



Auditor-General Amendment Bill 2008

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Auditor-General Amendment Bill 2008

Date introduced: 3 December 2008

House: Senate

Portfolio: Department of Prime Minister and Cabinet

Commencement: The Act commences on Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Auditor-General Act 1997* (the 1997 Act) to allow for the distribution of reports or extracts of reports to any person who the Auditor-General considers has a special interest in the report and incorporate certain amendments recommended by the Joint Committee on Public Accounts and Audit in relation to the disclosure of confidential information in public reports.

Background

Basis of policy commitment

The Auditor-General: Ally of the People and Parliament

Reports 331 and 346 of the Joint Committee on Public Accounts formed the basis of the 1997 Act. The Committee conducted a comprehensive inquiry in 1988 into the operations of the Auditor-General and produced a report entitled *The Auditor-General: Ally of the People and Parliament*. According to the second reading speech of the Minister of Finance at the time, Mr Fahey, the Committee recommended profound changes to the Auditor-General's operations, including that the *Audit Act 1901* be replaced with more modern legislation.¹

Auditor-General Act 1997

The *Auditor-General Bill 1996* was one of a package of Bills to replace the *Audit Act 1901*. The other Bills comprising the package of reforms were the Financial Management

1. Hon John Fahey, Minister for Finance, 'Second reading speech: Auditor-General Bill 1996', House of Representatives, *Debates*, 12 December 1996, p. 8342.

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and Accountability Bill 1996, Commonwealth Authorities and Companies Bill 1996 and the Audit (Transitional and Miscellaneous) Amendment Bill 1996. The *Auditor-General Act 1997* was the central plank of these reforms. The Minister for Finance, Mr Fahey stated the objectives of the legislation at the time:

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.²

In 2001, the Joint Committee on Public Accounts and Audit reviewed the Auditor-General Act and the Committee’s [report 386](#) made five recommendations. The Government [responded](#) to Recommendations 2, 3, 4 and 5 on 19 September 2002. The Government response agreed to Recommendations 2, 4 and 5 and in part to Recommendation 3 which is discussed later. This Bill incorporates the Government response in relation to Recommendations 2-5.

Financial implications

According to the Explanatory Memorandum, the Bill has no financial impact.

Main provisions

Schedule 1—Amendments relating to reporting requirements

Item 5 inserts paragraph 15(2)(c) and provides that the Auditor-General must give the Chief Executive of an agency which is subject to an audit a copy of the performance audit report. Section 15 relates to agencies established under the [Financial Management and Accountability Act 1997](#)³.

Item 6 proposed subsection 15(2A) provides that the Auditor-General may give a copy of the report or an extract of it to any person or body, including a Minister, who the

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2. Hon John Fahey, Minister for Finance, ‘Second reading speech: Auditor-General Bill 1996’, House of Representatives, *Debates*, 12 December 1996, p. 8342.
 3. A list of Commonwealth agencies subject the Financial Management and Accountability Act 1997 (FMA Act).

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Auditor-General considers has a special interest in its content. A provision in relation to Commonwealth authorities is found in **item 9, proposed subsection 16(5)** and to Commonwealth companies in **item 12, proposed subsection 17(4A)**.

Item 8 proposed paragraph 16(4)(c) provides that the Auditor-General must give a copy of a performance audit report to a [Commonwealth authority](#)⁴ or a subsidiary of the authority for which the audit was conducted. **Item 11, proposed paragraph 17(4)(c)** provides for a similar provision in relation to a company or a subsidiary of a company for which an audit has been conducted.

Item 14 proposed paragraphs 18(2)(c) to (g) expands the list of agencies and persons to whom copies of performance audit reports must be given provided that they comply with certain conditions and that the report relates to the operations of that agency. Currently the section requires that the Auditor-General to table copies of the audit report in each House and to give a copy to the Finance Minister. The Bill proposes that copies be given to each responsible Minister, the chief executive of an agency, Commonwealth authority or Commonwealth company, or if it relates to the operations of a person, a copy to that person.

Item 15 proposed subsection 18(3) repeals and substitutes the existing provision to broaden the Auditor-General's discretion in relation to whom he/she may give a copy of the report. Currently the Auditor-General may give a copy of a general performance audit report to any other Minister whom the Auditor-General considers has a special interest in the report. It is proposed to broaden that discretion to include any other person or body who the Auditor-General considers has a special interest in the report or the content of an extract of it.

Section 19 deals with the obligation of the Auditor-General to provide proposed (that is, draft) audit reports to the organisation that is the subject of them to enable the relevant organisation to respond in writing to the proposed report within 28 days. Those written comments must be considered before the preparation of the final report.

Item 16 proposed subsection 19(2) repeals and substitutes the existing provisions. In the case of a Commonwealth Authority or its subsidiary, the proposed report must be given to an officer of that Authority: in the case of a Commonwealth company, it must be given to a director or senior manager of that company. **Item 17 proposed subsection 19(3)** amends the existing provision to provide that the Auditor-General may provide a copy of a proposed report or an extract of it to any person who the Auditor-General considers to have a special interest in the report. The Committee suggested that the Auditor-General **must** give a copy or copy of an extract to a person with a special interest in the report.⁵

4. A list of statutory authorities and Commonwealth companies that are subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

5. Joint Committee of Public Accounts and Audit, [Review of the Auditor-General Act 1997](#), Report 386, Canberra, August 2001, p. 23.

