PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

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Report on the Inquiry into Victoria's Audit Act 1994

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PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

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Parliament of Victoria
Public Accounts and Estimates Committee

Report on the Inquiry into Victoria's Audit Act 1994

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DUTIES OF THE COMMITTEE

The Public Accounts and Estimates Committee is a joint parliamentary committee constituted under the *Parliamentary Committees Act 2003*.

The Committee comprises ten members of Parliament drawn from both Houses of Parliament.

The Committee carries out investigations and reports to Parliament on matters associated with the financial management of the State. Its functions under the Act are to inquire into, consider and report to the Parliament on:

- any proposal, matter or thing concerned with public administration or public sector finances;
- the annual estimates or receipts and payments and other Budget Papers and any supplementary estimates of receipts or payments presented to the Assembly and the Council; and
- any proposal, matter or thing that is relevant to its functions and has been referred to the Committee by resolution of the Council or the Assembly or by order of the Governor in Council published in the Government Gazette.

The Committee also has a number of statutory responsibilities in relation to the Office of the Auditor-General. The Committee is required to:

- recommend the appointment of the Auditor-General and the independent performance and financial auditors to review the Victorian Auditor-General's Office;
- consider the budget estimates for the Victorian Auditor-General's Office;
- review the Auditor-General's draft annual plan and, if necessary, provide comments on the plan to the Auditor-General prior to its finalisation and tabling in Parliament;
- have a consultative role in determining the objectives and scope of performance audits by the Auditor-General and identifying any other particular issues that need to be addressed;
- have a consultative role in determining performance audit priorities; and
- exempt, if ever deemed necessary, the Auditor-General from legislative requirements applicable to government agencies on staff employment conditions and financial reporting practices.

CHAIR'S FOREWORD

In keeping with the long tradition of the Public Accounts and Estimates Committee self-referencing its inquiries, in June 2009 my Committee notified Members of both Houses of Parliament of its Inquiry into the *Audit Act 1994*. The aim of the Inquiry was to review the legislation in its entirety, paying particular attention to innovative opportunities to progress it to leading edge status.

Because of the absolute importance of integrity in public administration and of the associated accountability obligations of those empowered to manage public resources, the *Audit Act 1994* is a key statute in Victoria.

The Audit Act is the enabling legislation of Victoria's Auditor-General. It establishes the Auditor-General's operating powers and responsibilities as Parliament's auditor of government and its agencies in the public sector. The Act complements special provisions governing the Auditor-General's appointment, tenure and independence which are enshrined within the *Constitution Act 1975*.

In February 2010, the Committee issued a Discussion Paper which invited views on a wide range of potential options for change to the audit legislation. Submissions were subsequently received from interested parties and public hearings were then held by the Committee to further explore key issues with those parties.

This report brings together all of the matters that have been examined by the Committee during the Inquiry. It traverses complex and sensitive issues associated with the constitutional standing of the Parliament and the Judiciary, and whether such standing would be undermined by assigning within the Audit Act legislative authority to the Auditor-General to audit their administrative functions. The Committee obtained advice from a constitutional legal expert, which is presented in full in the report, to assist its deliberations on these ground-breaking issues.

The report also examines in some detail the arguments for and against extending the Auditor-General's legislative powers to encompass access to the records of private sector contractors. The report identifies a diversity of opinions on the accountability implications of the delivery of government services under contractual arrangements with the private sector, as expressed to the Committee during the Inquiry.

The Committee puts forward, in this report, 53 recommendations which address the Auditor-General's relationship with the Parliament, the conduct of audits of administrative functions within Victoria's Courts and avenues available to strengthen numerous operational audit powers and responsibilities.

The Committee considers these recommendations have clear potential to build on past initiatives taken in Victoria to strengthen the audit legislation. They reflect the Committee's view of the action necessary to ensure the provisions of the Audit Act keep pace with contemporary developments in public accountability and that the needs and interests of Parliament, and through it the people, can continue to be adequately served through the independent functions of the Auditor-General.

The Committee is appreciative of the contributions made by all the parties, including the Auditor-General, the Department of Treasury and Finance and the Australasian Council of Auditors-General, who contributed to its Inquiry. The Committee's commentary in the report on each potential amendment to the Audit Act draws on the valuable input of the parties, whether presented to the Committee in correspondence, submissions or in evidence at public hearings.

I wish to thank members of my Committee for their active involvement throughout the Inquiry, which included consultations with other audit jurisdictions, and for their valuable assistance in finalising this report.

And finally, on behalf of the Committee, I extend my thanks to the Committee's secretariat for its usual impressive standard of work in helping to deliver a comprehensive report on this major Inquiry.

Bob Stensholt MP
Chair

RECOMMENDATIONS

CHAPTER 1: INTRODUCTION

1.1 Background to the Inquiry

The *Audit Act 1994* (the Audit Act) establishes the operating powers and responsibilities of the Auditor-General. Its coverage includes the operations of the Victorian Auditor-General's Office. It also addresses the relationship of the Auditor-General with the Public Accounts and Estimates Committee (the Committee) as the representative body of Parliament and the Auditor-General's accountability to Parliament for use of the powers accorded the position and for discharge of the position's responsibilities.

While revisions have been made to the legislation from time to time, it has been some years since there has been a comprehensive and exhaustive review.

In correspondence to the Committee, the Auditor-General has expressed the view that there were some areas of his mandate and operational platform that could be adjusted or improved. The Auditor-General indicated that amendments to the audit legislation were needed to support the audit mandate and ensure continued provision of comprehensive and high quality audit service to Parliament and the public.

The Auditor-General also advised the Committee that submissions had been made to the Premier and the Minister for Finance on his suggested amendments and discussions had been held with the Departments of Treasury and Finance and Premier and Cabinet.

The Government identified in its *2009 Annual Statement of Government Intentions* in February 2009 that it is committed to strengthening the Audit Act. The document states that an Audit Amendment Bill would help the State strengthen financial accountability by clarifying the powers of the Auditor-General. In addition, amendments to the Act should achieve the following:[1]

- provide clarity on certain aspects of the Auditor-General's mandate and powers, including adherence to applicable Accounting and Auditing Standards;
- promote greater efficiency in the operation of the Victorian Auditor-General's Office; and
- fulfil the Government's commitment to implement certain recommendations of the Committee's 2006 *Report on a legislative framework for independent officers of Parliament*.

The process stated by the Government is that proposals will be referred to the Committee for advice.

In its *2010 Annual Statement of Government Intentions* released in February 2010, the Government indicated it would consider the outcome of the Committee's work relating to the Audit Act before finalisation of its planned amendment Bill for the Act. It expected such action would occur during the next Parliament.[2]

1.2 Source of reference

On 22 June 2009, the Committee referred itself a new Inquiry under section 33(3) of the *Parliamentary Committees Act 2003* into Victoria's *Audit Act 1994*. Its aim is to review the legislation in its entirety, paying particular attention to innovative opportunities to progress it to leading edge status.

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1 Government of Victoria, *Annual Statement of Government Intentions*, February 2009, p.30

2 Government of Victoria, *Annual Statement of Government Intentions*, February 2010, p.73

A factor influencing the Committee's decision to conduct the Inquiry related to whether the audit legislation had kept pace with changed service delivery arrangements and accountability requirements in the public sector, including the accountability implications of private sector participation in the delivery of government services and infrastructure.

In recent years, a number of jurisdictions within Australia have reviewed and amended their audit legislation. These jurisdictions include Western Australia and Tasmania. The Australian Parliament's Joint Committee of Public Accounts and Audit is also undertaking an Inquiry into the Commonwealth audit legislation. Without a wide ranging review, Victoria runs the risk that its audit legislation may not adequately meet Parliament and community expectations that the accountability obligations of government and its agencies match the contemporary management and operating environment in the public sector.

1.3 Terms of reference

Provisions that govern the appointment, tenure and independence of the Auditor-General as an independent officer of Parliament have been enshrined in Victoria's *Constitution Act 1975* since 2000. These significant provisions cannot be readily altered by elected governments as the Constitution Act specifically precludes their repeal, alteration or variation unless the amending Billhas been passed by both Houses of Parliament and approved '*by the majority of the electors voting at a referendum*'.[3]

Accordingly, the Committee's Inquiry focuses on the provisions of the Audit Act.

The approved terms of reference for the Inquiry are:

(a) review in its entirety the Act and its provisions, taking into account contemporary developments and emerging issues both in Victoria and similar jurisdictions so as to further strengthen public accountability in Victoria;

(b) seek public submissions and hold hearings on the review of the Act;

(c) consider the views of the Auditor-General of Victoria;

(d) consider the views of the Department of Premier and Cabinet and the Department of Treasury and Finance, as the appropriate central agencies of the Victorian government, on desirable reform and amendment of the Act; and

(e) examine audit legislation in other jurisdictions both in Australia and overseas with a view to determining whether the legislation and practice in those jurisdictions might be relevant to review and reform the Act.

The breadth of the above terms of reference reflects the Committee's desire for consideration during the Inquiry of a wide range of potential avenues for innovative legislative change.

1.4 Scope of the Inquiry

The Committee's work program for the Inquiry comprised:

- a section and subsection assessment of the provisions of the Audit Act;

3 *Constitution Act 1975* (Vic), s. 18, (1B)

- consideration of a series of amendments to the Act advocated in correspondence to the Committee by the Auditor-General;
- consideration of views of the Government's key central agencies, the Department of Premier and Cabinet and the Department of Treasury and Finance;
- the status of the February 2006 recommendations applicable to the Auditor-General of the previous Public Accounts and Estimates Committee arising from its *Report on a legislative framework for independent officers of Parliament*;
- meetings with Public Accounts Committees, Auditors-General and professional accounting bodies in selected Australasian jurisdictions, with particular focus on the Australian, Western Australian, Tasmanian and New Zealand jurisdictions;
- liaison through correspondence (via questionnaires) and electronic means with relevant organisations in the United Kingdom and Canadian jurisdictions;
- consideration of views expressed on behalf of private sector contractors on the need or otherwise for amendments to the audit legislation associated with the delivery of services under contract in the Victorian public sector;
- engagement of an independent constitutional legal expert to provide advice on particular constitutional and legal issues;
- the publication in February 2010 of a Discussion Paper on options for legislative change as the catalyst for inviting public submissions and holding public hearings during the first half of 2010;
- consideration of public submissions and evidence given at public hearings held during April and May 2010;
- the development of findings and recommendations; and
- presentation of a report to Parliament.

On 2 June 2010, the Premier released the results of a review commissioned by the government in November 2009 of the powers, functions, coordination and capacity of Victoria's integrity and anti-corruption system, including the Ombudsman, Auditor-General, Office of Police Integrity, Victoria Police and the Local Government Investigations and Compliance Inspectorate. The review was conducted by the Public Sector Standards Commissioner and a newly-appointed Special Commissioner. The majority of the review's findings relate to legislation other than the Audit Act. However, the review has recommended establishment in legislation of an Integrity Coordination Board with membership comprising the heads of Victoria's integrity bodies, including the Auditor-General. The Committee's report includes reference to this recommendation and some other matters included in the review's report that it considers to be relevant to its Inquiry.

The Committee's report also includes reference to any matters of relevance to the Audit Act that might flow from the *Public Finance and Accountability Bill 2009*, currently before Parliament. That Bill represents the results of the government's major review of Victoria's public finance legislation. The Committee had earlier, in June 2009, presented a report to Parliament on its Inquiry into Victoria's public finances.

1.5 Structure of report

In developing this report, the Committee determined to follow a similar structure to that adopted for its February 2010 Discussion Paper. However, this report provides commentary, findings and recommendations on particular issues presented under the following headings:

- potential amendments to the Audit Act pertaining to the special relationship of the Auditor-General with Parliament;
- potential amendments for formalising arrangements entered into from time to time between the Judiciary and the Auditor-General for the audit of non-judicial functions within Courts;
- potential amendments aimed at strengthening or clarifying the information-gathering powers and other audit operational powers and responsibilities of the Auditor-General; and
- other possible amendments, including those that address procedural issues.

The Committee considers the above groupings of proposed amendments may also be useful for consideration of avenues available to further enhance the structure of the Act itself. It recognises, however, that identification of the optimum approach to integrating amendments into the principal Act is a matter for expert consideration by the Chief Parliamentary Counsel.

Similar to the Committee's Discussion Paper, the report encompasses areas with potential for new coverage in the Audit Act as well as for strengthening existing provisions.

Throughout its Inquiry, the criteria adopted by the Committee for guiding its research, analysis, findings and recommendations was the scope for building on past enhancements to the Act and ensuring that a leading edge legislative model was in place to meet the contemporary needs of Parliament and the Victorian community.

CHAPTER 2: THE CONSTITUTIONAL AND PARLIAMENTARY STATUS OF VICTORIA'S AUDITOR-GENERAL

2.1 The role of an Auditor-General within the Westminster system of government

Many countries, including Australia, operate under the Westminster system of government. This system of government was named after the Palace of Westminster, where the British Parliament sits. The Westminster system of government is characterised by three arms of government, the legislature (or Parliament), the executive (the elected government as a group of Cabinet ministers) and the Judiciary, which is independent from the Parliament.[4]

In countries operating with the Westminster system of government, Auditors-General or equivalently-titled officials, who are usually officers of the Parliament, conduct independent examinations of the financial operations and management practices of public sector agencies, and report the results to Parliament. In such countries, Auditors-General are an important means used by Parliament, on behalf of the community, for holding elected governments accountable for the use of public resources entrusted to their control.

In correspondence to the Committee, the Department of Treasury and Finance described the role and scope of an Auditor-General in the Westminster model of government in the following terms:[5]

> *Under the Westminster model of government, the Parliament is central to the system of governance. Parliament makes law for financial governance and administration, and authorises the appropriation of funds to the Executive Government, which achieves public outcomes through the delivery of goods and services, and by ensuring that all parts of the public sector follow sound governance and financial management principles.*
>
> *The Judiciary is a separate tier which interprets the laws made by Parliament and administers justice. Parliament can scrutinise the exercise of executive powers through various mechanisms, including reviewing various departmental reports and accounts, by considering reports by officers responsible directly to Parliament rather than to the Executive Government (such as the Auditor-General), appointing committees established to inquire into various aspects of government performance, and so on.*
>
> *The position of Auditor-General within this model is considered a crucial link in the process of accountability to the taxpayer on the utilisation of public funding. The principal role of the Auditor-General is to provide assurance to Parliament on accountability and performance of the Executive Government.*

The Auditor-General also communicated with the Committee on the significance of the functions of an Auditor-General under the Westminster system and referred to the position as Parliament's independent assurance that public funds are being expended efficiently, effectively and in accordance with law.[6]

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4 Parliament of Victoria, 'What is the "Westminster System"?', <www.parliament.vic.gov.au/windowintime/faq/showfaq.cfm?faqid=22>, accessed 1 December 2009

5 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, received 2 December 2009, p.2

6 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

2.2 The traditional and evolving functions of the Victorian Auditor-General

The office of the Victorian Auditor-General has a long and commendable history in serving the Parliament. For over 150 years, the position has played a key role in upholding public accountability in the state. Reports tabled in Parliament by Auditors-General over this time have informed the Parliament and taxpaying public about the accuracy, reliability and integrity of government operations and performance. Many of the issues raised by Auditors-General in reports to Parliament have become the catalyst for improvement actions in the public sector aimed at enhancing public sector performance, strengthening the transparency of reported information and reinforcing the accountability of Victorian government agencies.

For the 2010-11 financial year, the Auditor-General's budget is expected to total $34.4 million, comprising:

- $20.3 million for mandatory audit reports on financial statements and reports on non-financial performance indicators;[7] and
- $14.1 million for discretionary audit work associated with performance audits and other services provided to Parliament.

To assist the Auditor-General in the discharge of operational audit functions and responsibilities, the Audit Act provides, in sections 7E and 7F, for the engagement of audit staff within the Victorian Auditor-General's Office (VAGO) and of private sector contractors to supplement internal resources whenever deemed necessary. The Auditor-General expects to issue 560 opinions on financial statements, 114 opinions on non-financial performance indicators and 37 reports to Parliament during 2010-11.[8]

2.2.1 Traditional focus on financial attest audit functions

Up until the late 1980s, the functions of the Auditor-General were predominantly of an attest nature and focused strongly on the material accuracy of financial data covering revenue and expenditure transactions, and assets and liabilities recorded in financial statements produced annually by government agencies. The traditional work of the Auditor-General also encompassed assessments of compliance by government agencies with applicable legislation.

This financial attest audit process culminates in the expression of an independent audit opinion on financial statements attesting, if appropriate, to the fair presentation of reported operating results and financial position, in line with professional reporting standards and financial reporting legislation.

This financial audit function largely mirrors the equivalent audit procedure undertaken in the private sector although the traditional work of the Auditor-General has always extended beyond the private sector role to identification on behalf of Parliament of instances of waste or a lack of probity in the use of taxpayers funds. The financial audit function involves suitably qualified staff with financial or accounting expertise. It is a core mandatory feature of the work of Auditors-General, on behalf of Parliament, in Westminster jurisdictions around the world.

One of the characteristics of the financial audit process is its strong focus on evaluations of the soundness of internal controls within agencies, the completeness and accuracy of reported financial

7 The costs of financial audits are recovered by the Auditor-General through the charging of audit fees under section 10 of the *Audit Act 1994*.

8 Victorian Auditor-General's Office, *2010-11 Annual Plan*, May 2010, pp.38, 40

information and explanations of any major changes in key income, expense and balance sheet items between reporting periods. While valuable and critical to public accountability, this focus is of a financial nature only and does not involve, to any great extent, going beyond the financial data to examine the manner in which the resources underpinning the operations of agencies have been used in the delivery of public programs and services.

2.2.2 Emergence of performance auditing as a key partner to financial audits and audits involving compliance with legislation

It was in recognition of the above limitation in financial audit coverage that performance auditing emerged in Victoria from around the late 1980s. After several years of transitioning to a performance audit framework, in 1990 the Auditor-General received from Parliament, through amendments to the Audit Act, discretionary authority to conduct performance audits in government agencies. Performance auditing extends the audit process into the field of independent evaluations of management performance involving the extent to which programs and services have been implemented in an economical, efficient and effective manner.

Constrained only by a statutory requirement in section 16(5) of the Audit Act not to question the merits of government policy, performance audits can address, for example, economic, social, environmental, health, infrastructure, safety and community issues. Performance audits also widen the skill requirements of audit staff associated with performance evaluation beyond financial or accounting expertise to a multiplicity of disciplines, supplemented as necessary by specialist input in line with the subject of particular audits. Multi-disciplinary teams are therefore common for many performance audits.

The provisions of the Victorian Audit Act relating to performance auditing have been widened by Parliament over the years in recognition of the increasing attention given to such audits in VAGO.

2.2.3 Recognition of program evaluation and other management initiatives in the public sector

In outlining VAGO's role in performance auditing, the Committee recognises that program and project evaluation within the public sector is also a long-established practice.

Management within public sector agencies arrange periodic evaluations of the delivery of their programs with a view to establishing that the programs are continuing to achieve their objectives and are meeting the needs of users. Such evaluations may involve specially-qualified internal resources or external evaluation specialists. While performance audits conducted by the Auditor-General are independent and are reported to Parliament, evaluations are usually internal reviews of programs or projects arranged by management and do not, as a matter of course, involve the reporting of results to Parliament. Some significant evaluations, however, have involved outside independent or peer reviews and have been reported to Parliament or made publicly available. Evaluation methodology is similar to that used in performance audits and evaluations are an important element of continuous improvement and risk management strategies within organisations.

It is also appropriate to recognise the Gateway Review Process managed by the Department of Treasury and Finance. This process is an important component of the Government's best practice Gateway initiative for proposed major asset investments. This initiative aims to assist agencies in ensuring capital investments are adequately developed, well spent, meet the Government's strategic objectives and achieve value for money outcomes. The review process, stage 6 of the Gateway initiative, focuses on the evaluation of benefits after project completion. The Department of Treasury and Finance's Gateway guidance indicates that Gateway reviews are conducted by a selected panel of experts or practitioners independent of the team managing the program or project and help senior

responsible officers within agencies to achieve their business aims.[9] This internal focus is an important feature of the Gateway initiative.

2.3 Progressive strengthening through legislative action of the Auditor-General's relationship with the Parliament

2.3.1 Strengthening of Auditor-General's legislative framework and accountability to Parliament

Until 1997, the independence and relationship of the Auditor-General with the Parliament in Victoria was implicit within the provisions of the Audit Act through the assignment of operational powers and functions and the right to report, without interference, directly to Parliament.

Some amendments to the Audit Act introduced in 1997 were designed to establish a closer link between the Auditor-General and Parliament. The principal amendment at the time with this aim in mind was the designation of the Auditor-General as Victoria's only independent officer of Parliament.[10] In the amending Bill's Second Reading Speech, the then Premier stated '*The intention behind this is to enshrine the relationship between the Auditor-General and the Parliament as the Auditor-General's principal client.*'[11]

Accompanying the 1997 legislative changes was the assignment to VAGO of its own appropriation as an organisational component of the Parliament, and the presentation of its budget estimates in the Parliament's annual Appropriation Act. In practice, quantification of the Auditor-General's budget within the annual Appropriation Bill presented to Parliament is still subject to determination by the government after consultative input by the Committee under the Audit Act. Previously, VAGO was linked for budgetary and administrative purposes to the Department of Premier and Cabinet.

While the 1997 legislative action brought the Auditor-General directly under the Parliamentary appropriation, the independence of the office in terms of the practical application of audit functions was still implied in the legislative framework and the Parliament had no statutory participation in the appointment of the Auditor-General.

Fiscal changes in the late 1990s required significant outsourcing of actual auditing by the Auditor-General to external contractors, including a newly-established statutory body, Audit Victoria. The Auditor-General maintained a separate small office.

These particular changes were reversed and the independence of the Auditor-General and office were directly reinforced in a suite of legislative reforms that occurred in 2000. They involved significant additions to Victoria's Constitution Act and the Audit Act concerning the Auditor-General and Parliament.

The legislative changes introduced from 2000 were premised on the following description of the role of the Auditor-General that was presented in the opening paragraph of the amending Bill's Second Reading Speech by the then Premier:[12]

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9 Department of Treasury and Finance, 'Gateway Review Process', <www.gatewayreview.dtf.vic.gov.au>, accessed 10 June 2010

10 *Audit (Amendment) Act 1997* (Vic), s. 7

11 Hon. J. Kennett, Premier of Victoria, Legislative Assembly, *Victorian Parliamentary Debates*, 30 October 1997, p.897

12 Hon. S. Bracks, Premier of Victoria, Legislative Assembly, *Victorian Parliamentary Debates*, 11 November 1999, p.364

> *The need for an effective and independent Auditor-General is almost universally accepted as a hallmark of our democratic institutions. The Auditor-General plays a pivotal role in supporting Parliament in its functions of authorising and supervising the spending of public money by the executive.*

This telling message set the scene for the far-reaching legislative action that was to take effect at the time. A key element of this action was the enshrining in Victoria's *Constitution Act 1975* of provisions governing the appointment, tenure and independence of the Auditor-General as the State's then only independent officer of the Parliament. As mentioned in the introductory chapter, these provisions cannot be changed by elected governments unless the amending Bill has been passed by both Houses of Parliament and approved '*by the majority of the electors voting at a referendum*.'[13]

This constitutional protection explicitly affirmed the Auditor-General's special and unique relationship with Parliament. This relationship is manifested through the Constitution Act's requirements for:

- the appointment of the Auditor-General to be subject to the recommendation of the Public Accounts and Estimates Committee as the representative body of Parliament (in practice, the Committee manages the recruitment, selection and appointment process prior to submission of a recommended appointee);
- the assignment, subject to the laws of the state, to the Auditor-General of complete discretion in the exercise of the position's powers under the legislation; and
- the setting of strict conditions, requiring approval of both Houses of Parliament, before an Auditor-General can be suspended from office.

2.3.2 Comparison with Victoria's other independent officers of Parliament

The above three protective provisions in the Constitution Act, covering appointment, independence and tenure, have, since 2000, distinguished the Auditor-General from Victoria's three other current independent officers of Parliament, the Ombudsman, the Electoral Commissioner and the Director, Police Integrity.

The independence of the Ombudsman and the Electoral Commissioner is protected in the Constitution Act while their other governing provisions such as appointment and tenure are found in their respective enabling legislation.[14] For the Director, Police Integrity, all of the position's governing provisions are set out in the position's enabling legislation, the *Police Integrity Act 2008*. The constitutional provisions also distinguish the Auditor-General from Victoria's many regulatory bodies such as commissions, special type ombudsmen, tribunals and investigatory entities etc. which, while requiring operational autonomy for effective delivery of their services, are established and appointed by the Executive Government and exist primarily to serve the Executive Government.

The unique constitutional and parliamentary status of the Auditor-General in Victoria was also reinforced by amendments in 2000 to the Audit Act that assigned several new consultative powers to the Committee as the representative body of Parliament. These powers include consultative input into the Auditor-General's draft annual audit plans and annual budget. These changes built on existing provisions in the Audit Act involving the Committee in matters concerning the accountability of the Auditor-General, such as the arrangement on behalf of Parliament of a periodic performance audit of the Auditor-General and VAGO.

13 *Constitution Act 1975* (Vic), s. 18, (1B)

14 *Constitution Act 1975* (Vic), ss. 94E, 94F; *Ombudsman Act 1973* (Vic); *The Electoral Act 2002* (Vic)

The changes were described in the amending Bill's Second Reading Speech as designed to '*strengthen the accountability of the Auditor-General to Parliament and enhance the power of the Parliament over the executive.*'[15] To date, there have been no equivalent provisions on accountability to the Parliament in the enabling legislation of Victoria's other three independent officers of Parliament, the Ombudsman, the Electoral Commissioner and the Director, Police Integrity.

The difference in current accountability regimes has been less striking with the Director, Police Integrity, as the enabling legislation for that position provides for investigatory oversight of certain operating functions of the position by the Special Investigations Monitor established under that legislation.[16] In addition, the Electoral Commissioner has an informal relationship with the Parliament's Electoral Matters Committee. The Ombudsman has therefore been the only officer of Parliament without a relationship, formal or informal, with a parliamentary committee or a special accountability regime established under legislation.

The enabling legislation and accountability regimes of the Ombudsman and the Director, Police Integrity, have been recently examined by the government as part of a review by the Public Sector Standards Commissioner and a Special Commissioner of Victoria's integrity and anti-corruption system. The Commissioners' report, released on 2 June 2010, proposes changes to the powers and functions of the Ombudsman and to the accountability regimes of the Ombudsman and the Director, Police Integrity. The report recommends, inter alia, that a Victorian Integrity and Anti-Corruption Commission be established, with a newly-established Public Sector Integrity Commissioner (the inaugural Chair), the Director, Police Integrity and the Chief Municipal Inspector as the new Commission's three members. It also recommends that the powers and functions of the new Commission and the Ombudsman be monitored by a new parliamentary committee, fulfilling a similar role to that of the Public Accounts and Estimates Committee (PAEC) in relation to the Auditor-General.[17] The government has indicated it will adopt the recommended structural model for the state's integrity and anti-corruption system.

2.3.3 Distinctive status accorded to the Auditor-General

In summary, the combination of the unique constitutional protections accorded the office of Auditor-General and the strong features in the Audit Act of the Auditor-General's accountability to Parliament, including consultative roles assigned to the Committee, illustrate clearly that the Auditor-General is a special instrument of the Parliament. In this capacity, the Auditor-General has the fundamental purpose of serving the needs and interests of Parliament, and through it the people.

It was these distinctive characteristics of the constitutional and Parliamentary status of the Auditor-General and the associated importance of ongoing enhancements to the Auditor-General's enabling legislation that influenced the Committee to launch its Inquiry into the provisions of the *Audit Act 1994*.

15 Hon. S. Bracks, Premier of Victoria, Legislative Assembly, *Victorian Parliamentary Debates*, 11 November 1999, p.366

16 *Police Integrity Act 2008* (Vic), s. 114

17 State Services Authority, *Review of Victoria's Integrity and Anti-corruption System*, 31 May 2010

CHAPTER 3: LEGISLATIVE AMENDMENTS DEALING WITH AUDITOR-GENERAL'S RELATIONSHIP WITH PARLIAMENT

3.1 Features of the legislative framework pertaining to the Auditor-General's relationship with Parliament

As mentioned in the preceding Chapter, provisions governing the appointment, tenure and independence of the Auditor-General as an independent officer of the Parliament have been enshrined in Victoria's *Constitution Act 1975* since 2000. The Chapter also indicates that these provisions cannot be changed by elected governments unless the amending Bill has been passed by both Houses of Parliament and approved '*by the majority of the electors voting at a referendum*'.[18]

The *Audit Act 1994* is the Auditor-General's enabling legislation. It addresses the Auditor-General's operational relationship with Parliament, the position's audit powers and responsibilities and the administration of the Auditor-General's functioning body, the Victorian Auditor-General's Office (VAGO).

The provisions of the Audit Act covering the operational relationship of the Auditor-General with Parliament include various statutory functions which have been assigned to the Public Accounts and Estimates Committee, as the representative body of Parliament. These functions include:

- provision of consultative input to the Auditor-General on the development of each draft annual work plan prior to the Auditor-General's completion of the plan and its tabling in Parliament — **section 7A**;
- consultation on determination of the Auditor-General's annual budget — **section 7D(2)**;
- an authority to exempt the Auditor-General from financial management practices and staff employment conditions applicable to government agencies — **section 7C**;
- provision of consultative input to the Auditor-General on preparation of specifications setting out the objectives, scope and planned work program of each performance audit — **section 15(2)**;
- management of the appointment process and submission of a recommendation to Parliament on the appointment of an external auditor to conduct an audit of VAGO's annual financial statements — **section 17**; and
- at least once every three years, management of the appointment process and submission of a recommendation to Parliament on the appointment of an external person to conduct a performance audit covering the economy, efficiency and effectiveness of the Auditor-General and the operations of VAGO — **section 19**.

For the latter two functions, reports prepared by the appointed auditors are tabled in Parliament. The Committee may choose to further investigate on behalf of Parliament these reports and their recommendations.

The above provisions focus on the Auditor-General's accountability to Parliament for use of the extensive audit operational powers accorded the position under the Audit Act and for discharge of

18 *Constitution Act 1975* (Vic), s. 18, (1B)

the position's operational responsibilities. The provisions also reflect Parliament's interest in the resourcing and operational capacity of the Auditor-General, which is manifested particularly through the Committee's consultative involvement in the determination of the Auditor-General's annual budget.

3.2 Amendments to the Audit Act pertaining to the Auditor-General's relationship with Parliament

The remaining commentary in this Chapter addresses the Committee's consideration of potential amendments to the Audit Act linked to the Auditor-General's relationship with Parliament. The commentary encompasses a wide range of topics identified during the course of the Inquiry through correspondence and submissions received from interested parties, discussions held during public hearings and the Committee's own research. In addition, the Committee gained valuable insights into particular issues from its discussions with parliamentary committees, Auditors-General, government officials and other organisations during visits to other jurisdictions in Australia and overseas.

Under each identified issue, the commentary outlines some introductory narrative on the nature of the topic followed by discussion of the potential options for change drawing on the views expressed by interested parties and experts, as appropriate, as well as the Committee's research. The position reached by the Committee together with its recommended approach to bring about value-adding legislative change to the Audit Act completes the commentary in each case.

3.2.1 Feasibility of legislative provisions addressing audits of the administrative functioning of Parliament

Parliament's special constitutional status and the need for a careful approach

As identified in the Committee's commentary in Chapter 2, the supremacy of Parliament as the legislature or legislative arm of government is a fundamental constitutional principle underpinning the Westminster system of government. In addition, Parliament is where government is formed, the source of government funding and the means through which the executive gives an account of its actions.

It is Parliament's sole province to determine the boundaries of the audit powers of the auditor appointed by it, the Auditor-General. These boundaries are set out within the provisions of the Audit Act and are logically restricted to the functions of the State's elected government in its capacity as the executive arm. The Executive Government's functions and funding are authorised by the Parliament and it is accountable to the Parliament for the manner in which it utilises resources entrusted to it.

The power and jurisdiction of Parliament are addressed by Erskine May in his authoritative publication, *Parliamentary Practice*.[19]

Because of the supreme constitutional status of the Parliament, it has been traditionally accepted that the Auditor-General does not have any explicit or implicit authority or power to undertake audits of Parliament's formal functioning as Victoria's legislature.

However, as identified by the Committee in its February 2010 Discussion Paper, the Auditor-General conducts an audit of Parliament's annual financial statements by arrangement. The Discussion Paper also included extracts from an April 2000 invitation issued by the then Presiding Officers of

19 W. McKay (ed.) (2004), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd edn), London: LexisNexis

Parliament to the then Auditor-General to conduct Parliament's external audit incorporating, as a specific component, the annual financial audit. The impetus for Parliament's action at the time is evident from the following extract from the invitation made to the Auditor-General which emphasises the importance placed by Parliament on its administrative accountability:[20]

> *We wish to endorse the principle of external auditing of the Parliament of Victoria's administration.*
>
> *The Parliament of Victoria places a high emphasis on ensuring its business and administrative activities are conducted within an effective corporate governance and accountability framework.*
>
> *A specific element of this framework concerns recognition that the utilisation of a significant level of public funding in administering Parliament should be subject to periodic external audit. To enhance this framework, we already have an independent internal audit function which reports to us in our capacity as Presiding Officers*
>
> *In addition to our internal audit, we believe it is appropriate that the external audit function be undertaken by the Auditor-General with a capacity to report to the Parliament…*
>
> *We are pleased to extend an invitation to your Office to conduct the external audit of the Parliament of Victoria, and in respect of the annual financial audit, invite you to present us with the usual annual letter of engagement.*

The Committee considers that such an invitation addressing the wider external audit of Parliament would facilitate the conduct of both financial and performance audits of the administrative functions of Parliament through its departments, including the Department of Parliamentary Services.

In correspondence to the Committee prior to release of its Discussion Paper, the Auditor-General proposed that the financial audit of Parliament currently undertaken by arrangement be formalised as a legislative requirement.[21]

In a paper to the Committee, also in the lead-up to publication of its Discussion Paper, the Department of Treasury and Finance raised as a potential question for the Inquiry whether it was appropriate for the powers of the Auditor-General to be extended to include the Parliament and, if so, should they encompass the full ambit of the Auditor-General's powers.[22]

It was against the above background that the Committee invited in its Discussion Paper the views of interested parties on a range of issues associated with the efficacy or otherwise of formalising within the Audit Act involvement by the Auditor-General in audits, both financial and performance, of the administrative functioning of Parliament. In doing so, the Committee recognised that Parliament's unique constitutional status meant that care needed to be exercised in examining the subject. The Committee also recognised that the outcome of the Committee's deliberations would be a matter solely for determination by the Parliament.

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20 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 28 August 2009

21 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

22 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, 2 December 2009, p.2

Financial audits of Parliament's administration

Feasibility of establishing a statutory basis

The Committee notes that preparation of Parliament's annual financial statements forms part of the responsibilities of its Department of Parliamentary Services. The audited financial statements of Parliament for the year ended 30 June 2010 included in the department's annual report disclose that a total of $123.5 million in output and special appropriations was provided to the Parliament in that year.[23] The expenditure details disclosed in the financial statements include, but do not separately identify, salaries and allowances paid to Members of Parliament other than Ministers' salaries and allowances which are paid by the Department of Premier and Cabinet. Commentary on this latter subject is provided under a separate heading later in this Chapter.

The Committee considers that the annual audit of Parliament's financial operations, conducted by the Auditor-General, via an arrangement, is an important manifestation of Parliament's desire to adhere to high standards of governance and accountability for its financial management of significant levels of public funds.

As previously mentioned, the Auditor-General has proposed that the annual financial audit of Parliament be formalised as a legislative requirement within the Audit Act. The Auditor-General considers that such action would provide clarity on the ability to audit Parliament's financial operations. In a submission to the Committee following release of its Discussion Paper, VAGO expressed the view that:[24]

> *... Given that a role of the Auditor-General is to audit financial statements of authorities under the Act, it is appropriate that the administrative functions of Parliament be included in this definition.*

The views of Victoria's Presiding Officers

In its February 2010 Discussion Paper, the Committee signalled its intention to explore with the Presiding Officers of the Victorian Parliament their views on the appropriateness of the current audit arrangements in place for Parliament's administrative functions and on the justification or otherwise of supplementing existing arrangements through legislative reference.

In evidence to the Committee, the Presiding Officers referred to the longstanding non-statutory arrangement in place for the Auditor-General to audit Parliament's annual financial statements. The Presiding Officers expressed the view that there would be little practical effect from past and current practice if the arrangement was subject to a statutory backing. The Speaker of the Legislative Assembly informed the Committee that:[25]

> *... As I see the Parliament's role, whether we invite the Auditor-General to oversight our books or whether it is a legislative requirement, I have got to, I suppose, ask the question: what difference will that make?*
>
> *The Parliament prides itself, and always has, on being an absolute champion of process and procedures. The Auditor-General has always audited the Parliament's books…*

23 Department of Parliamentary Services, *2009-10 Annual Report*, September 2010, p.50

24 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.12

25 Ms J. Lindell, Speaker of the Legislative Assembly, transcript of evidence, 10 May 2010, pp.2, 7

> *Whether or not there is a line that is changed that says that the Auditor-General 'will' carry out financial audits annually on the Parliament, …the reality is that the Auditor-General always has.*

The President of the Legislative Council concurred with these views on Parliament's annual financial audit.

The Committee also heard from the Presiding Officers and accompanying Parliamentary officers on the strong features of Parliament's governance framework and initiatives taken to reinforce its accountability for the management of public resources. These features include the use of an audit committee, the engagement of an external firm to conduct internal audits, the progressive development of a risk management framework and production of an annual report which is tabled in Parliament. The Committee was pleased to note this outline of Parliament's governance structure. The current independent external audit conducted by the Auditor-General complements these internal management initiatives and is the source of assurance on the soundness of such initiatives in contributing to the completeness and accuracy of Parliament's annual financial statements.

The position in other jurisdictions

In evidence to the Committee, the Auditor-General advised it was his understanding that the audit legislation in all Australasian jurisdictions, other than Victoria and New South Wales, '*treats the administration of Parliament as an entity that is scheduled and listed for audit.*'[26]

The legislative position across jurisdictions as outlined by the Auditor-General was subsequently confirmed by the Australasian peak body of Auditors-General, the Australasian Council of Auditors-General (ACAG), in information requested from it by the Committee. The ACAG material shows that the financial statements of Parliamentary departments in most other jurisdictions, including the federal legislation in Australia and New Zealand, fall within the mandate of the Auditor-General through the inclusion of those departments in the statutory definition of entities subject to audit.[27]

Details of the legislative situation across Australasia, as sourced by ACAG from each audit office, are set out in Appendix 2 of this report.

Position reached by the Committee

After consideration of the information on this issue presented to it during the course of its Inquiry, the Committee considers there are grounds for formalising within the Audit Act the current longstanding practice under which the Auditor-General conducts, by arrangement with Parliament, audits of Parliament's annual financial statements.

The evidence presented to the Committee by the Presiding Officers indicates that they would not have an objection to such action. In addition, a financial audit has set boundaries which focus on the completeness and material accuracy of financial data, rather than assessments of performance, in the lead up to expression of an audit opinion on financial statements. There may not therefore be a need for specific ring-fencing provisions within the Audit Act which would preclude, for such an audit, the Auditor-General from commenting on the merits or otherwise of Parliament's formal functioning as Victoria's legislature.

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26 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.16

27 Australasian Council of Auditors-General, correspondence to Committee, received 21 May 2010

Legislative action would ensure that the powers, responsibilities and accountability obligations of the Auditor-General under the Audit Act would formally apply to the annual audits of Parliament's financial administration.

Because of the Auditor-General's longstanding involvement in the conduct of Parliament's external financial audit and given the absence of any obvious conflicts or sensitivities arising from Parliament's constitutional status (see expert advice set out in Appendix 1), the Committee advocates that an explicit authority for the audit be incorporated in the Audit Act rather than a provision which empowers the Auditor-General to enter into audit arrangements with the Parliament. Such an approach would give statutory permanency to the Auditor-General's involvement which would assist the planning and management position of both Parliament and the Auditor-General. It would also be consistent with contemporary practice in most other Australasian jurisdictions.

Recommendation 1: **An explicit authority be incorporated within the *Audit Act 1994* for the Auditor-General to undertake the audit of Parliament's annual financial statements.**

Performance audits of Parliament's administration

Feasibility of establishing a statutory basis

As identified in its Discussion Paper, the Committee included within the ambit of its Inquiry consideration of the efficacy or otherwise of formalising within the Audit Act the right of the Parliament and the Auditor-General to enter into agreements for the conduct, from time to time, of performance audits of Parliament's administrative activities. As mentioned in an earlier paragraph, one such agreement in the form of an invitation by the then Presiding Officers to the then Auditor-General covering the totality of Parliament's external audit was made in April 2000. The Committee understands from evidence given by the current Presiding Officers that no equivalent invitations have been extended to the Auditor-General since that time.

At an early stage of the Inquiry, the Auditor-General, in correspondence to the Committee, expressed reservations about undertaking activities which may not be within the scope of the Audit Act, in principle and in the context of VAGO's limited resources.[28] As with the position with financial audits mentioned above, the Auditor-General seeks clarity on the ability to audit Parliament's administrative functions, '*beyond the current arrangement that exists between Parliament and the office.*'[29]

A performance audit widens the boundary of an audit beyond the traditional functions of financial attestation and levels of legislative compliance to encompass evaluations of management performance in terms of economy, efficiency and effectiveness. As such, in contrast to the preceding discussion on financial audits, issues dealing with evaluations of Parliament's management and performance, given its unique constitutional status, can be complex and require specific attention and assessment.

The views expressed by Parliament's Presiding Officers

The sensitivities associated with any proposal to empower the Auditor-General to conduct performance audits of Parliament's administration were highlighted in the evidence given to the Committee by the Presiding Officers. The Speaker of the Legislative Assembly informed the Committee that:[30]

28 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 8 September 2009

29 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.12

30 Ms J. Lindell, Speaker of the Legislative Assembly, transcript of evidence, 10 May 2010, p.2

> *... whether there should be performance audits of the Parliament, I would question the appropriateness of having a body sit over the Parliament and question the efficiency of members of Parliament and how members of Parliament run their offices and question the efficiency of the research undertaken in the library.*
>
> *I suppose I am a person who believes that the Parliament should be the ultimate decision-maker and the ultimate organisation in the state that sets its own course rather than having an individual or an officer of the Parliament somehow come over the top of Parliament and be able to, in a sense, make judgement. I would suggest in terms of how members of Parliament behave in their electorates and communications that they may put out or may not put out, it is all a very subjective thing as to the public good and what is public information and what is not public information.*
>
> *I do not really support the idea of performance audits. I can see where perhaps there are parts of Parliament where that might be fine, but in the end I just do not believe that Parliament as an organisation should have to answer itself to an office that is a creation of the Parliament...*

The President of the Legislative Council expressed concurrence with the views of the Speaker and particularly:[31]

> *... on the matter of the Auditor-General overseeing Parliament and parliamentarians. I think that would really politicise the office of the Auditor-General to the extent where it would inevitably create problems.*

The Committee respects the views expressed by the Presiding Officers. It recognises their authoritative nature and that they centre strongly on preserving the supreme status of Parliament. Such status is a fundamental tenet of the Westminster system of government which the Committee has been conscious of during the course of its Inquiry. Drawing on this key tenet, the Committee directed attention during the Inquiry to matters linked to the important points raised by the Presiding Officers concerning:

- the potential conflict associated with an officer of Parliament making judgement on the Parliament and, as a consequence, being seen as above the Parliament; and
- the extent to which the administrative and support functions of Parliament can be clearly separated from its formal functioning as Victoria's legislature.

Principal/agent issue

On the potential conflict issue, the Committee put forward in its Discussion Paper as a discussion point whether the Auditor-General could be viewed as effectively an agent of the Parliament with a principal/agent relationship in place. The Committee went on to say that, if such relationship existed, it could be argued that any audit of Parliament by the Auditor-General as an officer of Parliament could be viewed as an internal audit rather than an external one.

VAGO's submission to the Committee rejected the concept of an Auditor-General as an agent of Parliament. The submission stated:[32]

31 Mr R. Smith, President of the Legislative Council, transcript of evidence, 10 May 2010, p.2

32 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.12

> *The Auditor-General is clearly not an agent of Parliament – to suggest this is to suggest that the Auditor-General acts on the direction of Parliament and does its bidding, which is in fundamental opposition to the provisions regarding his independence and the "no direction" provision in the Constitution Act 1975. Nor is it accurate to portray that an audit of Parliament by the Auditor-General is an internal audit. The role of internal audit is "commonly defined as an independent appraisal activity within a Public Sector Agency, for the review of operations as a service to the Responsible Body and management." This line of argument overlooks the express establishment of the Auditor-General as an independent officer of the Parliament (section 94B of the Constitution Act 1975).*

The Committee does not regard the principal/agent issue in the context of performance audits of Parliament's administration to be as clear cut as described by the Auditor-General. In saying this, the Committee is mindful that the special relationship of the Auditor-General with Parliament and the important constitutional protections flowing from that relationship are founded on the premise that the Auditor-General is Parliament's appointed auditor of the executive government. It nevertheless considers that any extension of the Auditor-General's traditional audit role in the public sector to encompass performance audits of Parliament's administration would not necessarily interfere with the fact that the Parliament is the Auditor-General's principal client. Any action to formalise within legislation audits by the Auditor-General of Parliament's administration would more likely fit into the category of a widening of the Auditor-General's servicing of the needs of Parliament, as the key client, rather than a catalyst for taking the Auditor-General to a position that might be seen as above Parliament itself.

