditor-General comply with procedural fairness and other legal requirements when preparing audit reports.
- 5. Is it desirable for the ANAO to consult or inform the relevant parliamentary officer or committee of an intention to claim parliamentary privilege?
  - ⇒ Yes.<sup>9</sup>

2.20 The ANAO's questions to the Solicitor-General did not specifically seek clarification on whether Parliamentary privilege applies to ANAO draft reports or extracts of draft reports. The advice from the AGS, of 20 February 2001, commented on draft reports.

2.21 The ANAO specifically asked the Solicitor-General whether working papers created by the Auditor-General for the purposes of preparing performance audit reports or financial audit reports fall within the expression 'proceedings in Parliament?' The Solicitor-General responded positively with the view 'that the creation of the working papers for the purposes of preparing audit reports would be regarded as 'acts done ... for purposes of or incidental to, the transacting of the business of a House'. The Solicitor-General stated:

Such a conclusion would be consistent with a broad reading of s.16(2) of the *Parliamentary Privileges Act 1987*. I agree with the conclusion expressed in the AGS advice that it would be proper to proceed on the basis that the creation of the working papers does fall within the expression 'proceedings in Parliament' in s.16(2).<sup>10</sup>

2.22 From an operational perspective, the ANAO administers working papers and the circulation of draft reports with care and caution. The Auditor-General stated:

...we are quite conservative in the way that we treat documentation in our dealings with people into the stage before a report is actually tabled. I do not know of one instance where it has created an administrative or other problem for us; it is just that we need to be somewhat

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9 Correspondence from the Solicitor-General to the ANAO dated 1 June 2001.

10 Correspondence from the Solicitor-General to the ANAO dated 1 June 2001.

more careful, and we probably get a bit more legal advice than we might otherwise have got.<sup>11</sup>

- 2.23 The Queensland Auditor-General indicated, in relation to the Queensland Audit Office, that Parliamentary privilege does apply to working documents and draft reports. The Queensland Auditor-General stated:

Parliamentary proceedings extends to cover the preparation of a document to be tabled before the House. As such, privilege attaches to these reports and any relevant extracts both during the report's preparation and after its tabling in Parliament.<sup>12</sup>

- 2.24 The Victorian Auditor-General commented that the principles of Parliamentary privilege 'ought also to apply indirectly to the circulation of proposed findings and recommendations' during the consultative process.<sup>13</sup> However, the Victorian Auditor-General acknowledged that 'the status of the document until it is tabled is very much at large—in fact, I suspect it is not covered by privilege or even earlier versions of it—but we constantly remind people that the outcome of this exercise is a parliamentary document.'<sup>14</sup>

## Conclusions

- 2.25 The audit process relies on a free flow of information on a continuous basis. The Committee recognises that the provision of Parliamentary privilege is an essential element in protecting the office of the Auditor-General from legal action so that it may provide a fearless account of the activities of executive government.
- 2.26 This inquiry revealed that there is some uncertainty as to whether Parliamentary privilege applies to Auditor-General working papers and draft reports. Recent advice from the Solicitor-General and the AGS suggested that it would be proper to proceed on the basis that Parliamentary privilege applies to draft reports, and working papers for the purpose of preparing audit reports. The AGS stated that 'unless and until a court decides to the contrary,

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11 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.26.

12 Queensland Auditor-General, *Submission No. 8*, p.2.

13 Victorian Auditor-General, *Submission No. 2*, p.3.

14 Mr Wayne Cameron, Victorian Auditor-General's Office, *Transcript*, p.14.

the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of proceedings in Parliament’.

- 2.27 It should be noted that the Solicitor-General’s advice focused on the creation of working papers *for the purpose of preparing audit reports*. The Committee notes that the Solicitor-General’s advice did not comment on the application of Parliamentary privilege to working papers which are not directly linked to the creation of an audit report. The AGS stated that ‘other material which has been prepared independently of the performance audit report but which is referred to in the report would not necessarily attract Parliamentary privilege.’
- 2.28 The AGS suggested that legislative amendments could be enacted to clarify the application of Parliamentary privilege to ANAO draft reports and working papers. The ANAO had reservations that legislative amendment was warranted. The Committee, however, believes that further Parliamentary scrutiny of this matter is warranted.
- 2.29 The Committee, based on the evidence provided, accepts that until a court decides to the contrary, it is proper for the Auditor-General to proceed on the basis that Parliamentary privilege does apply to ANAO draft reports and working papers created for the purpose of preparing audit reports or financial statement audit reports. The legal advice provided to the Committee, however, did not comment on the application of Parliamentary privilege to extracts of draft reports. The significance of extracts of draft reports is examined in the next section.
- 2.30 The Committee considered that there may be justification for amending legislation to provide certainty that draft reports and extracts of draft reports would attract privilege when they are circulated in accordance with the Act. The principal reason for wanting to provide this certainty is to remove the opportunity for a person who might be adversely referred to in a draft report or extract of a draft report, to use the threat of litigation in an attempt to influence the final form of the Auditor-General’s findings. The Committee also considered that there is an argument for giving the Auditor-General certainty as to their privileged status, since the Act requires that they be circulated. The Committee was not persuaded of any need for legislation to give greater clarity to the privileged status of working papers or draft reports and extracts of draft reports before they are circulated.

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

### Recommendation 1

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

## Draft Report Extracts

- 2.34 With the trend towards outsourcing of government services, there are potentially more groups that may have an interest in an Auditor-General performance audit. For example, where a government agency employs a contractor to deliver certain services, a performance audit of this function may include verification of the services provided by the contractor. In this event, the Auditor-General may decide to give a copy of the proposed report to the contractor.
- 2.35 The Auditor-General commented that, in these cases, it is not always necessary to provide a full copy of the proposed report to the contractor but only relevant extracts of the proposed report. Section 19, however, does not provide the Auditor-General with the power to circulate extracts of a proposed report.

- 2.36 In practice, the ANAO provides extracts of proposed reports to affected parties in the interest of natural justice and procedural fairness. However, this is done outside the provisions of section 19 of the Act. Consequently, recipients of the report extracts are not subject to the confidentiality requirement imposed by section 36(3).
- 2.37 The ANAO has compensated for this situation by placing administrative mechanisms to ensure that confidentiality requirements are imposed on the recipients of extracts of draft reports.
- 2.38 The ANAO, in its submission, requested that the Act be amended so that section 19(3) will allow extracts of proposed reports to be sent to those with a special interest in the report. This would ensure that the recipients of such reports would be subject to the confidentiality requirements under section 36(3). The Auditor-General stated:

I will make one particular strong point as to why extracts are important. The main point of section 19 is to ensure that the factual basis of the audit and our recommendations are satisfactory—in other words, they are sustainable and there are no reasons that a person of good faith could not come to valid conclusions as a result. If the whole of the report has to go to every person, no matter if only one sentence is relevant—not even the person mentioned because, as you know, we rarely mention people by name—and can be pointed to that particular person, the problem would be that, if we were wrong in information and that went to a number of people, it may give rise to defamation action and give access to the Commonwealth Treasury unnecessarily, which would not be advisable.<sup>15</sup>

- 2.39 The CPA Australia supported amending section 19, as proposed by the Auditor-General, provided there was ‘an opportunity for the contractor to provide a response or address the issue.’<sup>16</sup> Similarly the Department of Finance and Administration (DoFA) indicated that it did not have a problem with the concept of providing extracts of proposed reports. DoFA acknowledged that the provision of report extracts would be more relevant to

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15 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.28.