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However the Bill has retained the discretion in the Auditor-General to ‘may give a copy’ to any person whom he considers has a special interest in the report. This is consistent with items 6, 9, 12 and 15. **Item 20 proposed subsection 19(5)** provides that the Auditor-General must include all written comments in the final written report. This accords with the Government response in relation to the Committee’s Recommendation 3 that agency comments provided to the Auditor-General should be included in full in the final report but not in summary documents as the Committee recommended.

The question whether working papers and draft reports attract parliamentary privilege also arose in the Committee’s deliberations. The summary of the issue, including the view of the Australian Government Solicitor at that time, is attached in Appendix A. In recommendation 1 of its report, the committee ‘suggested’ 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.

It is unclear what, if any, action has occurred in relation to this issue. The government did not respond to this recommendation when it issued its response to the other 4 recommendations of the Committee.

Section 36(3) of the *Auditor-General Act 1997* protects information contained in proposed reports by stating that anyone receiving a copy of a proposed report must not disclose any of the information in the report except with the consent of the Auditor-General. This offence attracts a maximum penalty of 2 years imprisonment.

Item 21 proposed section 23A provides a legislative basis for a current practice of the ANAO, according to the Explanatory Memorandum, of providing information to third parties for comment in assisting the auditor to resolve inaccuracies or misunderstandings prior to the final report being prepared.⁶

Item 22 proposed subsection 36(2A) provides that subsection 36(1) of the *Auditor-General Act 1997* does not prevent the disclosure of information under section 23A provided it is in accordance with that section. Subsection 36(1) provides that a person must not disclose information obtained during the course of performing an Auditor-General function except when performing those functions or for the purpose of any Act that gives functions to the Auditor-General. **Proposed subsection 36(2B)** provides that a person commits an offence if the information is disclosed in accordance with section 23A but the person to whom it is disclosed was not performing an Auditor-General function and that person subsequently discloses the information. The penalty is imprisonment for 2 years. **Proposed subsection 36(2C)** provides that subsection 36(2B) does not apply if the Auditor-General has consented to the use or disclosure. A defendant bears an evidential

6. Explanatory Memorandum, Auditor-General Amendment Bill 2008, p. 5.

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burden under section 13.3(3) of the Criminal Code. Evidential burden is defined in section 13.3(6) of the Criminal Code as meaning the ‘burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.’ The question of whether an evidential burden has been discharged or not is one of law (section 13.3(5) of the Criminal Code).

Item 25 proposed 37(4) amends the existing provision in line with the Committee’s recommendation that the words ‘If the Auditor-General decides to omit’ “suggests that the final determination whether to include sensitive information in a report rests with the Auditor-General.”⁷ During the 2001 inquiry, the ANAO raised concerns about the inconsistency between subparagraph 37(1)(b) and subsection 37(4). Subparagraph 37(1)(b) of the *Auditor-General Act 1997* provides that the Auditor-General must not include information in a public report if the Attorney-General has issued a certificate stating that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection 37(2).⁸ The Committee agreed with the suggestion of the Auditor-General that subsection 37(4) be amended to reflect the intentions expressed in the Explanatory Memorandum⁹ to the 1996 Bill and the Committee agreed with that proposition.

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.¹⁰

The Committee recognised that as the Attorney-General is part of the executive government and one of the roles of the Auditor-General is review the activities of executive government, the Attorney-General may have a conflict of interest when he/she determines that certain information should be restricted from public access under subparagraph 37(1)(b).

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

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7. Joint Committee of Public Accounts and Audit, *Review of the Public Accounts and Audit*, Report 386, Canberra, August 2001, paragraph 4.10.
 8. *ibid*, paragraph 4.9.
 9. Paragraph 71 of the Explanatory Memorandum to the 1996 Bill states that if “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”—Explanatory Memorandum: Auditor-General Bill 1996, paragraph 71.
 10. Joint Committee of Public Accounts and Audit, *Review of the Public Accounts and Audit*, Report 386, Canberra, August 2001, paragraphs 4.21-4.22.

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

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

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

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

4.18 Similarly, DoFA stated:

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

However, the Committee ultimately noted and recommended:

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

4.21 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.

Item 26 proposed subsection 37(5) repeals and substitutes the existing provision to remove the word "decides" so as to make clear the Auditor-General has no discretion to

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omit information when the Attorney-General has issued a certificate. It also tidies up the drafting of the provision.

Item 28 proposed subsection 45(4) provides that the Independent Auditor may give a copy or an extract from the report to any other Minister who in his/her opinion has a special interest in the report. The role of the Independent Auditor under the Auditor-General Act is to carry out auditing of the financial statements and carry out performance audits of the ANAO.

Item 29 provides for the general application of Schedule 1 amendments, other than items 21 and 22, to apply to reports and proposed reports completed on or after the commencement of this Schedule regardless of when the work started. **Item 30** provides **items 21 and 22**, which relate to the use or disclosure of information, apply on or after commencement.

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Appendix A

The Committee commented as follows:

This inquiry revealed that there is some uncertainty as to whether Parliamentary privilege applies to Auditor-General working papers and draft reports. Recent advice from the Solicitor-General and the AGS suggested that it would be proper to proceed on the basis that Parliamentary privilege applies to draft reports and working papers for the purpose of preparing audit reports. The AGS stated that ‘unless and until a court decides to the contrary, the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of proceedings in Parliament.’¹¹

The AGS commented in its advice that:

- ‘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 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’.

11. Joint Committee of Public Accounts and Audit, [Review of the Auditor-General Act 1997](#), Report 386, Canberra, August 2001, p. 16-17.

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