Expert legal advice provided to the Committee on the principal/agent question stated as follows:[33]

> *It is by no means self-evident that the relationship between the Parliament and the Auditor-General is that of principal and agent, as understood under general law. Nonetheless, it may be accurate, in a broad sense, to describe the Auditor-General as acting in certain respects in a representative capacity for the legislature as a whole.*

On a related matter, the Committee considers that if legislative change was to occur in this area it would be more appropriate to involve the Auditor-General rather than another external auditor. This view stems from the Auditor-General's role as Parliament's sole auditor in the public sector and the ongoing resultant benefit to public accountability in Victoria that accrues from this permanent role. This does not suggest that no other auditor could function as professionally and competently as Parliament's auditor. However, the Committee does consider that the benefits to Parliament in terms of periodic value adding independent assessments of its administration would necessarily be greater from permanent use of the Auditor-General and a consequential consistent understanding and knowledge by audit of Parliament's operational environment.

Separating Parliament's administrative functions

The second point considered by the Committee in this area concerns the question of separation of Parliament's administrative and support functions from its formal status as Victoria's legislature.

There is no doubt from the Committee's viewpoint that such separation must be clearly established in order to protect Parliament's decision-making on matters associated with its formal functioning as well as to uphold the credibility of the performance audit process. Without it, the Committee contends there can be no case for performance audits of Parliament's administration.

33 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, p.6

In evidence presented to the Committee at its hearing with the Presiding Officers and accompanying Parliamentary officers, the Committee heard that:[34]

> *... if you think that the Assembly and the Council actually have to have oversight of approving a number of regulated allowances, they do the approval and it goes through to DPS* [Department of Parliamentary Services] *then for payment. I am not quite sure where you would actually stop and start with the line that says, 'This is house business and parliamentary business,' when you have these beings called members of Parliament who operate in both the Parliament and in I suppose the service end of the Parliament.*

The Committee also heard:[35]

> *... one of the biggest challenges when you are looking at administrative functions and you start lining that up against what is the DPS authority in the appropriation is that 35 per cent of the funding in DPS relates to DPS. The rest of it goes directly to MPs, be it the MPs' office and communications budget or members' training budgets — all of those operating costs.*
>
> *You would need to be clear as to what you are calling an administrative function of the Parliament and what is that you are actually calling something that rightly belongs in the legislative realm. Does an MP's ability to function in their electorate office relate to the legislative function of the Parliament or does it relate to the administrative function of the Parliament? If you are going to do a performance audit, what is it that you are doing an* [sic] *performance audit of?*

These comments highlight that establishing a line of demarcation between the formal operation of Parliament and the administration of Parliament would not be a straight forward exercise.

The expert legal advice received by the Committee indicated that, if legislative action proceeded in the area, it '*would be desirable to include express provisions in the Audit Act defining "administrative" functions of the Parliament to which the power of audit applies.*' The legal advice stated that administrative functions might include such matters as:[36]

- *... the efficiency of the use or allocation of parliamentary resources; and*
- *the expenditure of the Parliament, and its efficiency or otherwise, in respect of such items as library services, public information, entertainment, information technology, or building renovation or maintenance.*

The Committee considers the separation of Parliament's administrative functions should be determined by ground rules formulated by the Parliament supplemented by explicit safeguards built into legislation to preclude departures from the ground rules. Equivalent legislative restrictions to those that apply to the State Services Authority that preclude it from reviewing functions of a judicial or quasi-judicial nature could, with appropriate modification, be considered in any amendments made to the Audit Act.[37]

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34 Ms J. Lindell, Speaker of the Legislative Assembly, transcript of evidence, 10 May 2010, p.4

35 Mr P. Lochert, Secretary, Department of Parliamentary Services, transcript of evidence, 10 May 2010, p.5

36 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, p.5

37 *Public Administration Act 2004* (Vic) s. 60

The position in other jurisdictions

As mentioned in an earlier paragraph, the Australasian peak body of Auditors-General, ACAG, presented information to the Committee on the extent of the Auditor-General's mandate covering Parliament's administration in other Australasian jurisdictions (see Appendix 2 of this report).

As with the position with financial audits of Parliament's administration, ACAG's information indicates that the audit legislation in all Australasian jurisdictions, other than Victoria and New South Wales, include provisions that enable the Auditor-General to conduct performance audits or, similarly-titled audits, of the administrative functions of Parliament.

The New Zealand Audit Office advised ACAG that it has previously reviewed the system for expenses and allowances of Members of Parliament. The Australian National Audit Office conducted a performance audit of Parliamentarians' entitlements in September 2009. That Office had conducted four previous audits in the subject area. It is the policy of the Tasmanian Audit Office to only conduct compliance audits of Parliamentary agencies, even though it has the power to undertake performance audits, while the South Australian Audit Office has not to date exercised its power to conduct economy and efficiency audits in the Parliamentary arena.

A summary of the situation across jurisdictions is presented in Appendix 5.

Advice received from constitutional legal expert on Parliament's constitutional status

As part of its deliberations on this topic, the Committee sought expert legal advice on whether there were any impediments, in terms of Parliament's supreme constitutional status, to incorporating explicit provisions in the Audit Act empowering the Auditor-General to undertake audits of the administrative functioning of Parliament. The advice received by the Committee on this issue was as follows:[38]

> *Part II (ss15 to 74AA) of the Constitution Act, headed "The Parliament", does not contain any provision which would prevent the Parliament from authorising external audits of the administrative functioning of the Parliament.*
>
> *There is an implied limitation, arising from the text and structure of the Commonwealth Constitution, which prevents the Parliament of the Commonwealth from validly enacting a law which would have the effect of impairing the capacity of the government of Victoria to function as a government, or which would restrict or burden the State in the exercise of its constitutional powers. A Commonwealth law which purported to regulate aspects of the internal workings of the Parliament of Victoria may well be invalid on that ground.*
>
> *There is no such general restraint, however, on the exercise by the Parliament of Victoria of legislative power with respect to the operation, and review, of its own expenditure and management. That power is expressed in the broadest terms in s.16 of the Constitution Act. The power extends to amendment of the Constitution Act itself (s.18(1)), subject to compliance in appropriate cases with the referendum requirements of s.18.*
>
> *In my opinion, there would be no constitutional impediment, whether derived from the Constitution Act or the Commonwealth Constitution, to the conferral upon the Auditor-General, by legislation enacted by the Parliament, of power to conduct financial audits or performance audits in respect of the administrative functions of the Parliament.*

38 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, p.4

Position reached by the Committee

After consideration of the above legal advice and all of the issues on this subject raised with it during the Inquiry, the Committee has concluded that, subject to appropriate safeguards including Parliament's right to determine the line of demarcation between its formal operations and its administrative functions, new provisions should be inserted into the Audit Act to authorise performance audits by the Auditor-General of the administrative functions of Parliament. Such action would give full transparency to Parliament's ongoing commitment to strong public accountability for its administration of significant levels of public resources.

Performance audits bring the auditor into the potentially contentious area of evaluating resource management in terms of economy, efficiency and effectiveness. Adequate safeguards therefore need to be established by Parliament to guard against any undermining of its supreme position in Victoria's system of government.

The Audit Act, in section 16(5), currently precludes the Auditor-General from questioning the merits of government policy in reports to Parliament on audits of government agencies. The Committee considers that similar legislative restrictions structured to reflect Parliament's unique constitutional status should be developed. These restrictions should explicitly prohibit the Auditor-General from questioning the merits of Parliament's formal functioning as Victoria's legislature, including the formal role of parliamentarians both within Parliament and through their offices.

Legislative action should be supplemented by the development of ground rules which establish the lines of demarcation between Parliament's formal activities (such as the direct operations of each House) and administrative functions which clearly support Parliament's formal processes (including the various support services falling within the responsibility of the Department of Parliamentary Services). Such ground rules should be formulated by the Parliament through whatever mechanism it deems appropriate.

Subject to the incorporation of explicit safeguards and a restriction on the boundaries of performance audits in the Audit Act, all of the legislative powers, responsibilities and accountability obligations of the Auditor-General under the Audit Act should apply to performance audits undertaken from time to time of Parliament's administration.

The Committee sees any new formalised audit arrangements as taking place cooperatively between the Parliament and the Auditor-General. The emphasis with such audits should be on assisting Parliament in its endeavours to continually achieve best practice and exhibit full transparency in its administration of public funds.

Recommendation 2: **New provisions be inserted into the *Audit Act 1994* to authorise the Auditor-General to conduct performance audits of the administrative functioning of Parliament. The new provisions should explicitly prohibit the Auditor-General from questioning the merits of Parliament's formal functioning as Victoria's legislature, including the role of parliamentarians.**

Recommendation 3: **The Parliament formulate rules which establish the lines of demarcation between Parliament's formal activities, such as the direct operations of each House, and administrative functions which clearly support Parliament's formal processes.**

3.2.2 Frequency of Parliament's performance audit of the Auditor-General

Nature of this topic

As pointed out in Chapter 2 of this report, the unique constitutional status of Victoria's Auditor-General stems from the enshrining within Victoria's *Constitution Act 1975* of provisions governing the appointment, tenure and independence of the Auditor-General. This constitutional protection, the fact it cannot be changed, except through approval of the majority of electors voting at a referendum, and the Auditor-General's already wide-ranging operational powers set out in the Audit Act, reinforce Victoria's leading edge position on the key role of the Auditor-General in upholding public accountability.

There is therefore a distinct focus within the Audit Act on the need to balance the Auditor-General's strong independence and operational capability with an equally strong accountability framework governing the Auditor-General's use of such independence and capability. As mentioned in Chapter 2, this balance is principally manifested through legislative functions assigned to the Committee, including the management of Parliament's periodic performance audit of the Auditor-General and VAGO.

During its inquiry, the Committee addressed the frequency of the statutory performance audit and on the need or otherwise for additional provisions within the Audit Act covering consultation with the Auditor-General on the appointment and on the terms of reference for the audit.

The frequency of Parliament's performance audit

Issues addressed in Committee's February 2010 Discussion Paper

Section 19 of the Audit Act provides that a performance audit by Parliament of the Auditor-General and VAGO shall be conducted at least once every three years. Under the legislation, the performance auditor is appointed by Parliament on the recommendation of the Committee and the auditor is required to report directly to Parliament. The Committee can conduct its own inquiry into the results of a performance audit.

Recent performance audit reports (2007 and 2004) have been comprehensive. In particular, the 2004 report identified some concerns that led the Committee to undertake a further Inquiry into the performance of VAGO.

Under section 19 of the Audit Act, the person appointed by Parliament to conduct an annual financial audit of VAGO cannot also undertake the performance audit.

Recommendation 10 of the previous Committee's February 2006 report on officers of Parliament addressed the statutory frequency of this performance audit and stated:[39]

> *The Audit Act 1994 be amended to provide that the independent performance audit of the Victorian Auditor-General's Office be undertaken every four years…*

A four-year audit frequency would align with the term of government in Victoria.

The government's response to the previous Committee's report indicated it will give further consideration to this recommendation.

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39 Public Accounts and Estimates Committee, *Report on a legislative framework for independent officers of Parliament*, February 2006, p.79

In the lead up to the Committee's February 2010 Discussion Paper, the Auditor-General advocated to the Committee that section 19 of the Audit Act be amended to extend the frequency of Parliament's performance audit '*to some longer period*'. The Auditor-General informed the Committee that '*the nature of these reviews is such that the current frequency is resource intensive for the office, and presents a risk to the carrying out of VAGO's core functions.*'[40]

The Department of Treasury and Finance also raised this issue in its paper to the Committee prior to publication of its Discussion Paper. The Department asked if it is appropriate, '*from an accountability perspective, for this audit to be conducted during each term of Government, or across terms of Government? What is an appropriate frequency?*'[41]

The Committee's Discussion Paper invited input from interested parties on the ideal frequency of the performance audit and some related issues including the extent to which factors such as risk management and resource demands on both VAGO and the Committee should influence determination of the optimal audit frequency.

Views expressed to Committee in submissions and in evidence at public hearings

In a submission to the Committee, VAGO outlined some additional points to support the Auditor-General's proposal that a four-year audit frequency be established in the Audit Act. VAGO's submission stated:[42]

> *The Auditor-General has proposed that the current triennial performance audit of the office under section 19 of the Act be changed to four years, and should be timed to fall in the middle of each parliamentary term. Now that Victoria has a fixed four election year term (except for exceptional circumstances) it is reasonable for the office to be performance audited once in the life of each Parliament. That frequency would not reduce the accountability of the office, especially given the number of other accountability mechanisms in place.*
>
> *There is a significant resource implication associated with this important accountability process. It is understood the three years timeline was established when that was the term of Parliament. Other jurisdictions with statutory review periods, such as Queensland and Tasmania have longer time periods (5 years).*
>
> *A four year frequency for performance audits of the office would retain this important accountability mechanism within a reasonable time cycle.*

VAGO's submission also put forward for the Committee's consideration two further proposals of the Auditor-General pertaining to the statutory performance audit, namely:[43]

> *The Auditor-General also notes that unlike agencies who are the subject of the Auditor-General's performance audits in the public sector, the office currently is not afforded the opportunity to consultation or comment on the terms of reference for its performance audit. The Auditor-General recommends that section 19 of the Act be amended to provide for consultation on the terms of reference. Consultation may*

40 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

41 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, received 2 December 2009, p.6

42 Victorian Auditor-General's Office, submission to Committee, received 18 March 2010, p.5

43 ibid.

> *also give PAEC the opportunity to better target the performance audit and afford the Auditor-General the same approach as is mandated for all other performance audits across the Victorian public sector.*
>
> *Also of concern is that external performance auditors commissioned by the PAEC do not seem to be covered by the secrecy provisions in the Act. The Auditor-General recommends that these auditors should be covered by secrecy provisions consistent with the otherwise established principle in Victoria.*

In evidence given to the Committee, the Auditor-General indicated that his recommendation that the Audit Act incorporate a provision on consultation on the terms of reference proposed for the performance audit was founded on the principle of procedural fairness which applies to audits by VAGO of government agencies. The Auditor-General also suggested that through such consultation, the Committee '*could be informed by knowing what we have been doing, where we are at and what exists, and that could influence the scope or the specificity of the terms of reference the Committee is proposing.*'[44]

The second point on secrecy provisions raised by the Auditor-General is already covered to a large extent in the Audit Act as the main secrecy provision, section 12 pertaining to information access, applies to the performance auditor. However, there is scope to further strengthen the position on secrecy by also applying section 20A pertaining to improper use of information to the performance auditor. That section prohibits improper use of information acquired during the course of audits.

In its submission to the Committee, ACAG indicates its support for a five-year frequency for the performance audit with retention of the words "at least" to cover circumstances necessitating more frequent circumstances.

ACAG regards '*five years as an appropriate period for the conduct of an office-wide performance audit of any entity.*'[45] It cites a view expressed to it by the Queensland Audit Office, which is subject to a five yearly strategic review that such a timeframe '*allows an appropriate period for any issues raise* [sic] *to be appropriately considered and any required action implemented and monitored prior to the next review occurring.*'[46] It identifies that this frequency is also used in recently revised audit legislation in Western Australia and Tasmania.

In a submission to the Committee, Professor Kerry Jacobs (who the Committee notes at the time of this Inquiry is a member of VAGO's Audit Committee), supports a four-year audit frequency but does not favour retention of the words "at least" as, in his view, '*this could easily be subject to political abuse.*' Professor Jacobs also indicates that '*it is always within the mandate of the PAEC to conduct an inquiry into the operation of the VAGO.*'[47]

On the question of consultation, ACAG advocates the Auditor-General should be consulted on the appointment of the performance auditor in addition to the audit's terms of reference. It also believes the performance auditor '*should be precluded from commenting on audit findings, decisions or recommendations reached by the Auditor-General during the course or conduct of an audit.*'[48]

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44 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.27

45 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.14

46 ibid., p.16

47 Prof. K. Jacobs, Canberra, submission to the Committee, received 12 March 2010, p.2

48 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.15

In evidence to the Committee, ACAG's representative was asked to clarify this latter comment as the auditor's capacity to evaluate these matters would seem to be intrinsic to forming a view on the Auditor-General's effectiveness and efficiency. The Committee was informed that the auditor should not be looking at audit files or commenting on conclusions reached in particular audits. Rather, ACAG believes the auditor should be looking at quality control processes that an Auditor-General might have, '*but not trying to second-guess the findings and recommendations of the auditor on a particular project.*'[49]

The position in other jurisdictions

The Committee's research indicates that provision for a periodic performance audit or strategic review of the Auditor-General by Parliament is a relatively common feature of audit legislation in many Australasian jurisdictions. However, not all jurisdictions exhibit all of Victoria's strong features such as involvement of the Parliament through a parliamentary committee in the appointment of the auditor, the scope of the audit encompassing the economy, efficiency and effectiveness of audit operations and a statutory requirement for the auditor to report directly to Parliament.

The frequency of Parliament's performance audit varies across jurisdictions. For example, the audit legislation in Western Australia, Tasmania and Queensland provides for a five-year frequency with the latter two jurisdictions incorporating the "at least" proviso to cover any need for more frequent audits. The Commonwealth audit legislation adopts a term approach to the performance audit with a requirement that the appointed independent auditor must conduct an annual financial audit and may at any time undertake a performance audit. The auditor is appointed by the Governor in Council, on the recommendation of the Minister and after approval of the Commonwealth Parliament's Joint Committee of Public Accounts and Audit, for at least three years and not more than five years. New South Wales and the Northern Territory have a frequency of three years similar to the existing situation in Victoria.

The legislative position on periodic performance audits of the Auditor-General in the UK and Canadian legislation is not as clearly defined as across Australasia. The UK audit legislation does provide for a performance audit to be conducted by an auditor appointed by the Public Accounts Commission but there is no set frequency for the audit. The Canadian audit statutes, both federally and in the provinces, provide for annual financial audits of the Auditor-General but do not have an explicit requirement for a performance audit.

Appendix 5 summarises the legislative position on the frequency of performance audits of the Auditor-General across Australasian jurisdictions.

As with audit frequency, the position on consultation with the Auditor-General associated with the performance audit varies across jurisdictions. The audit legislation in Western Australia, Queensland and Northern Territory provides for consultation by the responsible Minister with the Auditor-General on both the appointment of the auditor and the terms of reference for the audit. The consultation in the latter two jurisdictions also covers the relevant parliamentary committee as the Parliament does not have a prime role in the appointment process. The Tasmanian legislation provides for consultation by the Treasurer with the Auditor-General only, with no involvement of a parliamentary committee, notwithstanding that the auditor is appointed by the Governor on the Treasurer's recommendation. The consultation with the Auditor-General in that jurisdiction only covers the terms and conditions for the audit and only extends to the auditor's appointment if the independent financial auditor also conducts the performance audit.

49 Mr M. Blake, Tasmanian Auditor-General, Australasian Council of Auditors-General, transcript of evidence, 7 April 2010, p.3

The other Australasian audit statutes do not have explicit consultative requirements, which is also the situation in the UK and Canada.

Position reached by the Committee

The Committee's identification of this topic for inclusion within its Inquiry was essentially aimed at building further on an already strong and transparent accountability framework within the Audit Act governing the performance of the Auditor-General and VAGO. The Committee considered that any potential legislative change pertaining to Parliament's periodic performance audit of the Auditor-General should not weaken the Auditor-General's accountability to Parliament for the discharge of the position's extensive operational and reporting powers.

The Committee supports extension of the performance audit frequency to at least once every four years which would align with the term of government in Victoria. The Committee considers that, ideally, the performance audit should be conducted at the beginning of the third year of Parliament because this would be in the middle of the parliamentary term.

The Committee considers it would be desirable to retain the words "at least" in the Audit Act for the core frequency of four years to maintain discretion to the Committee for more frequent audits, should prevailing circumstances warrant such action.

On the issue of consultation, while the Committee is satisfied with the current arrangements, it also accepts that the principle of procedural fairness from the perspective of the Auditor-General, as the audited party, ideally should be reflected in the provisions of the Audit Act. The Committee considers this principle should apply to the terms of reference for each performance audit. The direct role assigned to the Committee by Parliament in the legislation regarding the submission of a recommendation to it on the appointment of the performance auditor and the management of the audit process is a leading edge feature of the statutory framework The enshrining of provisions within the legislation requiring consultation by the Committee with the Auditor-General on the audit's terms of reference would complement this leading edge status. However, discretion would remain with the Committee in regard to the final terms of reference.

The Committee is also of the view that there is scope, through legislative amendment, to further strengthen the secrecy provisions relating to the performance audit by including section 20A(1) within the scope of the Act's section 19(5) which applies certain powers and obligations to the performance auditor. Section 20A prohibits improper use of information acquired during the course of audits. Legislative amendment in this area would mean the full suite of secrecy obligations under the Audit Act that apply to the Auditor-General and VAGO on an ongoing basis would also extend to Parliament's performance auditor.

The proposal put to the Committee that Parliament's performance auditor be precluded from commenting on findings, conclusions or recommendations of the Auditor-General in particular audits of public sector agencies is not supported. The Committee is strongly of the view that detailed examinations of a sample of performance audits in terms of the quality and completeness of evidential matter to substantiate audit findings, conclusions and recommendations reported to Parliament are vital to forming meaningful independent assessments for Parliament of the efficiency and effectiveness of the Auditor-General.

Recommendation 4: **Section 19 of the *Audit Act 1994* be amended to provide a frequency of at least once every four years for the performance audit of the Auditor General commissioned by this Committee on behalf of Parliament.**

Recommendation 5: **The *Audit Act 1994* be amended in section 19 to provide for consultation by this Committee with the Auditor-General on the proposed the terms of reference pertaining to Parliament's periodic performance audit of the Auditor-General. Discretion would remain with the Committee in regard to the final terms of reference.**

Recommendation 6: **The *Audit Act 1994* be amended to include section 20A(1) within the ambit of the Act's section 19(5) so that the full suite of secrecy obligations that applies to the Auditor-General on an ongoing basis also extends to Parliament's performance auditor.**

3.2.3 Parliamentary involvement in the appointment of an Acting Auditor-General

Nature of this topic

Section 6 of the Audit Act enables the Governor in Council to appoint a person to act as Auditor-General for a period of up to six months when the position is vacant or the Auditor-General is unable to perform the functions of the position.

Section 7 of the Audit Act provides that the person employed in VAGO as the Deputy Auditor-General may also act as Auditor-General during any vacancy and illness, absence or suspension of the Auditor-General, with no time restriction. The Deputy Auditor-General cannot act as Auditor-General if the Governor in Council has made an acting appointment under section 6.

There is no specified role for Parliament within the appointment process under section 6 or section 7.

The past practice in Victoria has been that the appointment of an acting Auditor-General is via the appointment of the Deputy Auditor-General under section 7 of the Audit Act. This process is managed within VAGO.

The previous Committee, in its 2006 *Report on a legislative framework for independent officers of Parliament*, recommended that the appropriate parliamentary committee be involved in recommending long-term acting officers of Parliament.[50] In the case of the Auditor-General, the appropriate parliamentary committee is the Public Accounts and Estimates Committee which, in accordance with section 94A of the Constitution Act, has a statutory role in recommending the appointment of the Auditor-General. In effect, the previous Committee recommended that Parliament, through the Committee, be given a clear legislative role for both actual and long-term acting appointments to the position of Auditor-General.

At an early stage of the Inquiry, the Auditor-General proposed, in correspondence to the Committee, that sections 6 and 7 of the Audit Act be amended, in line with the above recommendation, to provide that an acting Auditor-General be appointed on the recommendation of the Committee, consistent with the appointment process for the Auditor-General. The Auditor-General considered that such a change would enhance the independence of the Acting Auditor-General.[51]

50 Public Accounts and Estimates Committee, *Report on a legislative framework for independent officers of Parliament*, February 2006, p.83

51 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

The Department of Treasury and Finance also raised with the Committee, in the lead up to publication of its Discussion Paper, that, if the previous Committee's recommendation was acted upon, '*would it be appropriate and efficient for the Governor-in-Council to continue to appoint a short term Acting Auditor-General, for appointments of only a period of up to 6 months?*'[52]

Views expressed to Committee in submissions and in evidence at public hearings

VAGO's submission to the Committee on this topic reiterates the view expressed by the Auditor-General in his May 2009 correspondence to the Committee that the audit legislation provide for an acting Auditor-General to be appointed by the Committee consistent with the appointment process for the Auditor-General. The submission states that, in addition to enhancing the independence of the Acting Auditor-General, the change would '*reinforce the Parliament's established role in relation to the appointment of the auditor* ("auditor" taken by Committee as meaning the Auditor-General).'[53]

In evidence to the Committee, the Auditor-General provided further elaboration of his position and, in doing so, differentiated between longer term absences of the Auditor-General, through either a vacancy in the office or other reasons, and shorter term absences (which might be when annual leave is taken or an official business trip occurs, etc.). In making this distinction, the Auditor-General stated:[54]

> *... where the Auditor-General is no longer there, the Committee should be involved in the appointment of the Acting Auditor-General. So if I go on leave next week, I see that as operational and an internal operational decision.*
>
> *If I resign today, I would argue that the PAEC should be involved in appointing the Acting Auditor-General pro tem until the permanent selection process is done.*

In its submission to the Committee, ACAG expressed support for the principle that the Committee appoints an Acting Auditor-General. It is also of the view that, in the absence of the Auditor-General for any reason and for any period, the appointee should automatically be the Acting Auditor-General. It sees the potential involvement of the Governor-in-Council in the appointment process, which could occur in Victoria under section 6 of the Audit Act, as leaving '*the Acting position vulnerable to Executive influence.*'[55]

Notwithstanding the above views, ACAG pointed out to the Committee that it sees as '*a better model even than that where the Deputy A-G* [Auditor-General] *is appointed by the PAEC is that the A-G appoints the Deputy. This assures the independence of both of these positions. That Deputy should then automatically act as the A-G in the A-G's absence.*'[56]

In evidence to the Committee, ACAG's representative emphasised the importance of having a similar process followed for the Acting Auditor-General's appointment to that which occurs with the Auditor-General. The representative stated:[57]

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52 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, received 2 December 2009, p.5

53 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.6

54 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.21

55 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.16

56 ibid., p.17

57 Mr M. Blake, Tasmanian Auditor-General, Australasian Council of Auditors-General, transcript of evidence, 7 April 2010, p.4

> *... whatever the process or the timeframe is, the process should be similar so that the deputy has the same level of powers and immunity as does the Auditor-General.*
>
> *... If there has been a proper process to appoint the deputy in the first place, then why shouldn't that person not also automatically act?*

The position in other jurisdictions

During its visit to Western Australia, the Committee identified that the equivalent provisions in the audit legislation in Western Australia, revised in 2006-07, are a little different to the Victorian position in that they provide that the Deputy Auditor-General, a position established under the legislation, is to act as Auditor-General during any vacant period. However, the Deputy Auditor-General cannot act as Auditor-General if the Governor, on the recommendation of the responsible Minister, has appointed an appropriately qualified person to act as Auditor-General.

The responsible Minister in Western Australia must consult with the parliamentary leader of each political party and two parliamentary committees, including the Public Accounts Committee, before making a recommendation. There is no time restriction on any appointments by the Governor.[58]

In addition, the Committee learnt from its visit to New Zealand that the New Zealand legislative approach is more direct than that followed in Victoria and Western Australia. The audit legislation provides that the Deputy Controller and Auditor-General in New Zealand is, like the Controller and Auditor-General, designated as an officer of Parliament, and appointed, for a specified statutory period, by the Governor-General on the recommendation of the House of Representatives. The Deputy Auditor-General is assigned the functions, duties and powers of the Auditor-General for as long as a period of vacancy or absence continues.[59]

The audit statutes in Queensland, South Australia, Tasmania and New South Wales provide that the Deputy Auditor-General acts as Auditor-General with no reference to any parliamentary nor Executive involvement although ACAG's representative informed the Committee that in Tasmania, as a matter of practice, the appointment is made by the Premier on the recommendation of the Auditor-General.[60]

In the other jurisdictions, the Commonwealth, Australian Capital Territory and the Northern Territory, the Executive plays the key role in the appointment of a person to act as Auditor-General.

With regard to timeframes, the Committee was interested to find that the acting appointee in the Australian Capital Territory is subject to a limit of continuous appointment of 12 months and the acting appointee in the Northern Territory has a limit of three months which can be renewed for periods of a similar duration. The submission received from Professor Kerry Jacobs emphasised the need for the legislation to have a clearly defined timeframe. Professor Jacobs stated that '*I suspect that 6 months might be a bit short in a difficult situation and I would suggest a maximum of a year with no possibility for renewal of the acting role.*'[61]

A summary of the position across Australasian jurisdictions is presented in Appendix 5.

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58 *Auditor General Act 2006* (WA), clauses 8, 9 of Schedule 1

59 *Public Audit Act 2001* (New Zealand), ss. 11, 12 and Schedule 3

60 Mr M. Blake, Tasmanian Auditor-General, Australasian Council of Auditors-General, transcript of evidence, 7 April 2010, p.4

61 Prof. K. Jacobs, Canberra, submission to the Committee, received 12 March 2010, p.2

Position reached by the Committee

After consideration of the various views and information made available to the Committee on this topic during the Inquiry, the Committee considers there is a need to distinguish between short-term and long-term absences in the statutory office of the Auditor-General when determining arrangements for appointments of an acting Auditor-General.

For all longer-term periods of absence, which could extend over several months when the statutory office becomes vacant through, for example, resignation or factors impeding the capacity of the Auditor-General to undertake official duties, acting appointments should be subject to recommendation by the Committee, as occurs with the position of Auditor-General.

For all short-term periods of absence of the Auditor-General, such as in the case of annual leave and involvement in official duties outside Victoria or Australia, the Committee considers the person occupying the position of Deputy Auditor-General, or otherwise titled within VAGO, as appointed by the Auditor-General, should act as Auditor-General.

The Committee does not see a need for designation of the Deputy Auditor-General within VAGO, when not acting as Auditor-General, as an independent officer of Parliament. It considers this special status should only be accorded to the statutory office of Auditor-General which should automatically extend to acting appointments made either by the Committee or the Auditor-General.

On timeframes, the Committee supports a statutory cap of continuous appointment of 12 months for long-term acting assignments but expects that assignments extending to the maximum duration would be rare. Short term acting assignments should have a maximum continuous period of three months.

The Committee advocates that the relevant provisions of the Audit Act be amended to reflect the above circumstances.

Recommendation 7: **On provisions relating to an Acting Auditor-General, the *Audit Act 1994* be amended to:**

(a) **provide that the process for the appointment of the Auditor-General, as set out in Section 94A of the *Constitution Act 1975* applies also to long term appointments as Acting Auditor General. The amendment should specify a maximum continuous period of 12 months for such appointments, with no renewal provision;**

(b) **provide that the person appointed by the Auditor-General to the position of Deputy Auditor-General or otherwise titled within the Victorian Auditor-General's Office, or acting in that position, acts as Auditor-General for all short-term absences of the Auditor-General from office, up to a maximum continuous period of three months; and**

(c) **explicitly assign the designation of independent officer of Parliament to both short-term and long-term acting appointees.**

3.2.4 No direction given to the Auditor-General from Parliament on operational matters

Nature of this topic

This topic centres on whether or not the Audit Act should be amended to explicitly preclude Parliament from directing the Auditor-General on operational matters, but enable Parliament to request the Auditor-General to conduct specific audits.

The Audit Act requires in section 7D(1) the Auditor-General to consult with the Committee on its audit priorities. The section states that '*In performing or exercising his or her functions or powers, the Auditor-General must confer with, and have regard to any audit priorities determined by, the Parliamentary Committee.*'

Section 7D(1) is complementary to the consultative powers assigned to the Committee under the Audit Act concerning the Auditor-General's budget and draft annual plan. The Committee's consultative powers relating to the Auditor-General's draft annual audit plan, set out in section 7A, are the main means used by it to convey, on behalf of Parliament, its views to the Auditor-General on particular audits.

Since the 1999 insertion of section 7D(1) into the Audit Act, the consultation with the Committee, as a conduit of Parliament, on audit priorities and the Auditor-General's budget and draft annual plan has operated well, with updated processes embodied in a protocol between the Committee and the Auditor-General.

Expert legal advice received by the Committee has confirmed its previous understanding that the obligations in section 7D(1) '*to confer with*' the Committee and '*have regard to*' audit priorities determined by it does not mean that the Auditor-General is compelled to adopt those priorities. The legal advice concluded as follows:[62]

> *In short, I confirm that, in my opinion, s 7D(1) of the Audit Act neither:*
>
> *(a) obliges the Auditor-General to adopt, or act in accordance with, audit priorities determined by the Parliamentary Committee; nor*
>
> *(b) empowers the Parliamentary Committee to compel the Auditor-General to do so.*
>
> *The Auditor-General will have complied with the obligation in s 7D(1) if he or she has consulted with the Parliamentary Committee and taken into account any audit priorities identified by the Parliamentary Committee.*

While the Auditor-General has the authority for determining the composition of the final audit plan, there is a requirement under section 7A that the plan include responses to suggestions received from the Committee in regard to audit priorities.

In its February 2006 *Report on a legislative framework for independent officers of Parliament*, the previous Committee recommended that the legislation governing the operations of all officers of Parliament explicitly state that Parliament and its parliamentary committees cannot direct these

62 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, p.8

officers on operational matters but can request them to undertake specific investigations.[63] The government's response to the Committee's report indicated that it supports this recommendation.

At an early stage of the Inquiry, the Auditor-General proposed to the Committee that the previous Committee's recommendation be implemented through insertion of a new section in the Audit Act.[64]

The Department of Treasury and Finance, in a paper to the Committee, cited this topic and asked whether there is '*a need to replicate a clause in the Audit Act 1994 that already clearly establishes the independence of the Auditor-General in the Constitution Act 1975?*'[65] The Department also asked whether, in view of this issue, '*is there a distinction between independence, consultation and accountability? How is this distinction maintained in the current Act and is there scope to enhance such clarification?*'[66]

Views expressed to the Committee in submissions

VAGO's submission to the Committee elaborated on the Auditor-General's support for insertion of a "no direction" provision within the Audit Act. The submission states:[67]

> *The Auditor-General proposes replicating the constitutional protections in section 94B(5) of the Constitution Act 1975 in the Audit Act 1994. This proposal arises due to the doubt created by the use of the phrase "subject to this act, the Audit Act 1994…" in section 94B(5) of the Constitution Act 1975, which is the key independence provision. Given this doubt, the Auditor-General believes that the independence of the office should be enshrined in the Audit Act 1994 by explicit reiteration that he cannot be directed in his audit function. This approach is also consistent with the Government's stated support for the PAEC's recommendation in its Report on a Legislative Framework for Independent Officers (2006).*

In support of his proposal, the Auditor-General also cites INTOSAI's (an international peak body of audit institutions) *Independence principle 3* and the *Minimum requirements for the independence of the Auditor-General* developed by the Australasian Council of Public Accounts Committees (ACPAC). These latter requirements include a reference that the Auditor-General should not be subject to any direction on how to carry out audits.[68]

The Auditor-General does not support legislative change that would expressly provide for the making of requests to the Auditor-General for audits. The Committee had raised this point as a discussion issue in its Discussion Paper, predominantly from the viewpoint of Parliament. VAGO's submission states:[69]

> *Anyone can make requests by correspondence, including Parliamentary Committees and MPs, which are dealt with as part of the development of the Annual Plan for each year. Furthermore, the Auditor-General is obliged to take into account the PAEC's audit*

63 Public Accounts and Estimates Committee, *Report on a legislative framework for independent officers of Parliament*, February 2006, pp.77–8

64 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

65 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, received 2 December 2009, p.5

66 ibid., p.6

67 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.6

68 *Minimum requirements for the independence of the Auditor-General*, as amended by ACPAC Conference, Sydney, February 1997, "Operational independence", Clause 2.3

69 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.6

> *priorities when exercising his functions under the Act (section 7D(1)). Accordingly, an amendment to this effect is unnecessary.*

In its submission, ACAG also expresses concern at the "subject to the Audit Act…" provision within the Constitution Act which '*could have the effect of bypassing constitutional safeguards*' and '*impact negatively on the A-G's independence.*' It considers the Audit Act should be amended to include '*an explicit provision stating that the A-G is not subject to direction from Parliament, or of any of its committees, but that the Parliament or its committees can request the undertaking of particular audits.*'[70]

Professor Kerry Jacobs, in his submission, expresses concurrence '*with the Committee's view* [identified in its Discussion Paper] *that the current constitutional independence of the Auditor-General is clear and well established. The Parliament should not (via the PAEC or any other aspect) direct the Auditor-General on operational matters*.'[71]

Professor Jacobs also cautions against limiting '*the power of Parliament or of any house or committee of Parliament to submit requests to the Auditor-General. However, some statement that these would normally come through the PAEC would be reasonable.*'[72]

The position in other jurisdictions

In submitting this proposal, the Auditor-General identified that revised audit legislation in Western Australia had addressed this issue in a manner consistent with the previous Committee's recommendation. The audit legislation in South Australia adopts a similar approach.

During its visit to Western Australia, the Committee identified that the relevant sections of that jurisdiction's audit legislation, the *Auditor General Act 2006*, are sections 7, 8 and 20.[73]

Section 7 of the Western Australian Act provides statutory protection of the Auditor-General's independence in a manner similar, but not totally identical, to Victoria's Constitution Act. It uses the words *…the Auditor-General is not subject to direction from anyone…* without any qualifying proviso. Section 8 requires the Western Australian Auditor-General to have regard to the audit priorities of Parliament as determined by either House of Parliament, the Public Accounts Committee or the Estimates and Financial Operations Committee. Section 20 states that the Auditor-General may carry out any audit that the Western Australian Public Accounts Committee or the Estimates and Financial Operations Committee request the Auditor-General to carry out.

Other Australasian jurisdictions have adopted varying approaches to the "no direction" issue. The Commonwealth and Tasmanian audit statutes have a similar ("subject to") proviso to the assignment of complete discretion to the Auditor-General to that included in Victoria's Constitution Act. The audit legislation in some other jurisdictions does not include a "subject to" proviso, however, in several cases, the no direction provision is offset by other provisions requiring the Auditor-General to undertake audits requested by the Parliament and/or the Executive.

While the audit legislation in Western Australia and South Australia provides that the Auditor-General is not subject to direction from anyone, no Australasian audit legislation explicitly precludes the Parliament or any of its committees from directing the Auditor-General on operational matters.

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70 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.19

71 Prof. K. Jacobs, Canberra, submission to the Committee, received 12 March 2010, p.2

72 ibid.

73 *Auditor General Act 2006* (WA)

A summary of the audit approach to this topic across jurisdictions is provided in Appendix 5.

Advice received from constitutional legal expert

As part of its consideration of this topic, the Committee sought expert legal advice on whether Parliament's constitutional status would be undermined if it was restricted in the Audit Act from directing its appointed auditor on operational matters. The following advice was received by the Committee:[74]

> *In my view, the inclusion in the Audit Act of an express provision restricting the Parliament from directing the Auditor-General on operational matters would not, in any legal sense, diminish or undermine the constitutional status of the Parliament. The ambit of the Auditor-General's powers from time to time is a matter for the legislature.*
>
> *It is a matter for political debate whether such a restriction would, in any relevant sense, diminish or undermine any public perception as to the status of the Parliament. It may be said that such a restriction would be consistent with the constitutional objective manifested in s 94B of the Constitution Act of safeguarding the independence of the Auditor-General.*

Position reached by the Committee

As pointed out in the introductory Chapters of this report, the constitutional protection of the Auditor-General's independence cannot be readily altered by elected governments. It is a unique feature of Victoria's public accountability framework. Because of this protection, the Committee considers it is arguable that there is no need for any explicit equivalent provisions in the Audit Act, bearing in mind the Constitution Act takes precedence over other acts.

The Committee notes the view expressed to it during the Inquiry on the potential for the constitutional safeguards to be bypassed through possible future amendments to the Audit Act that are caught in the *'Subject to … the Audit Act 1994 and other laws of the State'* proviso in section 94B(6) of the Constitution Act That proviso qualifies the constitutional assignment of complete discretion to the Auditor-General in the conduct of audit functions.

The only two references in the Audit Act that can be linked to the 'subject to' element of section 94B(6) are, as mentioned earlier:

- section 7A requiring consultation by the Auditor-General with, but not direction from, the Committee on each year's draft audit plan; and
- section 7D(1) which respects the Auditor-General's independence but allows the Committee to convey its audit priorities to the Auditor-General for consideration.

The Committee does not regard either of these positions as detracting from the independence of the Auditor-General as enshrined in the Constitution.

The Committee is aware of the need to balance the independent status of the Auditor-General as an officer of Parliament with the role of the Parliament. It believes that the current arrangements should stand. It also notes that under current arrangements suggestions for audit can be made to the Auditor-General but that ultimately the Auditor-General frames the Audit Plan. The Committee

74 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, pp.8–9

supports the continuation of this arrangement. However, one member of the Committee would prefer a further stating of the independence of the Auditor-General in the Audit Act.

Recommendation 8: **Given that the independence of the Auditor-General is enshrined within the Constitution Act and the priority of the Constitution Act over all other Acts, no further amendments to the *Audit Act 1994* be made on this topic.**

3.2.5 Adequacy of provisions relating to performance audits of Victoria's officers of Parliament

Nature of this topic as addressed in the Committee's Discussion Paper

The Victorian Parliament, through legislation, has to date established four independent officers of the Parliament. The four independent officers of the Parliament and the legislative source of their designation are:

- the Auditor-General — section 94B of the *Constitution Act 1975;*
- the Ombudsman — section 94E of the *Constitution Act 1975;*
- the Electoral Commissioner — section 94F of the *Constitution Act 1975; and*
- the Director, Police Integrity — section 9 of the *Police Integrity Act 2008.*

The Auditor-General was Victoria's first designated independent officer of Parliament. The Ombudsman and Electoral Commissioner followed a few years later and the Director, Police Integrity, is a relatively recent designation.

The previous Committee, in its 2006 *Report on a legislative framework for independent officers of Parliament*, examined the enabling legislation of the Ombudsman and the Electoral Commissioner. The Director, Police Integrity was designated as an independent officer of Parliament around two years after the previous Committee's report.

Several recommendations of the previous Committee addressed the accountability of the Ombudsman and the Electoral Commissioner. In its Recommendation 7, the previous Committee advocated that:[75]

- the Public Accounts and Estimates Committee, or another designated Committee, be given the principal responsibility for ensuring the independence and accountability of the Ombudsman and his/her office; and
- the Electoral Matters Committee be given the principal responsibility for ensuring the independence and accountability of the Electoral Commissioner and his/her office.

The previous Committee also recommended in its Recommendation 9 that the enabling legislation of both the Ombudsman and the Electoral Commissioner be amended to provide for an independent performance audit every four years with the auditor appointed by Parliament on the recommendation of the appropriate parliamentary committee. The Government indicated in its response it would give this matter further consideration.

75 Public Accounts and Estimates Committee, *Report on a legislative framework for independent officers of Parliament*, February 2006, pp.75–7

The Committee's February 2010 Discussion Paper pointed out that the Auditor-General, as Parliament's appointed auditor, has legislative authority under the Audit Act to conduct annual financial audits and periodic performance audits of the operations of the Ombudsman, the Electoral Commissioner and the Director, Police Integrity. This legislative authority is derived from the definition of an authority under section 3 of the Audit Act which encompasses the bodies established as departments or statutory authorities through which the independent officers discharge their responsibilities.

Given that the focus of the Committee's Inquiry is on the provisions of the Audit Act, the Discussion Paper put forward for debate one possible option for addressing within the Act some of the issues raised in 2006 by the previous Committee. This option took the form of potential amendments to the Audit Act which provide for the creation of a designated frequency for performance audits by the Auditor-General of the other officers of Parliament. The Auditor-General could be required to have regard to, but not be compelled to adhere to, this benchmark in the compilation of annual audit plans under section 7A of the Audit Act.

The Discussion Paper identified that the setting of a designated performance audit frequency for such audits could be justified on the ground that Parliament is entitled to reasonably frequent independent audit assessments from its appointed auditor of the extent to which operations of those three officers of Parliament have been managed in an economical, efficient and effective manner. Such an accountability arrangement would be consistent with the officers' close relationship with the Parliament.