16 Mr Kevin Lewis, CPA Australia, *Transcript*, p.7.

contractors outside the Commonwealth rather than Commonwealth departments who would 'see the whole report under section 19 and to be governed by the provisions of the Act.'<sup>17</sup> DoFA stated:

I suppose we also do not have the issue that the Auditor-General is concerned about – that is, that he may be exposed or the Commonwealth may be exposed to defamation if they actually publish a section 19 report widely because they have to consult with a lot of people.<sup>18</sup>

2.40 Similarly, the Departments of Family and Community Services, and Defence indicated that they agreed with the Auditor-General's proposal to amend section 19 to allow the distribution of extracts of a proposed report.<sup>19</sup>

2.41 However, the Department of Environment and Heritage (DEH) did not agree with the Auditor-General's proposals to amend section 19. In contrast, DEH advocated that the ANAO should provide full copies of the draft report to affected parties. DEH argued that parties that were subject to criticisms by the Auditor-General should have the right to provide comments, and 'the most direct and simple way of doing this is to provide the entire report to any affected contractor'. DEH insisted that the mere 'provision of extracts may not put the criticism in appropriate context.'<sup>20</sup>

2.42 In response, the Auditor-General indicated that particular issues in a report are reasonably self contained and can be circulated as extracts. The Auditor-General stated:

There is an argument in one of your submissions that, in order to put the report in context, the individuals concerned with the corporations, agencies, et cetera, should have the right to see the full report. The point is—and the committee would know this from its own experience—that, except where an agency is very heavily involved in particular aspects, most of the other aspects apply in particular areas and those areas are reasonably self-contained. Therefore, they do not have any

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17 Mr Jonathan Hudson, Department of Finance and Administration, *Transcript*, p.36.

18 Mr Jonathan Hudson, Department of Finance and Administration, *Transcript*, p.36.

19 Mr Michael Roche, Department of Defence, *Transcript*, p. 49; Dr David Rosalky, Department of Family and Community Services, *Transcript*, p. 76.

20 Department of Environment and Heritage, *Submission No. 5*, p.1.

necessity—nor should they have any concern—that there are any other aspects in the report.<sup>21</sup>

2.43 In addition to the Auditor-General’s proposal to amend section 19(3), the Department of Defence (Defence) proposed additional amendments to section 19(3). Section 19(3) states that the ‘Auditor-General *may* give a copy of the proposed report to any person who, in the Auditor-General’s opinion, has a special interest in the report.’ In contrast, section 19(1) states that the ‘Auditor-General *must* give a copy of the proposed report to the Chief Executive of the Agency.’

2.44 Defence maintains that in those instances where the Auditor-General invokes his access powers under section 32 and 33 then the Auditor-General must provide a copy of the proposed report or extract to the affected party.<sup>22</sup> Defence stated:

I believe that in any case where the Auditor-General has had access under 32 or 33 by virtue of a contractual provision or not the equivalent of section 19(1) should apply to the chief executive officer of any external organisation that has audit access.<sup>23</sup>

2.45 As part of the inquiry into Contract Management in the Australian Public Service, the ANAO addressed the circulation of proposed reports under section 19(3). The ANAO suggested that natural justice operates in common law which ensures that relevant parties would be given access to a proposed report. The ANAO commented that unlike ‘the discretionary power in 19(3) of the Act, referral of draft reports or relevant extracts under natural justice is a legal requirement.’<sup>24</sup>

## Conclusions

2.46 The Committee recognises the importance of allowing affected parties the opportunity to comment on ANAO reports. Once the reports are tabled in Parliament, their contents are protected by parliamentary privilege. Consequently, it is important for the Auditor-General to provide avenues for affected parties to correct factual errors or provide written comments. However, these

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21 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.28.

22 Mr Michael Roche, Department of Defence, *Transcript*, p. 49.

23 Mr Michael Roche, Department of Defence, *Transcript*, p. 45.

24 Australian National Audit Office, Submission 75 to the inquiry into Contract Management in the Australian Public Service, 16 August 2000, p. 2.

avenues also need to be protected by confidentiality requirements to ensure that distribution of draft reports or extracts of draft reports are provided only to the relevant stakeholders.

- 2.47 The Committee supports the ANAO proposal that section 19(3) be amended to allow extracts of draft reports to be provided to affected parties. While the Auditor-General currently provides extracts of the report to parties with a special interest, this is done outside the legislative framework and therefore recipients are not subject to the confidentiality requirements of section 36(3).
- 2.48 The Department of Defence proposed that section 19(3) be amended to ensure that the Auditor-General *must*, if sections 32 or 33 are used, give a copy of the proposed report to any person with a special interest in the report. This may prove impracticable if the ANAO used its access powers in relation to an organisation but does not use the information gathered or comment on the organisation in the report. Under Defence's proposal, the organisation would be entitled to have a copy of the proposed report even though there was no mention of the organisation or its operations in the proposed report. For this reason, the Committee does not support Defence's proposal of connecting access powers with the requirement to circulate a draft report under section 19(3).
- 2.49 The ANAO advised that while section 19(3) is discretionary, natural justice operating under common law requires the ANAO to provide a person with access to the report if there are matters in the report that relate to that person. In view of this, there should be no objection to amending section 19(3), by changing *may* to *must*, to ensure that any ambiguity is removed about providing a report or extract to a person with a special interest in the report.
- 2.50 Therefore, section 19(3) should be amended to ensure that the Auditor-General *must* give a copy *or an extract* of the proposed report to any person who, in the Auditor-General's opinion, has a special interest in the report.
- 2.51 It should be noted that if section 19(3) is amended then consequential amendments will need to be made. For example, section 36(3), relating to confidentiality of proposed reports circulated under section 19, will need to be amended to include 'or extracts of a proposed report.'



## Recommendation 2

2.52 The Committee recommends that the Government amend section 19(3) of the *Auditor-General Act 1997*, to read:

- After preparing a proposed report on an audit under sections 15, 16, 17 or 18, the Auditor-General ~~may~~ *must* give a copy or an extract of the proposed report to any person who, in the Auditor-General's opinion, has a special interest in the report.

The Government will need to ensure that all consequential amendments arising from this amendment are made.

## Extending time to comment on ANAO draft report

2.53 Under section 19(4) recipients of a proposed report have 28 days to provide written comments for consideration by the Auditor-General. This time period is intended to provide affected parties with sufficient time to check for any factual errors, consider their response to the report, and provide a written reply.

2.54 The Department of Foreign Affairs and Trade (DFAT) reported that 28 days is sometimes not adequate given the complexities of the issues involved. DFAT explained that audits conducted by the Auditor-General are resource intensive and may affect a number of different areas in the department. In addition, DFAT indicated that its complicated bureaucratic structure means that it may sometimes be difficult to meet the 28 day time frame. DFAT stated:

In essence, the rationale for that request is that the final audit report does not always contain the comments that are made by the audited agencies. So, while the report itself as a whole is not a surprise there can be elements, particularly difficult elements of the report, where departmental or agency views are not reflected.<sup>25</sup>

2.55 DFAT, therefore, requested that the Act be amended so that section 19(4) will allow recipients of draft reports to have 35 days to make written comments. DFAT argued that this 'would seem a

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25 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.62.

more manageable timeframe.<sup>26</sup> DFAT maintained that the extra seven days, which it did not consider significant, would 'ensure a better quality response and a more considered response in cases where there are differences of opinion in the final reports.'<sup>27</sup>

- 2.56 The ANAO did not support DFAT's proposal. The ANAO commented that in practice if agencies make a good case for the extension of the 28 days, the ANAO will 'inevitably grant it.'<sup>28</sup> In addition, the ANAO suggested that the time for responding was quite generous compared to the timeframes given by some State Auditors-General.<sup>29</sup> The Auditor-General stated:

I would be very loath to go beyond the 28 days, because it does add an unnecessary cost to the audit. It also creates more problems in terms of finalising the audit with the specific agencies involved. Time and experience have shown that 28 days is more than satisfactory.<sup>30</sup>

- 2.57 The Auditor-General also explained that the ANAO provides agencies with issues papers sometimes months before a draft report. This is in addition to the draft report process. The Auditor-General stated:

It seems to me that another 28 days is not exactly a great burden for agencies to respond when they have had so many opportunities to be intimately involved in the audit process and in many cases have known for months where the audit really is coming out.<sup>31</sup>

- 2.58 The Committee also sought the views of the Department of Education, Training and Youth Affairs (DETYA) and from the Department of Family and Community Services (FaCS) on the issue of extending the time period for agencies to comment on draft reports. DETYA stated:

I must say that we have not found any problem with the 28-day time limit as it has operated for some time. We

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26 Department of Foreign Affairs and Trade, *Submission No. 9*, p.2.