Relevant recommendations of the government's review of Victoria's integrity and anti-corruption system

In identifying this topic as a discussion point for its Inquiry, the Committee recognised that the Government's consideration of the above recommendations included in the previous Committee's 2006 report could ultimately lead to changes to the enabling legislation of the state's independent officers of Parliament other than the Auditor-General.

The Committee's Discussion Paper also pointed out that, following establishment of the government's review of Victoria's integrity and anti-corruption system announced by the Premier on 23 November 2009, which encompasses the Auditor-General, the results of the review were now likely to be the prime basis for the government's consideration of the enabling legislation of each of the investigative officers subject to the review and of any future legislative action in this area.

On 2 June 2010, the Premier released the results of the integrity and anti-corruption review. The majority of the review's findings and recommendations relate to legislation other than the Audit Act.

On issues which are relevant to the previous Committee's recommendations pertaining to Parliamentary oversight and strengthening of the accountability regimes of Victoria's officers of Parliament, other than the Auditor-General, the reform model proposed by the review encompasses oversight by a new parliamentary committee '*which would fulfil a similar role to that performed by PAEC in overseeing the effective functioning of the Auditor-General*' including '*three yearly performance audits.*'[76] The government has stated that it will adopt the review's proposed model.

76 State Services Authority, *Review of Victoria's Integrity and Anti-corruption System*, 31 May 2010, p.xvii

No action proposed by the Committee on this topic

As the above components of the model proposed by the government's review of the integrity and anti-corruption system do not impact on the provisions of the Audit Act, the Committee does not propose any further action arising from the points outlined on this topic in its Discussion Paper.

Some further findings of the government's review which are aimed at strengthening cooperation and coordination across the integrity system, encompassing the Auditor-General, do have implications in terms of the Audit Act. These findings are addressed by the Committee in Chapter 6 of this report under the heading *6.1.6 Disclosure of information to external parties and power to conduct joint audits and/or investigations*.

3.2.6 Parliamentary involvement in the determination of the Auditor-General's annual budget

Nature of this topic

In Victoria, the Executive presents two appropriation Bills to Parliament. One Bill relates to the organisational units of Parliament and the other addresses the budget estimates of government departments. The Auditor-General's annual budget forms part of Parliament's annual Appropriation Act.[77]

Following parliamentary debate, the Legislative Assembly (the Lower House), votes on the two Appropriation Bills. The Upper House, the Legislative Council (the Upper House), cannot change the position reached by the Legislative Assembly.

Section 7D(2) of the Audit Act establishes a consultative role for the Committee in the determination of the Auditor-General's annual budget. The section reads as follows:

> *The Auditor-General's budget for each financial year is to be determined in consultation with the Parliamentary Committee concurrently with the annual plan under section 7A.*

The assignment of this consultative function to the Committee represents Parliament's safeguard against the risk of an elected government restricting the audit functions of the Auditor-General through unreasonable budget reductions. The safeguard does not serve to facilitate budgetary allocations to the Auditor-General which are out of line with the budgetary principles applying to the rest of the public sector. Rather, it exists to ensure that the resources available to the Auditor-General each year are sufficient to enable discharge of the responsibilities assigned to the position by Parliament in the Audit Act.

The Committee's role is strictly consultative. The role enables its views on the Auditor-General's budget for the ensuing year to be conveyed, whenever deemed necessary, to the Executive, having regard to the contents of the Auditor-General's draft audit plan for that year and the results of the Committee's prior consultation on that plan. The Committee has on occasion made explicit its views on prepared budgets to the executive. Final determination of the quantum of the budget to be presented to Parliament in Parliament's Appropriation Bill remains the prerogative of the government.

The previous Committee, in its 2006 *Report on a legislative framework for independent officers of Parliament*, discussed this subject mainly in the context of the lack of any parliamentary involvement in the budget process governing the Ombudsman and the Electoral Commissioner. The previous committee advocated that the budgetary arrangements for these two positions should be brought in line

77 See, for example, *Appropriation (Parliament 2009/2010) Act 2009* (Vic), Schedule 1

with those applying to the Auditor-General, with an appropriate parliamentary committee assuming a statutory consultative role. It recommended such action be taken and that each parliamentary committee table in Parliament a report on the forthcoming budget, with a copy forwarded to the Treasurer.[78] This latter element of the recommendation involved extension of the Committee's current consultative function relating to the Auditor-General.

The Government's response to the previous Committee's report indicated it did not support the above recommendation. The Government advised that, '*As the report acknowledges, there has been no evidence of concern, and ultimately, the Government remains responsible for the expenditure of taxpayers' funds.*'[79]

In correspondence received from the Auditor-General in the lead up to publication of its Discussion Paper, the Auditor-General described the current legislative position on his budget as '*... a significant weakness and gives a means for the Executive to exercise control over the Auditor-General's program.*'[80]

The Auditor-General also stated:[81]

> *As the Auditor-General is Parliament's auditor, Parliament rather than the Executive should determine the level of funding, free of Executive influence.*
>
> *The lack of financial autonomy is all the more stark when coupled with the ability for the Executive to influence staff terms, conditions and obligations through their status as public servants.*

The Auditor-General proposed to the Committee that the Audit Act be amended '*to provide for Parliament to decide funding levels, based on a submission from the Auditor-General to the Speaker.*'[82]

As pointed out in its Discussion Paper, the Committee is cognisant that the government has previously expressed a view on this subject, mainly in the context of officers of Parliament other than the Auditor-General, through its response to the previous Committee's 2006 recommendation.

It was after receipt of the Auditor-General's views and proposal for a more decisive role for Parliament on the position's annual budget, the Committee determined to include the issue as a discussion point for the purposes of its Inquiry. In reaching this decision, it also recognised that the component of the previous Committee's recommendation impacting on the Audit Act, the tabling of a report to Parliament on the budget, with a copy going to the Treasurer, would not be in conflict with the government's own view that it remains responsible for the expenditure of taxpayers' funds.

The Committee was also cognisant that under the current arrangements Parliament approves the appropriation for the Auditor-General as part of the Parliamentary Appropriation Bill and not as part of the general government Appropriation Bill.

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78 Public Accounts and Estimates Committee, *Report on a legislative framework for independent officers of Parliament*, February 2006, pp.81–2

79 Victorian Government, response to the Committee's *Report on a legislative framework for independent officers of Parliament*, tabled 10 August 2006, p.7

80 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

81 ibid.

82 ibid.

Views expressed to Committee in submissions and in evidence at public hearings

In its submission to the Committee, VAGO provided further elaboration of the Auditor-General's views on this subject. The submission stated:[83]

> *The Auditor-General has proposed that the Act be amended to provide for Parliament to determine the level of funding for the office, free from executive influence. INTOSAI Independence Principle 8 identifies funding as a key aspect of independence and the ACAG research shows Victoria's legislation is not sufficiently robust in this respect. Financial resourcing decisions are currently under the control of the Executive.*
>
> *As the Auditor-General is an independent officer of the Parliament, Parliament has an important role in overseeing the preparation and approval of his budget. In particular, Parliament should support the transparency of the budget process and be satisfied that the Auditor-General is provided with sufficient funding to deliver the established level of service expected by the Parliament and required to address the statutory mandate, operational standards and performance audit.*
>
> *Under section 7A of the Act, the Auditor-General is obliged to consult with the PAEC on Parliament's behalf on the office's Annual plan. Once Parliament has provided support for that plan, the necessary resources to commit to that plan should be provided by the Executive.*

VAGO's submission also reiterated the Auditor-General's view that the Audit Act '*should be amended to provide for Parliament to decide on funding levels based on a submission from the Auditor-General to the Speaker.*'[84]

At the Committee's hearing, it was pointed out to the Auditor-General that the Parliament itself does not have the privilege that he was requesting. The Auditor-General responded as follows:[85]

> *No, but in the Constitution Act and the Audit Act, in trying to enshrine and protect the independence of the Auditor-General, there was a statutory process prescribed that was followed and then it was overlaid with an executive intervention.*

ACAG's submission to the Committee acknowledges '*the strength of the current arrangements in Victoria in the consultative role played by the PAEC in determining the A-G's budget and the other current arrangement whereby the Parliament approves the appropriation for the Auditor-General as part of the Parliamentary Appropriation Bill.*' ACAG added that '*...Whilst these are sound safeguards, final budgetary decisions remain under the control of the Executive.*'[86]

Professor Kerry Jacobs also provided views on this subject. His submission recognises the features of the Victorian model and includes the following comments:[87]

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83 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.7

84 ibid.

85 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.4

86 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.26

87 Prof. K. Jacobs, Canberra, submission to the Committee, received 12 March 2010, p.2

> *This is a perennial and controversial issue. There is evidence from Australia and internationally the budget restriction is used as a political tool to restrict the activity of Auditors-General. There is potential for abuse where the budget is established and approved by the Executive. The Victorian model is better. Perhaps the best option is if the VAGO budget was reviewed and proposed by an independent body. It could then fall to the PAEC to accept or amend the proposed budget giving clear reasons for any amendment. This is the best way I can see to ensure the capacity necessary for an independent Auditor-General. An alternative is that the budget of the Auditor-General be based on some underlying factor – such as a set percentage of the total state expenditure.*

In evidence to the Committee, the Secretary, Department of Treasury and Finance explained the process pertaining to the Auditor-General's budget in the following terms:[88]

> *The current mechanism from the end point is that Parliament determines the budget of the auditor because it is a line item in the appropriation bill for Parliament and it goes through. Like most money bills, that is put forward by the executive, by the Treasurer, by the government of the day. The process by which it is dealt with is the same as how every other line item in an appropriation bill is dealt with in respect to Parliament's budget and the lines that are in that appropriation bill. Parliament puts a submission to government, the government considers the submission, makes a decision on what legislation it wishes to implement into Parliament and then Parliament discusses it. That is the mechanism.*
>
> *... At the moment there is a consultative process between the Auditor-General and the PAEC which feeds into that budgetary process…*

The position in other jurisdictions

Some other jurisdictions have established within their audit legislation similar, but not totally identical, provisions to Victoria for parliamentary participation in the determination of the Auditor-General's annual budget.

For example, the Commonwealth Parliament's Joint Committee of Public Accounts and Audit (JCPAA) has the power to consider the Auditor-General's budget and make recommendations to both Houses of Parliament and the responsible Minister.[89] Immediately before the federal budget is delivered, the Australian National Audit Office (ANAO) briefs the JCPAA on its confirmed appropriation. The Chair of the JCPAA then makes a statement to the Parliament, on budget day, prior to the tabling of the budget, on whether the JCPAA believes the ANAO has been given sufficient funding to carry out its functions. The speech to the House of Representatives is also an opportunity for the JCPAA to flag emerging areas of concern in terms of the Auditor-General's budget in forward years. A corresponding statement is made to the Senate by one of JCPAA's government Senators.[90]

During its visit to Western Australia, the Committee was advised that the audit legislation in that state requires the Treasurer to have regard to any recommendations of a nominated parliamentary committee concerning the Auditor-General's budget.[91] Similarly, the Queensland legislation requires

88 Mr G. Hehir, Secretary, Department of Treasury and Finance, transcript of evidence, 7 April 2010, pp.8–9

89 *Auditor-General Act 1997* (Cwlth), s. 53; *Public Accounts and Audit Committee Act 1951* (Cwlth), s. 8

90 Public Accounts and Estimates Committee, *Report on the 2006-07 Financial and Performance Outcomes,* May 2008, p.726

91 *Auditor General Act 2006* (WA), s. 44

the Treasurer to consult with the parliamentary committee responsibility for overseeing public accountability in developing the Auditor-General's budget.[92]

In the Australian Capital Territory, the Public Accounts Committee can advise the Treasurer of the appropriation that the Committee considers should be made for the operations of the Auditor-General.[93] In evidence to the Territory's Public Accounts Committee, the Auditor-General has expressed concern on whether, in practice, the legislation is working in accordance with its intended purpose. The Auditor-General made the following comments which are pertinent to the issues under consideration by the Committee with this topic:[94]

> *The Auditor-General cannot be absolutely independent if the government of the day has the ability to control the resources available to the Auditor-General. Although an Auditor-General may have a sufficiently broad mandate, and discretion regarding the manner in which she or he discharges the legislated functions, the Auditor-General's capacity to properly and fully discharge those functions is limited unless there is a degree of certainty that the resources needed to do so are available.*

The UK and New Zealand jurisdictions go further than the position generally applying in Australia. The legislature in those jurisdictions makes the final decision on the Auditor-General's budget after receiving and considering input from government. In these instances, the consultative participation is reversed from Parliament to government.[95]

The Committee discussed this issue with the Auditor-General and Treasury officials during its visit to New Zealand and was advised that, in that jurisdiction, a parliamentary committee, the Officers of Parliament Committee, presents the Auditor-General's annual budget to Parliament for its consideration and approval. ACAG expressed specific support for the New Zealand model in its submission to the Committee's Inquiry.

A summary of the legislative situation across jurisdictions on this topic is presented in Appendix 5.

Advice received from constitutional legal expert

During the Inquiry, the Committee sought expert legal advice on whether there were any constitutional issues arising from the current arrangements under which the Executive, the subject of audit by the Auditor-General on behalf of Parliament, has the decisive role in determining the Auditor-General's annual budget. The Committee received the following advice:[96]

> *It is the Parliament, and not the Executive, which has the power under s 89 of the Constitution Act to appropriate funds from the Consolidated Revenue, by means of a law made under s 92 appropriating such funds to such specific purposes as may be provided in such law.*
>
> *I assume that the current arrangements by which the Executive determines the Auditor-General's annual budget:*

92 *Auditor-General Act 2009* (Qld), s. 21

93 *Auditor-General Act 1996* (ACT), s. 22

94 Australian Capital Territory Auditor-General's Office, *Inquiry into the Auditor-General Act 1996*, submission to the Standing Committee on Public Accounts, p.7

95 *National Audit Act 1983* (UK) s. 4; see also the website of the Office of the Auditor-General, New Zealand, <www.oag.govt.nz>

96 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, p.9

> *(a) does not trespass upon and remains subject to, the ultimate monetary control of the Parliament through its exercise of the power of appropriation from Consolidated Revenue; and*
>
> *(b) does not involve or permit any reduction in the Auditor-General's remuneration, within the meaning of s 94A(7) of the Constitution Act.*
>
> *If that is so, then in my opinion it is unlikely that there would be any constitutional impediment to the continuation of the current arrangements with respect to the Auditor-General's annual budget.*
>
> *Further, a measure of parliamentary oversight is provided by the requirement in s 7D(2) of the Audit Act that the Auditor-General's budget for each financial year be determined "in consultation with" the PAEC.*

Position reached by the Committee

As identified in the preceding commentary on this topic, Victoria's legislative model pertaining to the Auditor-General's annual budget has some strong features designed, from Parliament's perspective, to safeguard the Auditor-General's resourcing and operational capacity. These features relate to the Committee's consultative role in determining the annual audit budget and Parliament's scrutiny and approval of each year's Appropriation Bill covering its operations, including the Auditor-General. As mentioned above, the legal advice received by the Committee from a constitutional expert refers to these features and indicates that Parliament's role in approving the Auditor-General's budget through its exercise of the power of appropriation is consistent with the requirements of the Constitution Act.

Notwithstanding these strong aspects, determination of the quantum of the Auditor-General's annual budget included in Parliament's annual Appropriation Bill remains primarily the prerogative of the government of the day. The Committee considers that this is not the ideal arrangement as the government is the principal subject of surveillance by the Auditor-General. The audited party, should not, as a matter of principle, have a significant role in decisions which could influence the boundaries of the audit program of Parliament's auditor.

In making these comments, the Committee recognises that Parliament itself does not have the privilege sought by the Auditor-General in relation to its own budget and there are no constitutional impediments with the current arrangements. In addition, the arrangements appear to the Committee to be working smoothly and it is not aware of any past excessive or unwarranted reductions in financial resources allocated to the Auditor-General.

It is also important to emphasise that an Auditor-General is not entitled at any time to special treatment in the allocation of budgetary resources, relative to the rest of the public sector and other independent officers of Parliament, without clear justification such as when audit responsibilities are expanded through legislative action or structural decisions of government.

Nevertheless, while the Constitution Act is aimed at protecting on a permanent basis the independence of the Auditor-General, the reality is there is scope for that independence to be diluted if an elected government in Victoria at some point in time ever felt inclined to place unwarranted constraints on the quantum of the Auditor-General's budget in one or successive years.

The previous Committee's 2006 recommendation on this subject, while made in the context of officers of Parliament other than the Auditor-General, offered the opportunity to further strengthen Parliament's involvement in the budget process without curtailing the government's role.

The Committee considers, however, after assessing all of the issues that have come to its attention on this subject during the Inquiry that the current process in Victoria should continue but be strengthened by adopting the federal practice of PAEC formally reporting to Parliament on the proposed Auditor-General's budget prior to the bringing down of the budget.

The process would include prior consideration by the Committee of input from the Treasurer on behalf of the Executive and from the Auditor-General.

Recommendation 9: **Section 7D(2) of the *Audit Act 1994* be amended to provide that the Auditor-General's budget for each financial year is to be determined by the Parliament after consideration of a statement on the budget presented by the Chair of the Public Accounts and Estimates Committee.**

Recommendation 10: **The amendment to section 7D(2) of the *Audit Act 1994* include a requirement for the Committee to consider the views of the Treasurer and the Auditor-General, prior to informing the Parliament on the Auditor-General's budget.**

3.2.7 Consultation by the Auditor-General with the Committee on performance audit specifications

Nature of this topic

Section 15(2) of the Audit Act requires the Auditor-General to consult with the Committee in the preparation of specifications for individual performance audits. Such specifications set out the objectives of a planned performance audit and the key issues earmarked for attention during the course of the audit. This consultative requirement was incorporated into the Audit Act in 2000 as part of a suite of amendments to strengthen the independence of the Auditor-General and establish a transparent accountability framework for the Auditor-General.

In correspondence to the Committee before release of its Discussion Paper, the Auditor-General proposed that the requirement, set out in section 15(2) of the Audit Act, to consult with the Committee on specifications for individual performance audits be removed from the Act.[97]

In its Discussion Paper, the Committee outlined its initial view on this issue. That view, which was subject to consideration of matters raised by interested parties during the Inquiry, was that its involvement, in a consultative capacity, in the development by the Auditor-General of performance audit specifications is a valuable means of enabling Parliament to have input into the scope of individual performance audits. The Committee added that such input is provided without interfering with the Auditor-General's right to determine the final form and substance of audit specifications. Indeed it is the Committee's experience that this consultation has proved beneficial on many occasions in assisting improved terms of reference for audits.

97 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

Views expressed to the Committee in submissions and in evidence at public hearing

The earlier correspondence received from the Auditor-General did not outline the rationale for the advocated removal of section 15(2) from the Audit Act. VAGO's submission to the Committee provided the necessary elaboration and included the following comments in support of the proposal:[98]

> *Consultation on individual specifications occurs through a subcommittee of PAEC. As the full committee is involved in the consultations on the annual plan, the subcommittee has already been through the annual plan process. The PAEC already has a significant workload and necessarily specifications consultation routinely takes place when audits are relatively well advanced. Consequently, such consultations may not be the best use of the Committee's time and it is questionable whether involvement in this operational phase is appropriate.*
>
> *This particular provision in the Act is illustrative of the broader issue of PAEC's role vis a vis the office. It suggests an internal audit/audit committee relationship, rather than an independent auditor/oversight relationship.*
>
> *Whilst it is appropriate for the PAEC to be consulted on the Auditor-General's activities in the broad through the Annual Plan, once the planning process concludes, further involvement serves to may* [sic] *impair the Auditor-General's independence and compromises the Committee's capacity to appropriately oversee the independent audit function. The Annual Plan consultation extends to scoping statements for upcoming audits, and this level of detail should be sufficient for accountability and oversight purposes.*

VAGO's submission also contained some high-level comments on the relationship between the Auditor-General and the Committee. These comments concluded that the Committee's Inquiry '*provides the opportunity to re-evaluate the relationship between the PAEC and the Auditor-General to foster greater complementarity and mutual respect for each institution's respective roles.*'[99]

At the Committee's public hearing, the Auditor-General was asked where he saw contemporary philosophy in terms of the role of the Auditor-General, bearing in mind VAGO's submission placed a strong emphasis on independence and on potential impediments to that independence such as the consultative functions of the Committee canvassed in this topic. The views expressed by the Auditor-General were of particular interest to the Committee and included:[100]

> *... the auditor has traditionally had a very wide remit to review the operations of the public sector, as the eyes and ears of Parliament, one might say, and to report independently to the Parliament. The only sanction the auditor has is to put the spotlight of publicity on a report by making it public.*
>
> *That is an important tenet of our system of democracy that operates with a reasonable level of transparency and a check and balance so that all stakeholders in the system can rely on the information they are being provided. In a sense that is reflected partially in terms of stewardship by this universal audit of financial reports. In terms of performance, that*

98 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.8

99 ibid., p.4

100 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.3

> *is why the second wave of reform of the audit acts codified the approach to performance auditing. When you look back over history, public sector auditors both in Australia and in the Westminster system generally have always had that wider remit of varying things — of probity, avoidance of waste and extravagance, and the proper use of public funds. In that sense, I do not see it as changing, but it is very important for that function to be able to be discharged reliably, for the auditor to operate reasonably as a free agent. I think that is where we come back to the balance in the oversight.*
>
> *As I have said in the submission, I see a very clear role for consultation with the primary client, the Parliament, in relation to the annual audit plan, because that is strategic planning of the audit operations. To me that is the appropriate time for the Parliament to make known views or thoughts and considerations, and conversely, apart from the ongoing oversight of the office by committees such as PAEC, the periodic performance audit of the office is a legitimate, independent report back to the Parliament of how it is operating. Some of the areas we might come back to and discuss is the extent to how close we get to the operational side of the office.*

Later in the hearing, the Auditor-General was asked what value he saw in the consultations with the Committee on performance audit specifications. As part of his response, the Auditor-General indicated:[101]

> *We take on board the comments but I do not know that they change the fundamental direction of audits. I suppose just my judgement is that the real value is the annual strategic, when we are talking about directions and plans and priorities. To me the spec is too transactional for an oversight body and the nature of parliamentarians' business and requirements versus the nature of an operational audit office.*

ACAG's submission supports the proposal put forward by the Auditor-General. In evidence to the Committee, ACAG's representative expanded on this support:[102]

> *The annual plans that the Auditor-General put together and I have read are pretty detailed. They go into a fair amount of detail on some of the scoping of the projects that he is planning to do. I would have thought that is all it needs to be.*
>
> *If the scope says we are going to look at an outsourced contract of some sort and limit our boundaries to the services provided under the contract, that should be enough, I would have thought. I use as an example, perhaps, what is happening in the commonwealth where the commonwealth Auditor-General in recent days has been asked to look at things like the insulation program, the broadband rollout and so on. They are major public sector initiatives.*
>
> *I think it is a bit tough to ask the Auditor-General to suddenly respond to those and go asking his or her public accounts committee to respond in detail to the criteria or the planned approach and so on. It just seems to me that it was perhaps going too far and it was getting involved in operational matters.*

101 ibid., p.27

102 Mr M. Blake, Tasmanian Auditor-General, Australasian Council of Auditors-General, transcript of evidence, 7 April 2010, p.7

In evidence to the Committee, the Secretary, Department of Treasury and Finance also presented comment on the relationship between the Committee and the Auditor-General in the context of the Committee's consultative powers: The Secretary stated:[103]

> *... if you want to get the best out of an Auditor-General and its independence, I do not think a model where Parliament, through the PAEC or some other mechanism, actually prescribed exactly what reviews the Auditor-General should do and where they should do things would meet what have traditionally been the desires of Parliament in setting up an audit office.*
>
> *Having a free rein for largely determining what business they operate under I think is quite important, but they need to be accountable for that back to Parliament to ensure that you are getting the job done that you want and that there is not something occurring which diverts their attention away from what Parliament thinks is important. There is a balance that has to be played out there. That balance at the moment operates through the consultative process as much as anything else between the Auditor-General and the PAEC. It does not look broken to me.*

No equivalent situation in other jurisdictions

The Committee's research on this topic shows that the consultative role on performance audit specifications assigned to the Committee under section 15(2) of the Audit Act is unique to Victoria.

Position reached by the Committee

The Committee signalled in its Discussion Paper that it had formed an initial view on this subject. However, it also indicated it wished to explore the issues further at the submissions and hearings stages of its Inquiry before reaching a final position. The above reasonably lengthy references to the opinions of interested parties expressed during those stages reflect the Committee's desire that adequate recognition and visibility is given to the expressed views. This approach is important as the subject involves a particular statutory function of the Committee and external perspectives on that function need to be respected and considered.

The Committee acknowledges the points made by various parties in submissions and evidence concerning the assessed strategic value of the Committee's consultative input in relation to the Auditor-General's annual audit plan. Some parties have contrasted this value with the limited benefit seen to be accruing from the Committee's consultative input on individual performance audit specifications. The latter consultative role has been viewed in some quarters as unnecessarily encroaching on operational matters, aggravated by timing factors.

The Committee's assessment of the value of its consultations on performance audit specifications is different to that cited by some parties in submissions and evidence. It operates a four member subcommittee for the consultations and considerable time and effort are devoted to the task, drawing on informed briefings on the audit subject matter and each member's knowledge, concerns and experience of issues and developments pertinent to the planned scope of each performance audit. The Committee considers that the consultative process operates effectively

Furthermore, only a brief indicative outline of performance audits to be conducted over the ensuing year is included in the Auditor-General's annual audit plan. The more detailed terms of reference and the accompanying identification of key issues to be addressed become available at the specification stage which provides a sounder basis for the Committee's input.

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103 Mr G. Hehir, Secretary, Department of Treasury and Finance, transcript of evidence, 7 April 2010, p.3

Nevertheless, the Committee's thinking on this subject is guided more by the significance of the opportunity available to Parliament in section 15(2) of the Audit Act to make a contribution in the form of feedback and suggestions to the Auditor-General on the planned scope and approach for each performance audit. Its consultative function in this area is an important element of the comprehensive statutory relationship that exists in Victoria between the Parliament, via the Committee, and the Auditor-General. The breadth of this relationship is not matched elsewhere in Westminster jurisdictions researched by the Committee. The Auditor-General retains discretion and autonomy in considering the feedback on specifications for each audit.

The Committee considers that Parliament's right within this advanced framework to provide consultative feedback and suggestions, but not direction, to the Auditor-General on performance audit specifications overrides any concerns regarding the operational boundaries and administrative timing of its input. These concerns can be addressed as part of the ongoing and constructive dialogue on matters of mutual interest that underpins the relationship between the Committee and the Auditor-General. They are not sufficiently substantive to justify removal of the Committee's consultative functions on performance audit specifications from section 15(2) of the Audit Act.

The Committee has therefore concluded that legislative change to the Audit Act on this topic is not warranted. One member of the Committee queried the necessity of the Committee's involvement in the planning of individual performance audits.

Recommendation 11: **The current arrangements within the *Audit Act 1994* for this Committee to be consulted on the Auditor-General's annual audit plan and performance audit specifications be retained.**

3.2.8 Employment in the Victorian public sector of person vacating the office of Auditor-General

Nature of this topic

Section 94C of the *Constitution Act 1975* provides that the Auditor-General holds office for seven years and is eligible for reappointment. There are no provisions in the Constitution Act which restrict employment in the Victorian public sector when a person vacates the office of Auditor-General.

The previous Committee addressed this matter in its 2006 *Report on a legislative framework for independent officers of Parliament*. It recommended that no independent officer of Parliament be able to take a position within the Victorian public sector until after a period of at least two years from completion of their appointment. The previous Committee stated in its report that this arrangement would reinforce the independence of officers of Parliament.[104]

In its response to the above recommendation, the Government supported the proposed employment restriction but indicated that an independent officer should not be prevented from taking another independent office during the two-year period.[105]

At an early stage of the Inquiry, the Auditor-General proposed, in correspondence to the Committee, that the Audit Act be amended in line with the previous Committee's recommendation.[106]

104 Public Accounts and Estimates Committee, *Report on a legislative framework for independent officers of Parliament*, February 2006, p.73

105 Victorian Government, response to the Committee's *Report on a legislative framework for independent officers of Parliament*, tabled 10 August 2006, pp.4–5

106 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 28 August 2009

The Committee's Discussion Paper identified that, as all provisions relating to the Auditor-General's appointment and tenure of office are enshrined in the Constitution Act, any changes to that Act could not proceed without a referendum. The Department of Treasury and Finance had also identified this position in a paper submitted to the Committee.[107]

It was this factor that prompted the Committee to express in its Discussion Paper an initial view that the Audit Act may not be the appropriate repository for provisions on employment restrictions for a person vacating the office of Auditor-General. To address the matter in the Audit Act would be contrary to the unique enshrinement within Victoria's Constitution Act of all matters impacting on the Auditor-General's appointment and tenure of office.

The Committee cited at the time one possible way to address this issue without impinging on the constitutional position. This involved establishing a post-office employment restriction as a standard condition of the terms of appointment of an Auditor-General as part of the administrative action flowing from the appointment authority set out in section 94A(2) of the Constitution Act. That section provides for the appointment of the Auditor-General by the Governor in Council on the recommendation of the Committee.

Views expressed on topic in submissions

It was against the above background that the Committee opened this topic up for input from interested parties in submissions or in evidence at public hearings. Brief references to the subject were subsequently received in submissions from VAGO and Professor Kerry Jacobs.

VAGO's submission to the Committee identifies the Auditor-General's support for an amendment to the Audit Act in principle '*but notes this is already provided for in professional standards and that there may be technical challenges in implementation.*'[108] The submission also indicates that any restriction on post-office employment should exclude other independent executive and non-executive positions which partly picks up the point, as mentioned above, raised by the government in its response to the previous Committee's 2006 report.

Professor Jacobs, in his submission, opposes a blanket ban on a vacating Auditor-General on employment in Victoria because of the valuable skills and talents of Auditors-General. He suggests an approach such as '*The Auditor-General should not within 5 years of retirement take a position which represented a conflict of interest because of their knowledge and experience as an Auditor-General.*'[109]

Situation in other jurisdictions

The Committee's research on this subject indicates that the legislation in several Australasian jurisdictions, similar to section 94A(4) of Victoria's Constitution Act, precludes all or specified outside employment of the Auditor-General while holding office. However, there is no legislative coverage of employment restrictions applying to persons vacating the office of Auditor-General.

Position reached by Committee

The Australian accounting profession's code of ethics APES 110 imposes an employment restriction on retiring auditors. This restriction is set out in section 290.144 of that code which establishes a

107 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, received 2 December 2009, p.5

108 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.8

109 Prof. K. Jacobs, Canberra, submission to the Committee, received 12 March 2010, p.3

period of two years for a former audit partner in the private sector before joining a previously audited company.

The accounting profession's ethical pronouncement complements "cooling off" periods for retiring audit partners set out in the Corporations Act. A two-year cooling off period applies to retiring partners under section 324CI of the Corporations Act and a similar employment restriction applies to a retiring professional member of an audit company under section 324CJ of that Act. These statutory actions aim to mitigate threats to audit independence arising from former audit partners joining previously audited entities soon after vacating their audit positions.

For the purpose of section 324CJ of the Corporations Act, the retiring person is defined in section 324AF as the "lead auditor" or the "review auditor". The definition in both cases relates respectively to the registered company auditor responsible for the conduct of the audit and the person responsible for reviewing the audit. These two roles would be conducted by audit partners in the private sector. The equivalent positions in the public sector would be the Auditor-General and, potentially, members of VAGO's executive team.

The Committee has formed the view that a post-employment restriction of two years for a person vacating the office of Auditor-General would be appropriate. This restriction should preclude employment within the public sector other than as another independent officer of Parliament. Such exclusion would enable the skills and talents of Auditors-General to be continually utilised, should circumstances arise, in the delivery of services on behalf of Parliament and would not lead to the potential conflicts of interest associated with previously audited government agencies.

The Committee has also affirmed its initial view identified in its Discussion Paper that the Constitution Act should be the sole source of authority for all matters impacting on the appointment and tenure of the Auditor-General. Adherence to this key principle means there is no basis for an amendment to the Audit Act on the subject.

Instead, the Committee supports a post office employment restriction period of two years in the public sector, other than as another independent officer of Parliament, as a standard condition of the terms of employment of an Auditor General. This action would maintain the nexus with the Constitution Act as it would form part of the steps for future appointments of the Auditor-General taken by the Committee under the authority conferred on it under section 94A(2) of that Act.

The Committee has therefore concluded that an amendment to the Audit Act on this topic is not necessary.

Recommendation 12: **A post-employment restriction period of two years in the Victorian public sector, other than as an independent officer of Parliament, be a standard condition of employment for future appointments of the Auditor-General.**

3.2.9 Production of documents by the Auditor-General to Parliamentary Committees

Nature of this topic

Section 28 of the *Parliamentary Committees Act 2003* provides that a Joint Investigatory Committee has the power to call for persons, documents and other things. Such power is necessary to ensure that joint parliamentary committees such as the Public Accounts and Estimates Committee are able to fully perform their investigatory functions on behalf of Parliament.

Section 20A of the Audit Act precludes improper use by the Auditor-General, employees of VAGO and audit contractors engaged by VAGO of information acquired when undertaking functions under the Act. It also prohibits divulgence of such information except when carrying out those functions.

In early correspondence to the Committee, the Auditor-General expressed the view that, because the legislation for parliamentary committees does not refer to the secrecy obligations set out in section 20A, '*a Parliamentary Committee may be able to call for the Auditor-General's audit documents*'[110] The Auditor-General proposed to the Committee that a new provision be inserted in the Audit Act that: [111]

> *... clearly states that the Auditor-General is not obliged to produce documents to any Parliamentary Committee. Such a provision would enhance the Auditor-General's independence and frustrate attempts to use information which he might have for political purposes...*

In a paper to the Committee on suggested questions relating to its Inquiry prior to release of its Discussion Paper, the Department of Treasury and Finance raised the question on whether:[112]

> *... the current provisions around the independence of the Auditor-General (including his interaction and relationship with parliamentary Committees such as the PAEC)* [are] *appropriate and sufficient, or is there a need to further increase independence? If so, how?*

The Department also stated that, as the parliamentary committee that has oversight responsibility for the Auditor-General, '*it is appropriate for the PAEC to consider the implications of such a proposal in terms of its own role and responsibility to Parliament and its relationship with the Auditor-General...*'[113] The Department further suggested the following issue could be considered:[114]

> *Should the doctrine of executive privilege (public interest immunity) that applies to Executive Government be extended to an independent officer of Parliament, such as the Auditor-General?*

The Committee's Discussion Paper included the following definition of public interest immunity as set out in the government's guidelines for appearing before Victorian parliamentary committees:[115]

> *Public interest immunity is a traditional legal doctrine which allows Government to prevent the disclosure of certain evidence in legal proceedings if it is in the public interest to keep that evidence undisclosed. The underlying basis for the doctrine is that Government at a high level cannot function without some degree of secrecy. Ministers and officials could not effectively discharge their responsibilities if all documents created to develop and implement policy were publicly available.*

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110 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 28 August 2009

111 ibid.

112 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, received 2 December 2009, p.3

113 ibid., p.6

114 ibid.

115 Premier's Circular No.2003/1, *Guidelines for Appearing Before State Parliamentary Committees*, October 2002, p.14

Initial view of the Committee outlined in its February 2010 Discussion Paper

The Committee's initial view on this topic outlined in its Discussion Paper was that it could impede the investigative activities of committees established by Parliament. The Committee also considered an amendment of this nature would be inconsistent with the special relationship of the Auditor-General with Parliament and, through Parliament, with the Committee as its representative body.

Under the Audit Act, the Committee has been assigned a range of functions including consultation on draft audit plans and arrangement of Parliament's periodic performance audit which reinforce the accountability of the Auditor-General to Parliament. From the Committee's perspective, such functions fit neatly into the exemption on release of information set out in section 20A relating to '*functions under this Act*'.

The exchange of information and documents between the Committee and the Auditor-General is particularly relevant to the Committee's periodic follow-up of the findings and recommendations of the Auditor-General in reports to Parliament. This follow-up process focuses on the adequacy of action taken by audited agencies on audit findings and recommendations and is a key means of reinforcing, on behalf of Parliament, the accountability of government agencies for the management of resources entrusted to their control.

The Committee does not see the operation of its relationship with the Auditor-General as constituting a risk to the Auditor-General's independence. Nor does it see the relationship in conflict with the Auditor-General's obligation to adhere to professional standards of confidentiality in relation to audit information, given Parliament's status as the Auditor-General's principal client.

The Committee also noted that parliamentary committees have the power to hold hearings '*in camera.*'[116]. By convention it is also incumbent on members of committees not to reveal the proceedings of committees prior to their reporting to Parliament. This would include making public any documents received in confidence by the Committee. Any breach by a committee member can be referred to the Privileges Committee.

The Committee identified in the Discussion Paper that one possible amendment to the Audit Act arising from consideration of the Auditor-General's proposal would be to explicitly state within section 20A that the restriction on disclosure of information by the Auditor-General beyond the carrying out of functions under the Act does not extend to information required by the Committee. Such action would specifically recognise the Committee's special overseeing roles in relation to the Auditor-General's statutory functions and to the wider areas of public sector performance and accountability.

The Committee signalled in the Discussion Paper that it intended to further consider issues relating to this topic, including the views of interested parties.

Views expressed on topic in submissions and in evidence at public hearings

VAGO's submission to the Committee provides further elaboration of the Auditor-General's support for an amendment to the Audit Act on this topic. In doing so, the submission addresses some of the points raised by the Committee in its Discussion Paper. The views of the Auditor-General set out in VAGO's submission are as follows:[117]

116 *Parliamentary Committees Act 2003* (Vic), s. 28(3)

117 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.9

The Auditor-General's view is that independence and respect for an independent officer of the Parliament role that reports publicly to the Parliament warrants complete protection from the divulging of documents relating to audit functions to any Committee.

Requiring the production of documents presents a real risk of politicising the office and impeding its operations in practice. In particular, as the Discussion Paper points out, the office is currently exempt from FOI [Freedom of Information] *requests for any audit material. Requiring production of documents to a Committee is directly contrary to this provision and would mean that any Committee could obtain Cabinet in Confidence or other sensitive documents they otherwise could not access. These documents could be used for partisan purposes and the exercise of such a power would undermine the fine balance which currently exists in relation to provision of information to the auditor notwithstanding explicit statutory authority.*

The Discussion Paper also states that sensitive documents could be viewed by a Parliamentary committee 'in camera", and that there is a convention that committee members do not divulge documents publicly. The Auditor-General notes however that this is an unenforceable convention, whereas an employee of the office who improperly divulged such documents would be subject to criminal penalty. This is an issue too central to the auditor's ability to reliably inform the Parliament to be put at risk of short term expediency or opportunism.

The Discussion Paper states that DTF [Department of Treasury and Finance] *have suggested the extension of Executive privilege to the Auditor-General as a means of protecting documents. This doctrine is however vague and would not be as effective as a blanket legislative provision. In addition, it is not clear who would determine the scope of executive privilege applying to a document. The Auditor-General should not be in a position where he would have to comment on the applicability of the privilege to executive documentation as this also carries a further risk of politicising the office.*

It should be remembered the Auditor-General already reports findings and conclusions publicly and is available to be examined and to provide advice to Committees of the Parliament as to where they might source information from the owner of that information.

In its submission to the Committee, ACAG stated:[118]

... Not surprisingly, there can be differing views on this matter, particularly noting that the issue is generally not addressed in legislation, and is handled in accordance with custom and practice followed in each jurisdiction. On balance, ACAG supports a provision that:

- *recognises that responding to requests from Parliamentary Committees for the provision of information and documentation is an integral aspect of performing an Auditor-General's functions: and*

- *in responding to requests from Parliamentary Committees for information and documents the A-G is able to take into account considerations of public interest.*

118 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.31

> *In proposing this position, ACAG notes that the concept of public interest is an accepted test that many Auditors-General are required by statute to take into consideration in determining whether to include information in a public report.*

ACAG's submission also drew attention to the importance of confidentiality provisions in audit acts and similar provisions within codes of conduct applied by the accounting profession. It indicated that *auditees must know that information provided to their auditor will be treated confidentially.*

Professor Kerry Jacobs, in his submission, strongly supports the Auditor-General's proposed legislative change. His focus is on audit working papers which he describes as representing:[119]

> *... the process of decision-making and reflection on the part of the Auditor-General and therefore are analogous to policy advice given to the minister or the working notes from a police investigation.*

Professor Jacobs asserts disclosure of working papers '*would constitute interference in the activities of the Auditor-General at a level which would be intolerable and could be open to political mischief of the highest order.*' Professor Jacobs also recognises, however, the Committee's oversight role and states '*it might be appropriate to request key documents or information to facilitate PAEC follow-up and oversight. This would place the onus on the Auditor-General to deliver these documents or explain why she/he did not wish to make them available.*'[120]

Situation in other jurisdictions

As pointed out by ACAG in its submission, there can be differing views on this subject and the issue is generally not addressed in audit legislation but handled in accordance with custom and practice followed in each jurisdiction.

The subject has been canvassed in the Inquiry into the *Auditor-General Act 1997* by the Commonwealth Parliament's JCPAA. In correspondence to the JCPAA, the Commonwealth Auditor-General has linked the issues involved with the subject to consideration of the public interest. The Auditor-General stated to the JCPAA that:[121]

> *... My overriding objective is to have arrangements in place that ensure that confidence in the audit process is maintained, while at the same time recognising the important relationship that the ANAO has with Parliamentary Committees generally and the specific role of the JCPAA in reviewing the ANAO's audit and review reports.*
>
> *... the ANAO suggests that an amendment to the Act that requires the Auditor-General to have regard to the public interest in providing information or documents to Parliamentary Committees would be appropriate. Such an amendment would not diminish the Auditor-General's accountability for the audit conclusions and opinions that are issued and are publicly available. Further, it is the ANAO's understanding that responding to requests for information and documents, where appropriate, is an integral part of performing an Auditor-General function. The Committee also has the avenue of seeking information and documents directly from public service agencies.*

119 Prof. K. Jacobs, Canberra, submission to the Committee, received 12 March 2010, p.3

120 ibid.

121 Australian National Audit Office, submission 3.9 to the Joint Committee of Public Accounts and Audit, 12 March 2010, Attachment A

These views are similar to those expressed to the Committee by ACAG.

Position reached by the Committee

The initial view formed by the Committee on this matter, as outlined in its Discussion Paper and reiterated above, was founded on an open and cooperative relationship between the Committee and the Auditor-General focused on serving Parliament's best interest. The Committee regarded a blanket removal of an obligation of the Auditor-General to furnish information to committees as not necessarily serving Parliament's best interest. Such blanket removal could impede the investigative activities of committees undertaken specifically on behalf of Parliament. It would be in direct conflict with the explicit investigative powers conferred by Parliament on its committees in the *Parliamentary Committees Act 2003*.

The Committee recognises the absolute importance of the confidentiality of audit working papers and documents to upholding the integrity of the audit functions of the Auditor-General. It does not envisage that a Parliamentary committee would, as a general rule, wish to breach the confidentiality principle by seeking specific working documents held by the Auditor-General. It does however see a fine balance between maintaining audit confidentiality and meeting the overseeing or investigative objectives of a committee and particularly this Committee which performs special overseeing and investigative functions directly related to the Auditor-General which have been assigned under legislation to it by Parliament. In other words, both parties have Parliament as their principal client and are responsible for ensuring all of their actions, whether undertaken separately or in unison with each other, are centred on best meeting the needs of Parliament.

As also mentioned in the Committee's initial thoughts on this subject, a robust exchange of information and documents between the Committee and the Auditor-General is particularly relevant to the Committee's periodic follow-up of the adequacy of action taken by audited agencies in response to the reported findings and recommendations of the Auditor-General. This follow-up process is a key means of reinforcing, on behalf of Parliament, the accountability of government agencies for the management of resources entrusted to their control.

For the above reasons, the Committee does not support a blanket removal of an Auditor-General's responsibility to provide information to parliamentary committees. As pointed out in submissions to it during the Inquiry, interactions between an Auditor-General and a committee such as this Committee are an integral part of an Auditor-General's work. The Committee believes that its past relationship with the Auditor-General has been founded on a firm desire of both parties to achieve optimum outcomes in terms of their mutual goals of improving public sector performance and reinforcing accountability in the public sector.

It is also for the above reasons the Committee sees that any consideration of serving the public interest in connection with this subject has to be taken as equating with serving the Parliament's interest. This goal should be paramount in any amendment likely to be made to the Audit Act.

While the Committee remains of the view that the operation of its relationship with the Auditor-General does not constitute a risk to the Auditor-General's independence or adherence to professional standards of confidentiality, it is prepared to support an amendment to the Audit Act which gives some protection to the Auditor-General but emphasises the responsibility of the Auditor-General in working with and assisting committees in their parliamentary functions. Importantly, the suggested amendment provides Parliament with an overarching authority and safeguard against any unjustified withholding of information requested by a committee or any inappropriate request for information by a committee.