27 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.62.

28 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.28.

29 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.28.

30 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.29.

31 Mr Pat Barrett, Australian National Audit Office, *Transcript*, pp.29.

have found that to be a reasonable period within which to prepare comments and responses to draft reports.<sup>32</sup>

- 2.59 FaCS expressed similar views, concluding that 28 days is sufficient to comment on draft reports. FaCS stated:

The 28 days has not been a constraining parameter for us, except from our own fault: with any deadline one will leave these things because of other priorities.<sup>33</sup>

## Conclusions

- 2.60 The Committee does not support DFAT's proposal to increase the number of days available for agencies to comment on draft reports from 28 days to 35 days.
- 2.61 The Committee is satisfied that 28 days is sufficient time for agencies to adequately consider their response and prepare a written reply. The Committee also heard that if a department provided the ANAO with a good case for extension, the ANAO may be flexible with the deadline.
- 2.62 Furthermore, the Committee does not believe that extending the time will solve DFAT's problem - which is essentially about how to ensure the Auditor-General accurately reflects and captures agency comments in an audit report. Extending the time will only add to the ANAO costs and delay the timeliness of the tabling of the audit report in Parliament.

## Agency comments on ANAO reports

- 2.63 The Auditor-General, usually, includes agency comments in the final report. Agency comments are usually in response to recommendations made by the Auditor-General. This provides an opportunity for agencies and affected parties to provide written comments in relation to the draft report and the ANAO recommendations.
- 2.64 The Act does not direct the Auditor-General to include comments provided by recipients of draft reports. Defence indicated that the

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32 Mr Peter Grant, Department of Education, Training and Youth Affairs, *Transcript*, p.60.

33 Dr David Rosalky, Department of Family and Community Services, *Transcript*, p.70.

fact that the power is discretionary does not give due consideration to the interests of agencies. Defence stated:

... if you reply within 28 days he must consider these comments. It does not say that he has to do anything with them other than consider them.<sup>34</sup>

2.65 Similarly, DFAT considered that there was scope for improving this section. DFAT stated:

One way the procedures could be improved would be for there to be more clarity in the procedures if there is a difference of view. If a department does have a different view, the Auditor-General is required to consider the departments views, but it is never been made clear what that means in terms of inclusion or otherwise in the final report. We certainly see room for improvement there.<sup>35</sup>

## Conclusions

2.66 The Committee agrees that section 19(4) be amended to require the Auditor-General to include agency comments in the final report. The Auditor-General, however, is an independent officer of the Parliament and should not be subject to direction when it comes to findings and conclusions.

2.67 In practice, the Auditor-General usually includes agency comments in performance audits. However, under the Act at the present time, the decision is left to the Auditor-General as to what should or should not be included. In order to avoid disputes about the representation of agency views, the ANAO should include agency comments, in full, in performance audits.

### Recommendation 3

2.68 **Subsection 19(4) of the *Auditor-General Act 1997* should be amended to read:**

- **If the recipient of the proposed report gives written comments to the Auditor-General within 28 days after receiving the proposed report, the Auditor-General must consider, and include, those comments, *in full*, before preparing a *in the* final report and any summary documents.**

34 Mr Claude Neumann, Department of Defence, *Transcript*, p.45.

35 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.68.



## **Sections 32 and 33 – Access Powers of the Auditor-General**

### **Introduction**

- 3.1 The effective conduct of a performance or financial statement audit requires the Auditor-General to have full and free access to Commonwealth records and premises. The Auditor-General requires access to records and premises to be able to obtain information. This information forms the evidence on which to base the Auditor-General's opinion about the efficiency and effectiveness of program administration, or in relation to a statement audit whether the financial statements are a true and fair view of a department's financial position.
- 3.2 Sections 32 and 33 of the Act provide the legislative framework for the access powers of the Auditor-General. Section 32 outlines the power of the Auditor-General to obtain information and section 33 empowers the Auditor-General to enter and remain on premises occupied by a Commonwealth agency.
- 3.3 The Committee has long held a view that the Auditor-General's access powers should be increased to include within its scope access to the premises of Commonwealth contractors. Several government departments and a private sector peak body gave evidence to the Committee supporting this view. This chapter examines this issue.

## Section 32 – Overview

- 3.4 Section 32 provides the Auditor-General with wide powers to obtain information from any person. This includes directing a person to provide the Auditor-General with information, give evidence under oath or surrender documents under their control.
- 3.5 Section 32 is divided into five sub-sections. The section is reproduced, in full, below:

### ***Section 32 – Power of the Auditor-General to obtain information***

- (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.*
- (2) *The Auditor-General may direct that:*
- (a) *the information or answers to questions be given either orally or in writing (as the Auditor-General requires);*
  - (b) *the information or answers to questions be verified or given on oath or affirmation.*
- The oath or affirmation is an oath or affirmation that the information or evidence the person will give will be true, and my be administered by the Auditor-General or by an authorised person.*
- (3) *A person must comply with a direction under this section. Maximum penalty: 30 penalty units.*
- (4) *The regulations may prescribe scales of expenses to be allowed to persons who are required to attend under this section.*
- (5) *In this section:*
- authorised official*** *means an FMA official who is authorised by the Auditor-General, in writing, to exercise powers or perform functions under this section.*

- 3.6 The powers of the Auditor-General to direct a person to provide information is not restricted to public sector agencies. However,

the audit process relies on the process of discovery. The ANAO needs to look through records and documents to determine the relevant information. If the ANAO does not know a document exists, then it cannot request that it be provided.

## Section 33 – Overview

- 3.7 Section 33 outlines the powers of the Auditor-General to access premises. The Act empowers the Auditor-General to enter and remain on any property occupied by a Commonwealth agency. However, this power to enter premises does not extend to Commonwealth contractors.
- 3.8 Section 33 is divided into four sub-sections. The section is reproduced, in full, below:

### ***Section 33 – Access to premises etc.***

- (1) *The Auditor-General or an authorised official:*
- (a) *may, at all reasonable times, enter and remain on any premises occupied by the Commonwealth, a Commonwealth authority or a Commonwealth company; and*
  - (b) *is entitled to full and free access at all reasonable times to any documents or other property; and*
  - (c) *may examine, make copies of or take extracts from any document.*
- (2) *An authorised official is not entitled to enter or remain on premises if he or she fails to produce a written authority on being asked by the occupier to produce proof of his or her authority. For this purpose, **written authority** means an authority signed by the Auditor-General that states that the official is authorised to exercise powers under this Division.*
- (3) *If an authorised official enters, or proposes to enter, premises under this section, the occupier must provide the official with all reasonable facilities for the effective exercise of power under this section.*

*Maximum penalty: 10 penalty units*

- (4) *In this section:*



**authorised official** means an **FMA** official who is authorised by the Auditor-General, in writing, to exercise powers or perform functions under this section.

**premises** includes any land or place.

## Background

- 3.9 In *Report 379 – Contract Management in the Australian Public Service*, the Committee recommended that the Minister for Finance and Administration make legislative amendments to allow the Auditor-General to access premises of Commonwealth contractors. The Government rejected the proposal stating that it was more appropriate to pursue the issue of the Auditor-General access powers through administrative means.
- 3.10 The Government committed to developing a standard access clause that may be inserted into government contracts and request for tender documents. The Department of Finance and Administration (DoFA) and the Australian National Audit Office (ANAO) have been working jointly to develop the access clauses. The access clauses are not mandatory.
- 3.11 The access clauses provide the ANAO and Commonwealth agencies with access to information held by contractors, including third party subcontractors, for the purpose of audits. Information about the access clauses can be obtained on DoFA’s website under *Best Practice Police Guidance – Standard Access Contract Clauses*.