The Committee has therefore concluded that an amendment to the Audit Act is warranted to:

- specifically emphasise the importance placed by Parliament on an effective relationship between parliamentary committees and the Auditor-General;
- provide that maintenance of an effective relationship places a responsibility on the Auditor-General to have regard to the interest of Parliament in furnishing information requested by committees; and
- establish a mechanism for Parliament, through, for example, its Privileges Committee or some other forum determined by it, to rule in the albeit rare circumstance that a request by a committee for information might be challenged by the Auditor-General.

The Committee views such an amendment as having direct application to its own activities, given its unique statutory responsibilities, with less direct application to most other committees of the Victorian Parliament.

While the optimum placement of such amendment in the Audit Act would be a matter for determination by the Chief Parliamentary Counsel, the Committee considers it could fit neatly within section 7 which deals with several consultative functions of the Committee. An alternative position would be within section 20A on improper use of information with the disclosure of information to committees categorised as forming part of official functions carried out under the Act.

Recommendation 13: The *Audit Act 1994* be amended to:

(a) explicitly emphasise the importance placed by Parliament on an effective relationship between parliamentary committees and the Auditor-General;

(b) require the Auditor-General to have regard to the interest of Parliament in furnishing information requested by committees; and

(c) provide for Parliament to decide through whatever mechanism it determines if a request by a committee for information is challenged by the Auditor-General.

3.2.10 Audit coverage of Ministers and/or Ministers' offices

Nature of this topic

In introducing this topic in its February 2010 Discussion Paper, the Committee identified that much has been written on the constitutional convention of Individual Ministerial Responsibility. The 1976 report of the Royal Commission on Australian Government Administration described the convention and the changes that had occurred up to that time in perceptions of what is required by the convention. The Committee considers that such changes in perception would have intensified in the period since 1976.

The 1976 Royal Commission stated:[122]

122 Royal Commission into Australian Government Administration*, Report*, 1976, pp.59–60

> *It is through ministers that the whole of the administration—departments, statutory bodies and agencies of one kind or another—is responsible to the Parliament and thus, ultimately, to the people. Ministerial responsibility to the Parliament is a matter of constitutional convention rather than law. It is not tied to any authoritative text, or amenable to judicial interpretation or resolution. Because of its conventional character, the principles and values on which it rests may undergo change, and their very status as conventions be placed in doubt. In recent times the vitality of some of the traditional conceptions of ministerial responsibility has been called into question, and there is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all of the faults and shortcomings of his public service subordinates, regardless of his own involvement, or to tender his resignation in every case where fault is found…*

Ministers' salaries and allowances are set under the *Parliamentary Salaries and Superannuation Act 1968* and are paid by the Department of Premier and Cabinet. The Department's 2009-10 annual report shows that aggregate expenditure on ministerial salaries and allowances amounted to $5.8 million in that year. The Department's financial transactions are audited by the Auditor-General.[123]

In addition, the delivery of programs and services relating to each ministerial portfolio falls within the management responsibility of relevant departments or public bodies and is subject to annual financial audits of those entities and any performance audits directed at those entities as determined from time to time by the Auditor-General.

There is therefore currently audit coverage of ministerial salaries and allowances as well of delivery of programs and services within each ministerial portfolio. However, the reporting of salaries and allowances is in aggregate and the Auditor-General's authority to conduct performance audits of programs and services within ministerial portfolios relates to departments and public bodies but not to ministerial offices.

The Committee's Discussion Paper disclosed that the Auditor-General had proposed to the Committee that, through legislative change, Ministers' offices should become subject to an annual financial audit by the Auditor-General.[124] The Department of Treasury and Finance also questioned whether it is appropriate for the powers of the Auditor-General to be extended to ministers and, if so, should such powers be restricted to financial audits or cover the full ambit of the Auditor-General's mandate.[125]

A further point raised by the Committee in its Discussion Paper related to the value or otherwise of including within the Audit Act a provision that involves the Auditor-General expressing an opinion to Parliament on whether a decision by a Minister not to provide information, such as on the ground of commercial confidentiality, to Parliament relating to the conduct or operation of an agency is reasonable and appropriate. The Committee had identified, during its visit to Western Australia, that a provision along these lines is set out in that state's audit legislation.[126]

It was against this background that the Committee considered the feasibility of legislative amendment in this area, cognisant of the constitutional doctrine of individual ministerial responsibility.

123 Department of Premier and Cabinet, *2009-10 Annual Report*, p.78

124 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

125 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, p.2

126 *Auditor General Act 2006* (WA), s. 24(2)(c)

Views expressed to the Committee in submissions and in evidence at public hearings

VAGO's submission to the Committee identified this issue as a matter on which '*the Auditor-General seeks clarity regarding the ability to audit the administration of Ministers' offices.*'[127] The remaining comments in the submission on the subject centred on the provision in the Western Australian legislation, as cited above, which requires the Auditor-General to issue an opinion on whether ministerial decisions not to provide particular information to Parliament are reasonable and appropriate. VAGO' submission does not support adoption of this approach in Victoria. It states:[128]

> *... The Auditor-General is concerned that the way the WA provision is drafted, it invites comment on what ostensibly may be a policy decision of a Minister. Furthermore, it risks impairing the Auditor-General's independence as opinions regarding specific decisions of Ministers can be seen as partisan.*

On the broader issue of audits of ministers' offices, the Auditor-General posed the question in evidence to the Committee '*where ministerial offices are spending public moneys, why should they not now be audited against compliance with policies, guidelines and requirements?*'[129]

ACAG, in its submission, supports the Auditor-General's view on both the audit of ministerial offices and non-adoption of the approach followed in Western Australia involving ministerial decisions on information not provided to Parliament. On these two points, the submission stated:[130]

> *... ACAG supports the A-G's view that, through legislative change, Ministers' offices should become subject to both the financial audit and performance audit functions of the A-G. However, these functions should be limited to the administrative functions of such offices and not policy considerations.*
>
> *ACAG does not support the need for such an opinion* [on a Minister's decision not to provide particular information to Parliament]. *In ACAG's view, involving the A-G in this manner could politicise the process potentially reducing his/her independence.*

In evidence to the Committee, the Secretary, Department of Treasury and Finance mentioned the sources of funding of ministers' offices in the context of the feasibility of audits of those offices and stated:[131]

> *I think that is actually an issue that Parliament needs to consider because ministers are, at the end of the day, members of Parliament and certainly part of the resources that go to ministers comes from the executive arm, but part of it comes from the parliamentary process. Again there is the question of the scope of the audit office and the extent to which they are about the auditing of the executive, or whether they are about the auditing of the Parliament. That is a question that comes up.*

127 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.13

128 ibid.

129 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.17

130 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, pp.34–5

131 Mr G. Hehir, Secretary, Department of Treasury and Finance, transcript of evidence, 7 April 2010, p.4

The Secretary added the following further comments in relation to the feasibility of performance audits of ministers' offices:[132]

> *I do not feel in a position to answer it one way or the other, because I really do think it is a matter — when you get into that sort of blurred line between what is Parliament and what is the executive, it is a very difficult question. To have the Auditor-General have a specific role in undertaking performance audits of Parliament or arms of it is a big question that goes to some of the fundamental structures of how our government's framework operates, and I am not certain how much you can cut off a minister's ministerial staff and say that you are going to treat that differently from the rest, given that the expectation would be that the staff of the minister operate completely under the direction of the minister, and the minister is a member of Parliament.*

These comments of the Secretary are relevant, in addition to this topic, to some of the issues the Committee has discussed in the earlier section 3.2.1 of this report dealing with audits of the administration of Parliament.

Professor Kerry Jacobs, in his submission, while recognising there is some merit in the proposal to audit ministerial offices, expressed strong caution given the '*potential for political embarrassment and open conflict between the Auditor-General and the Executive.*'[133]

Situation in other jurisdictions

The Queensland audit legislation has a provision relating to the audit of expenditure of ministerial offices. Under that provision, the Auditor-General is required to audit an annual consolidated report of such expenditure prepared by the government under Queensland's *Financial Accountability Act 2009*.[134] ACAG referred to this legislative requirement in its submission and added there is no specific requirement identified in relation to performance audits of ministerial offices.

The Committee is not aware of any other provisions in audit legislation across jurisdictions that specifically address the audit of ministerial offices.

Advice received from constitutional legal expert

The expert legal advice sought by the Committee on this topic covered two points, namely:

- any relevant contemporary developments relating to the constitutional convention of individual ministerial responsibility; and
- whether the constitutional status of ministers restrict or rule out any proposals for legislative provisions in the Audit Act governing audits of individual ministers and or their offices.

The advice received on these two issues is presented below:[135]

Individual ministerial responsibility

> *The content of the convention of individual ministerial responsibility for errors occurring in departments falling within a ministerial portfolio has varied over time. There is force*

132 ibid.

133 Prof. K. Jacobs, Canberra, submission to the Committee, received 12 March 2010, p.3

134 *Auditor-General Act 2009* (Qld), s. 41

135 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, pp.9–11

in the view, expressed by one commentator, that, as a matter of contemporary practice, a ministerial resignation is now only expected if the minister was implicated in the mistake, failed to remedy the situation or deliberately misled Parliament or the public. Further, these are matters of convention, any sanction for breach of which is likely to lie in the political rather than judicial sphere.

It seems to me doubtful that external audit by the Auditor-General of the performance of ministers and their offices, whether financial or performance, would cut across, in any legal sense, the individual responsibility of ministers to the Parliament.

It may well be thought that the contemporary decline in the role or significance of the convention of individual ministerial responsibility would enhance, rather than undermine, arguments for additional legislative control by means of external audit. In any event, that again is a matter for political debate. The convention of individual ministerial responsibility is unlikely to be relied upon by a court as defining any constitutional boundary for legislative activity in this field.

Impact of audit proposal on constitutional status of ministers

Ministers of the Crown must be, or within 3 months' of appointment become, members of the Legislative Assembly or the Legislative Council (Constitution Act, s 51). Save for reserve powers, no executive power may be exercised without receiving the advice of the government responsible to the legislature.

Thus, by a combination of constitutional provisions, principles and conventions, ministers are responsible to Parliament for the discharge of their responsibilities, that being an essential component of the system of responsible government which has existed in Victoria, and the other States, since well before federation. It is an aspect of responsible government, in Victoria as in the other States, that ministers are liable to the scrutiny of one or other House of a bicameral legislature in respect of the conduct of the executive branch of government.

There is no recognised restriction, arising from the constitutional status of ministers, upon the power of the Parliament to enact legislation regulating or providing for the independent examination of the conduct by ministers, or ministerial officers, of their public functions. On the contrary, the supervision and scrutiny by the legislature of the conduct of the executive branch of government is of the essence of the system of responsible government established by the Constitution Act.

In my view there is unlikely to be any constitutional or legal impediment to the Parliament amending the Audit Act to permit audits (financial or performance) of individual ministers or their offices.

Position reached by the Committee

As mentioned in an earlier paragraph, the payment of Ministers' salaries and allowances is managed by the Department of Premier and Cabinet. Verification of the completeness and accuracy of this expenditure forms part of the Auditor General's annual audit of that department's financial statements.

Other costs associated with the administration of ministerial offices form part of output expenditure reported by the various portfolio departments but are not separately categorised or reported as such. These costs are also subject to audit by the Auditor General as part of the annual financial audits of departments, but not separately identified in those statements.

All expenditure for ministerial offices is therefore currently subject to financial audit by the Auditor-General. However, given that the expenditure is either reported in aggregate or not separately disclosed, the Committee considers there are grounds to enhance the transparency and accountability of published information. This enhancement could be achieved through a requirement that departments report annually to Parliament on the costs of each ministerial office. The underlying source data for this reported information would have been audited by the Auditor General through the normal course of financial audits.

Enhancing the transparency and financial accountability of ministerial offices in this way would be consistent with relevant findings of the review of Victoria's integrity and anti-corruption system commissioned by the government. The review's report, released in June 2010, included support for the strengthening of accountability arrangements for publicly funded employees of Members of Parliament by bringing such arrangements within the ambit of the role of the review's proposed new position of Parliamentary Integrity Commissioner.

The report from the integrity and anti-corruption review states:[136]

> *The Parliamentary Integrity Commissioner's role to investigate breaches of standards should extend to publicly funded employees of members of parliament. In particular, contributors to the Review supported the extension of accountability arrangements to ministerial officers, noting that such officers are paid with public money and can exercise considerable authority. These officers perform functions as a direct extension of ministers and should be subject to investigations from the same integrity body with oversight of ministers. The Review proposes that the Parliamentary Integrity Commissioner has the power to investigate the conduct of publicly funded employees of members of parliament in accordance with the Ministerial Staff Code of Conduct and the Code of Ethics for Electorate Officers.*

The government has adopted the integrity model proposed in the review's report.

With regard to performance audits of ministerial offices, the delivery of programs and services relating to each ministerial portfolio falls within the management responsibility of relevant departments or public bodies. These programs and services are subject to performance audits directed at those entities as determined from time to time by the Auditor-General. The Committee therefore does not see a need for any additional provision in the Audit Act for performance audits specifically pertaining to ministerial offices.

Finally, the Committee supports the views expressed to it during the Inquiry that it is not appropriate to incorporate within the Audit Act a requirement for the Auditor-General to report to Parliament on whether portfolio decisions of ministers not to provide particular information to Parliament are appropriate and reasonable. A legislative provision of this nature would carry a clear risk of involving the Auditor-General in policy decisions of ministers and of impeding the Auditor-General's independence.

136 State Services Authority, *Review of Victoria's Integrity and Anti-corruption System*, 31 May 2010, p.xiv

Recommendation 14: **The reporting requirements of departments be amended to require annual reporting to Parliament of the costs of each ministerial office.**

3.2.11 Appropriation for the costs of Parliament's periodic performance audit of the Auditor-General

Nature of this topic

Section 19(4) of the Audit Act provides that the remuneration payable to the person appointed by Parliament, on the recommendation of the Committee, to conduct the periodic performance audit of the Auditor-General be paid from funds appropriated to the Parliament.

In early correspondence to the Committee, the Auditor-General indicated that an amendment to section 19(4) may be necessary based on Recommendation 11 in the previous Committee's 2006 *Report on a legislative framework for independent officers of Parliament*. The Auditor-General suggested that advice from the Chief Parliamentary Counsel is likely to be needed on the issue.[137]

The previous Committee's recommendation was linked to a corresponding recommendation (Recommendation 9) that the two other independent officers of Parliament at the time, the Ombudsman and the Electoral Commissioner, be subject to a periodic performance audit managed by Parliament, similar to the position with the Auditor-General. Recommendation 11 effectively meant that the costs of such audits should, as is the case with the Auditor-General under section 19(4) of the Audit Act, be met from money appropriated to the Parliament.[138]

As mentioned in the Committee's Discussion Paper, the Department of Treasury and Finance, in a paper to the Committee, asked whether it is '*necessary or appropriate for costs of such an audit to be met from a special/standing appropriation, and is this consistent with the principles of the budgetary appropriation framework in place*'.[139]

Position reached by the Committee

The view expressed by the Committee in its Discussion Paper on this point was that it does not see the need for a special/standing appropriation given the periodic nature of the performance audit. However, it does see the need for the audit costs to be reflected in Parliament's appropriation, as required by section 19(4), as the audit is a parliamentary project and should be similarly recorded for accounting and accountability purposes.

Subject to any assessment of this issue that may be ultimately reached by the Chief Parliamentary Counsel on instruction by government, the Committee's view is that no further legislative action is warranted as the matter is already adequately addressed in section 19(4) of the Audit Act.

3.2.12 Reporting of sensitive material

Nature of this topic

Section 12(3) of the Audit Act gives wide discretionary power to the Auditor-General to include in any report to Parliament information considered to be relevant to the subject matter of the report and

137 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

138 Public Accounts and Estimates Committee, *Report on a legislative framework for independent officers of Parliament*, February 2006, pp.78–9

139 Department of Treasury and Finance, *Review of the Audit Act 2004*, correspondence to the Committee, received 2 December 2009, p. 6

to be in the public interest. The Act does not authorise the Auditor-General to report to the Committee in lieu of Parliament when deemed appropriate, such as with audit findings on sensitive matters not considered suitable for public disclosure.

The Committee's Discussion Paper identified that the Auditor-General had proposed to the Committee that section 12(3) be amended '*to remove the public interest test to determine whether sensitive material should be reported in an audit report. Replace it with a discretion to report such matters in a separate report to PAEC.*'[140]

Views expressed to the Committee in submissions

As identified in the commentary under the following section 3.2.13, VAGO's submission to the Committee dealing with the topic addressed in that section suggested that the Committee may like to consider supplementing the existing reporting provisions of the Audit Act with '*an amendment to allow the provision of a separate report to the PAEC where information is too sensitive to be placed on the public record.*'[141]

VAGO's submission to the Committee also provided some additional information under the heading of this topic on the Auditor-General's proposed legislative change and stated:[142]

> *The Auditor-General has proposed removal of the public interest test in section 12(3) of the Act and replacing it with a power to report separately to the PAEC on sensitive issues which are judged as not appropriate to be reported publicly. This amendment would allow sensitive issues to be provided to PAEC where public dissemination might have adverse consequences.*
>
> *For example, identifying weaknesses in IT security in Executive agencies might not be made public as such information could attract attacks on those particular systems. Reporting on such matters to PAEC would provide assurance to Parliament without attracting adverse consequences to agencies subject to audit.*

In their submissions, ACAG and Professor Kerry Jacobs expressed support for the Auditor-General's proposed amendment. ACAG's submission also drew the Committee's attention to the approaches adopted on this subject in some other jurisdictions which are addressed under the next heading.

Situation in other jurisdictions

The audit legislation in several Australasian jurisdictions such as Western Australia, Tasmania and New Zealand, assigns a discretionary power to the Auditor-General to report to Parliament or a parliamentary committee (usually specified as the Public Accounts or equivalently titled Committee). The legislation does not explicitly link this discretionary power to the reporting of sensitive material.

The Committee's visits to Western Australia and New Zealand enabled it to examine the relevant provisions in the audit legislation in those jurisdictions.[143] The New Zealand legislation extends the discretionary power to include a minister, a public entity or any person.

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140 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

141 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p. 10

142 ibid., p. 21

143 *Auditor General Act 2006* (WA), s. 25; *Public Audit Act 2001* (NZ), s. 21

The audit legislation in two other jurisdictions, Queensland and the Australian Capital Territory, go further than the above jurisdictions and contain provisions which explicitly address procedures for the reporting of sensitive material. Both statutes itemise five similar but not totally identical grounds which could constitute sensitive information. The five grounds broadly cover:[144]

- impacts on commercial interests;
- revelation of trade secrets;
- prejudicing of investigations into alleged contraventions of the law;
- prejudicing fair trials of persons; and
- prejudicing relations between governments.

Should the Auditor-General consider that disclosure of such particular information would not be in the public interest, both statutes prohibit such disclosure. The Queensland legislation makes it mandatory for the information to be reported to the parliamentary committee while the legislation in the Australian Capital Territory assigns discretion to the Auditor-General.

Any such report provided to the parliamentary committee by the Auditor-General in the Australian Capital Territory is deemed '*to have been referred to the Committee by the Legislative Assembly for inquiry and such report as the Committee considers appropriate.*'[145]

A summary of the position across jurisdictions is presented in Appendix 5.

Position reached by the Committee

The Committee is of the view that the Auditor-General should have a discretionary power to report on sensitive material to the Committee in lieu of Parliament, where public disclosure of such material is deemed by the Auditor-General as contrary to the public interest.

An amendment to the Audit Act of this nature would complement the existing key discretionary power of the Auditor-General in section 12(3) to include in reports to Parliament any information considered to be in the public interest.

The Committee considers that the legislation should provide guidance, in a non-conclusive way, on the characteristics of material that might be considered to be sensitive in nature. These characteristics could incorporate the five grounds identified in the above paragraph that are presented in the audit legislation in Queensland and the Australian Capital Territory. The characteristics should also include matters of security and community safety.

The Committee would have discretion in determining the nature of its response to any report on sensitive material transmitted to it by the Auditor-General in lieu of Parliament.

144 *Auditor-General Act 2009* (Qld) s. 66; *Auditor-General Act 1996* (ACT), s. 19

145 *Auditor-General Act 1996* (ACT), s. 19

Recommendation 15: **The reporting powers of the Auditor-General under the *Audit Act 1994* be widened to include a discretionary power to report to this Committee, in lieu of Parliament, on sensitive information, where the Auditor-General considers public disclosure of such information would be contrary to the public interest.**

Recommendation 16: **Guiding criteria for categorising information that, if publicly disclosed, would be contrary to the public interest be incorporated within the Audit Act.**

3.2.13 Tabling of Auditor-General's reports

Nature of this topic

The Committee's consideration of this topic relates to whether the Audit Act should be amended to provide for the tabling in Parliament of audit reports of the Auditor-General other than the circumstances dealing with the reporting of sensitive material as addressed in the preceding section.

As pointed out in the Committee's Discussion Paper, the Audit Act currently specifies that the Auditor-General has the option to table reports in Parliament. This option is set out in section 16(1) which states that '*The Auditor-General may make a report to the Parliament on any one or more audits conducted by or on behalf of him or her under this or any other Act.*'

The Auditor-General has, to date, tabled all reports in Parliament. The Committee stated in its Discussion Paper that, in principle, it supports the Auditor-General being required to table or present to Parliament all reports on the basis that ultimately the Auditor-General is an officer of the Parliament and, while operating independently, reports to Parliament.

View expressed by the Auditor-General in VAGO's submission and in evidence to the Committee

VAGO's submission to the Committee included the following comments on this topic:[146]

> *... The Auditor-General notes that to his knowledge the discretion not to table has only been exercised once, as a result of legal advice commissioned by the* [then] *Government in 1995 regarding a proposed "Child Protection and the Children's Court" audit which considered the audit was ultra vires. The discretion may therefore serve a useful purpose. PAEC may like to consider a proposal retaining the discretion and supplementing it with an amendment to allow the provision of a separate report to the PAEC where information is too sensitive to be placed on the public record…*

As identified in the commentary on the preceding section, VAGO's submission also contained specific comments on the latter matter concerning the reporting of sensitive material.

In evidence to the Committee on the need for legislative change to require all audit reports to be tabled in Parliament, the Auditor-General expressed caution and stated:[147]

> *I would be wary of it being interpreted the other way, though — that everything should be reported, because again, while in effect all our financial audits are acquitted by an*

146 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.10

147 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.23

opinion and a summary report on the results, all our performance audits are covered and/ or reconciled with the annual plan, a report to parliament. The extent that circumstances change and we do not proceed with an audit, we acquit that in direct communications with PAEC and I am pretty sure in our annual report…

Situation in other jurisdictions

It is common across other Australasian jurisdictions that, like Victoria, there is a mandatory requirement for the Auditor-General to undertake annual financial audits and furnish an opinion on financial statements. That opinion is included in the annual reports of agencies submitted to Parliament. For other audits such as performance audits or investigations, the requirement to report to Parliament is generally discretionary. Under some audit statutes, the Auditor-General must report to Parliament on the exercise of audit functions, powers and duties. In addition, the legislation in Queensland provides that the Auditor-General must report to the Legislative Assembly on all audits conducted at the request of the Legislative Assembly.[148]

Position reached by the Committee

The Committee remains of the view that the Auditor-General should, as a matter of principle, be required to table or present to Parliament all reports arising from audits, other than those containing sensitive material, on the basis that, ultimately, the Auditor-General is an officer of the Parliament and, while operating independently, reports to Parliament as the principal client.

In reaching this position, the Committee recognises that, as a matter of course, the Auditor-General reports to Parliament on all completed audits and informs the Committee through the consultative channels under the Audit Act of any changes to the annual audit plan.

The Committee has therefore concluded that the practice of the Auditor-General should be formalised through an amendment to section 16(1) of the Audit Act that requires the Auditor-General to report to Parliament on all completed audits, other than sensitive information transmitted to the Committee. As mentioned, changes to each year's audit plan, such as planned audits not subsequently conducted or completed, form part of the Auditor-General's interactions with the Committee under the consultative provisions of the Audit Act.

Recommendation 17: **Section 16(1) of the *Audit Act 1994* be amended to require the Auditor-General to report to Parliament on the results of all completed audits, but excluding reports transmitted to this Committee containing sensitive material.**

148 *Auditor-General Act 2009* (Qld), s. 61

CHAPTER 4: AUDITS OF NON-JUDICIAL FUNCTIONS WITHIN VICTORIA'S COURTS

4.1 Feasibility of legislative provisions addressing performance audits of the administrative functioning of Victoria's Courts

Chapter 4 of the Committee's February 2010 Discussion Paper established the boundaries of the Committee's examination of the above topic as part of its Inquiry into the Audit Act.

The Discussion Paper canvassed a number of discussion issues pertaining to the topic. It invited the views of interested parties on the appropriateness or otherwise of including provisions within the Audit Act governing performance audits of the administrative functions of Victoria's Courts.

Prior to release of the Committee's Discussion Paper, the Department of Treasury and Finance asked in a paper to the Committee whether, as a matter of principle, the Audit Act should '*expressly articulate the role and the nature of the relationship between the public sector auditor and the Judiciary,* [and] *can statute override the principle of judicial independence and the legal convention of separation of powers*.'[149]

The Committee recognised in its Discussion Paper that questions regarding legal provisions that directly address the Judiciary are, given the Judiciary's special constitutional status, necessarily complex and need to be addressed with caution. Its discussions with representatives of relevant organisations in Western Australia and New Zealand in the lead up to release of its Discussion Paper reinforced the sensitivity and complexity of the topic. The Committee also recognised that its deliberations on this subject during its Inquiry would require expert legal consideration.

4.1.1 Judicial independence and judicial accountability

As identified in the Committee's Discussion Paper, from both constitutional and accountability perspectives, this topic has several distinguishing characteristics including the importance of the principle of judicial independence to Victoria's Courts. That principle is a fundamental component of the 'separation of powers' doctrine in the Westminster system of government. It underpins the special status of the Courts as the Judiciary or judicial arm of government. In the words of the Chief Justice of the Supreme Court of Victoria, the Judiciary '*is a fundamental constitutional principle upon which our democracy is built.*'[150]

Similarly, the term 'judicial independence' has been described within the Judiciary as '*... a Constitutionally enshrined right of citizens, to have a Judiciary which is free from interference from the Parliament and Executive Government.*'[151]

In this context, the Auditor-General needs to be seen as an officer of Parliament and subject to the separation of powers and not apart from it.

Developments in public sector accountability over the years, including the emergence of output management and the attendant use of performance measures and targets, have placed increasing

149 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, received 2 December 2009, pp. 2–3

150 Hon. M. Warren AC, Chief Justice of the Supreme Court of Victoria, *Public Confidence in the Judiciary*, Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009

151 Chief Justice M. Gleeson, Chief Justice of the High Court of Australia, *Public Confidence in the Judiciary*, Speech to the Judicial Conference of Australia, Launceston, 27 April 2002

pressure on the Judiciary to be more accountable for its administration of public resources. From the Judiciary's viewpoint, these developments have had to be very carefully addressed in order to uphold judicial independence and the quality of justice, but also to respond to reasonable demands for greater openness and transparency in the management of the Courts.

The significance of the challenge to the Judiciary arising from these developments was described in 2001 by a senior member of the Judiciary in the following terms:[152]

> *Perhaps the foremost challenge for judicial administration today is to ensure that contemporary expectations of accountability and efficiency remain consistent with the imperatives of judicial independence and the maintenance of the quality of justice…*
>
> *Accountability for adjudicative functions occurs in the form of open justice, the obligation to publish reasons and appellate review. Accountability for the administrative functions of courts is, in principle, distinct. Some activities fall clearly into one or another category but there is a significant area of overlap between the two.*

As pointed out by the Committee in its Discussion Paper, it is recognition of the significant degree of overlap that can exist between judicial accountability and administrative accountability that complicates discussion on this subject. Such overlap precludes definitive formulation of the respective boundaries of the two terms.

4.1.2 The current accountability regime for Victoria's Courts

A strong commitment by the Courts to public accountability

As mentioned above, the accountability of the Judiciary is principally manifested in the form of open justice, the obligation to publish reasons for decisions and appellate review. These are fundamental tenets of judicial accountability.

The above tenets are complemented through ongoing initiatives taken in individual Courts to further strengthen their current and future operations, governance and performance. Important catalysts for giving transparency to the nature and impact of these initiatives are the annual reports of each Court and judicial body in Victoria. The Committee's reading of these reports identified that they contain a wide range of material, strategic and operational, retrospective and prospective, illustrating a commitment to the achievement of high standards in judicial and administrative performance.

In addition to information presented in annual reports, the extensive performance data on Court administration across Australia published annually by the Productivity Commission as part of its examination of government services includes comprehensive information on the performance of Victoria's Courts relative to other jurisdictions.

Audit of Courts' financial information – current arrangements

In terms of financial accountability, the Audit Act does not provide for annual audits by the Auditor-General of the financial operations of Victoria's Courts.

However, information relating to the financial operations of Courts is subsumed, but not separately identified or consolidated under Court headings, within the annual financial statements of the Department of Justice. The department's financial statements are audited each year by the

152 Hon. J. Spigelman AC, Chief Justice of New South Wales, *Judicial Accountability and Performance Indicators*, 1701 Conference: The 300th Anniversary of the Act of Settlement, Vancouver, BC, Canada, 10 May 2001

Auditor-General as required by the Audit Act. In addition to this process, the annual reports of each Court include summarised data relating to their financial administration but this data is not subject to audit by the Auditor-General.

The annual report of the Department of Justice for 2009-10 shows that the total output cost associated with the administration of Victoria's Courts, the Victorian Civil and Administrative Tribunal as well as the Dispute Settlement Centre of Victoria was $378.8 million in that year.[153] The output performance measures and targets for Courts presented in the Department's annual report are identified under the output *Court matters and dispute resolution* and consist of:

Table 4.1: Performance of Victoria's Courts for 2009-10 output "Court Matters and Dispute Resolution"

Performance measures	Unit of measure	2009-10 target	2009-10 actual	2008-09 actual	2007-08 actual
Quantity					
Criminal and non criminal matters disposed[(a)]	number	355,914	395,892	371,095	359,248
Quality					
Quality of court registry services[(b)]	per cent	85	98.4	97.9	95
Quality of dispute resolution services	per cent	90	88	89	92
Timeliness					
Criminal and non-criminal matters disposed within agreed timeframes	per cent	80	76	80	80
Cost					
Total output cost	**$ million**	**380.8**	**378.8**	**370.1**	**315.5**

Notes:

(a) Additional matters disposed included a rise in traffic and transit offences in the Magistrates' Court and higher than expected civil matters resulting from procedural reforms and initiatives underway in the Supreme Court.

(b) The 2009-10 result is due to service initiatives implemented including a revised Service Charter and Complaints Policy, new guides for mangers about service delivery and a dedicated Customer Assistance Unit at the Melbourne Magistrates' Court.

Source: Department of Justice, Annual Report 2009-10

The 2010-11 budget papers show that the estimated output cost for the output *Court matters and dispute resolution* in 2010-11 is $407.7 million, an increase of $28.9 million on the actual cost outcome of $378.8 million for 2009-10. The budget papers state that this increase is '*due to new and incremental funding for managing court demand and changes to the Children's Court – Dispute Resolution.*'[154]

The Auditor-General's annual financial audit of the Department's financial statements attests to the material accuracy of reported financial information. In respect of Court data incorporated in those financial statements, the audit represents an important component of the administrative accountability

153 Department of Justice, *2009-10 Annual Report*, September 2010, p.49

154 Budget Paper No.3, *2010-11 Service Delivery*, pp.146–7

of Victoria's Courts for the use each year of significant levels of public funds. However, there is no statutory basis in the Audit Act for annual financial audits specifically relating to each Court.

Audit of Courts' administrative performance – current arrangements

As with financial audits, the involvement of the Auditor-General in the examination, through performance audits, of the administrative functioning of Courts is not codified within the provisions of the Audit Act. It is addressed through a protocol adopted with effect from July 2006 by Victoria's Heads of Jurisdictions, after consultation initiated by the Auditor-General.

The genesis for this protocol was legal advice obtained by the Department of Justice some ten years earlier in 1996 that prevented tabling in Parliament of a prepared report of the Auditor-General pertaining to the Children's Court. That legal advice opined that the Courts do not fall within the definition of an authority for the purposes of the Audit Act. It established that, given the special constitutional status of the Courts, it is not appropriate for the Auditor-General to have any explicit or implicit legislative authority or power to undertake performance audits of the Courts' judicial functioning.

The protocol between the Courts and the Auditor-General enables the Auditor-General, from time to time and subject to specified conditions, to conduct performance audits of non-judicial functions. The protocol is premised on the following two key principles:[155]

- such audits should involve only the administrative functions of the Courts, not their judicial functions; and
- the distinction between judicial and administrative functions is a matter of judgement and incapable of precise definition for all circumstances.

The protocol sets out the following five 'guidelines' which apply conditions to a performance audit planned or undertaken by the Auditor-General – references in the guidelines to a 's.16 audit' should be read as 'a s.15 audit' as the power to conduct a performance audit now resides in that section:

1. *Where the Auditor-General intends to undertake a s.16 audit, the Auditor-General will advise the Attorney-General and the relevant Head of Jurisdiction of the scope of the intended audit, its proposed Terms of Reference and who are to undertake the audit, prior to its commencement.*

2. *A s.16 audit will not proceed unless the relevant Head of Jurisdiction is satisfied that the proposed s.16 audit is unlikely to involve the relevant Court's judicial functions.*

3. *Regular consultation with the relevant Head of Jurisdiction will occur during the course of a s.16 audit. If during the course of such consultation, the relevant Head of Jurisdiction forms a view that the report of the audit will deal with the judicial functions, the issue will be raised with the officer conducting the audit. If the question cannot be adequately resolved by discussion to the satisfaction of the Head of Jurisdiction, the audit will be suspended and, save for the Supreme Court, the issue referred to the Attorney-General who, after consultation with the relevant Head of Jurisdiction, will determine whether the audit is or is likely to deal with judicial functions. In the case of the Supreme Court, the*

155 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 28 August 2009

Chief Justice will finally determine whether the audit is or is likely to deal with judicial functions.

4. *The Auditor-General's Office will not publish a report of a s.16 audit on the Courts unless a draft of the report has been first considered by the relevant Head of Jurisdiction and the Attorney-General.*

5. *The Auditor-General's Office will withdraw a draft report of a s.16 audit on the Courts if in the opinion of the Attorney-General it deals with judicial functions.*

At the time of the commencement of the protocol, the Department of Justice advised the Auditor-General that the Chief Justice of the Supreme Court considered that performance audits within that jurisdiction would need to be confined to financial and accounting matters. The Department also informed the Auditor-General that the Chief Justice considered performance audits of case listing constitute the auditing of functions of a judicial nature and as such would not be agreed by the Supreme Court. The departmental correspondence to the Auditor-General indicated this view was shared by the other Heads of Jurisdiction.[156]

In its report on the 2008-09 Budget Estimates, the Committee recommended that the Auditor-General undertake further performance audits of the Courts as a means of assisting the Courts to improve timeliness and other measures of their performance.[157] When responding to the Committee on this recommendation, the Auditor-General drew attention to the uncertain legal position and suggested the Committee include the matter within its Inquiry into the Audit Act. On the 2006 protocol, the Auditor-General advised the Committee that:[158]

> *Notwithstanding the cooperation of the courts with audits undertaken under the protocol, I consider it to be significantly deficient; in that it purports to allow the Executive, and in some circumstances, a Head of jurisdiction, to determine if an audit may occur and when a report may be published. This approach impairs my independence.*

Since the protocol was established, the Auditor-General has conducted an examination of the key administrative functions of the Magistrates' Court. The results of that audit, which were wide-ranging, were reported to Parliament in June 2007. The issue of timeliness and other performance measures such as case management were not covered in that report.[159]

The Auditor-General has also undertaken audits of some major projects managed by the Department of Justice which relate to the information technology infrastructure of Courts, including an audit of the Integrated Courts Management System in June 2009.

The Auditor-General's Annual Plan for 2010-11 identifies that a performance audit on Court diversion programs is planned for that year and a performance audit focusing on Court backlogs is planned for 2011-12.[160]

156 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 28 August 2009

157 Public Accounts and Estimates Committee, *Report on the 2008-09 Budget Estimates — Part Three*, October 2008, p.242

158 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 8 September 2009

159 Victorian Auditor-General's Office, *Administration of Non-judicial Functions of the Magistrates' Court of Victoria*, June 2007

160 Victorian Auditor-General's Office, *Annual Plan 2010-11*, p.33

4.1.3 Views expressed to the Committee in submissions and evidence at public hearings

On the financial data of Courts, the Auditor-General had proposed in early correspondence to the Committee that legislative action occur to provide that the operations of the Courts are subject to a separate financial audit by the Auditor-General.[161]

VAGO's submission to the Committee elaborates on the views of the Auditor-General concerning audits of non-judicial functions within Victoria's Courts. It outlines these views initially under two high-level headings, Accountability for public funds and the use of Protocols, which the submission indicates are equally applicable to the issues pertaining to audits of Parliament's administration addressed in section 3.2.1 of this report. On accountability for public funds, VAGO' submission includes the following comments:[162]

> *A fundamental precept of democracy is accountability for taxpayer funds voted by Parliament. ... The legal or organisational structure of any body receiving funds should not be a barrier to open accountability.*
>
> *Notwithstanding audit should respect the core judicial, policy and legislative functions which should rightly be exercised independently within their respective spheres. Preservation of these functions from interference is essential. The current situation however, whereby the administration of the courts and the administration of Parliament is effectively auditable only at the discretion of the Heads of Jurisdiction or the Presiding Officers, detracts from accountability and ironically sets lower standards for accountability for courts and for Parliament than for the rest of the public sector.*

On the use of protocols, VAGO's submission regards their use as unsatisfactory as a basis for conducting audits because they:[163]

- *are not legally enforceable*
- *purport to give control of the parameters of the audit to the subject of the audit*
- *are fundamentally at odds with the independent audit mandate, and*
- *create a basic conflict whereby a party with a vested interest controls the process to which they themselves are subject.*

VAGO's submission also contains comments specifically relating to Courts. These comments indicate that '*The Auditor-General seeks clarity on the type and extent of audits he can undertake in the courts in order to assure Parliament that public funds are being used appropriately...*'[164]

At the Committee's public hearing, the Auditor-General was asked to further elaborate on his views in terms of the clarity that he is seeking as well as how administrative functions can be separated from judicial functions. The evidence given by the Auditor-General on these points included:[165]

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161 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

162 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.11

163 ibid.

164 ibid., p.12

165 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, pp.13–15

> *... if I am an independent officer of the Parliament and Parliament is my primary client — my consideration is whether I should be better respecting the letter of the law. If Parliament has not given me the authority to go into the courts, why am I going in there?...*
>
> *... Courts are spending public funds that have been raised by tax, so why should they not be equally accountable for providing assurance and the Parliament being assured as to why it has been spent. The obvious challenge would be judicial independence, but that is akin to the Auditor-General not questioning the merits of policy directions...*
>
> *... I would have thought that a starting point for where you could impede on judicial discretion would be once a trial starts, because then it is clearly a judicial area. In terms of the scheduling of court space, for instance, or things like that, sound administrative functions, there is a range of those sorts of audits, and, as the chairman mentioned, your committee would like us to do some audits, but I have got a real question mark, given the act does not provide for it, as to why I should do it, especially when I am supposed to be the independent auditor.*
>
> [On Court listings], ... *That is an area that has been done in a number of other jurisdictions. I have not embraced it here — I do not know what the attitude of the judiciary is, but in other jurisdictions the court listings have been audited and seen as an administrative function. The actual listing and the schedule at the start of the trial is seen as administrative....*
>
> [On suggested wording for drafting instructions], ... *The effectiveness and efficiency and the use of public funds in administrative functions.*

In its submission, ACAG expressed support for the overall position outlined by the Auditor-General. It stated:[166]

> *ACAG supports the position that the A-G* [Auditor-General] *should not have any implicit or explicit legislative authority or power to undertake performance audits of the Court's judicial functioning.*
>
> *However, ... The Courts are responsible for managing significant resources and the A-G should not be precluded from initiating a performance audit of aspects of the administrative (non-judicial) functions.*

In evidence to the Committee, the Secretary, Department of Treasury and Finance commented on the "back office" functions of the Courts and the department's periodic involvement with the Courts on those functions. On these points, the Secretary stated:[167]

> *My understanding of the way it works at the moment is that the auditor undertakes financial audits of the judiciary on the basis of agreement rather than mandate, and that has been going on reasonably successfully for a while. Once you get beyond that into performance auditing, I think that is where the blur makes it very difficult, because if you go beyond the operating efficiency of the back office functions of courts, there is not*

166 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.37

167 Mr G. Hehir, Secretary, Department of Treasury and Finance, transcript of evidence, 7 April 2010, p.43

> *much that is not getting into basically what are the governing functions or policy of the court…*
>
> *We have discussions with the courts on a regular basis — regular, as in every two or three years — about whether they are utilising good practice and efficiency in operating their back office functions and even their court functions, whether they can utilise courtrooms more efficiently and that type of stuff. I think you have to be very careful about where the lines are on these things, because it is a fundamental principle of our structure of government that the judiciary is separate from Parliament. We have an in through the financial side of things. However, it has to be treated carefully; it is not our job to tell Parliament how to operate, because that could impact on the quality of its decision-making processes.*

In response to a question on whether there is an openness and a willingness on the part of the Courts to make improvements, the Secretary stated:[168]

> *Yes. If you look at both the County Court and the Supreme Court, there has been significant practice reform in the last four or five years and almost all that has been driven internally. We have encouraged it, but it has been the courts actually looking at themselves and saying, 'How can we get better outcomes?'. They have commissioned work, done reviews, looked at their practices and instituted new methodologies for dealing with stuff which have increased their ability to do business significantly, is my understanding. I am pretty confident that both the Supreme and County courts have done quite a lot of work in that area.*

The evidence given by the Secretary reinforces the importance of care and caution in any attempts to differentiate between judicial functions and administrative or support functions within Courts. They also confirm the positive approaches taken by Courts to continuously reform and advance the efficiency and standard of their management of back office functions, recognising the level of public funds associated with their operations.

4.1.4 The audit position in other jurisdictions

As was the case concerning audits of the administration of Parliament, ACAG presented information to the Committee on the extent of the Auditor-General's mandate relating to the audit of Courts in other Australasian jurisdictions. That information reflected comments furnished to ACAG by each audit office. The comments of each office as provided to ACAG are set out in Appendix 2.

The Committee's analysis of the ACAG material indicates that the audit legislation in all Australasian jurisdictions enables the Auditor-General to conduct financial audits of Courts. Such audits are undertaken under:

- an explicit legislative authority relating to individual Courts or a statutory body specifically responsible for the administration of Courts; or
- an authority derived from the Auditor-General's statutory audit of the relevant government department responsible for the administration of Courts such as the local Department of Justice or similarly titled entity.

168 ibid., p.16

In the latter case, the legislative position could be similar to Victoria with Courts' data subsumed within the departmental financial statements and audited by the Auditor-General as part of that process. However, the responses of some audit offices indicate the relevant department may have specific responsibility for Court administration which leads to a clearer audit authority. This is not the case with the management model in place in Victoria where the Courts control their own administration but with significant assistance available from staff and other resources of the Department of Justice.

Most audit offices have indicated their legislative position on financial audits of Courts carries through to the conduct of performance audits. Their messages identify that the scope of such audits does not extend to judicial decision-making. The New Zealand and Tasmanian audit offices advised ACAG that each has previously conducted a performance audit of the management of Court workloads. In evidence to the Committee as ACAG's representative, the Auditor-General of Tasmania advised:[169]

> *A couple of years ago I said I wanted to do a compliance or performance audit of the effectiveness of the waiting times management by the courts. I chose the Magistrates Court to do that audit. I sat down and had a lengthy discussion with the Chief Magistrate at the time of doing so. The Chief Magistrate said to me, 'I am very happy for you to come and do that sort of audit as long as you do not question judicial decisions'. I was really keen that I did not want to do that. I did however want to see how effective they were, or are, in managing court waiting times.*
>
> *We did the project. We agreed on the terms of reference with the Chief Magistrate. We reported publicly. The Chief Magistrate has said in a public forum how well the project was run and how useful the outcomes were to the management of his office. I think there was a win-win for us there. I believe that Auditors-General should not be precluded from doing those sorts of audits, because I would expect the courts, like any other public sector entity, to be efficient and effective in the use of their funds. However, we would make sure that we do not question their judicial decisions.*

A similarly positive audit experience with a Court was conveyed to the Committee by the Victorian Auditor-General in a previous role in another jurisdiction. The audit involved court listings and was the catalyst for a request for a parallel audit in another court jurisdiction.[170]

These positive experiences indicate the potential for productive outcomes from performance audits of the administrative functioning of Courts where the parameters of the audit are carefully discussed and agreed between the parties.