## Standard access clauses

- 3.12 The Committee sought to determine the progress of including the standard access clauses in government contracts. The Auditor-General advised that ‘standard audit and access clauses have now been agreed to by the Minister for Finance and Administration and will very shortly be added to the competitive tendering and contracting (CTC) tool kit.’<sup>1</sup> The Auditor-General stated:

It is also understood that the revised procurement guidelines will include reference to these clauses. We now

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1 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.20.

propose to write to all agencies and draw their attention to the standard clauses.<sup>2</sup>

- 3.13 DoFA said that the guidelines have been agreed with the Auditor-General and stated:

I think you will find on our website a Commonwealth procurement tool kit which includes details of those standard access clauses.<sup>3</sup>

- 3.14 DoFA reiterated that the access clauses will not be mandatory. Agencies 'are required to take account of those guidelines' but 'they are not mandatory.'<sup>4</sup>

- 3.15 Defence has long been the most prominent opponent of moves for the Auditor-General to have access to the premises of Commonwealth contractors. In previous inquiries, Defence has maintained that this could increase contractors' costs and, in any event, sufficient powers already exist. The Committee sought Defence's view on the standard access clauses developed by the ANAO and DoFA.

## Access to the premises of Commonwealth contractors

- 3.16 The pace of technological innovation and the changing business and competitive environment has required government agencies to be more responsive to change. Government agencies are required to be more flexible and to explore new ways of delivering services to the public.

- 3.17 An increasing trend has been to contract out to private contractors services previously performed by government. As the private sector becomes increasingly enmeshed in the delivery of public goods and services, the public requires a mechanism to stay informed and the parliament needs a tool to keep executive government accountable. The Victorian Auditor-General stated:

...as the way governments carry out their business gets increasingly sophisticated and involves partnerships or contractual arrangements with the private sector, information held with respect to what is essentially

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2 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.20.

3 Mr Jonathan Hutson, Department of Finance and Administration, *Transcript*, p.34.

4 Mr Jonathan Hutson, Department of Finance and Administration, *Transcript*, p.34.

government activity is actually held by the private sector party. At times there even gets to be a debate about whose information it is.<sup>5</sup>

- 3.18 The evidence to the inquiry generally supported the need for the Auditor-General to have the power to access the premises of Commonwealth contractors. CPA Australia, for example, supported this position. CPA Australia stated:

... we do believe that, when you are talking about audits and the broader scope of getting into private sector premises, you do need some sort of legislative framework around that in order to be more accountable to the parliament and to the community.<sup>6</sup>

- 3.19 CPA Australia supported having a legislative framework in addition to some guidance such as the procurement guidelines. CPA Australia also noted that the standard access clauses needed to be worked through more thoroughly over time.

- 3.20 Similarly, the Department of the Environment and Heritage (DEH) supported the Auditor-General to have access to third party premises. In their submission, the DEH stated this will become 'increasingly important as more services are outsourced, and enables the ANAO and therefore indirectly the Department to impose more accountability on service providers.'<sup>7</sup>

- 3.21 The Department of Education, Training and Youth Affairs (DETYA) had already begun inserting standard access clauses in their contracts. DETYA stated that they never had a problem with contractor resistance. DETYA stated:

In fact our contractors appear to have accepted those provisions as a fair and reasonable part of our requirements as a purchaser of their services.<sup>8</sup>

- 3.22 Similarly, the Department of Foreign Affairs and Trade (DFAT) did not encounter any objection from private contractors. DFAT stated:

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5 Mr Wayne Cameron, Victorian Auditor-General, *Transcript*, p. 17.

6 Mr Adam Awty, CPA Australia, *Transcript*, p.5.

7 Department of Environment and Heritage, *Submission No. 5*, p.2.

8 Mr Peter Grant, Department of Education, Training & Youth Affairs, *Transcript*, p.56.

We do have standard clauses and we have never had any problems with our contractors in permitting access to the Auditor-General.<sup>9</sup>

3.23 In evidence to the Committee, Defence stated while it would attempt to follow the guidelines, a contract is a negotiable document. Defence noted that there are security issues involved and discussed a range of scenarios in which companies in the Defence industry would not allow unrestricted access. Defence stated:

There is no way in which the company concerned would accept an unrestricted right of access by an Australian government authority, even the Auditor-General, to the records of that company, if it implied that they could go into secure areas where even we do not have access.<sup>10</sup>

3.24 Defence maintained that if access is provided, companies would want to seek a range of caveats. These caveats would limit the access to relevant financial areas and maybe whether the information could be published.

## Conclusions

3.25 The Committee considers that the increasing role of the private sector in the provision of public goods and services requires an administrative mechanism to ensure the Auditor-General has access to the premises of Commonwealth contractors. The Auditor-General requires this power to obtain documentation and information to arrive at an opinion about the efficiency and effectiveness of program administration.

3.26 The Committee notes that standard access clauses have been developed jointly by the ANAO and DoFA and are available on the DoFA website. The ANAO has also committed to writing to all government departments informing them of the standard access clauses.

3.27 The Committee considers that the standard access clauses should be included in all government contracts unless there are strong reasons not to. In those cases where government agencies decide not to include in their contracts clauses which give the

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9 Ms Annabel Anderson, Department of Foreign Affairs and Trade, Transcript, p.68.

10 Mr Michael Roche, Department of Defence, *Transcript*, p.42.

Auditor-General access to the premises of Commonwealth contractors, then they must account for this decision.

- 3.28 The following approach provides a framework that will help to ensure that Parliament is kept informed of agencies non-compliance with Auditor-General access clauses. Agencies will need to notify their non-compliance in their Annual Reports. This provides relevant committees of the Senate and House of Representatives, as part of their power to review the annual reports of agencies, with the opportunity to scrutinise agencies regarding their decisions.

### **Committee resolution**

- 3.29 **The Committee has resolved that, as part of its power to review and change the Annual Report Guidelines, it will require government agencies to include in their Annual Reports:**
- **a list showing all contracts by name, value, and the reason why the standard access clause, which provides the Auditor-General with access to the premises of Commonwealth contractors, was not included in the contract.**

## **Section 37 – Sensitive information not to be included in reports**

### **Introduction**

- 4.1 The Act provides the Auditor-General with wide access powers. These powers mean that the Australian National Audit Office (ANAO) may obtain sensitive information in the course of performing its audit functions. The Act provides for the Auditor-General not to publish sensitive information if, in the Auditor-General's opinion, the publication of the information is contrary to the public interest.
- 4.2 The Act also has another safeguard to stop the Auditor-General from publishing sensitive information. Section 37 outlines the role of the Attorney-General in issuing a certificate preventing the Auditor-General from including sensitive information in a report.
- 4.3 Evidence to the inquiry suggested that section 37 may benefit from some minor amendments. This chapter will examine the role of the Attorney-General in relation to section 37 of the Act and suggest legislative amendments where relevant.

### **Section 37 – Overview**

- 4.4 Section 37 outlines the circumstances where the Auditor-General must not include information in a report. The Act specifies that the Auditor-General cannot include information if it is contrary to the public interest and lists six reasons where information cannot be included. Another major provision of section 37 is the power of

the Attorney-General to provide the Auditor-General with a certificate preventing disclosure of information.

- 4.5 It should be noted that section 37 has not, as yet, been invoked. The ANAO stated:

...in practice it has been found that the ANAO is able to “get its message across” satisfactorily without disclosing sensitive information in its public reports. This includes circumstances where the subject of an audit involves such issues as sensitive Defence information or information considered to be legitimately commercial-in-confidence.<sup>1</sup>

- 4.6 Section 37 is divided into six subsections. The section is reproduced, in full, below:

***Section 37 – Sensitive information not to be included in public reports***

- (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 or for any reason set out in sub-section (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;*
  - (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;*

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<sup>1</sup> Auditor-General of Victoria, *Submission No.2*, p.5.