4.1.5 Advice received from constitutional legal expert

In recognition of the importance of expert constitutional legal advice to its deliberations on this subject, the Committee sought advice on five specific questions. The advice received on these questions is presented in full below:[171]

> ***Given the "separation of powers" doctrine and the principle of judicial independence, is it feasible to assign explicit authority to the Auditor-General to audit non-judicial or administrative functions within Courts?***

169 Mr M. Blake, Tasmanian Auditor-General, Australasian Council of Auditors-General, transcript of evidence, 7 April 2010, pp.9–10

170 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.15

171 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, pp.11–19

I commence with an observation about terminology. The Question treats the terms "non-judicial" and "administrative" in relation to courts, as synonymous. In relation to State courts, however, this is not necessarily the case. Unlike federal courts State courts can be given functions (usually to be exercised in a judicial manner) which do not involve the exercise of "judicial power". Some confusion can thus exist. I shall continue to use the expressions "non-judicial" and "administrative" for present purposes, but I treat them in that context as relating to matters of administration of courts. Even that, however, gives rise to some difficulties, as I discuss below.

Part III (ss 75 to 87) and Part IIIA (ss 87AAA to 87AAJ) of the Constitution Act deal, respectively, with "The Supreme Court of the State of Victoria" and "The Judiciary". However, those provisions do not confer any express protection upon the Supreme Court (or other Victorian courts) from legislative or executive impairment of judicial independence, otherwise than in specific respects, such as judicial remuneration (s 82), pensions (s 83) and removal from office (s 87AAB).

Nonetheless, there are general restrictions, derived from Ch III of the Commonwealth Constitution, upon the power of the Victorian legislature or executive to impair the institutional integrity and independence of the Supreme Court of Victoria (or – but with a qualification discussed below – other Victorian courts capable of exercising the judicial power of the Commonwealth).

The Parliament of Victoria could not validly confer upon the Supreme Court of Victoria (or other Victorian courts invested with federal jurisdiction) a function which substantially impaired its institutional integrity and was therefore incompatible with its role as a repository of federal jurisdiction. One important indication that a particular law has that character is that the exercise of the power or function is likely to undermine public confidence in the courts exercising that power or function. The institutional integrity of the court will be impermissibly distorted if the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies. Among those defining characteristics, Ch III of the Commonwealth Constitution requires that a court capable of exercising the judicial power of the Commonwealth be, and appear to be, an independent and impartial tribunal.

The critical notions of "repugnancy" or "incompatibility" with the institutional integrity of the State courts are insusceptible of further definition in terms which necessarily dictate future outcomes. Accordingly, it is difficult to predict in advance whether a particular measure will be held to fall beyond power. Invalidity is more likely where the law mandates the taking by the court of particular steps, directs the court as to the manner or outcome of the exercise of jurisdiction, prevents the exercise of discretion or review, requires the court to determine an application in the absence of the affected party or binds the court to accept particular evidence or submissions.

The question turns upon the degree of impairment of the institutional independence of the courts and their capacity for independent adjudication, even if the legislation falls short of directing, or directly affecting, the final determination of a pending case.

I have difficulty seeing how the carrying out of financial audits (ss 8, 9) or performance audits (s 15) with respect to the Courts' non-judicial or administrative functions, or the reporting to Parliament in respect of such audits (s 16), could be said to amount to an unconstitutional interference with the exercise of judicial power, within the meaning of these authorities.

Obviously, it would be a separate question whether particular legislative or executive action subsequently taken in response to such audits, in the nature of new restrictions upon or other regulation of the exercise by the Court of its functions, might be beyond power.

In my opinion, it is unlikely that there would be any constitutional impediment, derived from either the Constitution Act or the Commonwealth Constitution, to the conferral upon the Auditor-General of statutory authority to carry out financial audits or performance audits of the non-judicial or administrative functions of Victorian courts.

I assume, of course, that the carrying out of financial or performance audits would not interfere with the exercise of the Courts' jurisdiction in any pending case and would not direct the Court as to, or directly affect, the manner or outcome of the exercise of the judicial function in any case or category of case.

However, there is a significant likelihood that the compulsory powers presently contained in the Audit Act in respect of:

(a) the production of documents (s 11(1));

(b) the search of, and taking of extracts from, documents (s 11(2));

(c) the examination upon oath of persons (s 11(3)); and

(d) access to otherwise confidential or secret information (s 12(1));

could not validly be conferred upon, or exercised by, the Auditor-General in respect of:

(iii) a judicial officer personally or his or her personal staff (as opposed to an administrative officer employed by the court); or

(iv) any documents in the possession of a judicial officer (or his or her personal staff) relating to the exercise of judicial functions.

There would be a significant argument, in my opinion, that the conferral or exercise of such coercive powers against judicial officers or their personal staff would be incompatible with the institutional integrity and independence of the courts mandated by Ch III of the Commonwealth Constitution. The risk could be minimised if the legislation expressly:

(a) prevented the Auditor-General from compelling the examination (or interview) of judicial officers or their personal staff; and

(b) made the production, for the purpose of any audit, of documents in the possession of judicial officers (or their personal staff) a matter for voluntary disclosure by the relevant judicial officer or court.

I would add a further comment. The comments made above should not be treated as meaning that Victorian courts cannot be reconstituted. There must be a Supreme Court for Commonwealth constitutional purposes – a matter dealt with below – but the position of other courts can be altered.

Is it possible to explicitly distinguish between judicial and administrative functions of Courts within legislation?

In my opinion, it would be possible, and desirable, to include in the Audit Act clear definitions of the "administrative" or "non-judicial" functions of the courts in respect of which any audit function may be carried out by the Auditor-General. This will require careful drafting, with particular attention being given to the function which the audit is required to perform. Little difficulty is likely to arise in relation to financial audits of courts, but performance audits give rise to more complicated questions.

For example there would be difficulties, it seems to me, if the Auditor-General sought to inquire into whether a Judge had "taken too long" to hear or decide a particular case of a kind. On the other hand it does not seem particularly offensive to the judicial function to inquire whether all cases of that species were taking too long.

To put it in more specific terms, the "administrative" or "non-judicial" functions might be defined to include such matters as:

(a) the number, seniority and organisational structure of staff of the courts;

(b) the average expense incurred, and time consumed, in the disposition of cases or the delivery of judgments;

(c) the efficiency of the use or allocation of judicial resources;

(d) the expenditure of the courts, and their efficiency or otherwise, in respect of such items as library services, public information, entertainment, information technology, or building renovation or maintenance; and

(e) the satisfaction, or otherwise, of "performance measures" or "performance targets" relating to average or aggregated statistical data in respect of caseload, disposition of cases, number of reserved judgments, delivery of reserved judgments, hearing time and other like matters.

No doubt some of these matters overlap with, or involve review of, the administration of courts by those otherwise responsible (including the heads of those courts) but whether that should occur is, in my opinion a question for the legislature and an issue on which different views may well be held.

I should add that in any such legislation it would be desirable to include a specific prohibition upon the Auditor-General examining, investigating or commenting upon the exercise by a court, acting judicially of power in any particular case or the merits of any determination made by a court in any proceeding.

The risk of contravention of any constitutional limit upon legislative or executive power would be further minimised if the Audit Act were to confer upon the head of jurisdiction of the relevant court the final power to determine, in the event of a dispute, whether a function proposed to be examined in an audit is "non-judicial" or "administrative" in nature and therefore amenable to audit.

Are there any constitutional or legal factors which would impede an alternative course of action of incorporating within the Audit Act a statutory backing to a

performance audit protocol entered into from time to time between the Courts and the Auditor-General?

I do not see any constitutional or legal impediment to the Parliament amending the Audit Act so as:

(a) to authorise the Auditor-General, from time to time, to enter into, and carry into effect, a performance audit protocol agreed with the Chief Justice (or Chief Executive Officer) of the various Victorian courts; or

(b) to give such protocols, once agreed and in accordance with their terms, statutory force and effect.

Would any move by the Victorian Parliament to establish a legislative basis within the Audit Act for audits of the administrative functions of the Supreme Court of Victoria be contrary to elements of the judgment of the High Court in the Kirk case?

In Kirk v Industrial Relations Commission of NSW, the High Court (relevantly) concluded that:

(a) Chapter III of the Commonwealth Constitution requires that there be a body fitting the description "the Supreme Court of a State".

(b) It is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description.

(c) A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide, by granting relief in the nature of prohibition, mandamus and certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error.

(d) A privative provision in State legislation, which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature.

(e) Such a provision is beyond power because it purports to remove a defining characteristic of the Supreme Court of the State.

In my view it is unlikely that freedom or immunity from independent examination as to expenditure, efficiency or effectiveness, by way of financial or performance audits, is "a defining characteristic" of the Supreme Court of Victoria, in the sense spoken of in Kirk. The use of formalised external financial audits by an independent officer of Parliament, and the extension of such audits to "performance" measures, are comparatively modern developments. Their application to the Supreme Court, in respect of non-judicial functions, would appear to have no historical analogue at or prior to federation. I think it unlikely, however, that the High Court would conclude that these measures would so alter the constitution or character of the Supreme Court that it would cease to meet the constitutional description.

Further, for the reasons given in answer to Question 10 above, it seems to me unlikely that such measures would impermissibly impair that institutional independence or impartiality which is a defining characteristic of the Supreme Court.

Accordingly, I consider it unlikely that an amendment to the Audit Act conferring power upon the Auditor-General to carry out financial or performance audits of the non-judicial or administrative functions of the Supreme Court of Victoria would contravene the limitations upon legislative power identified in Kirk.

Please comment on the usefulness of the provisions relating to the State Services Authority in section 60 of the Public Administration Act 2004 (Vic), or any other example, as a precedent for this issue.

Sub-Division 2 (ss 49 to 60) of Part 4 of the Public Administration Act 2004 (Vic) deals with "systems reviews", "special inquiries" and "special reviews" conducted by the State Services Authority constituted under s 37 of the Act.

Section 60 of the Public Administration Act provides:

> *"(1) Nothing in this Subdivision empowers the Authority to conduct, or a Minister to direct or request the conduct of, a special inquiry or special review into any exercise by a body of a function that is of a judicial or quasi-judicial nature.*
>
> *(2) The conduct of a systems review of, or a special inquiry or special review into any matter relating to, a body that exercises functions that are of a judicial or quasi-judicial nature must not in any way impede the exercise by the body of those functions."*

In my view, this provides a useful illustration of the type of provision which could be drafted so as to prevent the Auditor-General from conducting any audit of a judicial function or otherwise impeding in any way the exercise of judicial functions. It would be prudent for a provision to this, or substantially similar, effect to be included in the Audit Act in the event that Act were amended to confer upon the Auditor-General power to conduct financial or performance audits of Victorian courts.

4.2 Position reached by the Committee

The Committee's Discussion Paper stressed the complexity of this subject and the absolute need for care and caution in canvassing the underlying issues to ensure there is no conflict with the constitutional standing of Courts and the "separation of powers" principle. The information and views on the subject made available to the Committee during the Inquiry, including the advice received from a constitutional expert, have reinforced these fundamental prerequisites.

Financial audits

The Committee sees the situation concerning financial audits of Courts as reasonably straight forward giving rise to little or no sensitivity linked to the constitutional status of Courts. From the Committee's viewpoint, the current practice in Victoria where the financial information of Courts is audited by the Auditor-General as part of the annual audit of the Department of Justice appears to be working satisfactorily. It does have a downside, however, in that the information for each Court is not separately identifiable in the departmental financial statements.

The Committee considers better practice would be to establish a statutory requirement within the Audit Act for each Court to prepare financial statements which would be subject to audit by the Auditor-General and included in their annual reports. Such practice would strengthen the financial accountability of Courts and give full transparency to the financial operations of individual Courts. It would also complement the initiatives taken by the Courts over recent years to enhance the quality and presentation of material in their annual reports.

Performance audits

The feasibility of establishing legislative provisions governing performance audits of the administration of Courts is more complex and requires consideration of a wider range of issues. Central to this consideration is the constitutional status of Courts and the imperative that the status is not threatened in any way.

As identified in earlier paragraphs, the expert legal advice received by the Committee concluded that it is unlikely there would be any constitutional impediment to the conferral upon the Auditor-General of statutory authority to conduct performance audits of the administrative functions of Victorian Courts. The advice emphasises, however, that the institutional integrity and independence of the Courts would be at risk if coercive powers were exercised against judicial officers or their personal staff and were directed to the discharge of judicial functions. The advice states that this risk would be minimised if legislation expressly prevents the Auditor-General from compelling the examination of judicial officers or their personal staff, and made the production of documents for the purposes of any audit a matter for voluntary disclosure by the relevant judicial officer or Court.

A guiding factor in the Committee's formulation of a position on this issue has therefore been preservation of the right of the Courts to maintain a lead role in performance audits of their administrative functions that might be undertaken by the Auditor-General from time to time. Currently, such audits are undertaken through use of a protocol under a non-statutory framework which, while not posing any major difficulty to the Courts, creates uncertainty for the Auditor-General. This uncertainty stems from the absence of a direct nexus between the audit function within Courts and the powers and responsibilities assigned to the Auditor-General under the Audit Act. The Committee considers it is desirable that such a nexus be in place for all audits undertaken by the Auditor-General.

Aligned to the above factor is the efficacy of clearly differentiating between the judicial functioning of Courts, universally categorised by all parties participating in the Committee's Inquiry as "out of bounds" for any audit of Courts, and the administrative activities which support that judicial functioning. The expert legal advice offers some useful guidance on this key issue. The advice indicates that, with careful drafting, it is possible to include within the Audit Act clear definitions of the administrative functions within Courts. It cites some examples of items that could be included in such definitions and, importantly, emphasises the need for some specific safeguards to protect the constitutional standing of Courts. One of these safeguards confers on the heads of jurisdiction in Courts the power to determine, in the event of a dispute, whether a function is administrative in nature and therefore amenable to audit.

While the Committee is not privy to full details of the experiences of other Australasian jurisdictions with performance audits to date of the administrative functioning of Courts, the completion of a number audits, some involving Court listings and Court workloads, with apparent positive outcomes to the Courts, reinforces to it the value-adding potential of carefully-scoped performance audits. The Committee believes that good faith negotiations between the Courts and the Auditor-General on the boundaries of performance audits, derived from a mutual commitment to upholding the principles of judicial independence and public accountability, is a key ingredient to an effective and sustainable outcome on this subject. The strong orientation of Courts to openness and ongoing reform in their governance and resource management practices and the potential for the Auditor-General to make

positive contributions from an independent perspective to help Courts build on those improvement initiatives are indicative to the Committee that such an outcome can be realised.

It was of interest to the Committee that the report arising from the government's recent review of Victoria's integrity and anti-corruption system identified that the Victorian Attorney-General is currently working with the Judiciary to strengthen oversight arrangements. It describes this action as '*a positive step with potential to balance independence with accountability.*'[172] These oversight arrangements relate to processes in place to address complaints about judicial conduct that, although of concern, fall short of misbehaviour or incapacity warranting removal. The Attorney-General issued a Discussion Paper in November 2009, *Investigating Complaints and Concerns Regarding Judicial Conduct*, which in part looks at judicial independence and judicial accountability. While the principles underpinning these concepts as addressed in the Discussion Paper relate directly to judicial actions and therefore differ from the matters examined in the Committee's Inquiry, there are some high-level similarities which are reflected in the following comments presented in the Discussion Paper:[173]

> *... Inevitably, there is a degree of tension between protecting judicial independence and promoting judicial accountability. Nevertheless, judicial independence and judicial accountability can also be seen as complementary concepts.*

The Committee sees this complementary relationship between independence and accountability as clearly relevant to its deliberations on oversight arrangements for the administrative activities of Courts. It also sees the positive participation by the Judiciary in the Attorney-General's review as analogous to the initiatives taken by the Judiciary to enhance administrative accountability in Courts.

On 2 June 2010, the Attorney-General announced that a new body, the Judicial Commission of Victoria, would be established to provide a '*transparent and consistent system for investigating both serious and less serious complaints against judicial officers across the court system.*'[174]

Based on its analysis of all of the information available to it during the Inquiry and its assessment of the expert constitutional legal advice, the Committee has concluded that the current non-statutory arrangements in place in Victoria for performance audits by the Auditor-General of Courts' administration should be replaced by the insertion within the Audit Act of provisions which provide statutory backing to the conduct of such audits. Drawing on the expert legal advice, the Committee considers that it is essential that any legislative provisions prohibit the Auditor-General from directly addressing the efficacy of the judicial functioning of Courts during the course of such audits or commenting in an evaluative manner on judicial functioning in reports presented to Parliament. It would be useful for any future drafting of amendments to take account of the safeguards cited by the constitutional expert, which would confer a power to heads of jurisdiction in Courts to determine, in the event of a dispute, whether a function proposed to be examined in an audit is administrative in nature and therefore amenable to audit. This power should be accompanied by a requirement for the head to table in Parliament determinations made and their underlying reasons.

The Committee considers it is preferable to explicitly address within legislation the audit authority of the Auditor-General and the controlling powers of the heads of jurisdiction in Courts rather than give statutory force and effect to the current protocol in place between the Auditor-General and the Courts governing performance audits. The preferred approach is seen by the Committee as creating a more sustainable and transparent accountability framework and clearer articulation of the safeguards necessary to protect the institutional integrity and independence of Courts.

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172 State Services Authority, *Review of Victoria's Integrity and Anti-corruption System*, 31 May 2010, p.11

173 Department of Justice, *Investigating Complaints and Concerns Regarding Judicial Conduct*, November 2009, p.12

174 Hon. R. Hulls, Attorney-General, *New Commission to receive complaints against judges*, media release, 2 June 2010

Subject to the inclusion of explicit overriding safeguards, the Committee is of the view that the powers, responsibilities and accountabilities of the Auditor-General under the Audit Act should apply to performance audits of administrative functions in Courts.

The Committee understands there are no precedents in Victorian legislation identical to the matters pertinent to this subject. However, as confirmed by the constitutional legal expert, the approach taken in section 60 of the *Public Administration Act 2004* concerning the functions of the State Services Authority, though not mirroring exactly similar circumstances, would be of assistance in the development of any future drafting instructions.

In summary, the Committee recommends as follows on financial and performance audits of the administration of Victoria's Courts:

Recommendation 18: **The *Audit Act 1994* be amended to designate each Victorian Court and judicial body as an entity subject to an annual financial audit by the Auditor-General, with the Auditor-General's opinion on each entity's annual financial statements incorporated within their annual reports.**

Recommendation 19: **The *Audit Act 1994* be amended to authorise the Auditor-General to conduct from time to time performance audits of the administrative functioning of Courts.**

Recommendation 20: **The *Audit Act 1994* be amended to provide that the scope of performance audits of the administrative functioning of Courts conducted by the Auditor-General must not include judicial functions and that reports arising from such audits must not question the merits of judicial functions. The amendments should assign to heads of jurisdiction in Courts the power, in the event of a dispute, to determine if a function proposed to be examined in an audit is administrative in nature, with a requirement to table in Parliament each determination and the underlying reasons.**

CHAPTER 5: THE AUDITOR-GENERAL'S INFORMATION-GATHERING POWERS

5.1 Changing the scope of the audit role in the public sector

Chapter 2 of this report describes the traditional and evolving functions of the Auditor-General in Victoria. As mentioned in that Chapter, the role of the Auditor-General traditionally focused on financial aspects and the extent to which money was spent (inputs). The role was progressively extended to address whether expenditure was in line with intentions (outputs). It was further extended to assess whether the intended outcome had been achieved (value for money considerations and effectiveness of performance).

Performance auditing and program evaluations are now key areas of focus in the public sector. A major aspect of the Auditor-General's contemporary role in the public sector is through performance audits, which evaluate the effectiveness of government agencies in achieving outcomes and their efficiency and economy in managing public resources.

Public sector agencies increasingly use external bodies such as private companies and non-government organisations under contracts or funding agreements to assist in the delivery of programs and achievement of outcomes. It follows therefore that the Auditor-General needs full information to assess the performance of the public sector and its achievement of outcomes. The Auditor-General does not have a role in directly auditing outside bodies but needs access to sufficient information to make judgements for Parliament on public sector performance in delivering programs and services, e.g. private schools are not subject to audit by the Auditor-General but sufficient information needs to be available to the Auditor-General to assess the extent to which value for money has been achieved for the significant level of funds allocated to such schools.

This Chapter addresses the Committee's consideration of amendments to the Audit Act that relate to the Auditor-General's information-gathering powers. It focuses on issues associated with contracts entered into by government agencies with the private sector.

5.1.1 Right of access to premises and records of private sector contractors

This topic is potentially contentious as it explores the feasibility of widening the legislative role of the Auditor-General beyond the traditional boundaries of the public sector to encompass private sector contractors engaged by the public sector in the delivery of public projects or services. It is one of the sensitive and complex issues relating to the Auditor-General's operational powers examined during the Committee's Inquiry.

The topic generated substantial interest and a diversity of views from interested parties. As such, the Committee determined to include within the Chapter references to particular points on the topic made by each contributing party, whether presented to it in submissions, in evidence at public hearings or in correspondence. The aim was to give consideration to aspects of each contributor's input.

The length of this section of the Chapter is commensurate with the significance attached to the topic by the Committee.

Extent of the existing information-gathering powers within the Audit Act

Sections 11 and 12 of the Audit Act set out the Auditor-General's access powers to documents and other information required for the efficient and effective conduct of audits. These powers are extensive and encompass:

- a power under section 11 for the Auditor-General to require any person, including contractors, to appear before him or her and produce documents considered relevant to any audit; and

- right of access for audit purposes under section 12 to any information held by government agencies, overriding secrecy restrictions in other legislation and Cabinet confidentiality.

While the 'call for' power under section 11 is strong and extends to persons outside the public sector, it does not necessarily enable verification through normal audit processes that all requested documentation has been produced and constitutes accurate and reliable evidential material. In addition, the 'right of access' power under section 12 is limited to access to the premises of government agencies.

The Auditor-General also has authority under section 16C of the Audit Act to conduct performance audits of private sector bodies in receipt of financial benefits or assistance from government. While all of the information-gathering powers of sections 11 and 12 of the Audit Act apply to such audits, section 16C(3) excludes in the definition of financial benefits '*…a financial benefit received by a person or body as consideration for goods or services provided by them under an agreement entered into on commercial terms*'. This audit provision therefore excludes contractual arrangements on commercial terms entered into between the State and private sector parties.

While the above audit powers are strong, the combination of the limitations in sections 11 and 12 and the exclusion provision in section 16C means that the Auditor-General could face the constraint of an inability to gain access to material and information, such as electronic systems and records, held by private sector contractors engaged by the government or one of its agencies in the delivery of a public service or program. This access might be required as part of the Auditor-General's examination of the manner in which the responsible government agency has managed the relevant contract. Such examination, focussing on the soundness of an agency's performance in contract management, would normally be a core element of the functions undertaken by the Auditor-General when auditing delivery of services under public sector contracts.

The potential constraint that could be faced by the Auditor-General would be magnified if serious concerns were formed by the Auditor-General on the quality and effectiveness of an agency's monitoring of contract performance or of the contractor's performance in meeting the service obligations established under the contract. In such circumstances, attempts by the Auditor-General to form an opinion on the efficiency and effectiveness of service delivery could be impeded if problems were experienced in the gathering of key audit evidence through the normal avenues such as via the contractual obligations of the service provider in consultation with the responsible government agency.

Early views on the topic expressed to the Committee by the Auditor-General

At an early stage of the Committee's Inquiry, the Auditor-General proposed to the Committee that section 12 of the Audit Act be amended to provide specific access to the premises of third party contractors performing services for public sector agencies. As mentioned in the Committee's February 2010 Discussion Paper, the Auditor-General stated to the Committee that:[175]

> *This proposal would ensure that the Auditor-General continues to have complete and unfettered access to third party information which is relevant to an audit and would close a potential loophole, rather than have to rely on a contractual arrangement between the agency and the third party.*

175 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

> *The purpose of the proposal is not to provide a warrant to enter premises, but rather, in the same way as the information gathering power, to have an enforceable power of last resort to enable information to be accurately verified.*

The Auditor-General indicated that changes in this area to allow audit to 'follow the public dollar' were vital to maintaining strong accountability and protecting the public interest. This view stemmed from the increasing involvement of the private sector in the delivery of public projects and services, including through Public Private Partnerships (PPPs). The Committee's Discussion Paper indicated that the position outlined to the Committee by the Auditor-General on this point also stated:[176]

> *As Government has increasingly sought partnerships, alliances or other service delivery models involving the private sector, the provisions of the Audit Act 1994 have failed to keep pace with these developments. Consequently, the Auditor-General's mandate in respect of the use of very significant growing levels of public expenditure on large projects has diminished. Simultaneously there has been continued, if not increased, expectations from the community in terms of transparency and accountability.*
>
> *As alternative modes of service delivery become more widespread and new entities are created by public bodies and Government, the Auditor-General's capacity to provide the necessary assurance to Parliament and the community is necessarily impaired.*

The "no change" option as outlined in Committee's Discussion Paper

The Committee's Discussion Paper pointed out there is a case against the need for the action proposed by the Auditor-General. The paper stated that it was the Committee's intention to fully address both sides of the debate during the Inquiry.

The "no change" approach, which has been adopted to date in Victoria, centres on the accountability of government and its agencies to effectively manage contracts, with the Auditor-General having access to all necessary information to form an opinion on an agencies' performance in managing contracts. Proponents of this approach argue that legislative change of the kind advocated by the Auditor-General is not warranted.

The Committee's Discussion Paper stated that the main supporting rationale for the "no change" approach, from the viewpoint of this particular topic, is the higher the standard of contract management by agencies, the less likelihood that evidence-gathering problems would be experienced by the Auditor-General when evaluating delivery of contractual services.

Much valuable guidance has been produced by the Department of Treasury and Finance to assist agencies in their management of contracts with the private sector. Standard contractual provisions have been developed which govern the responsibilities of the contractual parties.

Victoria's standard contract for the provision of services includes an obligation for the service provider to retain records for a period of seven years after expiration of a contract. It also includes a clause that gives right of access to the lead government agency to accounts and records including for the purposes of an audit. While there are no express references in the standard contract to right of access by the Auditor-General as Parliament's appointed auditor, some contracts for PPPs, for example the service agreement for the Victoria's Emergency Alerting System, place an obligation on the contractor to grant access to the Auditor-General.

176 ibid.

The "no change" approach also gives rise to a need to consider the position of contractors and whether any statutory right of access assigned to the Auditor-General would unnecessarily impede their right to manage their contractual obligations without external pressure or interference. Adequate protection of their intellectual property and competitive strengths, and any potential decrement in the quality and numbers of contractors willing to do business with government also require examination.

Some discussion points initially raised with the Committee by the Department of Treasury and Finance

In a paper to the Committee in the lead up to its Discussion Paper, the Department of Treasury and Finance cited the following questions pertinent to this issue which were set out in that paper.[177]

- *Do change in the balance of public sector delivery models (for example, increased private versus public provision) change the level of accountability of the Executive and public entities to Parliament? If so, what level of assurance does Parliament expect from the auditor to ensure executive accountability is not diminished?*

- *Could there be an impact on the future ability of government to efficiently and effectively conduct business with the private sector and to attract potential investors to Victoria, if the powers of the Auditor-General and other independent officers were to extend beyond the boundary of the Victorian public sector?*

- *Is it appropriate for private sector entities to be subject to additional auditing and reporting requirements, other than those required by good practice ASX disclosure rules and federal legislation relating to such entities?*

- *Could the extension of powers beyond the public sector have a direct impact on the rights of individuals within the community?*

The Discussion Paper signalled that the Committee intended to seek the Department's stance on these questions during the course of the Inquiry.

Views expressed to the Committee in submissions and at public hearings

It was against the above background and awareness of the overall sensitivity of the topic and the broad arguments in favour of or against legislative action, that the Committee proceeded, in the period subsequent to release of its Discussion Paper, to consider the views on the topic expressed to it by particular parties in submissions and in evidence at public hearings.

Auditor-General

VAGO's submission to the Committee built on the extensive views previously expressed by the Auditor-General on the subject. Some extracts from the submission are presented below:[178]

> *Victoria's legislation is particularly weak in this area and other jurisdictions such as WA and Tasmania have moved beyond Victoria in this respect. This weakness effectively allows for the removal of information regarding the expenditure of public moneys beyond audit and Parliament's reach.*

177 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, received 2 December 2009, pp.2–3

178 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, pp.14–15

> *... proposed amendments are first order issues for the Auditor-General.*
>
> *... Major contracts such as Public Transport Franchising, which is worth around $2 billion, do not have explicit Auditor-General access. Other examples include PPP projects and tollways.*
>
> *... The amendments being sought have often been misrepresented as the Auditor-General seeking to audit the financial affairs of private sector entities. The Auditor-General has never proposed this. The access sought is to information and assets of the State in the hands of private providers to enable the audit of expenditure of public money, or the use of public property in the hands of private sector parties contracting with Government.*

VAGO's submission asserts in some detail that the contractual approach to this issue has failed and stresses that only '*a clear statutory access right will unequivocably and equitably establish the required framework and enable Parliament to receive unfettered assurance regarding the expenditure of public moneys...*'[179]

The Auditor-General was extensively questioned by the Committee on this topic at its public hearing. On reliance on contracts for access, the Auditor-General stated:[180]

> *... we see that as problematic in a couple of respects. The legal advice is that because we are not a party to the contract, we are then subject to the discretion or the cooperation of the government party, which then impacts on your independence and ability.*
>
> *The other one is that the performance of the sector in making provisions in contracts has a very checkered history. Notwithstanding policies, principles and guidelines, what I might call the success rate or reliability rate is quite low. Whether it is consciously or unconsciously, it gets overlooked and, in fact, I have had it put to me by some others that it provides an unnecessary leverage in negotiations that it can then become part of, and we are subordinating public accountability to an individual transaction's negotiation.*

When questioned if any problems to date have been experienced with access, the Auditor-General responded:[181]

> *My reading to date is to the extent we have accessed private organisations they have been cooperative, but my fear as the auditor is that when things are looking regular people are inclined to be cooperative. If things are looking less than regular there is an incentive both for the administering department and the commercial partner not to be so cooperative. This is where I bring us back to my exhortation to address the principles, and the hitherto established principle of public sector accountability is that you provide in legislation for the oversights and slips. I would stress that they are used in an exception but it is a bit like the saying that the best contracts are the ones that are never resorted to. The best legislation is the one that is rarely used, and I come back to the coercive powers of the act. They are rarely used but there is an important message to the system and an underlying provision to maintain the capacity for independent audit by enshrining those sorts of provisions in the legislation.*

179 ibid., p.16

180 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.5

181 ibid.

On whether the granting of access authority would create a disincentive for contractors to bid for government jobs, the Auditor-General found that '*…a difficult proposition to begin to address because the precedent and practice elsewhere is that scenario has not eventuated.*'[182] Other evidence provided to the Committee by an accompanying official of VAGO at the hearing argued that there could actually be an incentive to contractors if their work had been previously examined by the Auditor-General and found to be efficient and effective.[183]

A further point raised with the Auditor-General at the hearing concerned whether contractors could be assured that matters commercial in confidence and intrinsic to their competitive edge would be protected. The Auditor-General responded as follows:[184]

> *Can I qualify that I find it difficult to see that I would end up in that situation in a private body, because we have to be there to corroborate evidence that a public official has given us to demonstrate how well they are going.*
>
> *My short answer is: we do that effectively every day of the week, in accordance with the auditing standards that guide our behaviour, our approach and the confidentiality. Within the office it is peer reviewed, as professional practice; another professional looks over the shoulder and second guesses or reviews the logic of what the primary person has done. We have a robust system of QA, with external people coming in and reviewing a selection of our jobs. We have the PAEC's performance audit which comes in and does a selection. So aside from our own honesty and adherence to professional standards, there are three or four levels of control on that.*
>
> *At the other end I would say that we are handling sensitive things like that routinely in a range of audits, where I would argue that is working well. I can think of an instance. The public report on integrity of data had very severe threshold issues. The way we have handled that has been in a way to put the issues on notice, but not to put in the public domain a basis for people to attack the systems. That is grist for the mill for an auditor.*

Australasian Council of Auditors-General (ACAG)

ACAG's submission to the Committee regards the fundamental principle with this topic as relating to:[185]

> *…equity and transparency. There is evidence that relying on contract provisions has not worked with taxpayers ultimately disadvantaged. The 'follow the dollar' access principle overcomes this in the public interest. This is not therefore a wish on behalf of Auditors-General to audit the private sector.*

ACAG regards as a reasonable question whether the granting of audit access would impact on the future ability of government to conduct business with the private sector. However, it believes the more important question to be – '*if the private sector wishes to participate in public sector program delivery, and benefit from taxpayers' monies, they should be prepared to cooperate in enabling administering authorities to be held to account.*'[186]

182 ibid., p. 8

183 ibid., pp.7–9

184 ibid., p.9

185 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.39

186 ibid., p.41

On the need for ring-fencing of access to the delivery of contracted services, ACAG accepts that, while, in principle, conditions placed on the Auditor-General would impact independence, '*this could be too open-ended and ACAG suggests it would be reasonable to restrict access to the activities relating to the provision of government services. That is, not to the other activities of the private sector entity.*'[187] ACAG's representative reinforced this view in evidence to the Committee and commented in respect of the boundaries of audit activity that:[188]

> *If a public sector agency has outsourced a particular activity, whether it be via a contract or a PPP or any other mechanism, the boundaries should be limited to the level of expenditure that is paid to the private sector operator and then to the outcomes that they are expected to achieve with those funds.*

Professor Kerry Jacobs

Professor Jacobs supports the assignment of audit access to private sector contractors on the ground that the absence of such access '*will fundamentally undermine the processes of public accountability.*'

Professor Jacobs also stated:[189]

> *The fundamental issue is that public funds are provided by the tax-payers and therefore those who receive it must account for how they used it. If they accept these accountability obligations when they accept public funds, it* [is] *difficult to see how they can complain that their rights have been abused or infringed.*

Department of Treasury and Finance

The Committee raised various aspects of this topic with representatives of the Department of Treasury and Finance at a public hearing. The evidence given by the department was supplemented by additional written comments submitted to the Committee subsequent to the hearing.

In evidence to the Committee, the Secretary of the department expressed the view that the fundamental issue with this topic concerned the ambit of the role of the Auditor-General. The Secretary commented:[190]

> *I think the fundamental principle comes back to what is the role of the Auditor-General. The methodology that we have operated under has been that the role of the Auditor-General is to undertake an audit function on executive government, and that the structure under which the legislation works is about that.*
>
> *If executive government or a department outsources the delivery of something, then the role of the Auditor-General is to oversee that, look at the documentation and provide assurance to the Parliament whether the delivery of that service, product or whatever is value for money, good practice — whatever. It seems to me that the question that the Auditor-General is asking is exactly the same one that the contract manager should be asking as part of their management contract.*

187 ibid., p.42

188 Mr M. Blake, Tasmanian Auditor-General, Australasian Council of Auditors-General, transcript of evidence, 7 April 2010, p.5

189 Prof. K. Jacobs, submission to the Committee, received March 2010, p.4

190 Mr G. Hehir, Secretary, Department of Treasury and Finance, transcript of evidence, 7 April 2010, p.6

> *I do not quite understand what the circumstances are where the auditor does not get access to the information they need to provide the assurances to Parliament, except if the contract is not written in an appropriate way. If that is the case, the role of the Auditor-General under the current framework is to say, 'The contract does not provide the necessary information to give me assurance on this, and you need to improve the provisions of contract management processes around this'. I think through time you would find that our contracting performance has improved.*

On this same point, the Secretary concluded:[191]

> *The question that I ask is: does Parliament want to establish a role for the Auditor-General which is auditing executive government, or does it wish to extend that role into being able to access information and documentation and whatever mandatorily from all of the elements of the community with which government touches financially, which is almost all of it?*

The Secretary also expressed a view on what he considered to be the likely impact on private sector providers of expanding the Auditor-General's access powers. The Secretary stated:[192]

> *I think undoubtedly if you impose an additional cost on a private sector provider, then they will pass the cost on to the government. That is just what will happen and it does not matter whether it is putting an additional audit burden, or any other policy proposal you put on them, people do that. Does that have an impact on competition? Yes, but the question you need to ask is a cost benefit question rather than that one, I would have thought. Does the benefit of doing it overweigh the cost of doing it?*
>
> *It probably would be going too far to say that if you did this, the world would come to an end and we could not do it any more, it would just increase the cost of doing it. In relation to the significance of the increase, I do not know.*
>
> *Would it create an increased bias towards in-house delivery versus external? Yes it would because you are adding cost to the private sector; another regulatory burden over the private sector. That is undoubtedly true.*

The Secretary was also asked to comment on the manner in which the Auditor-General could corroborate assurances or information provided by a contract manager in a department in the absence of access power. The Secretary stated:[193]

> *I am not certain where that ends. There is either enough evidence provided to the contract manager by the provider to give assurance that the contract has been adhered to or there is not. If the contract does not provide enough information to give assurance to the contract manager and to any external body, whether it be the Auditor-General or a parliamentary inquiry or whoever else gets access to it, for them to ascertain that the contract is being delivered effectively, then the issue is poor contract management and poor contract description. That is the thing that needs to be fixed up. If the contract manager cannot be assured that the contract has been delivered effectively, then the contract is not written in a way which allows that to happen and it needs to be fixed.*

191 ibid., p.8

192 ibid., p.5

193 ibid., p.14

The written material submitted by the department to the Committee elaborated on some of the points made by the Secretary at the public hearing. On the role of the Auditor-General, the department stated:[194]

> *While it is recognised that the environment within which the Government operates is dynamic, the Auditor-General's ability to conduct audits within this changed environment has not been affected, accordingly the mandate has not diminished. It continues to be the responsibility of the Auditor-General to assist the Legislative arm of Government in the exercise of its constitutional functions, and to report to Parliament as to whether the Executive arm of Government (through the public sector) has adequately managed contracts in accordance with the specifications and whether the public sector has established and implemented sufficient and appropriate controls and processes to assure itself and Parliament as to compliance and value for money.*
>
> *Consequently, it is incumbent that the contracting authority ensures that appropriate records are maintained, or can be obtained if needed, to support the Auditor-General in performing his functions in ascertaining whether value for money has been attained by it from the private sector in the delivery of public services.*
>
> *... Where contract managers do not have all of the information necessary to effectively manage contracts and ascertain performance, it is appropriate for the Auditor-General to make such observations and recommendations in audit reports to Parliament, as a conduit for the Executive to act.*

The department's written comments to the Committee also advised of action aimed at strengthening access clauses within PPP contracts and Alliance Contracts. The department pointed out that current PPP contracts '*specifically address the release of confidential information to the Auditor-General for the purpose of satisfying VAGO's statutory duties.*' For Alliance Contracts, the department indicated '*it is leading the way in this area*' through the development of a model Project Alliancing Agreement with various other states:[195]

> *... which is expected to include a clause that makes specific reference to the Auditor-General whereby... the Victorian Auditor-General, may at any time during the performance of the work under the Agreement and up to the expiry of the period after Completion, inspect, audit or investigate the records prepared or maintained by us or our Subcontractors for the purposes of performing the work under the Agreement.*

This latter development with Alliance Contracts is of particular relevance as the proposed standard wording would assign specific access authority to the Auditor-General extending beyond contractors to subcontractors.

Department of Innovation, Industry and Regional Development and Department of Transport

The Committee was pleased to receive submissions from these two departments and also to hear evidence from them at public hearings. It has enabled the Committee to gain insight from an audited agency's perspective on some of the issues addressed in its Discussion Paper.

194 Department of Treasury and Finance, response to additional information requested by Committee, received 18 June 2010

195 ibid.

Department of Innovation, Industry and Regional Development (DIIRD)

In its submission to the Committee on this topic, DIIRD expressed caution against the granting of access authority to the Auditor-General. Its comments included:[196]

> *Whilst there may be strong public policy reasons which might suggest that the Auditor-General should be able to "follow the public dollar", this general proposition needs to be tempered, having regard to specific circumstances. If legislation were introduced which exposed all contractors engaged by Government to the potential of audit of their operations, this may provide a significant disincentive to those contractors from dealing with Government. The disincentive would be heightened if the Auditor-General were permitted by legislation to have access to the physical premises of providers. The effect of this could be an increase in the cost of obtaining services, as some contractors may be dissuaded from entering the tendering process. There could also be a negative impact on quality if the number of potential providers were to shrink.*

Departmental representatives elaborated on this view at the Committee's public hearing. They also outlined to the Committee, through presentation of sample access clauses, the approach it follows in its contractual and funding agreements governing access by the Auditor-General to information required for audit purposes. For contracts involving provision of goods and services, standard clauses grant access to the department or its representative to the premises and records of the contractor. There are no references to access that might be required by the Auditor-General. For its funding (non-contractual) agreements with external parties, specific access rights are assigned to the Auditor-General. These latter rights are already formally assigned to the Auditor-General under section 6C of the Audit Act.

Department of Transport (DOT)

Several questions concerning this topic were raised by the Committee with DOT's Secretary at a public hearing. The Secretary cited in a number of responses that the topic involved a balancing of competing interests. In doing so, the Secretary emphasised the importance of protecting the legitimate competing interests of private sector suppliers. The comments put forward by the Secretary included:[197]

> *... I think there are competing objectives to be balanced here: on the one hand, the need for the Auditor-General to perform his functions without unreasonable impediment from the state government; and, on the other hand, the legitimate commercial interests of private sector suppliers, including some that are very small and may struggle with the compliance burdens associated with it. However, that would depend on how it was drafted and how it was applied.*
>
> *... I would say that in my experience the private sector generally takes a lot of interest in the way in which sovereign risk is managed within different jurisdictions. I think Victoria, going back many years, has had a competitive edge over other states, because of the relatively business-friendly environment we have created here — not just in the last 10 years, but in the last 20.*
>
> *I would simply say that we should proceed cautiously if we are to increase that perceived sovereign risk, because at the end of the day we want to secure value for money to*

196 Department of Innovation, Industry and Regional Development, submission to the Committee, received 7 April 2010, p.2

197 Mr J. Betts, Secretary, Department of Transport, transcript of evidence, 7 April 2010, p.4

> *taxpayers and that involves maximising the number of firms that are prepared to come and compete for government business. It simply needs to be weighed in the balance; I cannot give you a precise weighting; that is something that could only be done once a power had been drafted and it had actually been in practice over time. It may be one of those things you never know until after the event.*

Australia's Joint Accounting Bodies

Australia's Joint Accounting Bodies, CPA Australia, the Institute of Chartered Accountants in Australia and the National Institute of Accountants, provided comments on this topic in their submission to the Committee. These comments include:[198]

> *The Joint Accounting Bodies support the ability of the AG to investigate matters relating to public money and property, including access to relevant records of information held by private sector contractors.*
>
> *... However, access to private records by the AG should be considered as something which is the exception, rather than the rule. Furthermore, it should only be done where adequate safeguards are in place.*

The Joint Accounting Bodies describe such safeguards as '*outlining clear reasons when access provisions may be invoked, maintaining appropriate confidentiality and commercial requirements, inclusion of provisions in contracts, receiving permission before access and so on.*'[199]

The Joint Accounting Bodies also stated:[200]

> *In our view there is no sound rationale, from the public policy perspective, to allow for the possibility that, where a matter is outsourced it reduces the capacity of the A-G to examine the situation. If the capacity of the AG is hampered by not permitting ready access to a contractor's records then public accountability is compromised. It is possible that some agencies may then see outsourcing as a means of reducing scrutiny – which would be an outcome that is not in the public interest.*

Infrastructure Partnerships Australia

Infrastructure Partnerships Australia (IPA) is the key national peak body which aims to harness expertise and best practice in the delivery of infrastructure services. It represents Australia's most senior business leaders and public sector executives from across the infrastructure sector.

During the Inquiry, the Committee invited the formal views of Infrastructure Partnerships Australia on this topic including its opinion on the likelihood of any negative consequences such as a disincentive to contractors to deal with government that could materialise if an audit access power was granted in legislation. This latter point was not specifically addressed by the organisation in its written response to the Committee. It confined its comments mainly to the Auditor-General's existing powers and the extent of transparency already provided under PPP projects.

The organisation recognises the important role of an independent Auditor-General '*in ensuring transparency and accountability of government expenditure. The role is crucial to ensure public*

198 Australia's Joint Accounting Bodies, submission to the Committee, received 26 March 2010, p.2

199 ibid.

200 ibid.

programs and services deliver value for money outcomes for taxpayers…' After discussing various points relating to the topic, it concluded as follows:[201]

> *Based on the current, extensive powers of the Auditor-General with regard to accessing private contractors and the substantial measures already in place to ensure transparency around each PPP contract, IPA does not consider there is justification for the creation of an explicit authority for the Auditor-General to access the premises and records of private sector contractors engaged in the delivery of major public projects or services.*

The situation in other jurisdictions

Legislation in several other Westminster jurisdictions, such as Western Australia, Tasmania, New South Wales, South Australia, New Zealand and the UK, assigns specific authority to the Auditor-General to gain access to the premises and records of persons other than government entities, such as private sector contractors, whenever deemed necessary.

The Committee established during its visit to Western Australia that, in the lead up to the passing of revised audit legislation in that state, the then Public Accounts Committee recognised in its report on the amending Bill:[202]

> *… the need for all public sector bodies, programmes and activities involving any use of public resources to be subject to audit by the Auditor-General, regardless of whether they are delivered by public sector agencies or by the private sector.*

The Committee's visit to New Zealand identified that access by the New Zealand Auditor-General to premises other than a government agency requires, under the audit legislation, authorisation by warrant issued by a District Court Judge.

In the UK, the legislation expressly identifies that right of access granted to the Comptroller and Auditor-General extends to both contractors and subcontractors engaged in the delivery of public services.[203]

In the Commonwealth, the audit legislation provides authority to the Commonwealth Auditor-General to obtain information from any person but, similar to the Victorian legislation, statutory access to premises is restricted to those of Commonwealth entities. For some years now, an approach centred on the quality of contract management and the associated accountability of government and its agencies for effective overseeing of contracts, has been followed. As part of this approach, the Commonwealth Department of Finance and Deregulation and the Australian National Audit Office (ANAO) have jointly developed non-mandatory standard contract clauses to provide the ANAO access to the premises of contractors and information held by contractors, including third-party subcontractors, for the purpose of audits.[204]

It was of interest to the Committee that the Commonwealth Auditor-General, in a submission to the Commonwealth Parliament's Joint Committee of Public Accounts and Audit, has advocated expansion

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201 Infrastructure Partnerships Australia, correspondence to the Committee, received 25 May 2010

202 Hon. E. Ripper, Legislative Assembly, *Western Australian Parliamentary Debates*, 29 June 2006, p.4590

203 *The Government Resources and Accounts Act 2000* (UK) (Rights of Access of Comptroller and Auditor General) Order 2003

204 Commonwealth Department of Finance and Deregulation, Standard Contract Clauses to provide ANAO access to Contractors' Information, May 2007

of audit access powers to encompass the audit of the contractual performance of private sector contractors. The Auditor-General included the following comments in the submission:[205]

> *To reinforce these powers* [the access powers in the audit legislation], *Commonwealth contracts often include provisions that provide the relevant agency and the ANAO access to information and records. Such access can be used in assessing the performance of the relevant agency, but not the performance of the external party. The ANAO considers that the existing accountability regime should be enhanced by expanding the Auditor-General's mandate to allow the performance of certain external parties who are involved in the delivery of government programs or activities to be audited by the Auditor-General. The scope of any such audit would be restricted to the functions performed by these parties for the Commonwealth.*

A summary of the legislative situation across jurisdictions on this subject is presented in Appendix 5.

Position reached by the Committee

It can be seen from the above references to matters raised with the Committee in submissions and at public hearings that this topic has generated significant interest from responding parties. While a diversity of opinions have been expressed, they broadly give rise to consideration of two fundamental but opposing perspectives, namely:

- there is potential for public accountability to be limited if the Auditor-General is not authorised in legislation to access the systems and records of private sector contractors engaged in the delivery of public services; or
- public accountability is adequately served when the ambit of the Auditor-General's role is confined to its traditional public sector boundaries and focuses on evaluations of the effectiveness of the performance of public sector agencies in managing contracts with the private sector.

The former viewpoint contends that changes in the delivery of services in the public sector over the years involving such developments as PPPs and Alliance Contracts have created a legislative gap which should be filled if Parliament's needs relating to the accountability of government agencies in managing public resources are to be met. It is generally conceded by proponents of this position that any access authority granted to the Auditor-General should be seen as a last resort reserve facility, available in exceptional circumstances when all other measures have been pursued. This reserve power is seen as necessary to ensure that the audit process is not impeded if serious problems are experienced with services delivered by a contractor or an agency's management of a contract, and Parliament's scrutiny of the underlying circumstances is not consequently weakened. It is also argued that legislative force is necessary even though contractual arrangements provide for access by the Auditor-General. It is also generally agreed that the access authority needs to be accompanied by safeguards, in the form of legislative provisions, which ring-fence any audit activity to issues relating to the delivery of contractual services in order to protect the intellectual property and competitive strengths of contractors.

The opposing viewpoint focuses on the importance of effective contract management in the public sector. In this context, the Auditor-General's function is seen as providing independent assurance to Parliament on the performance of contract managers in government agencies. Proponents of this position draw attention to the progressive strengthening in Victoria of access clauses within contracts.

205 Australian National Audit Office, submission to the Joint Committee of Public Accounts and Audit's Inquiry into the Auditor-General Act 1997, 9 April 2009

It is contended these clauses give contract managers and the Auditor-General a right to receive a wide range of information relating to the delivery of contractual services, obviating the need for a specific legislative authority to access the premises of contractors and inspect their records and systems. It is also contended with this viewpoint that public accountability is appropriately served through the Auditor-General reporting to Parliament when it is found that contract managers have not effectively managed contracts and recommending to Parliament the necessary remedial action required by the Executive Government. Proponents of this viewpoint also cite the likelihood of assignment of a legislative access authority to the Auditor-General creating a disincentive to potential parties to enter into government contracts in Victoria as well as leading to increased costs and a decrement in the number and quality of prospective contractors. The Committee has carefully analysed these opposing viewpoints and recognises that each contains valid points.

The Committee is supportive of:

- the action that has been taken to include and strengthen access clauses within Victoria's PPP contracts as a matter of course; and
- the standard access narrative under consideration by the government, in conjunction with other states, for Alliance Contracts.

The ambit of the wording earmarked for this latter standard clause is wide and would ensure that the Auditor-General has access to the premises and systems of private sector contractors and subcontractors whenever it is deemed necessary to extend the audit function beyond the operations of the managing government agency.

If this wording was adopted by all Victorian government entities for all contracts involving the provision of goods and services, there would be minimal need for the Auditor-General to draw on a specific legislative access authority.

The Committee is also supportive of the need to ensure there are adequate safeguards in place at all times, with or without the assignment of a legislative access authority to the Auditor-General, to protect the intellectual property and competitive strengths of private sector contractors.

On the central issue of legislative access authority, the Committee has concluded that the public accountability imperative is sufficiently strong to warrant incorporation within the Audit Act of a specific access power to the Auditor-General. It regards the granting of such a power as constituting a reserve mechanism, to be utilised as a last resort audit measure, in rare extenuating circumstances when all other avenues to obtain required information, including through the contractual provisions, have been exhausted.

Such rare circumstances would occur if the Auditor-General detected serious weaknesses in an agency's management of a contract or in the manner in which contractual services had been delivered. In these instances, the reserve access facility would enable Parliament to receive from the Auditor-General information on the extent to which value for money had been achieved in contractual arrangements from the deployment of public funds. The Committee considers that, without a reserve access provision and where contractual provisions prove ineffective, any findings of the Auditor-General would necessarily be limited to identifying the shortcomings identified in an agency's contract management and the required remedial action. Parliament's scrutiny of the circumstances directly relating to service delivery under the contract would therefore be restricted.

As mentioned in the Committee's February 2010 Discussion Paper, a live example of the need for a reserve access facility for the Auditor-General arose in Victoria in the 1990s. At the time, serious allegations of falsifying call data and inflating contractual claims were made against the private sector contractor responsible at the time for the management of emergency communications systems.

The Auditor-General had to rely on the cooperation of the contractor in gaining access to relevant electronic records in order to complete the audit and report fully to Parliament. Without such cooperation, a detailed audit report to Parliament would not have been possible. The circumstances ultimately led to a Royal Commission which included as its first recommendation in its 2001 report that the public accountability powers of the Auditor-General be extended to circumstances where private sector providers are contracted to provide public services.[206]

It is the importance of having a reserve facility available in legislation to fully protect Parliament's interests in the management of government contracts which creates the public accountability imperative for assignment of a statutory access power to the Auditor-General. The Committee nevertheless expects that the quality of contract management and the oversight of contractors' performance within government agencies will be consistently high enough to obviate any need for the Auditor-General to regularly resort to the legislative access authority. If use is ever made of this authority, Parliament via the Committee will be particularly interested in the underlying reasons for such use including the nature of the problems encountered by the Auditor-General.

The Committee recognises the views expressed to it during the Inquiry on some potentially negative consequences that could emerge from the granting of an audit access power. These consequences include a disincentive to contractors to seek business in Victoria, higher contractual costs to government and a possible reduction in the number and quality of available contractors. As mentioned by several parties during the Inquiry, it is difficult to predict the extent to which these consequences might materialise and much would depend on the manner in which a new legislative authority is exercised and the frequency of its use.

The Committee is inclined to the view that, with adequate ring-fencing provisions to protect the commercial standing of contractors coupled with the categorisation of the access facility as a reserve power to be used on behalf of Parliament on rare occasions, most reputable private sector service providers would not regard the access power as a major impediment to them doing business in the Victorian public sector. It could even be that many contractors might actually regard the potential for audit involvement by the Auditor-General in rare last resort circumstances as a logical component of their accountability obligations under public sector contracts and as a conduit for reinforcing their reputation as quality contractors.

In summary, the Committee considers inclusion, with appropriate safeguards, within the Audit Act of an authority for the Auditor-General to access the systems and records of private sector contractors and their subcontractors reduces the potential for any erosion of Parliament's scrutiny of public administration in Victoria stemming from the established patterns of in-house and external service delivery. Such action would further reinforce Victoria's commitment to leading edge public accountability.

The recommendations of the Committee on this topic are:

Recommendation 21: **The *Audit Act 1994* be amended to assign an explicit authority for the Auditor-General to access the systems and records of public sector contractors and their subcontractors pertaining to the delivery of services under contracts in the Victorian public sector.**

206 Royal Commission into Metropolitan Ambulance Service, *Report*, Summary Volume, November 2001, p.13

Recommendation 22: **The amendment to the *Audit Act 1994* identified in Recommendation 21 be drafted in a manner which restricts the access authority to the systems and records of contractors and their subcontractors, which relate to the delivery of services under public sector contracts.**

Recommendation 23: **The amendment to the *Audit Act 1994* identified in Recommendation 21 be also drafted in a manner which emphasises that the access authority is a last resort reserve measure to be used only when all other avenues, including through contractual provisions, prove ineffective and use of the access authority is deemed necessary to fully protect the interests of Parliament.**

Recommendation 24: **All Victorian government entities adopt the proposed access clause for Alliance Contracts as standard wording for all contracts with the private sector.**

5.1.2 Extent of legislative authority to investigate and audit matters pertaining to public money and public property

Nature of this topic

The Audit Act does not contain an explicit requirement that the Auditor-General conduct audits to examine any matter pertaining to the use of public money or public property.

The Committee's February 2010 Discussion Paper explained that section 3A, which was added to the Audit Act as part of a suite of amendments in 2003, addresses this issue in a non-explicit manner. It sets out in subsection 1 the objectives of the Act incorporating the various main statutory powers of the Auditor-General (such as the conduct of financial audits and performance audits) and concludes as follows in subsection 2:

> *It is Parliament's intention that, in pursuing these objectives, regard is had as to whether there has been any wastage of public resources or any lack of probity or financial prudence in the management or application of public resources.*

This message from Parliament illustrates the importance it attaches to investigative work concerning the integrity of public sector resource management undertaken by the Auditor-General during discharge of any of the statutory audit functions set out in the Act.

Those statutory audit functions encompass all aspects of the management of public moneys by an authority which, by definition in section 3 of the Act, covers departments, public bodies and entities controlled by the State or a public body.

The Auditor-General's power to audit the use of government financial assistance allocated to entities that are not authorities, such as in the form of grants to not for profit organisations or industry assistance packages to private sector bodies, is set out in section 16C. Section 16C(1) states:

> *The Auditor-General may conduct any audit he or she considers necessary to determine whether a financial benefit given by the State or an authority to a person or body that is not an authority has been applied economically, efficiently and effectively for the purposes for which it was given.*

As mentioned in the commentary on the preceding subject under 5.1.1, section 16C(3) excludes in the definition of financial benefit contractual arrangements on commercial terms entered into between the State and private sector parties.

Effectively, therefore, the only investigative power in relation to waste, probity or financial prudence in the management of public moneys without a statutory backing in the Audit Act is the question of the right of access to private sector contractors discussed in the preceding paragraphs of this Chapter. As pointed out in that discussion, the Auditor-General has full statutory powers concerning the contract management activities of the responsible government agency.

The Committee's Discussion Paper indicated that the Auditor-General advocated in correspondence to the Committee that a new provision be inserted in the Audit Act '*allowing the Auditor-General to investigate any matter relating to public money, or public property (including money expended by the State or local government), to reflect the current public sector operating environment*.' The Auditor-General stated that such a proposal '*would strengthen, clarify and extend the Auditor-General's remit to ensure all uses of public… money are subject to scrutiny.*'[207]

The Discussion Paper also referred to correspondence received from the Department of Treasury and Finance which raised the question of whether the current scope of the Auditor-General is appropriate or should the Auditor-General, in certain circumstances, be given authority to undertake audits of entities outside Executive Government. The Department cited as a suggested discussion point if such a notion is '*an infringement of the intended spirit of the Constitution Act 1975 and the Westminster model of… Government*.'[208]

The Committee's Discussion Paper recognised that adoption of the Auditor-General's proposal would mean that the Auditor-General would have the right to extend audit investigations to the use of public money or property under private sector contracts, when deemed necessary. The Committee notes that there are many services initially fully funded by Government (for example, community health) but carried out by non-government agencies, public companies or other private entities.

The Discussion Paper also recognised that an important advantage of the Auditor-General's proposal is its potential to clarify the current legislative setting on the Auditor-General's investigative powers which are currently addressed across a number of sections of the Audit Act. Such clarity would remove any doubt or uncertainty on the ambit of the Auditor-General's legislative authority and reduce the risk of challenges to such authority.

Less evident to the Committee was the proposal's potential to strengthen and extend the Auditor-General's powers if the preceding issue on right of access to private sector contractors ultimately attracts statutory backing. The delivery of all government programs and services, utilising either in-house or contracted resources, can be linked to a responsible government agency which would be the catalyst for any investigative work by the Auditor-General.

For the above reason, the Committee signalled in its discussion stage that it regards this issue as directly connected to the preceding section on right of access to private sector contractors. This connection could mean that legislative change in at least one area could be necessary to address the Auditor-General's concerns. In making this point, the Committee indicated it did not wish to understate the importance of ensuring, consistent with the Auditor-General's proposal for an explicit investigative mandate, that the statutory powers assigned by Parliament to the position are clearly outlined within the Audit Act.

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207 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

208 Department of Treasury and Finance, *Review of the Audit Act 1994*, correspondence to the Committee, received 2 December 2009, p.3

Views expressed to the Committee in submissions and in evidence at public hearings

The views expressed to the Committee by the Auditor-General, ACAG and the Department of Treasury and Finance on this topic were generally combined with their comments on the preceding topic discussed in some detail under section 5.1.1. The evidence presented to the Committee by those parties at public hearings similarly reflected matters relevant to both topics. As mentioned above, the Committee considers there is a direct nexus between this topic and the preceding subject on access authority to the systems and records of private sector contractors.

The situation in other jurisdictions

The audit legislation in Western Australia and Tasmania, which have been extensively revised in recent years, contain omnibus investigative provisions similar to that advocated for Victoria by the Auditor-General. Both statutes contain a listing of the purposes for which the Auditor-General may carry out an examination or investigation which include investigating any matter relating to public money or public property.[209]

In New Zealand, the Committee was informed during its visit that the subject was widely discussed in the lead-up to the 2001 revised audit legislation but it was determined that no action was necessary as the Auditor-General's functions and powers were considered to be sufficiently clear in the amending Bill.

As mentioned under the preceding section, ANAO has advocated, in a submission to the Australian Parliament's Joint Committee of Public Accounts and Audit, that the audit mandate under the *Australian Auditor-General Act 1997* be widened to encompass an authority to audit the performance of government contractors in addition to government agencies engaged in the management of contracts. The submission proposed that the scope of any such audit would '*necessarily be restricted to the work undertaken under contract to the Commonwealth.*'[210]

A summary of the legislative situation across jurisdictions on this subject is presented in Appendix 5.

Position reached by the Committee

The earlier commentary on this topic identified that, effectively, the only investigative power in relation to waste, probity or financial prudence in the management of public moneys without a statutory backing in the Audit Act is the right of access to records and systems of private sector contractors. The Committee has recommended in the preceding section that such access be authorised under the Audit Act, with appropriate safeguards.

After further consideration of this topic, the Committee has concluded that the assignment in the audit legislation of a right of access to the contractual records and systems of government contractors, if ultimately put to and passed by Parliament, would obviate the need for an explicit omnibus investigative provision. It would mean that the Auditor-General would have statutory access powers for the full spectrum of audit functions involving public money or property, whether such money or property is managed:

- in-house by public sector agencies (drawing on the existing core provisions of the Audit Act);

209 *Auditor General Act 2006* (WA), s. 18(2); *Audit Act 2008* (Tas), s. 23(c)

210 Australian National Audit Office, submission to the Joint Committee of Public Accounts and Audit's Inquiry into the Auditor-General Act 1997, 9 April 2009

- under contracts entered into by the government or its agencies with the private sector (drawing as necessary on a newly-assigned access authority); or

- by recipients of government financial assistance under non-commercial arrangements (drawing on the existing section 16(c) of the Audit Act).

The Committee has also concluded, however, that the above powers should be accompanied by an amendment to section 3A(2) in the objectives section of the Audit Act along the following lines (the Committee's recommended changes to the existing narrative within section 3A(2) are given emphasis):

> *It is the Parliament's intention that, in pursuing these objectives, regard is had as to whether there has been any wastage of public resources or any lack of probity or financial prudence in the management or application of public resource**s. To this end, the Parliament requires the conduct of audits by the Auditor-General.***

Such an amendment would more explicitly link the intention of Parliament stated in section 3A(2) to a requirement that the Auditor-General have regard to it in the conduct of audits.

Recommendation 25: **Section 3A(2) of the *Audit Act 1994* be amended to explicitly link Parliament's intention as stated in that section to the conduct of audits by the Auditor-General.**

CHAPTER 6: OPERATIONAL POWERS AND RESPONSIBILITIES OF THE AUDITOR-GENERAL

6.1 Recommended amendments to the Audit Act pertaining to the Auditor-General's operational powers and responsibilities

This Chapter addresses the Committee's consideration of amendments to the Audit Act that relate to the Auditor-General's operational powers and responsibilities (other than the information-gathering powers identified in Chapter 5). Many of the issues canvassed in the Chapter were raised by the Auditor-General in correspondence to the Committee during its Inquiry and focus on the strengthening of operational powers.

The Committee's commentary in the Chapter encompasses a wide range of topics identified during the course of the Inquiry. It includes matters raised with the Committee in correspondence, submissions received from interested parties, discussions held during public hearings and the Committee's own research. The issues addressed encompass both changes to existing provisions in the Audit Act and new areas of coverage in the Act.

An initial outline of each topic is followed by discussion of potential options for change drawing on the views expressed by interested parties and the Committee's research. The position reached by the Committee together with its recommended approach completes the commentary in each case.

The Chapter includes references to matters discussed by the Committee with parliamentary committees, Auditors-General, government officials and other organisations during the Committee's evidence gathering from other jurisdictions in Australia and overseas.

6.1.1 Incidental functions of the Auditor-General and the audit role in promoting performance improvement

Nature of this topic

Under Victoria's output management system, one of the two outputs of VAGO funded in the Appropriation Act, *Parliamentary Reports and Services*, encompasses provision of a range of services, other than of a direct audit nature, by the Auditor-General on behalf of Parliament. VAGO's 2009-10 Annual Plan states that the 'services component' of this output includes several elements which complement audit reports to Parliament and include '*guidance to public sector agencies, arising from our audit work, in specific areas of governance, management and accountability to support their improved future performance.*'[211]

The Auditor-General has for example produced in recent years a range of guidance material in association with performance audits, such as good practice guides on public sector ICT and records management. However, central agencies such as the Department of Treasury and Finance have the core responsibility for production of central guidelines and advice.

Section 7D(3) of the Audit Act authorises the Auditor-General to incur expenditure necessary for the performance of the functions of VAGO, subject to provision within any relevant Appropriation Act. Such expenditure could encompass the services component of the above output.

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211 Victorian Auditor-General's Office, *2009-10 Annual Plan*, May 2009, p.30

Section 16E was inserted in the Audit Act in 2003 to allow the Auditor-General to provide 'other auditing services' at the request of an authority. The section addresses the issue from an agency perspective and requires consent by the agency from the relevant Minister.

The combination of output funding under the annual Appropriation Act and the provisions of sections 7D(3) and 16E of the Audit Act provides the legislative authority for VAGO to deliver other auditing or incidental services.

In correspondence to the Committee prior to release of its Discussion Paper, the Auditor-General referred to the absence of an explicit authority for the provision of incidental functions in the Audit Act and indicated that such functions have expanded significantly in the contemporary environment. The Auditor-General proposed to the Committee that a new section be inserted in the legislation to specifically authorise the conduct of incidental functions which include the issue of good practice guides and certification to the Commonwealth Government of Commonwealth funding expended by the State.[212]

In its Discussion Paper, the Committee recognised that care needs to be exercised with incidental services in an audit environment to ensure audit independence is not impaired. It also raised the importance of not weakening the existing legislative framework, which accentuates the primary audit role of the Auditor-General but gives adequate secondary authority for the provision of incidental services such as the development and publication of good practice guides. On this latter audit role, the Committee also referred in the Discussion Paper to the importance of the contribution that can be made by the Auditor-General as a catalyst for improving public sector performance through creating positive relationships and a culture of strong performance and outcomes achievement.

Also directly relevant to this topic are the various discussion issues on continuous improvement and risk management raised with the Committee by the Department of Treasury prior to release of the Committee's Discussion Paper. Those issues, which were addressed in Chapter 6 of the Discussion Paper, included questions on the extent to which the provisions of the Audit Act effectively facilitate continuous improvement and support a risk management culture across the public sector. The department also posed whether the Auditor-General's role in advancing these two concepts was adequately expressed in the Audit Act.

Views expressed to the Committee in submissions

VAGO's submission to the Committee included, for this topic, the following additional comments on the Auditor-General's proposal for legislative change:[213]

> *The Auditor-General has proposed that a power to perform incidental functions, such as good practice guides and certification of Commonwealth funding expenditure be included in the Act.*
>
> *These functions should also encompass the ability to collaborate with other jurisdictions in developing, licensing and improving audit methodology software, and providing services connected with this activity such as training.*
>
> *The Auditor-General notes that the incidental functions sought should be limited to audit and directly related functions only, to preserve independence.*

212 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

213 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.18

On the discussion points concerning continuous improvement and risk management raised by the Department of Treasury and Finance (DTF), VAGO's submission contends that these points *fundamentally misconstrue the role of the office.* Other comments in the submission on this subject included:[214]

> *These roles sit squarely with the Executive, and more particularly with central agencies. Similarly, the Auditor-General does not have a view on what "optimum outcomes" are. The choice of outcomes is exclusively a matter for the Executive.*
>
> *... Whilst there is a legitimate place for the Auditor-General to be a catalyst for change, the responsibility for initiating any change, is for the Executive. The auditor has no executive authority; our only sanction is to report. Moreover, agencies generally, and central agencies in particular, remain responsible for developing and maintaining effective accountability and control environments. They have a responsibility to proactively engage in providing continuing integrity in those environments. Indeed, these discussion points are descriptors better applied to DTF's role.*
>
> *... The Auditor-General believes that any of the amendments suggested by DTF in this section would pose a serious threat to independence and in effect represent transferring Executive power, an inappropriate outcome.*

The Auditor-General expanded on these views in response to questions from the Committee at its public hearing.

On DTF's comments regarding continuous improvement and risk management, ACAG recognised in its submission the importance of the two concepts to public sector governance and the work of Auditors-General such as through the issue of good practice guides in supporting the concepts. In doing so, it shared the views expressed by the Auditor-General on the dangers to audit independence from direct audit involvement in the development of the concepts.[215]

At the Committee's public hearing, the Secretary, Department of Treasury and Finance, was given the opportunity to expand on the department's discussion points pertaining to continuous improvement and risk management, and the responsibility of the Auditor-General associated with those management concepts. The Secretary's comments in regards to continuous improvement to the Committee included:[216]

> *The role of the Auditor-General is to comment on whether people are adhering to policy and frameworks and to some extent the validity of those frameworks. That is an area that you have to be careful about as well because it is not the role of the Auditor-General to say whether a particular policy is right or wrong.*
>
> *There is a significant grey area between looking at a predominantly compliance-focused performance audit regime to one which is about compliance plus added value and how organisations can continue to improve through time. The question that we are asking, I suppose, is: are there issues within the Audit Act or should there be issues within the Audit Act which mean that performance auditing continues in the direction I think it has been going which look at not just compliance with current practice but what is best practice?*

214 ibid., p.23

215 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, pp.63–4

216 Mr G. Hehir, Secretary, Department of Treasury and Finance, transcript of evidence, 7 April 2010, p.10

> *How could you move towards best practice, those types of things but not getting into the space of setting policy or setting frameworks. I do not think there is anything we are talking about which would undermine the independence of the Auditor-General.*
>
> *... I suppose if I was suggesting an area in the legislation where the committee could give consideration to the nature of this role, it would be in the principles-type concept of the act, looking at the objectives and those types of things and whether within that framework it would be worthwhile considering concepts around best practice or continuous improvement as being part of the objectives of the auditor.*

On risk management:[217]

> *I think we still have a way to go in building comprehensive descriptions of risk appetite across government, and that is a responsibility of Treasury that we are working on continually — how you define these things better. But that only works if you have an accountability framework which accepts that as the base, that is, that risk management is what you want, not risk aversion. The questions we are asking there around those issues are whether the current act could be enhanced in any way, again probably through the objectives type of thing around making clear that we are not just about risk aversion, we are about effective risk management practices.*

In presenting his evidence, the Secretary pointed out that the department had worked with the Auditor-General on '*a couple of the things you have talked about and they have been good exercises which have produced good guidance in what best practice looks like.*'[218]

In its submission, DIIRD provides an auditee's perspective on the topic of incidental audit functions. It recognises the value of past good practice guides developed by the Auditor-General but cautions against adverse impacts on audit independence. In doing so, DIIRD cites the key responsibility of the Department of Treasury and Finance in the promulgation of such guides. DIIRD's submission commented as follows:[219]

> *DIIRD believes that there is significant value to be derived from the results of performance audits conducted by the Auditor-General. However, as noted in the Discussion on this topic* [in the Committee's Discussion Paper]*, there is a danger that the independence of the Auditor-General and his staff could be impacted if the Auditor-General also sets, by default, the operational and other standards by which the results of audits are to be judged.*
>
> *It would be preferable if the Auditor-General were to make recommendations to the Department of Treasury and Finance, or other accountable agency, so that that agency could develop and promulgate good practice guides as well as amend or develop applicable standards for application across Government.*
>
> *These activities, while valuable, are ancillary to the prime mission of the Auditor-General. It is acknowledged that the Auditor-General has historically played a valuable role in developing good practice guides.*

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217 ibid., p.12

218 ibid., p.11

219 Department of Innovation, Industry and Regional Development, submission to the Committee, received 7 April 2010, p.4

Similarly, the Secretary of DOT presented a positive but cautious agency perspective on the topic in evidence to the Committee. The Secretary informed the Committee that:[220]

> *... Clearly the Auditor-General has a great deal of experience across the whole of the public sector and there may be opportunities for promotion of best practice which will draw general conclusions out of the individual performance audits that the Auditor-General and his office conduct; and that may be of some use, although we need to make sure that the Auditor-General in producing guidelines or best practice advice was not compromised in terms of his ability subsequently to dispassionately and objectively review the performance of departments.*
>
> *If the Auditor-General is looking at, say, a whole series of different projects across different government agencies and different industrial sectors, and some general conclusions are emerging from that, then it is hard to see how it would not be useful for him to draw that together in some form.*

The Joint Accounting Bodies did not offer specific comments on this topic in their submission to the Committee. They did however recommend that '*the Committee be cognisant of the self-review threats to independence that are created by the provision of non-assurance services to assurance clients, when considering the incidental functions of the AG.*'[221]

The accounting profession's Code of Ethics for Professional Accountants, APES 110, provides detailed guidance to assurance practitioners such as auditors on managing potential threats to independence which could arise from the provision of incidental services to an audit client.[222]

Situation in other jurisdictions

The audit legislation in three Australasian jurisdictions, Western Australia, Tasmania and New Zealand, include provisions which empower the Auditor-General to provide other auditing services. The Western Australian and Queensland legislation refers to services '*of a kind commonly performed by auditors*' with the former also authorising provision of advice which is in the State's interest and would not compromise independence. The New Zealand statute authorises services '*of a kind that is reasonable and appropriate for an auditor to perform*.'

In a submission to the Australian Parliament's Joint Committee of Public Accounts and Audit, the Commonwealth Auditor-General advocated that:[223]

> *... there would be benefit in amending the Act to expressly recognise that the functions of the Auditor-General include the promotion of public accountability in the Australian public sector, and the authority to do anything incidental or conducive to any of the Auditor-General's audit responsibilities.*

The above submission cites as an example section 10(a) of the audit legislation in the Australian Capital Territory which lists as a function of the Auditor-General the promotion of public accountability in the public administration of the Territory.

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220 Mr J. Betts, Secretary, Department of Transport, transcript of evidence, 7 April 2010, p.10

221 Australia's Joint Accounting Bodies, submission to the Committee, received 26 March 2010, p.3

222 Accounting Professional and Ethical Standards Board, *APES 110, Code of Ethics for Professional Accountants*, Section 290

223 Mr I. McPhee, Commonwealth Auditor-General, Australian National Audit Office submission to the JCPAA Inquiry into the Auditor-General Act 1997, dated 9 April 2009, p.2

A summary of the legislative situation across jurisdictions on this subject is presented in Appendix X.

Position reached by the Committee

Currently, the principal authority for the Auditor-General to deliver services aimed at promoting improvement in public sector performance, which include production of good practice guides, is derived from the annual appropriation acts which authorise output expenditure for *Parliamentary reports and services*.

The Committee is supportive of the value-adding contributions that have been made to date by the Auditor-General as part of individual audits or through production of good practice guides to improving public sector performance. It shares the positive feedback on such contributions conveyed to it during the Inquiry. It was also of interest to the Committee that EPA Victoria has recently advertised that it is holding a community forum as part of its plans to deal with future environmental challenges which build in part on recent recommendations of the Auditor-General.

The Committee also shares the expressions of caution conveyed to it during the Inquiry warning against any adverse impact on audit independence. On this point, the Committee considers that other auditing services need to be directly related to the audit function. The outcome of any ancillary audit work, whether presented as best practice guidance in audit reports or presented in the form of a separate good practice guide or other format, should always be derived from audit functions and be seen as subordinate to the Auditor-General's primary audit role. Funding for ancillary audit work should not be sourced from or take precedence over resources earmarked for primary audit functions.

The Committee considers that core responsibility for promulgation of good practice guidance to the public sector on financial management and performance rests with the government's central agencies and particularly the Department of Treasury and Finance. Any widening of audit services delivered by the Auditor-General should complement this core government responsibility and not be seen as an extension of it or duplicating it. To avoid duplication, ancillary services to audits should be coordinated with the Department of Treasury and Finance.

The Committee considers there would be benefit in including a reference within the Act's objectives (section 3A) to the audit role in the promotion of performance improvement in the public sector. This reference could be inserted within section 3A(2) as an additional matter that Parliament intends to be taken into account in the pursuit of the objectives.

Recommendation 26: **The objectives of the *Audit Act 1994* set out in the Act's section 3A incorporate promotion of performance improvemtent as an additional matter that Parliament intends to be taken into account in the pursuit of the objectives.**

Recommendation 27: **To avoid duplication, the delivery of ancillary services to audits, such as production and promulgation of good practice guides, should be coordinated with the Department of Treasury and Finance which has core responsibility for this task.**

6.1.2 Application of Auditing Standards

Nature of this topic

Professional auditing and assurance standards in Australia are issued by the Australian Auditing and Assurance Standards Board. Such standards have legal backing under the *Australian Securities and Investments Commission Act 2001* (Cwlth).

Section 13 of the Audit Act imposes an obligation on the Auditor-General to apply professional auditing standards, as appropriate, in the performance of audit functions. Section 13 also provides that the Auditor-General may apply additional auditing standards, not inconsistent with professional auditing standards, with any additional standards summarised in the Auditor-General's annual report.

The Committee's Discussion Paper identified that the Auditor-General has proposed to the Committee that section 13 be amended to provide the Auditor-General with a limited discretion to dispense with an auditing standard, fully or partially, with reasons and details described in the annual report. In submitting this proposal, the Auditor-General stated: [224]

> *As there are few standards written for the public sector, circumstances may arise where compliance with a standard may conflict with powers or duties under the Act… In the light of this possibility, a means for the Auditor-General to opt out of an auditing standard becomes necessary in such circumstances.*

The Committee's Discussion Paper also mentioned that one particular area of debate concerning the application of professional standards to an Auditor-General relates to the position's key performance audit functions undertaken on behalf of Parliament in the public sector. The long form style of public reporting to Parliament on the results of these audits is a fundamental principle of public sector accountability, underpinning the provisions of the Audit Act, and is not always emulated in any performance audit functions undertaken in the private sector.

The current professional auditing and assurance standard in Australia is the Standard on Assurance Engagements ASAE 3500 *Performance Engagements* which has been operative since 1 January 2009.[225] Performance engagements under ASAE 3500 encompass performance audit engagements and performance review engagements, whether undertaken in the public or private sectors. It sets out in its paragraph 83 the expected basic elements of an assurance report but recognises that the assurance practitioner needs to use professional judgement in deciding how best to meet the Standard's reporting requirements. The Standard states the practitioner may use a short form or long form style of reporting to facilitate effective communication to intended report users. The longstanding practice of the Auditor-General to provide long form performance audit reports to Parliament, consistent with the approach envisaged under the Audit Act, is therefore not specifically impeded by the current standard.

As the Auditor-General has no direct control over the direction and content of future auditing standards, the Committee invited, in its Discussion Paper, input from interested parties on the desirability or otherwise of incorporating within the Audit Act a more explicit discretionary power to the Auditor-General on adoption of professional auditing standards.

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224 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

225 Australian Auditing and Assurance Standards Board, Standard on Assurance Engagements ASAE 3500, *Performance Engagements*, July 2008

Views expressed to Committee in submissions and in evidence at public hearings

VAGO's submission to the Committee provides information in support of the Auditor-General's proposed amendment. It states:[226]

> *The Auditor-General believes this is an important proposal as auditing standards have overwhelmingly evolved from the private sector. While progress is being made, the very different context of the public sector environment is yet to be comprehensively embraced. Victoria's provision is unusual and impedes the ability of the Auditor-General to audit in the public interest. The proposed amendment would require the Auditor-General to justify any departure from standards as an accountability mechanism and safeguard.*

At the Committee's public hearing, the Auditor-General was asked to expand on why professional auditing standards were not necessarily appropriate for audits conducted under the Audit Act. The Auditor-General's response included the following comments:[227]

> *Yes. The control we were looking for there was more to have regard to the standards and acquit where we feel they are inadequate and be explicit about what we did differently rather than being subservient to them because while they are stated to be sector neutral standards, they are largely retrofitted commercial standards, and the commercial standards are based on operating in a competitive marketplace, with people having a choice over whether they participate, so you can choose to buy shares or choose to trade and work.*
>
> *In the public sector it is difficult to exercise that choice…*

ACAG's submission to the Committee supports the inclusion of a discretionary power to the Auditor-General on adoption of professional auditing standards. The submission expresses the view that:[228]

> *This should be on the basis of "if not, why not". The most common discretion is along the lines of the requirement that the auditor "have regard to" auditing standards which ACAG supports.*

In their submission to the Committee, Australia's Joint Accounting Bodies indicate they do not support the assignment of discretion to the Auditor-General over the application and use of professional auditing standards. The accounting bodies consider that the Auditor-General must be directed to use professional standards *as a minimum* but accept that the Auditor-General should be able to supplement the standards, if deemed desirable and appropriate. The bodies consider the base line should be the profession's suite of auditing standards.[229]

The accounting bodies point out that auditing standards recognise that members of the profession may not need to comply with requirements '*where legislation requires otherwise.*' They believe that '*differences between professional and legislative obligations should be minimised where possible.*' They consider that '*allowing the A-G to set standards on auditing practice*,' which may potentially

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226 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.18

227 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.18

228 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.46

229 Australia's Joint Accounting Bodies, submission to the Committee, received 26 March 2010, p.3

differ from professional standards '*leads to inconsistency and potential confusion surrounding auditing practices.*'[230]

The accounting bodies also mention that considerable work has been undertaken by the profession in the development and updating of auditing standards to take account of public sector requirements.

Situation in other jurisdictions

The Committee's research and visits to Western Australia and New Zealand have confirmed that it is common in most other Australasian jurisdictions for the Auditor-General to have discretion in the application of professional auditing standards. For example, the audit legislation in Western Australia, Tasmania, New South Wales and Northern Territory provide that the Auditor-General must have regard to professional auditing standards which means there is no compulsion to adopt such standards. The Commonwealth, Queensland and New Zealand audit statutes go further than this discretion and empower the Auditor-General to set the standards that are to apply to the conduct of audit functions.

In the Commonwealth, the auditing standards issued by the Commonwealth Auditor-General are legislative instruments under the Commonwealth's *Legislative Instruments Act 2003*. In Queensland and New Zealand, the Auditor-General is required to periodically report to Parliament on the applied standards and, in Queensland, on the extent to which adopted standards are in accordance with professional standards.

During the Committee's visit to New Zealand, the New Zealand Auditor-General's Office explained the nature of the auditing standards issued by the Auditor-General. These are based on professional standards but are supplemented by standards which specifically reflect public sector needs and centre on a legislative audit model.

A summary of the situation across jurisdictions on this topic is presented in Appendix 5.

Position reached by Committee

The Committee recognises the importance of the Auditor-General utilising professional auditing standards as the principal basis for the conduct of audit functions under the Audit Act. Such standards have legislative backing and constitute authoritative pronouncements on auditing practices in the private and public sectors. Amendments to the standards in recent years increasingly reflect the specific characteristics of public sector audit settings which, in the case of Auditors-General, focus on detailed public reporting to Parliament on the results of audits.

The Committee has concluded that insertion within the Audit Act of a limited discretionary power to the Auditor-General on the application of auditing standards is warranted in order to guard against any potential, albeit unlikely, for developments in professional standards which do not fully reflect the specific operational environment of the Auditor-General in servicing Parliament. The Committee considers that such an amendment should require the Auditor-General to utilise recognised professional auditing standards in the conduct of audit functions under the Audit Act unless the Auditor-General believes it is more appropriate to use standards that go beyond professional pronouncements. The Auditor-General should also be required to consult with this Committee on the application of standards that go beyond professional pronouncements and report to Parliament within ten sitting days, details of the use of this discretionary power.

230 ibid.

Recommendation 28: **Section 13 of the *Audit Act 1994* be amended to require the Auditor-General to utilise professional auditing standards in the conduct of audit functions under the Act unless the Auditor-General believes it is more appropriate to use standards that go beyond professional auditing pronouncements. The amendment should also require the Auditor-General to consult with the Public Accounts and Estimates Committee on the application of standards that go beyond professional pronouncements and report to Parliament within ten sitting days details of the use of this discretionary power.**

6.1.3 Impact of certain legal privileges on audit access powers

Nature of this topic

The Committee's commentary in an earlier section of this Chapter, dealing with the question of right of audit access to premises and records of private sector contractors, identified that the access powers of the Auditor-General to documents and information required for audit purposes are set out in sections 11 and 12 of the Audit Act. An important aspect of these access powers is the ambit of section 12 which, in relation to information held within government agencies, overrides secrecy provisions imposed by specific legislation, a rule of law or Cabinet confidentiality.

An issue earmarked in the Committee's Discussion Paper for examination during the Inquiry is the extent to which the audit access powers in sections 11 and 12 apply if claims of legal professional privilege (also referred to in the legal literature as client legal privilege) are made to the Auditor-General. Such claims could be made in certain circumstances by audited agencies and/or individual members of the community, when requested by the Auditor-General to answer questions, furnish information or produce documents.

The Australian Law Reform Commission, in a 2007 report on the application of client legal privilege (it uses this term) in federal investigations, describes a legal privilege as '*essentially a right to resist disclosing information that would otherwise be required to be disclosed.*'[231] The report states that there are several privileges available at common law and under evidence legislation in Australia including client legal privilege and the privilege against self-incrimination. The Australian Law Reform Commission's report goes on to say that privileges are not only available as part of the rules of evidence but also can apply outside court proceedings as a substantive doctrine wherever disclosure of information may be compelled, including by administrative agencies. This latter circumstance would include information required by the Auditor-General.

The Victorian Law Reform Commission, in a 2005 report on implementing the Uniform Evidence Act, also separately identifies legal professional privilege (it uses this term) and the privilege against self-incrimination.[232]

It was against this approach in the legal literature that the Committee determined it was necessary to separately address legal professional privilege/client legal privilege and the privilege against self-incrimination under this topic heading.

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231 J. Gans and A. Palmer, Australian Principles of Evidence (2nd Ed, 2004), p.91 in Australian Law Reform Commission (ALRC) Report 107, Privilege in Perspective: Client Legal Privilege in Federal Investigations 2007, Ch.3

232 Victorian Law Reform Commission, *Implementing the Uniform Evidence Act — Report*, February 2006, pp.106–12

Legal Professional Privilege/Client Legal Privilege

The Australian Law Reform Commission's 2007 report states that client legal privilege in Australia is both a doctrine of the common law and a matter of statute. The report includes what it describes as a concise statement of the contemporary doctrine:[233]

> *It provides that, in civil and criminal cases, confidential communications passing between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. This rule also extends to communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation.*

When discussing the circumstances under which client legal privilege might be abrogated, the Australian Law Reform Commission's report cited the following reference from the 2002 *Daniels* High Court case to establish that express words or necessary implication were required to abrogate client legal privilege:[234]

> *It is now well established that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.*

It follows therefore that, if it was deemed desirable for legal professional privilege/client/legal privilege to be abrogated for the purposes of the Auditor-General's information-gathering powers in the Audit Act, the legislation would need to be amended to explicitly establish this position.

In its 2005 report on implementing the Uniform Evidence Act, the Victorian Law Reform Commission stated that legal professional privilege has been abrogated by statute in Victoria for hearings before Royal Commissions. The Commission also stated the privilege has been abrogated in section 3.3.46 of the *Legal Profession Act 2004*.

Under the *Legal Profession Act 2004*, various powers are given to inspectors appointed by the Legal Services Board, including the power to require documents and compel answers from legal practitioners. The Commission states in its report that the provisions of section 3.3.46 of that Act prevent a lawyer from refusing disclosure on the basis of the client's privilege.[235]

An additional explicit reference in Victorian statute to this privilege can be found in the *Police Integrity Act 2008*. That Act preserves the privilege in relation to information required by the Director, Police Integrity but also prescribes a procedure for the Director to follow, involving ultimately the Supreme Court or County Court, if a requirement to produce information is not withdrawn.

View expressed by the Auditor-General in a submission to the Committee

In its submission to the Committee, VAGO advised that the Auditor-General does not support an amendment in this area for the following reasons:[236]

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233 S. McNicol (2003), 'Implications of the Human Right Rationale for Legal Professional Privilege — The Demise of Implied Statutory Abrogation?' in P. Mirfield and R. Smith (eds), *Essays for Colin Tapper*, p.48, cited in Australian Law Reform Commission (ALRC) Report 107, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, 2007, Ch.3

234 *The Daniels Corporation Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 553

235 Victorian Law Reform Commission, *Implementing the Uniform Evidence Act — Report*, February 2006, p.110

236 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.18

> *Unless contrary legal advice is provided, the Auditor-General believes that section 12 of the Audit Act 1994 which removes restrictions on disclosure of information imposed by an enactment or rule of law overrides legal professional privilege. The Auditor-General believes legal professional privilege is a "rule of law" squarely covered by the provision. The introduction of a new provision is unnecessary and may create doubt about the application of section 12 to other rules of law.*

This view of the Auditor-General is, as indicated, subject to the nature of any legal advice that might subsequently be received by the Committee on the subject. That advice is presented in later paragraphs.

View expressed by DIIRD in a submission to the Committee

In its submission, DIIRD expressed some concern if privileged information obtained by the Auditor-General was publicly released. DIIRD's comments focus on section 12(3) of the Audit Act which enables the Auditor-General to include in reports to Parliament matters relevant to the subject matter of reports and where inclusion is in the public interest. DIIRD informed the Committee that:[237]

> *This provision causes concern because divulging advice that is clearly privileged could be a real deterrent in obtaining or providing full, frank and fearless legal advice on issues at hand. Therefore, while it is acknowledged that the Auditor-General may need to access material which is otherwise protected by legal professional privilege in the course of performing his duties, it is our firm position that the public release of such material is highly undesirable.*

Situation in other jurisdictions

The Committee's analysis of audit legislation in other jurisdictions identified that no audit legislation in Australasian jurisdictions explicitly provides for abrogation of legal professional privilege/client legal privilege.