- (e) *it would unfairly prejudice the commercial interest of any body or person;*
      - (f) *any other reasons 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.*
- (3) *The Auditor-General cannot be required to, and is not permitted to, disclose to:*
  - (a) *a House of Parliament; or*
  - (b) *a member of a House of the Parliament; or*
  - (c) *a committee of a House of the Parliament or a joint committee of both Houses of Parliament;*

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

*the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a copy of each report under this subsection to the Prime Minister, the Finance Minister and the responsible Minister or Ministers (if any).*
- (6) *In this section:*

**public report** *means a report that is to be tabled in either House of the Parliament*

**state** *includes a self-governing Territory.*



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

- 4.7 A certificate issued by the Attorney-General is a safeguard to prevent the Auditor-General from publishing sensitive information in an audit report. If the Attorney-General considers that the information in a proposed audit report is too sensitive to be published, the Attorney-General can issue a certificate preventing the Auditor-General from publishing the information.
- 4.8 The Attorney-General's certificate is governed by section 37(2) of the Act and clarified in the Explanatory Memorandum (EM). The EM states where:
- ...the Attorney-General has issued a certificate to the Auditor-General stating that disclosure would be contrary to the public interest, the Auditor-General must not include that information in a report which is to be tabled in either House of the Parliament.
- 4.9 The ANAO raised a concern during the inquiry that there is an inconsistency between section 37(1)(b) and section 37(4) of the Act. Section 37(1)(b) specifies that the Auditor-General must not include particular information in a public report if the Attorney-General has issued a certificate to the Auditor-General stating that disclosure of the information would be contrary to the public interest.
- 4.10 However, section 37(4), states that '*If* the Auditor-General *decides* to omit particular information from a public report because the Attorney-General has issued a certificate...' The use of the words *If* and *decides* suggests that the final determination whether to include sensitive information in a report rests with the Auditor-General. To remove the uncertainty, the Auditor-General suggested that the Act be amended to make the power of the Attorney-General consistent with the intentions expressed in the EM.
- 4.11 In considering the Auditor-General's proposal, the Committee noted that the Victorian Auditor legislation gives 'unfettered discretionary authority to the Victorian Auditor-General on the reporting of any material (deemed to be specially confidential or otherwise) to Parliament.'<sup>2</sup> In terms of comparison, the Victorian approach does not include any 'statutory prescription of the
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2 Auditor-General of Victoria, *Submission No.2*, p.3.

evaluative criteria to be applied by the Victorian Auditor-General to disclosure questions.’<sup>3</sup> The Victorian legislation also does not have ‘provision for the direct involvement of a representative of the Executive Government in decisions impacting on the reporting of audit findings.’<sup>4</sup>

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

I have discussed this issue with the Victorian Auditor-General. I come back to basic principles, and the basic principle that I come up with is, in terms of government responsibility, the government has access to the widest possible range of information, from the Public Service and elsewhere, on what issues may impact on the question of secrecy and security—particularly the security aspect, which, in many instances, an Auditor-General, no matter what their background and experience, is not necessarily across.<sup>5</sup>

- 4.13 Similarly, DoFA commented that the Attorney-General could advise the Auditor-General that something may in fact have a security implication.<sup>6</sup>
- 4.14 From a practical perspective, the Auditor-General commented that even when examining sensitive issues ‘we have been able to get the major issues across to the parliament without having to run the gauntlet of disclosing unnecessarily confidential and/or secure information.’<sup>7</sup>

## Accountability mechanisms for the Attorney-General

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

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3 Auditor-General of Victoria, *Submission No.2*, p.3.

4 Auditor-General of Victoria, *Submission No.2*, p.3.

5 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.21.

6 Mr Jonathan Hutson, Department of Finance and Administration, *Transcript*, p.35.

7 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.21.

this, the Committee examined the constraints that apply to the Attorney-General.

- 4.16 The Committee received advice from the Australian Government Solicitor which indicated that the Attorney-General's Certificate was subject to review under the *Administrative Decisions (Judicial Review) Act 1977*. However, the Auditor-General stated that this processes would be 'unduly bureaucratic'<sup>8</sup>. The Auditor-General concluded:

...it would be a very brave Attorney-General and government if an Auditor-General put a fairly persuasive case in the public interest and we could not get satisfactory resolution.<sup>9</sup>

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

What the Auditor-General would do would be to simply say in the report that this element had been excised on the basis of a decision made by the Attorney-General. Then the Attorney-General would be subject to questioning in the House.<sup>10</sup>

- 4.18 Similarly, DoFA stated:

...the Auditor-General still has the right to advise parliament that in fact parts of his report or parts of the information have actually been deleted for reasons that by the Attorney-General has. The Attorney-General is then accountable to parliament directly for that decision making process.<sup>11</sup>

## Conclusions

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

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8 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.24.

9 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.24.

10 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.24.

11 Mr Jonathan Hutson, Department of Finance and Administration, *Transcript*, p.35.

- 4.20 The Committee acknowledges that the Victorian model provides the Victorian Auditor-General with more discretion and freedom to determine what to report. However, the Committee considers it appropriate to have the Attorney-General provide a safeguard given that, in the context of the Commonwealth Government's broader responsibilities, there may be exceptional circumstances relating to such issues as defence and national security which require the input of executive government.
- 4.21 The Committee notes that there are several accountability mechanisms to ensure that the Attorney-General's certificate is subject to scrutiny. These include the:
- Attorney-General's certificate being subject to the *Administrative Decisions (Judicial Review) Act 1977*;
  - Attorney-General being subject to questions in Parliament; and
  - the risk of public dissent if the Auditor-General put forth a strong case for reporting certain information, and the Attorney-General restricted publication.
- 4.22 In view of this, the Committee considers that the original intention of section 37(1)(b), as expressed in the EM, should be confirmed through amendment to section 37(4). The Auditor-General supports this amendment.

#### Recommendation 4

- 4.23 **The Committee recommends that the Government amend section 37(4) of the *Auditor-General Act 1997*, to read:**
- **If ~~When~~ the Auditor-General decides ~~to~~ is required to omit particular information from a public report because the Attorney-General has issued a certificate under paragraph (1)(b) in relation to the information, the Auditor-General must state in the report:**
    - (a) **that information (which does not have to be identified) has been omitted from the report; and**
    - (b) **the reason or reasons (in terms of subsection (2)) why the Attorney-General issued the certificate.**

## Privacy as a reason not to report

- 4.24 Section 37(2) lists the possible reasons for excluding sensitive information from the Auditor-General's audit reports. These reasons include the publication of information which would prejudice Australia's national security, defence or international relations, information which would prejudice relations between the Commonwealth and a State, or information which would unfairly prejudice the commercial interests of any body or person.
- 4.25 DFAT's submission drew the Committee's attention to the fact that section 37(2) 'does not make any specific provision for the protection of an individual's privacy.'<sup>12</sup> DFAT is concerned that there could be matters arising from 'consular cases which should not be included in a public report in order to protect the privacy of the individuals, their families or other bodies concerned.'<sup>13</sup>
- 4.26 DFAT argued that individual privacy may become an issue in the future 'as more Australians travel overseas and there is an increased likelihood of long term, complex and potentially litigious consular cases arising.'<sup>14</sup> At the public hearing, DFAT stated:
- The department gathers a considerable amount of detail about individuals and their families in implementing their consular responsibilities. Many of those cases become controversial. Many of those cases are very easily recognised even when the broad parameters of the case are described and individuals' names are not referred to. What I am referring to is the very deep and detailed personal information that the department gathers in implementing that responsibility.<sup>15</sup>
- 4.27 DFAT concluded that as a matter of practice, 'the way the procedures have been conducted to date' has not been a problem.<sup>16</sup> However, it is the potential of future events that DFAT is concerned.

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12 Department of Foreign Affairs and Trade, Submission No. 9, p.2.

13 Department of Foreign Affairs and Trade, Submission No. 9, p.2.

14 Department of Foreign Affairs and Trade, Submission No. 9, p.2.

15 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.66.