It was of interest to the Committee that the Commonwealth Auditor-General, in submissions to the Australian Parliament's Joint Committee of Public Accounts and Audit, has advocated that the federal audit legislation be amended to explicitly abrogate this privilege. The Commonwealth Auditor-General informed the Committee that: [238]

> *... agencies, directly or through their legal advisors, at times claim that certain documents are protected by legal professional privilege and therefore are unable to be accessed by the Auditor-General. Such situations can result in delays in the conduct of an audit as protracted negotiations take place and that, at times, require the involvement of legal advisers to resolve the matter.*

The Commonwealth Auditor-General cited the provisions of section 16 of the Commonwealth *Inspector-General of Taxation Act 2003* as a suitable basis for amendment of the audit legislation as those provisions put beyond doubt the abrogation of the privilege but ensure that the gaining of access does not amount to waiver of the privilege by the person/s in other circumstances.[239]

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237 Department of Innovation, Industry and Regional Development, submission to the Committee, received 7 April 2010, p.5

238 Mr I. McPhee, Commonwealth Auditor-General, Australian National Audit Office submission to the JCPAA Inquiry into the Auditor-General Act 1997, dated 9 April 2009, pp.2–3

239 Mr I. McPhee, Commonwealth Auditor-General, Australian National Audit Office submission to the JCPAA Inquiry into the Auditor-General Act 1997, dated 11 August 2009, p.4

Advice received by the Committee from constitutional legal expert

In considering the issues pertaining to this topic, the Committee sought expert legal advice on whether legislative action is necessary to ensure the information-gathering powers of the Auditor-General under the Audit Act override claims of legal professional privilege. The Committee received the following advice:[240]

> *It is well established that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities, including legal professional privilege, in the absence of clear words or a necessary implication to that effect.*[241] *A compulsory power expressed in general terms, which does not refer to legal professional privilege and does no more than indicate that a significant purpose of the section is the investigation of contraventions of the law, will not give rise to any necessary implication that the power abrogates legal professional privilege.*
>
> *In my opinion, ss 11 and 12 of the Audit Act, as presently framed, would not be construed as abrogating legal professional privilege.*
>
> *In order to ensure that the compulsory powers of production and investigation in ss 11 and 12 override claims of legal professional privilege, it would be necessary to amend the Audit Act to include new provisions stating, in unmistakably clear terms, that legal professional privilege does not justify the withholding of information or documents in answer to the exercise of those compulsory powers.*

Position reached by the Committee

Based on the above expert legal advice and its research on this topic, the Committee considers there are justifiable public accountability grounds for explicitly abrogating within the Audit Act legal professional privilege/client legal privilege in relation to all of the information-gathering powers of the Auditor-General.

Without express provision in the legislation, the Auditor-General's examinations and investigations on behalf of Parliament could, at times, be hampered and/or delayed through claims of such privilege. It is the view of the Committee that the importance, from a public interest viewpoint, of unimpeded audits by the Auditor-General overrides consideration of preservation of the privilege for the purposes of the Audit Act. The Committee also considers that an amendment of this nature to the Audit Act should be accompanied by provisions which preserve a person's claim to the privilege for other specified purposes, such as in certain types of court proceedings.

The Committee considers an express statement in the Audit Act covering all information-gathering powers of the Auditor-General would remove any doubt on the matter and help overcome any potential impediments within and outside government agencies to the exercise of those powers. Widening application of the amendment to all of the powers of the Auditor-General is desirable because the overriding provisions of section 12 of the Act, which refer to a *rule of law,* address access to information held only within government agencies and therefore do not cover information that may be required by the Auditor-General from persons, contractors etc. outside of those agencies.

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240 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, p.19

241 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 561–564 (McHugh J), 575–578 (Kirby J), 591–595 (Callinan J)

Recommendation 29: **An express provision be inserted in the *Audit Act 1994* that explicitly abrogates legal professional privilege for all of the Auditor-General's information-gathering powers set out in the Act. The amendment should preserve a person's claim to the privilege for other specified purposes, such as in certain types of court proceedings.**

Privilege against self-incrimination

The abovementioned Victorian Law Reform Commission's 2005 report on implementing the Uniform Evidence Act includes the following description of the privilege against self-incrimination:[242]

> *No one is bound to answer any question or produce any document if the answer or the document would have a tendency to impose that person to the imposition of a civil penalty or to conviction for a crime.*

The Commission's report indicates the privilege is available in judicial or non-judicial proceedings and that, at common law, the privilege is available unless removed by express words or necessary implication in the relevant statute.[243] The Commission's report also cites instances in Victorian statutes where the privilege is expressly abrogated but preserved in terms of any subsequent court proceedings other than proceedings in respect of the falsity of the answer (such as in section 105 of the *Victorian Civil and Administrative Act 1998*). It also cites instances where the privilege is abrogated in particular court proceedings and where the privilege is expressly preserved.[244]

Situation in other jurisdictions

Unlike the position with legal professional privilege, several Australasian jurisdictions expressly abrogate the privilege against self-incrimination in their audit legislation and include provisions on the extent to which the privilege is preserved in other circumstances such as court proceedings. For example, during the Committee's visit to Western Australia, the Committee became aware that the Western Australian audit legislation, in section 36, overrides a person's common law right not to self-incriminate when requested to submit information to the Auditor-General.

The Committee also noted during its New Zealand visit that the New Zealand legislation adopts a similar approach in its section 31.[245]

Both the Western Australian and New Zealand statutes include restrictions on the extent to which information provided to the Auditor-General can be used in certain types of legal proceedings. Most other jurisdictions in Australia adopt a similar approach.

Advice received by the Committee from constitutional legal expert

As part of its consideration of this subject, the Committee sought legal advice on whether it is desirable to develop separate provisions covering legal professional privilege (as discussed in the above paragraphs) and the privilege against self-incrimination. The legal expert advised as follows:[246]

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242 J. D. Heydon, Cross on Evidence (7th ed., 2004) [25065] in Victorian Law Reform Commission, *Implementing the Uniform Evidence Act — Report*, February 2006, p.106

243 Victorian Law Reform Commission, *Implementing the Uniform Evidence Act — Report*, February 2006, p.106

244 ibid., pp.107–10

245 *Auditor General Act 2006* (WA), s. 36; *Public Audit Act 2001* (NZ), s. 31

246 D. F. Jackson QC, opinion to the Committee, received 23 August 2010, pp.20

The privilege against self-incrimination is "deeply ingrained in the common law" and is subject to the same presumption against abrogation that applies to legal professional privilege: it is not abrogated by statute except in very clear terms.

If the intention of the Parliament, in respect of the Auditor-General's powers of investigation, is to abrogate legal professional privilege and the privilege against self-incrimination, it would be necessary to do so by separate, express and unambiguous provisions dealing with each of these privileges.

In order to be effective, it would be necessary for each provision to refer expressly to the relevant privilege and to state in plain terms that the privilege provides no lawful excuse for failing to comply with a requirement by the Auditor-General for the production of documents or information or for examination on oath.

Position reached by the Committee

The Committee has reached a similar conclusion on the need for legislative change to the Audit Act abrogating the privilege against self-incrimination to that reached in the earlier paragraphs for legal professional privilege.

The Committee considers the public interest grounds for addressing legal professional privilege/ client legal privilege in the legislation apply equally to the privilege against self-incrimination. It has concluded that the Audit Act should be amended to explicitly abrogate the privilege against self-incrimination so that there can be no impediments to information, documents or answers to questions which may be required by the Auditor-General. The Committee has also concluded that the amendment should be accompanied by provisions which preserve a person's claim to the privilege for other specified purposes, such as in certain types of court proceedings.

Recommendation 30: **The *Audit Act 1994* be amended to explicitly abrogate the privilege against self incrimination in respect of all of the information-gathering powers of the Auditor-General set out in the Act. The amendment should preserve a person's claim to the privilege for other specified purposes, such as in certain types of court proceedings.**

6.1.4 Extension of Auditor-General's annual attest audit functions to encompass performance statements and internal controls

Nature of this topic

The Auditor-General is required under section 133 of the *Local Government Act 1989* to audit annual performance statements of each municipal council. The responsible Minister has the authority under the legislation to determine the form and content of the audit report.

In addition to this mandatory responsibility, the Audit Act, in section 8(3), assigns a discretionary power to the Auditor-General to audit the relevance, appropriateness and fair presentation of performance indicators of government agencies set out in their report on operations included in their annual report. The form and content of performance information included by relevant agencies in their annual report on operations is determined by the responsible portfolio Minister.[247]

247 Department of Treasury and Finance, *Presentation and Reporting of Performance Information,* FRD 27A, January 2009

The above two functions are additional to the Auditor-General's primary annual attest audit function which involves the audit of the annual financial statements of agencies. The functions are also additional to detailed performance audits of agencies evaluating the economy, efficiency and effectiveness of operations, which might be conducted from time to time by the Auditor-General under section 15 of the Audit Act.

The Committee understands that the Auditor-General has progressively widened the ambit of audit work conducted under section 8(3) of the Audit Act for particular groups of public sector agencies, such as water bodies and technical and further education institutions, in line with their progress in developing robust auditable data to support performance information.

As mentioned in the Committee's Discussion Paper, the Auditor-General proposed, in correspondence to the Committee, that section 8 of the Audit Act be amended to provide that annual performance statements prepared by agencies must be audited. The Auditor-General has also proposed that a provision be included in the Act that enables the Auditor-General to dispense with all or any part of the audit of performance statements in any year.[248]

Legislative action to require an annual audit of agencies' performance statements would extend the ambit of the Auditor-General's audit of key performance indicators beyond those indicators included by agencies in their annual report on operations to encompass all of their key performance measures and targets.

As also mentioned in the Committee's Discussion Paper, the Committee was informed during its visit to Western Australia that, for many years now, the Western Australian Auditor-General has been required under legislation to audit and report each year on the adequacy, appropriateness and fair presentation of key performance indicators developed by agencies as well as the accounting controls of agencies. These two audit attest elements are additional to the conventional expression of an audit opinion on the annual financial statements of agencies.

It was against the above background that the Committee has considered during its Inquiry whether the accountability of Victorian public sector agencies would be strengthened if the Auditor-General's mandatory annual financial audit was accompanied, through legislative amendment applicable to all agencies, by two additional annual attest audit functions addressing performance statements and accounting controls.

Views expressed to Committee in submissions

In its submission to the Committee, VAGO referred to the Auditor-General's support for extension of attest audit responsibilities and commented:[249]

> *The Auditor-General believes that the inclusion of the explicit ability to audit internal accounting controls and key performance indicators will strengthen accountability in the sector and provide greater rigour and assurance for Parliament.*
>
> *The Auditor-General also believes that accountability would be enhanced by requiring public sector agencies to provide annual attestation that their internal controls are compliant with the legal regulatory framework.*

248 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

249 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.19

DIIRD expressed the view in its submission that the audit scope should be restricted to published performance indicators. DIIRD stated:[250]

> *The audit of all performance indicators developed by agencies, rather than those which are published, could be seen as an intrusion into management's accountability and prerogative to manage their activities. It is believed that the Auditor-General should comment on the accuracy and adequacy of the published Key Performance Indicators only.*

Situation in other jurisdictions

As mentioned above, the audit legislation in Western Australia has for some years now empowered the Auditor-General to audit accounting controls and key performance indicators in the public sector.

The Committee ascertained from its visit to New Zealand that the Auditor-General conducts an examination of accounting controls within agencies as a component of the annual financial statement audit. The Committee was also informed that, with regard to performance information, departments in New Zealand are required to prepare annual statements of service performance which are subject to audit by the Auditor-General. These statements primarily address departmental performance in the delivery of outputs.

In a submission to the Australian Parliament's Joint Committee of Public Accounts and Audit, the Commonwealth Auditor-General stated that:[251]

> *From our own work and feedback from a number of State Auditors-General, it is evident that the systematic or periodic review of the appropriateness of performance indicators, as well as the accuracy and timeliness of an agency's reporting against them, contributes to an overall increase in the quality and credibility of the indicators themselves and the reliance that can be placed on agencies' reporting against them.*

The submission of the Commonwealth Auditor-General explores several options, including resource implications, for enhancing audit coverage of performance indicators.

The audit legislation in Queensland authorises the Auditor-General to examine the relevance, appropriateness and fair presentation of agencies' performance measures as part of audits of performance management systems (which is the audit mandate in that State relating to audits of performance in the public sector).

A summary of the situation across jurisdictions is presented in Appendix 5.

Position reached by the Committee

In its June 2009 report on *New Directions in Accountability* following its Inquiry into Victoria's Public Finance Practices and Legislation, the Committee examined in some detail performance reporting in the public sector. The Committee reported that effective public accountability by public sector agencies is dependent on the provision to Parliament of not only financial reports but also performance reports.[252]

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250 Department of Innovation, Industry and Regional Development, submission to the Committee, received 7 April 2010, p.5

251 Mr I. McPhee, Commonwealth Auditor-General, Australian National Audit Office submission to the JCPAA Inquiry into the Auditor-General Act 1997, dated 11 August 2009, p.4

252 Public Accounts and Estimates Committee, *New Directions in Accountability*, June 2009, p.71

The Committee found that the more progressive jurisdictions require all public sector entities to produce an annual audited performance report and include it, with their audited financial report, in their annual report presented to Parliament. The Committee recommended (Recommendation 31) that agencies in Victoria be required to produce an annual performance report. The Committee also recommended (Recommendation 36) that audit reports on performance indicators be phased in so that agencies have sufficient a period of time to "bed down" their reporting processes and underlying management control systems.[253]

In its response to the Committee's Recommendation 31, the government accepted in principle introduction of a requirement for agencies to prepare an annual performance report. It indicated that performance information will be presented in the annual report of operations prepared by agencies and that new requirements are likely to improve the extent of performance reporting by departments and public bodies.[254] The government accepted Recommendation 36 concerning the phasing in of audit reports on performance indicators. Its response to this recommendation, the government stated:[255]

> *Matters relating to audit scope are within the purview of the Victorian Auditor-General. The Government supports phasing in the implementation of the extent of any audits of performance reporting information.*

The overnment's proposals for reform of Victoria' public finance and resource accountability and management frameworks are reflected in the Public Finance and Accountability Bill 2009 under consideration in the Legislative Council of Parliament at the time of preparation of this report. The Bill states that one of its objectives is to:[256]

> *Make outcomes and their associated outputs the basis for the whole of the cycle of planning, resource allocation, resource management and financial and performance reporting.*

Based on the Committee's previous examination of this topic, the government's response to relevant recommendations of the Committee in its June 2009 report and views expressed by interested parties to the Committee during this Inquiry into the Audit Act, the Committee considers that the Audit Act should be amended to require the Auditor-General to audit annual performance statements prepared by public sector agencies. Under this amendment, the current discretionary power of the Auditor-General in section 8(3) to audit performance indicators would become mandatory, which would be consistent with the better practice recommendations of the Committee in its June 2009 report.

The Committee recognises that the nature of any changes to existing performance reporting practices by Victoria's public sector agencies is subject to Parliament's current consideration of the Public Finance and Accountability Bill 2009. Irrespective of the final format of any changed performance reporting requirements, the Committee is of the view that, in line with its earlier recommendation, use of the mandatory audit power by the Auditor-General should be phased in to accord with progressive development of revised reporting frameworks in agencies.

To facilitate a gradual audit approach, the Audit Act should assign a power to the Auditor-General to dispense with all or any part of an audit of performance statements. The Committee would expect that, eventually, the timing of annual audits of performance statements by the Auditor-General would

253 ibid., pp.71, 73, 75

254 Government Response to the Recommendations of the Committee in its report to Parliament on New Directions in Accountability, 4 December 2009, p.19

255 ibid., p.21

256 Public Finance and Accountability Bill 2009, clause 7(b)(1)

align with the annual audits of financial statements to maximise the economy and efficiency of both processes.

The Committee also considers that any consideration of the accountability benefits that would flow from introduction in Victoria of a requirement for agencies to prepare and have audited an annual performance statement should extend to also require agencies to attest to the adequacy and reliability of their internal accounting controls, and to have that attestation verified by the Auditor-General. As key internal accounting controls within agencies are evaluated by the Auditor-General during annual audits of financial statements, this extended attest process should ideally be aligned with agencies' attestation to financial statements and the Auditor-General's expression of opinion issued under section 9 of the Audit Act on those statements.

The Committee regards an extension of the existing attest responsibilities of agencies and the related audit functions of the Auditor-General to encompass both performance statements and internal accounting controls as better practice enhancements to governance and public accountability practices in Victoria.

Finally, the Committee notes that clause 39 of the Public Finance and Accountability Bill 2009 will, subject to its passage through Parliament, require the Minister to publish, at least once during a financial year, an outcomes progress report specifying progress on the government's intended outcomes as stated in the statement of outcomes published under clause 26 of the Bill. Should clause 39 ultimately pass through the Parliament, the Committee considers that a corresponding amendment should be made to the Audit Act to require the Auditor-General to audit the government's annual outcomes progress report.

Recommendation 31: **Section 8(3) of the *Audit Act 1994* be amended to require the Auditor-General to carry out an annual audit of performance statements prepared by public sector agencies. The amendment should include a power for the Auditor-General to dispense with all or any part of such audits which would facilitate their phasing in to correspond with development of agencies' revised reporting frameworks.**

Recommendation 32: **Section 9 of the *Audit Act 1994* be amended to require the Auditor-General to express an opinion on the adequacy and reliability of internal accounting controls established by agencies as a component of their governance practices.**

Recommendation 33: **Subject to passage through Parliament of clause 39 of the Public Finance and Accountability Bill 2009, the *Audit Act 1994* be amended to require the Auditor-General to audit the government's annual outcomes progress report.**

6.1.5 Audit of overseas entities

Nature of this topic

The Committee's Discussion Paper pointed out that an entity controlled by an agency or the State, which would include a company or a subsidiary company, falls within the definition of an authority within section 3 of the Audit Act, and thus is subject to audit by the Auditor-General.

The Discussion Paper also mentioned that difficulties can be encountered in applying this audit power to subsidiaries of government-controlled companies incorporated under overseas legislation.

The Committee's Discussion Paper also indicated that the Auditor-General had advocated to the Committee at an early stage of its Inquiry that a new section be inserted within the Audit Act to assign an explicit authority for the Auditor-General to audit overseas entities owned or controlled by the State or an agency of the State. The Auditor-General advised the Committee that this proposal would '*prevent subsidiaries* of *public bodies being established overseas and avoiding audit by the Auditor-General.*'[257]

VAGO's submission to the Committee did not convey any further views of the Auditor-General on this topic. However, ACAG's submission outlines some of the factors that are relevant to this topic, including the potential difficulty that can be experienced with establishing suitable audit arrangements in some overseas jurisdictions. ACAG commented as follows:[258]

> *ACAG notes that as Australia, and its jurisdictions, by necessity become more involved in the global workplace, so will jurisdictions increasingly transact internationally and establish international operations. Such operations increase risks and the powers and functions of the A-G in such situations should be no different as if these entities operated in Victoria. Therefore, the A-G should be appointed the auditor of all subsidiaries including those established internationally. ACAG acknowledges that this cannot always be achieved due to differing legislation in other countries. However, the principle to be achieved is one where the Victorian controlling state entity exerts influence to ensure the A-G's appointment or the appointment of an auditor suitable to the A-G.*

Situation in other jurisdictions

In the Western Australian audit legislation, the Auditor-General does not have a direct power to audit foreign subsidies controlled by government agencies. The matter is addressed by the inclusion of provisions in the Act that define foreign subsidiaries and establish that, if the foreign subsidiary has the power to appoint an auditor, the controlling agency must ensure the foreign subsidiary appoints as its auditor a person nominated by the Auditor-General and that person carries out such audits and reports to the accountable officer of the agency. That officer must transmit the audit report to the Auditor-General.[259]

Expressed in a slightly different way, the Queensland audit legislation provides that a controlled foreign-based entity may be audited by an auditor approved by the Auditor-General subject to its compliance with either one of four conditions. These conditions include that the controlled entity has significant operations outside Australia and is legally obliged to be audited under a law of a country other than Australia. The legislation also provides that the controlled entity must give a copy of any audit report it receives to the Auditor-General.[260] This approach preserves the authority of the Auditor-General to audit overseas subsidiaries but establishes an alternative process without weakening the Auditor-General's position, should circumstances warrant such action.

The Commonwealth audit legislation covers this matter through inclusion of subsidiaries in the provisions identifying the power of the Auditor-General to conduct financial audits of Commonwealth

257 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

258 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.47

259 *Auditor General Act 2006* (WA), s. 16

260 *Auditor-General Act 2009* (Qld), s. 32

authorities and companies.[261] However, like Victoria, the legislation does not provide for alternative audit arrangements if any difficulty is encountered with overseas subsidiaries.

The New Zealand audit legislation also provides that the Auditor-General has legislative authority to audit subsidiaries controlled by government.[262]

Appendix 5 includes reference to the legislative position on this topic across jurisdictions.

Position reached by the Committee

While the Committee considers that the definition of an "authority" within section 3 of the Audit Act encompasses overseas subsidiaries controlled by the government, it also considers thatthe sub-definition of an entity in that section should explicitly include subsidiaries to remove any doubt that subsidiaries controlled by the State are subject to audit by the Auditor-General.

The Committee also recognises that legal, logistic or other factors may preclude the Auditor-General from direct involvement in the ongoing audits of some or all foreign-based subsidiaries. It considers therefore that appropriate provisions should be inserted in the Audit Act which address such circumstances but preserve the Auditor-General's primary audit position.

To achieve this, the amending provisions should establish that the auditor of the overseas subsidiary may be engaged by the Auditor-General under the existing authority in section 7F of the Audit Act or, in other instances, must be approved by the Auditor-General. Where the latter applies, such as where the subsidiary has an obligation under the offshore legislation to appoint an auditor, the amendments should also identify the responsibilities of the controlling government entity for ensuring the Auditor-General's approval is obtained and all audit reports are transmitted to the Auditor-General.

Recommendation 34: **The definition of "authority" within section 3 of the *Audit Act 1994* be amended to expressly indicate that the sub-definition of an entity encompasses subsidiaries controlled by the State.**

Recommendation 35: **Provisions be included in the *Audit Act 1994* to cover circumstances which preclude the direct involvement of the Auditor-General in the ongoing audits of overseas subsidiaries. The amending provisions should establish appropriate oversight powers for the Auditor-General in relation to such audits and identify the associated responsibilities of the controlling government agency.**

6.1.6 Disclosure of information to external parties and power to conduct joint audits and/or investigations

Nature of this topic

The Audit Act sets out in sections 16F and 20A provisions governing the use and disclosure of information acquired by the Auditor-General, and employees and contractors of the Victorian Auditor-General's Office during the course of audits.

261 *Auditor-General Act 1997* (Cwlth), ss. 12 and 13

262 *Public Audit Act 2001* (NZ) s. 5

Section 16F enables the Auditor-General to provide written information to certain external parties, including the Chief Commissioner of Police, if it is considered during an audit that a matter warrants further investigation or attention. This provision allows the Auditor-General to communicate with regulatory or investigative bodies if a matter falling within their official purview was assessed by the Auditor-General during an audit as requiring their attention.

Section 20A(1) prohibits improper use of information acquired during audits by the Auditor-General, employees and contractors, and restricts the divulgence or communication of such information to the carrying out of functions under the Audit Act. Section 20A(3) applies a similar prohibition on improper use of information acquired by regulatory or investigatory bodies under section 16(F).

The Committee's Discussion Paper identified that the Auditor-General had expressed the view in correspondence to it that, by application of the above provisions, the Audit Act does not authorise the passing of information by the Auditor-General to external regulatory or investigative bodies other than when acquired during the course of an audit. As the Auditor-General could receive information worthy of passing to such bodies but not necessarily sourced from an audit, the Auditor-General has proposed that an amendment be made to section 20A and/or section 16F to address this gap.[263]

The Auditor-General has also proposed to the Committee that the Audit Act be amended to provide that third parties receiving audit material which is not a "proposed report" be prohibited from further disclosing that material. The conditions relating to persons receiving a proposed report are set out in section 20A(2) of the Audit Act.

This latter suggested amendment of the Auditor-General would apply to persons improperly receiving confidential audit information. While not specifically identified by the Auditor-General, such instances would likely include cases of unauthorised leaking of audit material including working papers to external parties.

The Committee recognised in its Discussion Paper that the review announced by the Premier in November 2009 of Victoria's integrity and anti-corruption system includes consideration of the coordination of the State's integrity and anti-corruption bodies. The Committee indicated that the above issues on the adequacy of the coverage within the Audit Act of the Auditor-General's interactions with other investigative or regulatory organisations are likely to be relevant to that review. The June 2010 findings of the integrity and anti-corruption review on this particular matter are addressed in later paragraphs of this section.

Views expressed to the Committee in submissions

VAGO's submission to the Committee provides some additional comment on the Auditor-General's support for an amendment to the Audit Act on this matter. The submission states:[264]

> *The Auditor-General has proposed that the secrecy provisions be amended to:*
>
> - *allow information obtained outside an audit to be referred to an appropriate agency; and*
> - *prevent third parties improperly receiving information from disclosing it further.*
>
> *The Auditor-General acknowledges that the first proposed amendment may impact on the current review of Victoria's integrity system. The Auditor-General has raised this*

263 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 28 August 2009

264 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.19

> *issue in the context of the ability for such a system to be coherent and integrated and notes that the current secrecy provisions are flawed in a number of respects and can actually hinder cooperation and strengthening of operational relationships between integrity organisations.*

ACAG's submission also includes comment on this topic which supports the Auditor-General's proposed amendments.

DIIRD also offered comment on the topic in its submission and advised the Committee its general view is that *'there should not be a limitation on the Auditor-General providing information in his possession on wrongdoing to the relevant investigatory agency in the public interest.'*[265]

Situation in other jurisdictions

The Committee's research indicates that the audit statutes in other Australasian jurisdictions generally address the protection of the confidentiality of information gathered by audit personnel during the discharge of audit functions in a manner similar to Victoria. In some cases, the prohibition on improper use of information exempts disclosure to investigatory or policing organisations when such disclosure is deemed to be in the public interest. Unlike the Victorian position in section 16(F) of the Audit Act, these exemptions do not limit disseminated information to that gathered during the course of an audit.

In addition, a number of jurisdictions impose specific restrictions on disclosure of draft report material provided by the Auditor-General to designated parties as part of official clearance processes. This equates with the Victorian approach in section 20A(2) of the Audit Act.

The audit legislation in other jurisdictions does not specifically impose disclosure restrictions on persons improperly receiving confidential audit information.

A summary of the situation across jurisdictions is presented in Appendix 5.

Relevant findings of the review of Victoria's integrity and anti-corruption system commissioned by the government

The June 2010 report on the results of the review of Victoria's integrity and anti-corruption system commissioned by the government examined the level of coordination between Victoria's integrity bodies including the Auditor-General. The review found '*there is currently no collective forum for integrity bodies to coordinate their activities or share information.*'[266]

With regard specifically to the Audit Act, the review identified that sections 16F and 20A put restrictions on the sharing of information gained during the course or conduct of an audit. It indicated '*there is no power in the Act to cooperate in investigations with other independent officers or other audit offices*.'[267]

265 Department of Innovation, Industry and Regional Development, submission to the Committee, received 7 April 2010, p.5

266 State Services Authority, *Review of Victoria's integrity and anti-corruption system*, 31 May 2010, p.14

267 ibid.

Proposed establishment of an Integrity Coordination Board

The review recommended that an Integrity Coordination Board, comprising membership of Victoria's core integrity bodies, including the Auditor-General, be established to strengthen cooperation and coordination across the integrity system. The report of the review states that:[268]

> *The Board should be empowered to share information and conduct joint investigations. Its legislation should establish an obligation for members to refer matters that come to their attention to the appropriate body for investigation. This should override provisions in integrity bodies' Acts that currently restrict information sharing. Consideration should also be given to whether individual integrity bodies' Acts require amendments to enable information sharing and joint investigations.*

As indicated in the review's report, the proposed legislation establishing the Integrity Coordination Board would override section 16F of the Audit Act and thus remove the current restriction in that section which limits sharing of information by the Auditor-General with other integrity bodies to material gathered during the course of an audit.

The Committee supports the legislative change proposed by the review and considers it will significantly enhance the statutory position of the Auditor-General concerning information-sharing with other integrity bodies and participation in joint investigations with those bodies.

The Committee recognises that the nature of amendments, as deemed necessary, to the legislation of individual integrity bodies, including the Audit Act, to complement the statutory creation of the Integrity Coordination Board is a matter that will be determined by the Chief Parliamentary Counsel as part of the drafting procedures relating to the new Board. The Committee does not therefore make any recommendations on this matter.

Joint audits with other audit offices

The point made in the review's report that there is no power in the Audit Act to enable the Auditor-General to participate in joint investigations with other bodies, and particularly, other audit offices, is a matter that has been raised with the Committee during its Inquiry.

VAGO's submission to the Committee identifies that '*In cases where public funding or programs straddle jurisdictions, there is no ability to exchange information nor delegate powers to other audit offices.*'[269]

At the Committee's public hearing, the Auditor-General was asked to comment on this matter in the context of the contemporary widening of the financial relationship between the Commonwealth and State and Territory governments and whether corresponding changes to legislation in other states would be necessary. As part of his comments on this issue, the Auditor-General stated in evidence that:[270]

> *The BER* [Building the Education Revolution] *initiative is doing some audits in schools here in Victoria, and under their legislation if they find a real problem or they see a real problem, they cannot alert us to it because of their secrecy provisions, so in a sense, in the way commonwealth–state funding is going, we have raised it. We have to begin somewhere.*

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268 ibid., p.xviii

269 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.24

270 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.16

ACAG also addressed this matter in its submission to the Committee. It stated:[271]

> *The global financial crisis resulted in a number of stimulus packages administered by Commonwealth agencies but with funding provided to the States and Territories along with the expectation they would deliver various outcomes. This is an example of a situation where Auditors-General could work effectively together to assess outcomes in the interests of the whole Australian public. The PAEC may wish to consider legislation facilitating such work including the capacity for the Victorian Auditor-General to share information in such circumstances.*

The Commonwealth Auditor-General has also raised this issue in submissions provided to the Australian Parliament's Joint Committee of Public Accounts and Audit. The Commonwealth Auditor-General referred to:[272]

> *... the development of a new Intergovernmental Agreement that is aimed at improving the quality and effectiveness of government services by reducing Commonwealth prescriptions on service delivery by the States and Territories, providing them with increased flexibility in the way they deliver services to the Australian people.*

The Commonwealth Auditor-General identified several options, from the perspective of the Australian audit legislation, to enhance external accountability arrangements arising from the above emerging circumstances which included:[273]

> *Explore opportunities and any necessary legislative changes which would assist in further cooperation between the Auditor-General and State and Territory Auditors-General. Such arrangements would be designed to assist in the Commonwealth and State and Territory Auditors-General working in a complementary manner and may provide for the authority for the Auditor-General to share information obtained during the course of audits with State and Territory Auditors-General.*

Position reached by the Committee

As mentioned in an earlier paragraph, the Committee supports changes to the Audit Act relating to the creation of an Integrity Coordination Board as proposed by the review of Victoria's integrity and anti-corruption system commissioned by the government. As the government's process for establishing the new Board will incorporate such changes, no recommendations by the Committee on this particular issue are included in this report.

Based on other matters relevant to this topic mentioned in the integrity and anti-corruption report and those that have been raised directly with the Committee during its Inquiry, the Committee considers that two additional changes to the Audit Act are warranted, namely:

- insertion of an explicit authority for the Auditor-General to share information with Australian State and Territory Auditors-General and to participate in joint audits with those Auditors-General — such an amendment would support the accountability implications arising from the recent expansion in Commonwealth-State financial arrangements; and

271 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.67

272 Mr I. McPhee, Commonwealth Auditor-General, Australian National Audit Office submission to the JCPAA Inquiry into the Auditor-General Act 1997, dated 9 April 2009, p.6

273 ibid., p.7

- widening of section 20A to impose disclosure restrictions on persons, other than authorised recipients specified in the Act, who come in possession of all or part of a proposed report of the Auditor-General.

With regard to the former matter, the Committee reported to Parliament in October 2009 on its assessment of the emerging developments under the new federal financial framework, including the envisaged role of the Auditor-General in the verification of outcomes, such as those pertaining to expenditure under the Commonwealth's economic stimulus plan. In its report on the 2009-10 budget estimates, the Committee recommended the government seek clarification with the COAG Reform Council on this matter.[274]

In its response to that report, the government expressed the view that such action was not necessary as expenditure under the new Intergovernmental Agreement on Federal Financial Relations is '*subject to the usual scrutiny of Auditors-General in each jurisdiction* and *the Agreement does not change the relationship between the Commonwealth and the States in a way as to diminish the role of Auditors-General.*'[275]

It can be seen that the government considers there are no new impacts on the role of Auditors-General under the new federal financial framework. Cognisant of this view, the Committee considers there is a need to strengthen the legislative authority of the Auditor-General to jointly work, and share information, with other Auditors-General and, particularly the Commonwealth Auditor-General in the context of federal funding. With such action, the Auditor-General would be better placed to scrutinise federal funding on behalf of the Victorian Parliament and also as a service to the Commonwealth Parliament via interactions with the Commonwealth Auditor-General. Such scrutiny would include the management of significant levels of federal funding, and on occasions a mix of federal and state funding, in the delivery of programs and projects in the State.

The Committee considers that an amendment to the Audit Act along the above lines would also constitute a useful precedent to assist other jurisdictions across Australia in their periodic deliberations on potential complementary enhancements to their audit legislation.

Recommendation 36: **The *Audit Act 1994* be amended to assign an explicit authority for the Auditor-General to share information with other Commonwealth Auditors-General and to undertake joint audits with other Commonwealth Auditors-General.**

Recommendation 37: **Section 20A of the *Audit Act 1994* be widened to impose disclosure restrictions on persons, other than authorised recipients specified in the Act, relating to all or parts of any proposed report of the Auditor-General coming into the possession of those persons.**

274 Public Accounts and Estimates Committee, *Report on the 2009-10 Budget Estimates — Part Two*, October 2009, p.85

275 Government Response to the Committee's recommendations in its Report on the 2009-10 Budget Estimates — Part Two, tabled in Parliament on 14 April 2010, p.8

6.1.7 Legal issues experienced by the Auditor-General concerning sections 3, 12 and 15(1)(b) of the Audit Act

Nature of this topic

The Committee included this topic in its Discussion Paper given the experiences of the Auditor-General with legal issues that arose during a performance audit on *Managing Complaints Against Ticket Inspectors*. The Auditor-General tabled a report on that audit in Parliament in July 2008 and included the following comments which centred on sections 3, 12 and 15(1)(b) of the Audit Act and the legal status of the Public Transport Ombudsman Limited (PTO Ltd):[276]

> *This audit was conducted under section 15(1)(b) of the Audit Act 1994 which allows the Auditor-General to conduct any audit necessary to determine whether the operations or activities of the whole or any part of the Victorian public sector (whether or not those operations or activities are being performed by an authority or authorities) are being performed effectively, economically and efficiently and in compliance with all relevant acts.*
>
> *It is not clear that the PTO Ltd is an 'authority' for the purposes of the Audit Act, since it is not established under an Act, and is therefore unlikely to be a 'public body' under the Act. It is also unclear that it is an entity of which the state has control, control being defined by reference to the relevant accounting standard, rather than, for example, by reference to the number of government appointed directors.*
>
> *Our view was that the audit could proceed on the basis that, notwithstanding doubts about being an 'authority' under the Act, PTO Ltd and its operations could be seen as part of the Victorian public sector, and therefore within section 15(1)(b) of the Audit Act 1994, which does not rely on the definition of 'authority'. This view is supported by the fact that it is likely that PTO Ltd is a 'public entity' for the purposes of the Public Administration Act 2004.*
>
> *Despite this, the PTO Ltd board refused to concede jurisdiction but agreed to assist the audit voluntarily.*
>
> *An alternative proposal to have PTO Ltd prescribed as an 'authority' by regulation made under section 3(e) of the Audit Act 1994 was rejected by the board at an early stage of the audit.*
>
> *During the conduct of the audit, the PTO* [Public Transport Ombudsman] *also raised the potential to breach the Privacy Act 1988 (Commonwealth) if it provided full information requested by audit. Full and free access to all information is a fundamental tenet of the auditor's role and consistent with the relevant auditing standard and the role of the Auditor-General.*
>
> *Following legal advice obtained by audit and notices issued under section 11 of the Audit Act 1994, the PTO agreed to provide the full information.*
>
> *A further issue was the application of section 12 of the Audit Act 1994 which removes any legal restrictions upon the access that the Auditor-General has to documents. Section 12 applies only to 'authorities' and its application to PTO Ltd was therefore doubtful.*

276 Victorian Auditor-General's Office, *Managing Complaints Against Ticket Inspectors*, July 2008, p.2

> *Once the audit was underway, the approach of both the PTO Ltd board, and the PTO was cooperative. Notwithstanding this, the audit should not have to rely on voluntary cooperation in order to carry out a performance audit.*
>
> *The Auditor-General's mandate in carrying out this performance audit was unclear in a number of respects. This had the potential to detrimentally affect the integrity of the audit, and to affect its timeliness.*

In the light of the above experiences, the Auditor-General proposed to the Committee that a suitable amendment be made to the Audit Act to ensure that situations similar to those experienced with the PTO Ltd are clearly covered by the provisions of the Act.[277]

Further views expressed to the Committee in VAGO's submissions

VAGO's submission to the Committee elaborated on the Auditor-General's proposed amendment with the following comments:[278]

> *The Auditor-General has proposed amending the Act to ensure that companies limited by guarantee, controlled by Government are subject to audit, and that those entities are subject to the information access provisions in the Act.*
>
> *The Auditor-General refers to the discussion in the paper surrounding the audit mandate and the 2008 audit report concerning complaints against ticket inspectors (pages 76–77). The PTOV* [Public Transport Ombudsman (Victoria)] *is a company established by Government limited by guarantee with the majority of its board appointed by Government. Consequently it is reasonable to assume that it is controlled by the executive and that audit access should follow. The PTOV however objected to the audit on a number of grounds which had the potential to frustrate the audit.*
>
> *The PTOV model of a company limited by guarantee is increasingly favoured by Government as a vehicle for carrying out functions, especially in the consumer complaint handling area. The Energy and Water Ombudsman (EWOV) has a similar structure. Where such entities are controlled by the executive, or spend public money, then they should be subject to the audit mandate consistent with generally accepted public sector accountability standards.*

Position reached by the Committee

The essence of the issue raised by the Auditor-General, arising from the experiences of VAGO during the audit of PTO Ltd, was whether the PTO Ltd, given it is a company limited by guarantee, was an entity controlled by the State and thus fell within the definition of an authority under section 3 of the Audit Act. The matter was eventually resolved between the parties.

Control is defined in section 3 of the Audit Act as having the same meaning as in the Australian accounting standard that applies to entities that are required to form part of consolidated statements prepared by a parent company under the Corporations Act. The relevant accounting standard, AASB 127, Consolidated and Separate Financial Statements, outlines several factors which may

277 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 28 August 2009

278 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, pp.19–20

control of an entity in the public sector, including where '*the government has broad discretion, under existing legislation to appoint or remove a majority of members of the governing body of that entity.*'[279]

The PTO Ltd is governed by a board of seven members, four of which, including an independent Chairperson, are appointed by the Minister for Transport.

The Committee's Discussion Paper identified that one possible avenue for avoiding similar problems in the future with entities such as the PTO Ltd is the legislative approach relating to the control concept adopted in the Canadian audit legislation. That legislation extends the definition of control to encompass corporations without a share capital and states that:[280]

> *A corporation without share capital is controlled by a municipality or government if it is able to appoint the majority of the directors of the corporation, whether or not it does so.*

ACAG, in its submission to the Committee drew attention to a similar approach taken in the Tasmanian audit legislation, which in its section 4, includes within the definition of a State entity:[281]

> ***(f)*** *the council, board, trust or trustees, or other governing body (however designated) of, or for, a corporation, body of persons or institution, that is or are appointed by the Governor or a Minister of the Crown.*

ACAG went on to say that '*...the Canadian solution is stronger by reference to "is able to ..., whether or not it does so.'*

The Committee therefore advocates that an equivalent provision be inserted in the Audit Act to remove any doubt that companies without share capital such as the PTO Ltd and other similar companies are controlled by the State and subject to audit by the Auditor-General.

Recommendation 38: **The *Audit Act 1994* be amended to provide that a company without share capital is controlled by the State if the State is able to appoint the majority of the directors of the company, whether or not it does so.**

6.1.8 Charging of audit fees

Nature of this topic

Section 10 of the Audit Act authorises the Auditor-General to charge fees to audited agencies for audits of annual financial statements conducted under section 9, and to the responsible minister for the audit of the State's annual financial report conducted under section 9A.

The Committee's Discussion Paper identified that the Auditor-General has advised in correspondence that section 10 does not encompass audit opinions expressed on performance statements prepared under the *Local Government Act 1989* or on performance indicators of agencies under section 8(3) of the Audit Act.

279 Australian Accounting Standard AASB 127, *Consolidated and Separate Financial Statements*, March 2008, p.17

280 *Auditor-General Act* (Canada) s. 2.1(2)

281 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.50

The Auditor-General proposed that section 10 be amended to make fees explicitly payable for all audit opinions expressed by the Auditor-General on financial and performance statements of agencies. In submitting this proposal, the Auditor-General advised that:[282]

> *Currently, fees are implicitly charged for performance statement audit opinions by consolidating financial statement and performance statement fees. This amendment would provide explicit legislative backing for the fees, and improve transparency and accountability, but would not extend the existing fee arrangements.*

In subsequent correspondence to the Committee, the Auditor-General also proposed that the words '*incurred by or on behalf*' in section 10(1), when referring to reasonable costs and expenses incurred by the Auditor-General, be removed. The Auditor-General stated that this proposal reflected a recommendation by Parliament's performance auditor in 2007 and was necessary '*to give flexibility in applying financial audit fees across agencies. It ensures the validity of write-ons and write-offs.*'[283]

Views expressed to the Committee in submissions

VAGO's submission to the Committee restated, in summary form, the Auditor-General's proposals for legislative change regarding the charging of audit fees. ACAG's submission on the topic expressed support for the Auditor-General's proposals.

The submission received from DIIRD, reflecting an audited entity's viewpoint, states that '*if the Auditor-General is required to conduct an audit under empowering legislation, there ought to be cost recovery. However, if an audit is conducted as a matter of discretion* [such as performance audits], *it ought to be funded centrally…*'[284]

Situation in other jurisdictions

The Committee's research of audit legislation in other Australasian jurisdictions shows that most audit statutes assign a broad-ranging authority to the Auditor-General to determine if an audit fee should be charged to an audited entity. In some jurisdictions, this authority extends beyond financial audits.

A summary of the situation across jurisdictions is presented in Appendix 5.

Position reached by the Committee

The Committee is of the opinion that an amendment to the Audit Act which provides that audit fees are chargeable for all mandatory attest audits undertaken by the Auditor-General would formalise within the legislation a long standing budgetary principle underpinning the charging of audit fees in Victoria.

Under this principle, the costs of attest audits of financial statements and performance statements are recoverable by the Auditor-General from audited entities while the costs of performance and other audits, which result in detailed reports to Parliament, have no specific statutory timing and involve non-standard reporting on managerial and organisational performance, are borne directly, in aggregate, from the Consolidated Fund on behalf of Parliament.

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282 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

283 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

284 Department of Innovation, Industry and Regional Development, submission to the Committee, received 7 April 2010, p.6

Under Victoria's output management system, the level of resources allocated to VAGO each year reflects the above two categories of audit functions through the application to VAGO of outputs headed:[285]

- *Audit reports on financial statements* — encompassing the core statutory responsibilities of the Auditor-General to express an audit opinion on financial statements and, in some areas, performance statements such as with municipal councils. The costs of this output are funded to VAGO via an annotated appropriation under section 29 of the *Financial Management Act 1994*, with recovered costs deemed to have been appropriated by Parliament.

- *Parliamentary reports and services* — comprising audits, mainly performance audits, which culminate in detailed reports to Parliament as well as the delivery of other services by VAGO for Parliament which aim to foster enhanced accountability and performance in the public sector. The costs of this output are funded directly from the Consolidated Fund under the authority of the annual appropriation act.

The Committee considers that an amendment to section 10 of the Audit Act to explicitly authorise the Auditor-General to charge fees for all mandatory audit opinions expressed by the Auditor-General on financial statements and performance statements of agencies, as well as any other attest audit function assigned under future legislation, would more accurately align the legislative authority to charge fees with the output structure in place for the annual funding of VAGO's operations. Such an amendment should be worded in a way which formalises the existing fee charging practices of VAGO and gives the necessary flexibility to the Auditor-General to apply audit fess across agencies.