16 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.66.

- 4.28 The Auditor-General is exempt from the majority of the provisions of the *Privacy Act 1988*. Despite this, the ANAO indicated that as a matter of long standing policy, it ‘complies with the Information Privacy Principles contained in the Privacy Act to the extent that it is able within the context of its statutory responsibilities and avoids, to the extent possible, including the names of individuals or other information that relates to an individual, in its audit reports.’<sup>17</sup>
- 4.29 The Auditor-General, in response to the proposal to amend section 37(2) to include privacy issues, commented that ‘we would have no problem in adding privacy.’<sup>18</sup>

## Conclusions

- 4.30 The Auditor-General is not subject to the *Privacy Act 1988*. In practice, however, the ANAO complies with the Information Privacy Principles. The Committee is confident that the ANAO exercises its powers with discretion and has high regard for individual privacy. The Committee considers that the present arrangements are satisfactory.

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17 Australian National Audit Office, *Submission No. 11*, p. 2.

18 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.29.

## Other issues

### Introduction

- 5.1 The first part of this chapter focuses on the ANAO's performance audit activities and the actions of Ministers. The performance audit aspects of the Act do not extend to auditing the performance of Ministers, and the Auditor-General is not seeking to change this aspect of the Act.
- 5.2 The Auditor-General, however, is seeking clarification on the responsibilities of Ministers in regard to their involvement in the administration of government programs. That is, where an audit is being conducted on an agency program, it may be necessary to interview a Minister if they have had close involvement in a program's administration. This matter, together with the circulation of reports to Ministers, is examined in this chapter.
- 5.3 The Department of Family and Community Services (FaCS) raised the possibility of potential problems when the ANAO conducts performance audits of its provider agencies. FaCS, for example, purchases services from Centrelink. FaCS suggests that if an audit is conducted on Centrelink then it should be provided with proposed audit reports and other communication. This matter is examined in this chapter.
- 5.4 The final part of this chapter notes the role of the Independent Auditor, and the provision of performance indicators relating to the output of the ANAO. This section examines how the performance of the ANAO is assessed, and whether the ANAO receives sufficient performance information to assist with continuous improvement.

## Section 15 – overview

5.5 Section 15 sets out the Auditor-General’s powers and responsibilities in relation to performance audits of agencies. The Auditor-General has wide powers to conduct a performance audit of an agency at any time. In addition, the Auditor-General is required to table the report in Parliament and give a copy to the responsible Minister. Section 15 is divided into three sub-sections which are shown, in full, below:

### **Division 2—Performance audits**

#### **15 Agencies**

- (1) *The Auditor-General may at any time conduct a performance audit of an agency.*
- (2) *As soon as practicable after completing the report on the audit, the Auditor-General must:*
  - (a) *cause a copy to be table in each House of the Parliament; and*
  - (b) *give a copy to the responsible Minister.*
- (3) *For the purposes of this section, an Agency is taken not to include any persons who are employed or engaged under the Members of Parliament (Staff) Act 1984 and who are allocated to the Agency by regulations for the purposes of the definition of Agency in section 5 of the Financial Management and Accountability Act 1997.*

## Distribution of audit reports to Ministers – section 15

5.6 The Auditor-General indicated that the requirement in section 15 to provide a copy of an audit report to the responsible Minister is restrictive in that other Ministers with a special interest in the report cannot be sent a copy. The Auditor-General proposed that section 15 be amended ‘to allow the distribution of single agency reports to any Minister with a special interest in the report’.<sup>1</sup>

5.7 In support of this amendment, the ANAO indicated that section 15 could be amended to reflect the provisions that operate in sections 18 and 19. Section 18 provides for the conduct of performance audits of the whole or part of the Commonwealth public sector. Section 18(3) states that in addition to the Finance Minister the ‘Auditor-General may give a copy of

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1 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p. 20.



the report to any other Minister who, in the Auditor-General's opinion, has a special interest in the report.'

## Conclusions

- 5.8 The Committee supports the proposal to amend section 15 to allow the Auditor-General to distribute single agency reports to any Minister with a special interest in the report. This measure gives additional flexibility to the Auditor-General and provides a beneficial outcome for executive government.

### Recommendation 5

- 5.9 **The Committee recommends that the Government amend section 15(2) of the *Auditor-General Act 1997*, to read:**

- **As soon as practicable after completing the report on the audit, the Auditor-General must:**
  - ⇒ **(a) cause a copy to be tabled in each House of Parliament; and**
  - ⇒ **(b) give a copy to the responsible Minister; and**
  - ⇒ **(c) to any other Minister who, in the Auditor-General's opinion, has a special interest in the report.**

## The actions of Ministers – section 15

- 5.10 The ANAO raised the issue of the responsibility of Ministers in relation to audits on agency programs. The ANAO is not entitled to audit the performance of Ministers. However, Ministers do involve themselves in the administration of government programs and, consequently, it may be necessary to interview them in relation to an audit of a government program. The ANAO sought clarification on this matter:

The ANAO considers that the Auditor-General's mandate, in the context of Ministers' involvement in the administration of Commonwealth programs or bodies, may warrant further consideration and clarification.<sup>2</sup>

- 5.11 Section 15 sets out the framework for the conduct of performance audits on agencies. Section 15(3) defines what is not an 'agency' and therefore

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2 Australian National Audit Office, *Submission No. 6*, p. 9.

cannot be subject to audit. This sections states that 'an Agency is taken not to include any persons who are employed or engaged under the *Members of Parliament (Staff) Act 1984*'. The Act does not specifically state that a Minister is exempt from performance audit, although this is stated in the Explanatory Memorandum (EM) to the Auditor-General Bill 1996.

- 5.12 The EM refers to the *Audit Act 1901* which exempted certain statutory officers from being the subject of a performance audit. These include Ministers of State of the Commonwealth, judicial and quasi-judicial officers and Royal Commissioners. The EM states that the provisions of the Bill are clear in setting out what the Auditor-General can audit and report on. Consequently, by not stating or referring to Ministers, the Auditor-General is not entitled to conduct audits of Ministers. However, the EM states:

...many statutory office holders have administrative responsibilities in addition to their statutory responsibilities. The Bill provides that the administrative functions of statutory office holders may be subject to a performance audit.<sup>3</sup>

- 5.13 Similarly, the ANAO commented that 'an audit which the Auditor-General is empowered to conduct can properly extend to interviewing such person or body where to do so is necessary for the conduct of, and is reasonably incidental to, the audit.'<sup>4</sup>

- 5.14 The ANAO suggested that in practice, 'relevant Ministers have responded positively to requests for information in relation to their involvement in the administration of government programs or of an agency, authority or Commonwealth company'.<sup>5</sup> The ANAO stated:

We have been fortunate to date that Ministers have readily agreed to cooperate. All we are saying is that we have got by to date with that, and that is a good thing, but if ever there were a situation where Ministers declined to be of assistance, that would become an issue for us and we would just have to report in the report that we were not able to progress this any further. The question was: does the parliament wish to clarify what is the expectation in terms of the Auditor-General's mandate and the relationship with Ministers?<sup>6</sup>

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3 Explanatory Memorandum to the Auditor-General Bill 1996, paragraph 27.

4 Australian National Audit Office, *Submission No. 6*, p. 9.

5 Australian National Audit Office, *Submission No. 6*, p. 10.

6 Mr Ian McPhee, Australian National Audit Office, *Transcript*, pp. 31-32.

- 5.15 The ANAO stressed that ‘the existing arrangements do give rise to some uncertainty about the extent to which the Auditor-General’s mandate extends to a review or examination of actions of Ministers and their staff in terms of the administration of government programs.’<sup>7</sup>
- 5.16 The ANAO noted that section 20 provides for audits by arrangement. However access powers set out in sections 32 and 33 cannot be used where an audit is conducted under section 20. An audit by arrangement was entered into with the Minister for Health and Aged Services in connection with the audit of Magnetic Resonance Imaging Services.<sup>8</sup>
- 5.17 In a supplementary submission, the ANAO suggested that the Act could be amended to give more clarification to the role of Ministers in relation to their administrative duties. The ANAO proposed that a further section be added to Part 4, Division 2 of the Act stating:
- A performance audit conducted under section 15, 16, 17 or 18 may include examination of any administrative activity carried out by a Minister in connection with the Agency, body or persons concerned.<sup>9</sup>
- 5.18 In addition to this amendment, the ANAO suggested that the EM should be amended ‘to make it clear that this does not mean the Auditor General’s mandate extends to an examination of the appropriateness of government policy.’<sup>10</sup>

## Conclusions

- 5.19 The Auditor-General is not seeking to conduct performance audits of a Minister. However, the Auditor-General in conducting a performance audit of an agency may need to interview a Minister in relation to aspects of program administration. The Explanatory Memorandum (EM) to the Auditor-General Bill 1996 was clear that the Auditor-General’s powers do not extend to auditing the performance of Ministers. However, the EM confirmed that statutory office holders do have administrative responsibilities and the ‘administrative functions of statutory office holders may be subject to a performance audit.’
- 5.20 The Committee concludes that while Ministers should not be subject to performance audit, they should be available to assist the Auditor-General with information relating to the audit of program administration. Where

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7 Australian National Audit Office, *Submission No. 6*, p. 10.

8 Australian National Audit Office, *Submission No. 6*, p. 10.

9 Australian National Audit Office, *Submission No. 13*, p. 1.

10 Australian National Audit Office, *Submission No. 13*, p. 1.

there is confusion as to a Minister's need for involvement in an audit, the Auditor-General and the Minister should seek to resolve these matters possibly using section 20 of the Act relating to audits by arrangement.

## Purchaser and provider agencies

- 5.21 The Department of Family and Community Services (FaCS) purchases services from Centrelink. In this respect, FaCS and Centrelink are in a purchaser/provider relationship. FaCS has brought attention to the case where the Auditor-General conducts a performance audit of services provided by Centrelink, but which are purchased by FaCS. FaCS commented that for 'audits of services delivered via a purchaser-provider agreement, the Auditor-General provides proposed audit reports and other communications to the provider, even though they may be relevant to the purchaser.'<sup>11</sup>
- 5.22 FaCS asserts that in those cases where its provider agencies are audited, then it should be consulted and provided, for example, with proposed reports. FaCS indicated that, in practice, it has a memorandum of understanding with Centrelink which 'establishes protocols and processes to attain certain information'.<sup>12</sup> FaCS concluded, however, that it did not want to rely on goodwill and memorandum of understandings as they have no force in law.
- 5.23 The ANAO responded that, in those cases where services involve both purchaser and provider agencies, it would conduct multiagency audits and both agencies would get access to the information. The Auditor-General commented that there 'would be very few times that we would do audits, particularly performance audits, when we do not do a purchaser and provider—the left and right hand so to speak.'<sup>13</sup>
- 5.24 The Auditor-General's principal point was that in practice the sharing of information was working well. For example, the Chairman of the board of Centrelink makes all the information available to the two secretaries who are on the board. The Auditor-General, however, believed that it was inappropriate for his office to provide proposed audit reports to other agencies that may have a financial interest in the audited agency. The

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11 Department of Family and Community Services, *Submission No. 10*, p. 3.

12 Dr David Rosalky, Department of Family and Community Services, *Transcript*, p. 74.

13 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p. 29.

Auditor-General made the analogy that this approach would be totally inappropriate in the private sector.<sup>14</sup>

## Conclusions

5.25 The Department of Family and Community Services (FaCS) reported that it should receive audit information from the Auditor-General where an audit is conducted on its provider agencies. The Committee acknowledges that the issues raised by FaCS are significant, and agrees with them. In the case of FaCS and Centrelink, both the CEOs of these agencies are on the board of Centrelink so the provision of audit information should be straight forward.

## The appointment of the Independent Auditor

5.26 The appointment and functions of the Independent Auditor are set out in Part 7 of the Act, and Schedule 2 to the Act.

5.27 The Independent Auditor is appointed by the Governor-General on the recommendation of the responsible Minister for a term of at least 3 years and not more than five years. The Minister must not make a recommendation to the Governor-General without first referring the proposed recommendation to the Joint Committee of Public Accounts and Audit.

5.28 In January 2000 the responsible Minister referred to the Committee a proposed recommendation for the position of Independent Auditor. This was the first time that such a reference had been made to the Committee under the Act.

5.29 In February 2000 the Committee conducted a public hearing where the Minister's nominee for Independent Auditor, Mr Michael Coleman, responded to questions from the Committee. Based on the discussions, the Committee approved the Minister's recommendation for appointment of Mr Coleman as Independent Auditor.

## Conclusions

5.30 The Committee is satisfied with the process for considering the recommendation for appointment of the Independent Auditor. The Act

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14 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p. 30.

sets out a similar process for considering the recommendation for appointment of the Auditor-General.

- 5.31 The Committee, in considering the recommendations for appointment of either the Independent Auditor or Auditor-General, asserts that the conduct of a public hearing where the Government's nominee is examined is appropriate. This will be a feature of future appointments.

## **The role of the Independent Auditor**

- 5.32 The Independent Auditor is the Parliament's auditor of the ANAO. The Independent Auditor audits the financial statements of the ANAO, and may at any time conduct a performance audit of the ANAO. These powers are set down in sections 44 and 45 of the Act.
- 5.33 The Independent Auditor has undertaken two performance audits of the ANAO as part of a 'three phase process of performance audits'. These audits, and a summary of their findings are detailed below.

### ***Report on Results of a Performance Audit of the Strategic Planning Framework, Australian National Audit Office, April 2000***

- 5.34 The Independent Auditor examined the ANAO's strategic planning process for the purpose of 'forming a view about whether the ANAO's strategic planning framework is appropriately structured and the process is being undertaken in a manner that will assist in ensuring that resources available to the ANAO are being utilised in an efficient and effective manner'. In addition, the Independent Auditor sought to suggest ways 'by which management practices, including procedures for monitoring performance, might be improved.'<sup>15</sup>
- 5.35 The Independent Auditor was satisfied that 'the ANAO's strategic planning framework is well structured and incorporates all of the elements that should form part of an efficient and effective corporate planning process.' The Independent Auditor stated:

The purpose, content and timing of the detailed plans within the framework are appropriate given the operations of the ANAO. The process provides meaningful and useful information which

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15 Independent Auditor, *Report on Results of a Performance Audit of the Strategic Planning Framework, Australian National Audit Office, April 2000*, p. 1.

allows the ANAO to plan effectively for both their current activities and future developments.<sup>16</sup>

5.36 The Independent Auditor's review identified a range of opportunities including:

- the ANAO should ensure that appropriate strategies are developed to address the significant change to methods of government transacting business in the future due to new e-commerce systems;
- a three year planning cycle should be formalised to coordinate each of the various elements of the strategic planning framework;
- a discrete presentation of the ANAO's strategic planning framework should be incorporated into the formal induction process for new personnel;
- the ANAO's strategies and the corresponding indicators of success and KPIs (key performance indicators) appear appropriate and aligned with the key result areas. However, some of the current KPIs are broad in nature and lack qualitative definition. Therefore, the Independent Auditor recommended improvements be made to the definition of the KPIs; and
- a series of actions should be undertaken in order to fully implement the risk management framework and integrate it into the strategic planning framework.<sup>17</sup>

***Report on Results of a Performance Audit of the Planning and Resource Allocation Processes, Australian National Audit Office, December 2000.***

5.37 The objectives of this audit were to perform an independent and systematic examination of the ANAO's high level resource allocation and performance audit selection process for the purpose of 'forming a view about whether the processes are effective in ensuring the economic and efficient utilisation of the resources available to the ANAO'.<sup>18</sup>

5.38 The Independent Auditor concluded that the ANAO 'has a planning and resource allocation process that is well structured.' The Independent Auditor stated:

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16 *ibid.*, p. 2.

17 *ibid.*, p. 2.

18 Independent Auditor, *Report on Results of a Performance Audit of the Planning and Resource Allocation Processes, Australian National Audit Office, December 2000*, p. 1.

The processes for selection of performance audit topics appear comprehensive, leading to the identification of relevant and appropriate topics. The ANAO takes note of input from stakeholders, including agencies and the JCPAA.<sup>19</sup>

5.39 The Independent Auditor's review identified a range of opportunities including:

- the recommendation that knowledge management policy guidelines be established to ensure that potential audit topics are recorded for future reference when they are tabled;
- the recommendation that the numerical ratings system used to assess potential performance audit topics should be expanded to separately rate key issues that may lead to increased risk; and
- the recommendation that as part of the initial planning phase, the selection criteria for performance audits be discussed with the JCPAA.<sup>20</sup>

## Conclusions

5.40 The Independent Auditor agreed to a Committee request to conduct a performance audit of the Australian National Audit Office and the Committee expects that this will be done.

5.41 The Committee examines the Independent Auditor's reports of the ANAO, and has made a practise of receiving a briefing from the Independent Auditor on his findings of each of his reports.

5.42 The Committee is satisfied with the way the process is working and concludes that the first two reports of the Independent Auditor have been useful. The Independent Auditor's reviews are directed at the planning level relating to various administrative frameworks and processes. It is appropriate that the Independent Auditor focus on these issues as it is essential that the framework and processes of the ANAO are working effectively and efficiently.

5.43 However, the Committee also has an interest in assessing the efficiency, effectiveness and appropriateness of some of the ANAO's micro-level outcomes. For example, whether individual performance audits conducted by the ANAO are making a sufficient and robust contribution to improving public administration. The Independent Auditor has not conducted this type of scrutiny of ANAO work product.

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19 *ibid.*, p. 2.

20 *ibid.*, p. 3.



- 5.44 The Committee has a legislative responsibility to review all reports of the Auditor-General. As part of this responsibility, every quarter the Committee examines a number of performance audits in a round table forum. The primary objective of this public examination is to ensure that the audited agency is taking into account the findings and recommendations of the ANAO, and, unless there is very good reason not to, implementing the ANAO's advice.
- 5.45 At the same time, the Committee also wants performance information relating to the outcomes of performance audits. This is often implicit in a performance audit and is based on such things as the number of recommendations agreed to by the audited agency, and where efficiency savings have been identified.
- 5.46 In addition, the ANAO reports on its performance in its Annual Report. The ANAO indicates that both quantitative and qualitative measure are used to assess the ANAO's performance.<sup>21</sup> The primary performance attributes for the ANAO's performance audit function include:
- number of reports;
  - length of reports;
  - timeliness of reports; and
  - resource usage.
- 5.47 In addition, the ANAO reports on how its performance audit activities contribute to improving public administration. The ANAO commented that 'if the reports of performance audits are to be viewed as adding value to public administration and accountability, it is important that the majority of their recommendations are recognised, agreed and implemented by entities as such.'<sup>22</sup>
- 5.48 In relation to the financial impact of performance audits, the ANAO commented that a 'further measure of the impact of performance audit services is the potential financial benefits that could be realised from implementation of audit report recommendations that are usually agreed with the entities concerned.' For example, the potential financial benefit of performance audits in 1998-99 was \$502 million.<sup>23</sup>
- 5.49 The Committee acknowledges the value of the ANAO performance information about its outputs through its Annual Report. The Committee

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21 The Auditor-General, *Annual Report, 1999-2000*, Canberra, p. 21.

22 *ibid.*, p. 33.

23 *ibid.*, pp. 34-35.

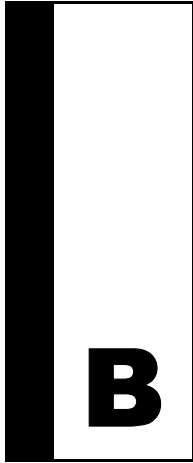
- suggests that enhancements could be made if the ANAO provided, in each performance audit, performance information showing explicitly how the ANAO's output has contributed to improving public administration in relation to an audited agency or agencies.
- 5.50 For example, for each performance audit the ANAO states the cost of conducting the audit. It would be beneficial if the ANAO then commented on the qualitative and quantitative benefits that have arisen from the audit or would arise if the audited agency implemented all the recommendations. This type of information would help to show, in explicit terms, what contribution the ANAO has made. In many cases, this information is implicit in the performance audit, but there would be benefit if a range of explicit statements were made about the possible outcomes of the audit.
- 5.51 The Committee accepts that it may not be possible, with every audit, to accurately project the financial benefits that may arise if recommendations were accepted. But where it is clear that financial benefits would arise, then the ANAO should bring attention to this in the audit report.
- 5.52 If the ANAO provided this type of outcome information in its performance audits, it would provide this Committee, or any other Parliamentary Committee, with a valuable source of information when scrutinising audited agencies. In addition, if the ANAO indicated in each performance audit how its work has contributed to the audited agency and the Parliament, then this may assist the Independent Auditor in conducting his function.
- 5.53 The Committee refers this conclusion to the Auditor-General for his consideration.

**Bob Charles, MP**  
**Chairman**  
**29 August 2001**



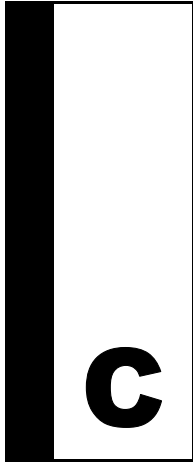
## **Appendix A – List of Submissions**

- 1 Mr Warwick Funnell, Professor of Accounting, Department of Accounting and Finance, University of Wollongong
- 2 Auditor-General of Victoria
- 3 CPA Australia
- 4 Dr James Guthrie and Ms Linda English
- 5 Department of the Environment and Australia
- 6 Australian National Audit Office
- 7 Department of Education, Training and Youth Affairs
- 8 Office of the Auditor-General of Queensland
- 9 Department of Foreign Affairs and Trade
- 10 Department of Family and Community Services
- 11 Australian National Audit Office (supplementary submission)
- 12 Department of Finance and Administration
- 13 Australian National Audit Office (supplementary submission)
- 14 Department of Defence



## **Appendix B – List of Exhibits**

- 1 Mr Pat Barrett, Australian National Audit Office, *Performance Audits and Financial Statements Audits by the Auditor-General: Application of Parliamentary Privilege*
- 2 Mr Pat Barrett, Australian National Audit Office, *Abridged Comparison of Selected Aspects of Audit Office Legislation*
- 3 Mr Ian McPhee, Australian National Audit Office, *Correspondence from Australian Government Solicitor, Auditor-General Act 1997; section 37*



## **Appendix C – Witnesses appearing at public hearings**

### **Melbourne**

**Tuesday, 15 May 2001**

#### **CPA Australia**

Mr Kevin Lewis, Director

Mr Adam Awty, Public Sector Advisor

#### **Auditor-General of Victoria**

Mr Wayne Cameron, Auditor-General

Mr Joseph Manders, Assistant Auditor-General

#### **Australian National Audit Office**

Mr Pat Barrett, Auditor-General

Mr Ian McPhee, Deputy Auditor-General

Mr Russell Coleman, Executive Director

#### **Department of Finance and Administration**

Mr Jonathan Hutson, Group Manager, Financial Framework Group

Mr Gavin Back, Branch Manager

Mrs Robyn Hardy, Director

**Department of Defence**

Mr Michael Roche, Under Secretary

Mr Claude Neumann, Inspector-General

**Department of Education, Training and Youth Affairs**

Mr Peter Grant, Deputy Secretary

**Department of Foreign Affairs and Trade**

Ms Annabel Anderson, State Director

Ms Michele Grant, Acting Director, Evaluation & Audit Section

**Department of Family and Community Services**

Dr David Rosalky, Secretary

Mr Geoffrey Stafford, Chief Internal Auditor