Recommendation 39: **Section 10 of the *Audit Act 1994* be amended to explicitly authorise the Auditor-General to charge fees for all mandatory attest audit functions specified in the Act, including audit opinions expressed on financial statements and performance statements of agencies.**

6.1.9 Application of the statutory definition of 'Authority' to Administrative Offices and multiple entities

Nature of this topic

The *Public Administration Act 2004*, in section 11, provides that the Governor in Council may by order establish an Administrative Office in relation to a department. This Act further provides that the head of a department is responsible for the management of the functions of any Administrative Office relating to it and the Office's head is responsible to the departmental head on all matters relating to the Office.

The Committee's Discussion Paper indicated that, notwithstanding the apparent direct link between a department and any related Administrative Offices, the Auditor-General had proposed that the definition of 'Authority' in section 3 of the Audit Act be extended to include Administrative Offices to guard against '*... circumstances whereby the device could be used to avoid audits...*'[286]

The Committee also identified in its Discussion Paper that a second matter raised with the Committee by the Auditor-General concerning the statutory definition of an 'Authority' relates to whether the

285 Victorian Auditor-General's Office, *Annual Plan 2010-11*, pp.37–9

286 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

definition extends beyond singular entities to include multiple entities. The past stance of VAGO has been based on earlier legal advice that the singular expression in the definition would also include the plural under section 37(c) of the *Interpretation of Legislation Act 1994*. When raising this point with the Committee, the Auditor-General advised the Committee that, based on more recent legal advice received by VAGO, a suitable amendment to the definition would remove any doubt on the matter.[287]

VAGO's submission to the Committee subsequent to release of the Discussion Paper summarised the Auditor-General's two proposals for legislative change and stated:[288]

> *The Auditor-General has proposed that:*
>
> - *administrative offices be expressly provided for in the definition of 'authority' in the Act; and*
> - *based on legal advice, a technical amendment be made to ensure that the definition of 'authority' includes multiple entities.*
>
> *These amendments remove potential challenges to mandate coverage.*

Position reached by the Committee

The Committee notes that the Public Finance and Accountability Bill 2009, currently under consideration by the Legislative Council, does not change the line of responsibility of a head of an Administrative Office to the relevant departmental head but extends the responsibilities of the position to include the public finance and accountability responsibilities conferred under the Bill.

The responsibilities of a head of an Administrative Office do not extend to the preparation of financial statements for audit by the Auditor-General or the submission of an annual report to Parliament. These functions rest with the related department. In fact, section 45(4) of the *Financial Management Act 1994*, which is reiterated in the Public Finance and Accountability Bill 2009, stipulates that the financial statements of an Administrative Office, other than the Environment Protection Authority (which is a statutory authority and therefore an authority for both financial management and audit purposes), must be incorporated and consolidated within the financial statements of the relevant department.

The *Public Administration Act 1994* and the *Financial Management Act 1994* identify that an Administrative Office is responsible to, and forms part of, the relevant department. The Committee does not therefore consider there is risk that an Administrative Office could be used in some way to avoid audit scrutiny. The need for any legislative change on the matter would be subject to legal consideration during future drafting of amendments to the Audit Act.

The Committee also considers that, whether the definition of 'Authority' in section 3 of the Audit Act should be amended to expressly cover multiple entities is a technical matter best determined through legal assessment at a drafting phase.

287 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 28 August 2009

288 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.20

Recommendation 40: **The adequacy of coverage within t*he Audit Act 1994 o*f the definition of an Authority within section 3, in terms of Administrative Offices and multiple entities, be assessed during development of future amendments to the Act.**

6.1.10 Automatic involvement of the Auditor-General as the auditor of State companies

Nature of this topic

Section 16D of the Audit Act provides that the Auditor-General may accept appointment under the Corporations Act as the auditor of a State company. The section defines a State company as '*a company of which the State or an authority has control*.'

Elsewhere in the Audit Act, in section 3, an authority is defined as including an entity, other than a department or a public body, of which the State or a public body has control. Control is defined as having the same meaning as the accounting standard governing the preparation of consolidated statements under the Corporations Act.

The Auditor-General is therefore the statutory auditor of companies controlled by the State for public accountability purposes on behalf of the Victorian Parliament. Their financial statements are subject to audit by the Auditor-General. In addition, their operations may from time to time be subject to performance audit scrutiny by the Auditor-General in accordance with the powers in the Audit Act assigned by Parliament.

The Committee's Discussion Paper identified that the Auditor-General had proposed that the Audit Act be amended '*to provide that, where the State holds more than 50% of shares in a corporation, the Auditor-General automatically is the auditor*.'[289] The Auditor-General expressed the view that this change would '*improve accountability, as any organisation controlled or owned by Government should be subject to audit by the Auditor-General*.'[290]

The matters raised by the Auditor-General are therefore already addressed in terms of the operations of State-controlled companies under Victorian legislation. However, the managing body of a State company is not currently compelled to appoint the Auditor-General as its auditor under the Corporations Act even though the Auditor-General is the statutory auditor of the company on behalf of the Victorian Parliament.

Situation in other jurisdictions

In most Australian jurisdictions, the audit legislation mirrors the position in Victoria and includes government-controlled companies within the statutory definition of entities subject to audit by the Auditor-General. The legislation also provides, in most cases, that the Auditor-General may accept appointment under the Corporations Act as auditor of controlled companies.

The legislation in the Australian Capital Territory stipulates that the Auditor-General must accept such an appointment.

While the Queensland legislation provides that the Auditor-General may accept appointment as auditor under the Corporations Act, it goes further to require the shareholders of a company that is a public

289 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

290 ibid.

sector entity to appoint the Auditor-General as its auditor.[291] ACAG advised of this legislative approach in Queensland in its submission to the Committee.

The situation across jurisdictions on this topic is summarised in Appendix 5.

Position reached by the Committee

It is clear to the Committee from its reading of sections 3 of the Audit Act that the financial and managerial operations of a company controlled by the State are subject to audit by the Auditor-General. That section recognises the accountability obligations of such companies to the Victorian Parliament given their status as a controlled entity of the State.

Under section 1281 of the *Corporations Act 2001*, an Auditor-General in Australian jurisdictions is taken to be a registered company auditor for the purposes of the Act.

The Committee considers that State-controlled companies should be obligated to appoint the Auditor-General as their auditor under the Corporations Act in recognition of their controlled status and that the Auditor-General their statutory auditor under the Audit Act for public accountability purposes in Victoria.

The Committee is not aware of any reason why such companies should have the option of appointing an auditor other than the Auditor-General under the Corporations Act, given their operations as a State entity are automatically subject to scrutiny by the Auditor-General.

An amendment to the Audit Act to provide for the automatic appointment of the Auditor-General as the corporations auditor of State-controlled companies would ensure there is one audit process in place, involving the Auditor-General as Parliament's appointed auditor, to meet the financial reporting and audit requirements of both the Audit Act and the Corporations Act. The Committee considers this legislative requirement would avoid unnecessary duplication and maximise the efficiency and effectiveness of the audit function in meeting the needs of both statutes.

Recommendation 41: **The *Audit Act 1994* be amended to require all companies controlled by the State to appoint the Auditor-General as their auditor under the *Corporations Act 2001*.**

6.1.11 The Auditor-General's power to call for documents

Nature of this topic

Section 11(1) of the Audit Act sets out the Auditor-General's power to require persons to produce documents and other information required for the efficient and effective conduct of audits. The power enables the Auditor-General to call for, by written notice, any person to appear before him or her and produce documents considered relevant to any audit. It covers all outside parties including private sector contractors engaged in the delivery of a public service.

Section 11(3) enables the Auditor-General to examine upon oath any person relating to all matters necessary for the execution of powers under the Audit Act.

While the 'call for' power under section 11(1) appears to be strong, it does not necessarily facilitate audit verification that all requested documentation has been produced and constitutes accurate

291 *Auditor-General Act 2009* (Qld), s. 34

and reliable evidence, particularly where an examination upon oath has not been made under subsection 11(3).

As mentioned in the Committee's Discussion Paper, the Auditor-General had advised the Committee in correspondence that legal advice relating to section 11 has identified that the interrelationship of subsections 1 and 3 of section 11 makes it difficult to extricate a separate and distinct power to require a person to produce documents without appearing for examination upon oath. The Auditor-General has proposed to the Committee that the section be redrafted to provide such a separate and distinct power.[292]

Views expressed to Committee in submissions

VAGO's submission to the Committee reiterated the Auditor-General's view on section 11 that:[293]

> *... as presently drafted, the provision is cumbersome as it does not clearly delineate between the power to call and the power to produce documents. This amendment would clarify the provision so it functions more efficiently and effectively.*

In its submission, ACAG expressed support for the Auditor-General's proposed amendment. In doing so, it stated that one of the general principles adopted by ACAG on the role of an Auditor-General (principle 3) reads as follows:[294]

> *Perhaps the most important power of Auditors-General is that of access to information to carry out the audits.*

Position reached by the Committee

The Committee recognises the importance of clear information-gathering powers to the discharge of the independent functions of an Auditor-General. The Committee therefore advocates that the interrelationship between subsections 1 and 3 of section 11 of the Audit Act be reviewed with the aim of bringing about a more distinct separation of the power of the Auditor-General to require persons to appear and produce documents, under section 11(1), from the power to examine persons upon oath, in section 11(3).

Recommendation 42: **Section 11 of the *Audit Act 1994* be amended to bring about a more distinct separation of the power of the Auditor-General in subsection 1 to require persons to appear and produce documents from the power in subsection 3 to examine persons upon oath.**

6.1.12 Incorporation of submissions or comments of audited agencies in reports of the Auditor-General tabled in Parliament

Nature of this topic

Section 16(4) of the Audit Act obligates the Auditor-General to include in reports tabled in Parliament any submissions or comments of audited agencies, received within specified timelines, or a summary of those submissions or comments in an agreed form.

292 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 14 October 2009 and 30 October 2009

293 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.20

294 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.59

The procedures that must be followed by the Auditor-General in obtaining agency comments and the associated timelines are set out in section 16(3).

These legislative requirements are long standing and have been a traditional practice of the Auditor-General in Victoria. The requirements ensure that the principle of natural justice/procedural fairness is accorded to agencies in respect to the content of audit reports and their published conclusions, findings and recommendations. Additionally, they constitute a valuable avenue for audit staff in identifying the existence of any factual errors in audit reports.

The Committee's Discussion Paper mentioned that it is now standard practice of the Auditor-General to include in reports to Parliament the following paragraph when introducing agency responses:[295]

> *The comments and submissions provided are not subject to audit nor the evidentiary standards required to reach an audit conclusion. Responsibility for the accuracy, fairness and balance of those comments rests solely with the agency head.*

The Committee signalled at the time that it intended to consider the need or otherwise for inclusion within the Audit Act of a provision which emphasises that the responsibility for the accuracy, balance and substantiation of agency responses rests with the agency head.

Many reports of the Auditor-General include an extract of agency responses in the upfront '*audit summary*' section with the full response presented separately in an Appendix to the report. The Committee is not aware if the published extracts of responses are agreed with agencies by the Auditor-General.

In addition, and as noted by the Committee in its Discussion Paper, on occasion, the Auditor-General has included in reports to Parliament further audit commentary on agency responses.[296] Agencies are not provided with the opportunity to respond to the additional audit comments.

The Committee has also noted that, in a very recent report, the Auditor-General has included an '*acquittal response*' to an agency's response which, in lieu of additional audit comment, reproduces a letter forwarded to the agency by the Auditor-General. This acquittal response includes reasons for the Auditor-General's disagreement with the agency on particular issues raised by it in its response as published in the report.[297]

The Committee mentioned in its Discussion Paper that the Auditor-General had proposed in correspondence to the Committee, but without elaboration, that section 16(4) of the Audit Act be changed '*to remove the obligation to publish agency comments or an agreed summary in response to a report.*'[298] The Committee indicated that the Auditor-General would have the opportunity to elaborate on his proposal during the Inquiry's public submissions and hearings stages.

Views expressed to the Committee in submissions and at public hearings

VAGO's submission to the Committee outlined, as follows, the factors underpinning the Auditor-General's proposed legislative change on this topic:[299]

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295 See, for example, Victorian Auditor-General's Office, *Responding to Mental Health Crises in the Community*, November 2009, p.xiii

296 See, for example, Victorian Auditor-General's Office, *Performance Reporting by Departments*, May 2010, p.xv

297 Victorian Auditor-General's Office, *Management of Prison Accommodation using Public Private Partnerships*, September 2010, Appendix C, p.35

298 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

299 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.21

This provision is an impediment to independence, and conflicts with the Auditor-General's role as Parliament's independent auditor. On one reading it could be construed as a lack of confidence in the ability of the Auditor-General's office to carry out its functions professionally and impartially, and overlooks the important natural justice safeguard for audited agencies which the office observes.

As previously outlined to the PAEC, the Auditor-General proposes the removal of the obligation to publish agency responses. INTOSAI Independence Principle 6 provides that Auditors-General should have the freedom to decide the contents and timing of audit reports. The requirement to publish responses reduces this discretion.

Agencies are already consulted well beyond the requirements of the Act and are afforded natural justice as a matter of course. The Auditor-General has proposed amending the Act to clarify the natural justice requirements, especially in relation to third parties. There are numerous opportunities for agencies to voice their views, both during the audit process and separately.

In performing an audit, auditors are subject to professional standards, for example relating to evidentiary requirements to make conclusions and findings, and the legal requirements under the Act. Audit reports comply with these standards. Agency comments however are not subject to any such standards. There is no requirement for them to be evidence based, nor to meet any external verification criteria.

Consequently, their veracity cannot be objectively verified and they can and are frequently used to merely repeat the Executive's position rather than addressing issues in the audit. These types of responses add little and should not be allowed to detract from the auditor's independent conclusions. Further, audit reports should not be used as a platform. In effect, the requirement to publish comments is a direction as to the content of an audit report.

A potential alternative is to provide that the Auditor-General must include a fair summary of agency responses. Such a summary however, must not be subject to approval by the audited agency as again this would undermine the fundamental principle of the auditor forming an independent opinion.

At the Committee's public hearing, the Auditor-General responded to a number of questions from the Committee on this subject.

When asked whether agencies should have the opportunity to provide their comments in a professional way under their responsibilities and accountability, the Auditor-General's response included:[300]

The question I ask is: what is the requirement to do it in a professional way, because they are not bound by the standards? ... We are providing a free forum in the primary report when, arguably, they have a range of other avenues. There is an obligation on the auditor to do procedural fairness, there is no denying that, but they have a range of other avenues to make their views known…

300 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.25

On potential alternative approaches such as provision of a later separate government response, the Auditor-General commented:[301]

> *Clearly it is a matter for the committee. My position, I suppose, is how many controls and constraints do you put on? I agree that the auditor must accord with the auditing standards because that is the foundation of our work. We have professional obligations in how we do that.*
>
> *I agree that in today's world we do procedural fairness, and I am obligated to do that professionally but I suppose my argument is that it is an audit report and that is where it should stop.*

ACAG's submission supports the stance of the Auditor-General. The submission included the following comment:[302]

> *A difficulty in section 16(4) which ACAG believes restricts the A-G's capacity to independently report, is the inclusion of the words "in a form agreed between the Auditor-General and the authority or department head." (ACAG's emphasis). There may be circumstances where differing points of view make it impossible for the A-G and the auditee to reach such agreement potentially leading to the A-G's ability to independently report being comprised.*

The Secretary, Department of Treasury and Finance, in evidence to the Committee, expressed his view on the Auditor-General's proposal in the following terms:[303]

> *It is not clear to me why reducing the information coming to Parliament would be a good thing…*
>
> *I think when a report comes to Parliament it is quite capable of forming a view based upon all the information, whether it is from the Auditor-General or commentary from departmental heads. It is not clear to me why it is in the public interest to reduce that.*

Expressing a view from an auditee's perspective, DIIRD in its submission strongly opposes removal of the statutory requirement to include agency comments in audit reports '*for natural justice reasons.*'[304]

In evidence to the Committee, the Secretary, Department of Transport, also commented on this topic from the viewpoint of an audited agency. The Secretary informed the Committee:[305]

> *I have not discussed that directly with the Auditor-General. I think generally speaking it would be helpful for the community and for Parliament to see both sides of a dialogue that is taking place, so generally speaking, giving departmental heads the opportunity to qualify or comment around recommendations made by the Auditor-General in no way dilutes or compromises those recommendations; they stand as they are.*

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301 ibid.

302 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, pp.59–60

303 Mr G. Hehir, Secretary, Department of Treasury and Finance, transcript of evidence, 7 April 2010, p.18

304 Department of Innovation, Industry and Regional Development, submission to the Committee, received 7 April 2010, p.6

305 Mr J. Betts, Secretary, Department of Transport, transcript of evidence, 7 April 2010, p.3

> *My view would be that enabling us to provide commentary is generally helpful. I would expect the highest standards from agency chiefs in terms of the comments that are made and we would generally comply with the highest standards possible. I am not aware of any difficulty in my portfolio arising from comments we have made in response to the Auditor-General's reports. I am sure he would raise them with me if there were any such difficulties. So, generally speaking I do not have a strong view other than to say that I think it is helpful for the department to put its position in response and to be accountable for that position.*

Professor Kerry Jacobs expressed the view in his submission that the incorporation of comments from agencies in tabled audit reports '*is good practice and to be encouraged. It also provides a good basis for follow up by the PAEC against the statements made by the agencies.*'[306]

Situation in other jurisdictions

The Committee's research indicates that the audit statutes in most Australian jurisdictions require the Auditor-General to invite agencies to respond to proposed audit reports within specified timelines. However, the audit provisions relating to the inclusion of responses in tabled reports vary with some legislation requiring inclusion of either all or a fair summary, some requiring inclusion of all and two, like Victoria, requiring all or a summary in an agreed form.

Unlike other jurisdictions, the audit legislation in the Australian Capital Territory assigns some discretion to the Auditor-General who must '*take account of*' agency comments when finalising reports.

Some jurisdictions extend the consultative process on proposed reports beyond agencies to include persons whom the Auditor-General considers to have a special interest in the content of a planned report.

A summary of the situation across jurisdictions is presented in Appendix 5.

Legal advice received by the Committee

To assist its consideration of the need or otherwise for any legislative amendments associated with this subject, the Committee sought advice from the Victorian Government Solicitor on whether the current reporting practices of the Auditor-General concerning agency responses are consistent with Parliament's intention under the relevant provisions of the Audit Act and the principle of natural justice/procedural fairness. As mentioned in the earlier paragraphs, the Auditor-General's current practices involve:

- the publication in reports of extracts of agency responses separate from their full responses without any indication of whether the extracts have been agreed with agencies;
- the inclusion of additional audit comment or an acquittal response in reports on agency responses without an opportunity accorded agencies to respond to that additional comment or acquittal response; and
- the publication of a qualifying preface to agency submissions and comments which identifies they are not subject to audit or evidentiary standards required to reach an audit conclusion and that responsibility for their accuracy, fairness and balance rests solely with the agency head.

306 Prof. K. Jacobs, submission to the Committee, received March 2010, p.6

Relevant parts of the legal advice received by the Committee from the Victorian Government Solicitor on these practices are presented below:[307]

Presentation of extracts of agency responses separate from but in addition to the complete responses

> *On occasion, the Auditor-General includes extracts from this correspondence* [the agency response] *after his 'Audit Summary', and before the substantive sections of his reports. However, this is not always the case. It is not clear whether such extracts are in a form that is agreed between the Auditor-General and the authority. However, we assume that they are not.*
>
> *Save that submissions or comments must be reproduced in full somewhere in the report (unless it is agreed to only include a summary of them), the Audit Act 1994 is silent as to the precise form in which submissions or comments must be included in a final report. It is a matter for the Auditor-General as to whether submissions or comments are also extracted after his 'Audit Summary'. So long as the full submissions or comments are included in the report, it is not inconsistent with the Audit Act 1994 for the Auditor-General to extract sections of those submissions or comments (without the agreement of the authority) and highlight them in a particular way at an early stage in his report. There is no statutory obligation for the Auditor-General to give particular prominence to the full submissions or comments.*

In reaching this conclusion, the advice states that '*We are again reinforced in this conclusion by the considerations described at* [the advice's] *paragraph 22* [which identifies]':[308]

- *The expansive nature of the Auditor-General's powers generally (he has 'complete discretion in the performance or exercise of his or her functions or powers'); and*
- *The broad nature of the Auditor-General's powers in relation to the content of his reports (he may include in his reports any information that he 'thinks desirable in relation to matters that are the subject of the Audit').*

Inclusion on occasion of additional audit comment or an acquittal response on agency responses[309]

> *The Auditor-General has also adopted a practice of providing, in his final reports, 'further comments' or an 'acquittal report' upon the submissions and comments made by authorities on an earlier version of his report. In some cases, the further comments have taken issue with assertions made by authorities.*
>
> *It is not clear whether the further comments are in a form agreed between the Auditor-General and the authority. However, we assume they are not.*
>
> *Subject to what we say at paragraph 27 below* [the next paragraph], *we do not consider that it is inconsistent with the Audit Act 1994 for the Auditor-General to include such further comments in his final reports. We are again reinforced in this conclusion by the*

307 Victorian Government Solicitor's Office, legal advice to the Committee, received 22 September 2010, p.7

308 ibid., p.5

309 ibid., pp.5–6

> *considerations described at paragraph 22 above* [see earlier reference to this paragraph in the legal advice].
>
> *However, if, once the Auditor-General's further comments have been included in a final report, the document has fundamentally changed from the original 'proposed report' that was provided to the authority, further obligations to provide this updated version of the report to the authority, and include any supplementary submissions or comments, may arise. It will necessarily be a matter of degree and judgment in the particular circumstances of an individual report as to whether the inclusion of further comments changes the report so fundamentally that such obligations arise.*
>
> *In this regard, we note that, when viewed in the context of the totality of several recent final reports, the Auditor-General's further comments have not represented particularly significant changes…*

The advice also noted that:[310]

> *… whilst the practice has not been adopted in respect of every report that they have produced in recent times, the Auditors-General of the Commonwealth, New South Wales, Queensland and Tasmania have, on occasion, included in their final reports further comments upon submissions or comments made by authorities.*

Further the legal advice stated:[311]

Publication of a qualifying preface to agency submissions or comments

> *The Auditor-General is responsible for ensuring that the conclusions* [in final reports]:
>
> - *Do have an evidentiary basis that meets the standard required to reach an audit conclusion; and*
> - *Are reached independently of the authority or authorities that are the subject of the audit, and are objective.*
>
> *The inclusion of submissions or comments made by authorities in the Auditor-General's final reports may give rise to the potential for readers to think that:*
>
> - *The submissions and comments are audited by the Auditor-General;*
> - *The Auditor-General has verified that they have an evidentiary basis that is consistent with the balance of his reports; or*
> - *The submissions and comments are independent and objective, in the same way that the balance of his reports are.*
>
> *If the Auditor-General considers that the inclusion of the qualification is necessary to preserve the independence of his office, and to ensure that his final reports (when read*

310 ibid., p.6

311 ibid

> *in their totality) are not inaccurate or capable of misleading readers, then we do not consider that the inclusion of the qualification is inconsistent with the Audit Act 1994.*

As with the above two points, the legal advice states that '*We are reinforced in this conclusion by…'* [the advice refers to the two matters on the breadth of the Auditor-General's powers expressed in its paragraph 22, the contents of which are identified above].[312]

The legal advice also included advice on Parliament's intention for the relevant legislative provisions in the Audit Act and the application of procedural fairness generally in the context of those provisions.

Parliament's intention and procedural fairness generally

On Parliament's intention, the legal advice states:[313]

> *In the absence of any further legislative direction in the Audit Act 1994 as to this process* [relating to agency responses], *the only other relevant expressions of Parliament's intention may be inferred from:*
>
> - *The expansive nature of the Auditor-General's powers generally;*
> - *The broad nature of the Auditor-General's powers in relation to the content of his reports; and*
> - *The standards that the Auditor-General must apply when conducting his audits.*
>
> *It may be readily inferred from the individual and cumulative effect of these legislative provisions that Parliament intended the Auditor-General to have considerable latitude as to the content of his reports, and to apply the relevant professional standards in conducting his audits. We therefore consider that, when the Constitution Act 1975 and the Audit Act 1994 are considered in their entirety, the Auditor-General's current practices are consistent with Parliament's intention. If Parliament considers that the Auditor-General's current practices are not consistent with the operations of ss 16(3) to 16(4) of the Audit Act 1994 that it intended, legislative amendments to clarify these issues may be required.*

With regard to the application of the principle of procedural fairness generally, the legal advice included the following comment:[314]

> *The right of affected parties to comment does not displace the fact that ultimately the Auditor-General has a statutory power to report to Parliament. So long as the parties are aware of the broad thrust of what will be said, and have the ability to comment upon it, the obligation to accord procedural fairness is discharged. The right of an affected party to comment upon matters affecting their interests is not necessarily a 'right to have the last word' upon matters affecting their interests.*
>
> *However, if new matters affecting the interests of authorities are raised by the Auditor-General's qualifications or further comments (i.e. matters that were not within the broad thrust of what was raised in the original 'proposed report'), then procedural*

312 ibid.

313 ibid., pp.8–9

314 ibid., p.10

fairness may require the Auditor-General to give them an opportunity to comment upon these matters. This would be the case irrespective of whether the obligation to accord procedural fairness is founded in the Audit Act 1994 or the common law.

Again, it will necessarily be a matter of degree and judgment in the particular circumstances of an individual report as to whether the qualification or further comments introduce genuinely new matters, which affect the interests of authorities, or are merely an extension of matters raised in the original 'proposed report'.

Position reached by the Committee

The Committee does not support removal from the Audit Act of the requirement for the Auditor-General to include agency submissions or comments in audit reports to Parliament if received within specified timelines. It regards such a requirement as intrinsic to the application of the principle of natural justice/procedural fairness.

In reaching this view, the Committee also recognises that agency heads generally value highly the opportunity granted to them under legislation to have their responses incorporated in audit reports.

The legal advice received by the Committee on this topic has provided confirmation that the practices followed by the Auditor-General pertaining to incorporation of agency submissions or comments in final audit reports transmitted to Parliament are not inconsistent with the relevant requirements of the Audit Act. In providing this confirmation, the legal advice identifies that its conclusions were reinforced by the significance of the constitutional protection of the Auditor-General's independence and the broad nature of the Auditor-General's reporting powers set out in the Audit Act.

The legal advice has also confirmed that the current practices of the Auditor-General in this area are consistent with Parliament's intention, which can be inferred from the expansive nature of the constitutional protection accorded the Auditor-General and the associated wide-ranging reporting powers assigned to the Auditor-General under the Audit Act. The advice also concludes that the obligation to accord procedural fairness to agencies is discharged through the current practices of the Auditor-General.

Importantly, the legal advice includes a proviso to the conclusions reached concerning:

- the practice of the Auditor-General to include additional audit comment or an acquittal response on agency responses from time to time in reports; and
- the discharge of the principle of procedural fairness when additional audit comment or an acquittal response is included in a report.

This proviso identifies that if new matters are raised by the Auditor-General that fundamentally change the broad thrust of what was raised in the original proposed report, there may be an obligation on the Auditor-General to give agencies an opportunity to comment on these new matters, in order to meet the requirements of the Audit Act and to discharge the principle of procedural fairness.

The legal advice also mentions a further proviso with regard to its assessment of Parliament's intention for the relevant legislative provisions of the Audit Act which it has inferred from those provisions. The advice indicates that legislative amendments may be required if Parliament deems that there is a need for greater clarity regarding its intention.

After careful analysis of these two provisos identified in the legal advice, the Committee has concluded that legislative amendment to the relevant provisions of the Audit Act is justified in order to give a clearer expression of Parliament's underlying intention for those provisions and better assist

the Auditor-General and audited agencies in meeting that intention. This legislative amendment should incorporate within section 16 of the Audit Act a requirement for the Auditor-General to ensure that any additional audit comment or acquittal response on agency responses inserted in final audit reports from time to time do not introduce new matters that fundamentally change the thrust of the report from the proposed report made available to agencies.

In advocating the above amendment, the Committee is not suggesting that the Auditor-General has infringed in this area through the insertion of additional audit comment in some reports. A specific provision in the legislation in this area would formalise, through clarity of legislative expression, the Auditor-General's existing practices.

The Committee also has concluded that a further legislative amendment is necessary which focuses on the responding agencies. The legal advice points out that comments submitted by agencies to proposed reports are not directly subject to evidentiary standards of a nature similar to those that must be adhered to in the reaching of audit findings and conclusions. The Committee considers any imbalance between the accountability of agencies vis-a-vis the Auditor-General regarding the content and fairness of respective reported comments can be addressed through legislative change. Such a change should explicitly require that the natural justice facility available to audited agencies in the Audit Act carries with it an obligation to ensure that submitted comments exhibit the characteristics of accuracy, balance and substantiation.

An amendment of this nature would facilitate the reaching of agreement between the Auditor-General and agencies if it is planned to include a summary of submitted comments in a report. In other instances involving inclusion of a complete response, the amendment should substantially reduce, or ideally eliminate, any need for the Auditor-General to insert additional audit comment in reports because of perceived deficiencies in the submitted narrative from agencies. The Committee intends to monitor this issue in its periodic follow-up of performance audits and would expect to see clear justification for any additional audit comment reported by the Auditor-General to Parliament.

Finally, the Committee also considers that the Audit Act should be amended to extend the application of natural justice pertaining to the content of proposed reports beyond agencies to include persons considered by the Auditor-General to have a special interest in a proposed report. In the absence of an express reference in the Audit Act, such application is currently implied under common law.

Recommendation 43: **The provisions of section 16 of the *Audit Act 1994* be extended to include a requirement for the Auditor-General to ensure that any additional audit comment inserted in final audit reports from time to time pertaining to published agency responses must not fundamentally change the thrust of the report when compared with the proposed report made available to agencies.**

Recommendation 44: **The provisions of section 16 of the *Audit Act 1994* be amended to assign an obligation on agency heads to ensure that comments submitted to the Auditor-General for inclusion within proposed audit reports exhibit the characteristics of accuracy, balance and substantiation.**

Recommendation 45: **The provisions of section 16 of the *Audit Act 1994* be varied to designate persons considered by the Auditor-General to have a special interest in a proposed report as eligible to receive and submit a response to such a report.**

6.1.13 Immunity protection

Nature of this topic

Section 7H of the Audit Act indemnifies the Auditor-General and staff of VAGO for anything done or omitted to be done in good faith in the performance of audit functions.

As indicated in the Committee's Discussion Paper, the Auditor-General had proposed in correspondence to the Committee that the indemnity protection in the Audit Act be replaced '*to give full immunity to the Auditor-General and his staff for actions carried out in good faith.*'[315]

The Auditor-General supported this view with the following comments:[316]

> *Immunity provides protection from having a civil or criminal case brought against the person/role protected where an act was undertaken/omitted in good faith. Where immunity is provided, no liability attaches to the person protected.*
>
> *... Indemnity on the other hand, provides protection against any liability for anything done/omitted in good faith, but is silent as to whether or not a civil or criminal case can be brought against the person protected. This provides no guarantee that an action will not be brought.*

The Auditor-General added that his Office '*is concerned to uphold the independence of the office of Auditor-General*' and that research commissioned by his Office had found that '*the threat of litigation could weaken the independence of the Auditor-General. Similarly, litigation could be used to divert attention from the Auditor-General's function.*'[317]

Situation in other jurisdictions

ACAG advised the Committee in its submission that:[318]

> *Most other jurisdictions provide a more explicit protection from liability by precluding any action or claim for damages in these circumstances, thus protecting their Auditor-General from becoming embroiled in litigation.*

The position advised by ACAG was confirmed by the Committee from its research and during its visits to Western Australia and New Zealand.

A summary of the situation across jurisdictions on this topic is presented in Appendix 5.

In addition to the position in audits statutes across Australasia, immunity protection has been assigned in Victoria to two independent officers of Parliament, the Ombudsman in section 29 of

315 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

316 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 7 December 2009

317 ibid.

318 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.62

the *Ombudsman Act 1973* and the Director, Police Integrity in section 51B of the *Police Integrity Act 2008*.

Position reached by the Committee

There was a range of views among Committee members as to the appropriateness of independent officers of Parliament being provided with immunity protection. On balance, the Committee believes the current indemnity provisions within the Audit Act, when allied with the proper extension of access powers, provide adequate protection for the Auditor-General and staff of VAGO.

Recommendation 46: **The indemnity protection accorded the Auditor General and staff of the Victorian Auditor General's Office within section 7H of the *Audit Act 1994* be retained.**

6.1.14 Amendments to other legislation which override the access powers of the Auditor-General in section 12 of the Audit Act

Nature of this topic

As mentioned in the Committee's commentary in Chapter 5, section 12 of the Audit Act assigns a key information-gathering power to the Auditor-General. It authorises the Auditor-General to access for audit purposes any information held by a government body. The access power overrides secrecy provisions in other legislation or a rule of law as well as Cabinet confidentiality.

VAGO's submission to the Committee expressed concern regarding an amendment made to the *Public Health and Wellbeing Act 2008* which expressly overrides section 12 in relation to confidential information held by prescribed consultative committees established by the Minister under the Act. The information conveyed to the Committee in VAGO's submission was as follows:[319]

> *... it has come to the Auditor-General's attention that section 42(2) and (3) of the Public Health and Wellbeing Act 2008 purports to limit the ability of the office to access information in the hands of certain consultative councils. These councils are established by government and full access to information should be provided as per any other government agency. This provision is carried over from section 24(2A) of the Health Act 1958 which was repealed effective 1 January 2010. The office was not consulted on the provision, is unaware of any rationale for it, and on its face sets a dangerous precedent whereby the Executive attempts to pick and choose what information is to be available to, and for, audit. Sensitive information held by audit is not only covered by secrecy provisions in the Act* [Audit Act] *but is also subject to internal security controls. The Auditor-General proposes that this provision be repealed as a consequential repeal in any Bill amending the Audit Act 1994.*

In evidence given at the Committee's public hearing, an officer of VAGO accompanying the Auditor-General provided further comment to the Committee which included:[320]

> *The consultative councils you are talking about are a couple of — there is a council on paediatric morbidity and there is another one on anaesthetic morbidity as well, which are consultative councils that are comprised of predominantly surgeons, to*

319 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p. 25

320 Mr M. Bini, Director, Policy and Coordination, Victorian Auditor-General's Office, transcript of evidence, 7 April 2010, p.17

> *my understanding. That provision was in the previous act which was when the new Health and Wellbeing Act came in in January this year. We were not consulted.*
>
> *We knew nothing about it, and there it is. It is in the submission to draw to your attention again, this issue about why are these particular entities being treated any differently? They are appointed by the minister, ostensibly on the part of the executive. I do not know whether they have public money or not, but I could foresee situations where we are doing performance audits in the Department of Health, some of their documentation may be relevant; the provision in that act specifically excludes us. This is not a case of, you need to make an argument about whether you have got access or not; it specifically excludes us.*
>
> *Our concern is obviously that that sort of provision starts appearing elsewhere, because it is a specific threat to the mandate…*

At the Committee's public hearing, the Secretary, Department of Treasury and Finance, was advised of the issue that had been raised by the Auditor-General and, in a question on notice, was requested to provide comments to the Committee. The information presented by the Secretary included:[321]

> *Under the Act* [the Public Health and Wellbeing Act], *Parliament has established 4 consultative councils, as specialist advisory committees, created for the purpose of advising on highly specialised areas within health care. In performing these functions, these councils have extensive information collection powers and collect highly sensitive material that relate to their specialist areas, authorising the collection of information for a legitimate health purpose, with the results of any research disseminated widely to assist health service providers in making systemic changes to the treatment and care they provide.*
>
> *It is important to note that Parliament has previously considered and approved this legislative provision, recognising the highly sensitive nature of the material collected for the purpose of fulfilling the statutory functions of councils. The confidentiality provisions of the Act do not apply to the administrative functions supporting councils, and only apply to the highly sensitive nature of the material collected for the purpose of fulfilling the statutory functions of councils. Accordingly, it is considered that the Auditor-General should be able to fulfil his statutory duty without accessing the information protected under section 42.*
>
> *The Committee should also note that this provision has been carried over from the Health Act 1958 which was repealed in 2010. The reason for retaining this provision is that the effectiveness of councils is heavily reliant on the quality of information it is able to collect and in this regard, also providing assurance to the health sector that the information they provide will not be divulged or compelled to be divulged for any other purpose than its originally intended purpose. Health professionals may not be willing to provide frank and fearless advice to councils without the reassurance that these confidentiality provisions prevail. There may also be issues associated with privacy of personal information, which could have a bearing on the sharing of this confidential information more widely.*

321 Mr G. Hehir, Secretary, Department of Treasury and Finance, letter to the Committee, received 18 June 2010

Position reached by the Committee

As mentioned above, section 12 of the Audit Act provides key information-gathering access powers to the Auditor-General. It is a long standing provision of the Act and its ambit, overriding secrecy provisions in legislation or a rule of law or Cabinet confidentiality, which is indicative of Parliament's intention to assign, through that section, the widest possible access authority to the Auditor-General.

Parliament's sanctioning of the overriding of secrecy provisions set out in other enactments within the ambit of section 12, in addition to a rule of law and Cabinet confidentiality, automatically meant that the most sensitive information held by government agencies or on their behalf could be accessed by the Auditor-General, if deemed necessary for the purpose of an audit. Parliament's recognition of the sensitivity and need for strict confidentiality of any information gathered by the Auditor-General under section 12 is reflected in the section through an express prohibition on divulgence or communication of such information except in the course of official duties under the Audit Act.

The Committee considers that the consequence of Parliament's passing of section 12 was that any information relevant to a policy of government is, irrespective of its sensitivity, accessible by the Auditor-General whenever necessary in order to fully evaluate and reach a conclusion in an audit on the implementation of that policy. Audit examination of the implementation of government policy, such as occurs with performance audits, encompasses the full gamut of management functions of an agency, not just their administrative functions.

The Committee does not wish to comment directly on the particular legislative amendment cited by the Auditor-General or the nature of the information collected by the consultative councils established under that legislation. It does consider, however, that amendments to legislation which expressly negate the existing access powers of the Auditor-General in section 12 of the Audit Act could restrict the scope of particular audits and adversely impact on the quality of audit findings and recommendations communicated to Parliament at the completion of those audits. Such circumstances would not be consistent with Victoria's leading edge public accountability framework.

Recommendation 47: **The access powers assigned to the Auditor General under section 12 of the *Audit Act 1994* and the stringent safeguards within that section on protection of the confidentiality of accessed information are essential elements of Victoria's public accountability framework and should not be overridden by other Acts of Parliament.**

6.1.15 Provisions relating to policy objectives of government

Nature of this topic

As is common in most audit statutes in Westminster systems of government, the Audit Act precludes the Auditor-General from questioning the merits of government policy objectives. This constraint is necessary to preserve the right of an executive government to formulate its policy directions without interference. The independent role of an Auditor-General on behalf of Parliament is therefore restricted to the implementation of government policy.

Subsections 5 and 6 of section 16 of the Audit Act address this matter in the context of the Auditor-General's reporting powers to Parliament and read as follows:

> *(5) Nothing in this section entitles the Auditor-General to question the merits of policy objectives of the Government.*

(6) In subsection (5)—

***"policy objectives"** includes—*

(a) Government policy direction of a Minister;

(b) a policy statement in a Budget Paper;

(c) a statement of objectives in a corporate plan of an authority approved by a Minister;

(d) any other document evidencing a policy decision of the Government or a Minister.

Differentiating between policy objectives and the implementation of policy can be difficult and may be complicated by individual circumstances. The audit legislation in most other jurisdictions does not supplement the constraining provision with a definition of policy or policy objectives. Presumably, those jurisdictions rely on the reaching of agreement between the Auditor-General and the audited agency on the boundaries of policy relevant to particular audits.

The Committee's February 2010 Discussion Paper identified that the definition of policy objectives in the Audit Act is presented in an open-ended way on where policy might be found rather than what actually constitutes policy. The Committee indicated in the Discussion Paper that there may be scope through its Inquiry to identify avenues for refreshing the legislative approach to this matter without eroding the essential requirement of preserving the right of an executive government to unfettered determination of policy. It invited the views of interested parties on the subject.

Views expressed to the Committee in submissions

VAGO's submission to the Committee indicated that the Auditor-General did not generally support legislative amendments relating to this topic that might flow from the discussion issues set out in the Committee's Discussion Paper. The submission from VAGO stated:[322]

> *The Auditor-General regards the policy restriction in the Act as an important safeguard of independence and provides a delineation of the role of the Auditor-General and that of the Executive. The definition is the most comprehensive in Australia and the Auditor-General does not believe there is a need to amend it. If it were decided to remove it, the Auditor-General has no objection to its removal as long standing convention is that Auditors-General do not question policy directions nor their merits. Audit attention is focused on the economy, efficiency and effectiveness of policy implementation.*
>
> *The Auditor-General is however concerned that the discussion points in the paper state that further amendment to the provision could "assist audited agencies and the Auditor-General in their reaching agreement on the boundaries of policy" (p68). Requiring agreement would further undermine the independence of audit and ignores the effectiveness of existing standards and PAEC oversight.*
>
> *The Auditor-General's role is to audit agencies in a fair, professional and impartial manner, to provide Parliament with assurance. The Auditor-General currently engages*

322 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.17

> *and consults with agencies on audits well beyond the requirements of the Act and they have more than adequate opportunity to raise issues of concern.*
>
> *It is also unclear what purpose further definition of policy in the Act would serve other than potentially impairing the Auditor-General's independence and further reducing his mandate.*

In its submission to the Committee, ACAG pointed out that the restriction of an Auditor-General's ambit to implementation of government policy '*is a convention followed by all Auditors-General in Australia.*' ACAG also indicated that it '*concurs* [with the point mentioned in the Committee's Discussion Paper] *that differentiating between policy objectives and policy implementation is complicated by circumstances. For this reason, the matter is best addressed by each circumstance and between auditor and auditee.*'[323]

Like the Auditor-General, ACAG expressed concern regarding inclusion of a definition of policy within the Audit Act and the potential adverse impact on the Auditor-General's independence. It stated that:[324]

> *... including a reference to policy in legislation runs the risk of reducing the independence of the Auditor-General… Trying to define policy also runs the risk of agencies continually challenging proposed projects on the basis they cross boundaries leading potentially to challenge an Auditor-General's authority and therefore independence.*

The Committee was interested in the view, from the perspective of an auditee, expressed by DIIRD on this subject in its submission to the Committee. DIIRD advised the Committee that:[325]

> *It is the Department's view that the constraint on the Auditor-General with regard to exclusion of policy objectives from audit is satisfactorily documented in the existing legislation. The Westminster model reinforces the position that policy ought to remain the prerogative of the Executive. Government policy is exempt from Auditor-General commentary to Parliament, and should remain so. As for seeking to define the meaning of policy further, the debates regarding the boundaries between policy and administration form part of the robust exchange between the auditor and auditee.*

Position reached by the Committee

The Committee recognises the importance of the long standing convention in Westminster jurisdictions that an Auditor-General be precluded from questioning the merits of government policy when reporting on the results of audits focussing on the implementation of government policy. It strongly supports the Victorian approach which explicitly addresses this convention in legislation as per section 16(5) of the Audit Act.

In identifying this subject as a topic for discussion during its Inquiry, the Committee noted the open-ended nature of the boundaries of policy objectives of government as set out in section 16(6) of the Audit Act. These boundaries specify examples of where policy objectives of government may be found rather than what actually constitutes policy. A more definitive approach might assist the

323 Australasian Council of Auditors-General, submission to the Committee, received 19 March 2010, p.45

324 ibid.

325 Department of Innovation, Industry and Regional Development, submission to the Committee, received 7 April 2010, p.4

Auditor-General and audited agencies in their identification of policy or policies of government in discussions during the scoping of audits.

It seemed to the Committee that where a policy document might reside could be of limited usefulness to the parties, and particularly the Auditor-General, as the location of a document could be regarded, because of the legislative reference, as a principal factor in identifying a government policy rather than its inherent characteristics. The feasibility of an alternative approach which differentiated in more specific terms between macro government policy and subsets of macro policy, the latter exhibiting operational characteristics amenable to audit scrutiny, was raised by the Committee for discussion as a potential way forward.

The views expressed to the Committee in submissions do not indicate that major problems have been experienced in this area. They principally advocate retention of the status quo. The committee notes in particular the view of VAGO that '*long standing convention is that Auditors-General do not question policy directions nor their merits*.'[326] In these circumstances, the Committee does not recommend any legislative change to the Audit Act.

Recommendation 48: **The provisions of section 16(6) of the *Audit Act 1994* pertaining to documents evidencing policy objectives of government be retained.**

6.1.16 Consolidation of Auditor-General's general powers

Nature of this topic

Complementing the enshrining of the Auditor-General's independence in Victoria's Constitution Act, the Audit Act itemises, in section 3A, the objectives of the legislation. These objectives correspond with, in all but one instance, the individual powers of the Auditor-General set out in the Act.

The one objective not linked to audit powers relates to the accountability of the Auditor-General to Parliament for the discharge of the position's responsibilities and corresponds with the provisions governing Parliament's financial and performance audits of the Auditor-General and VAGO managed by the Committee on behalf of Parliament.

The various powers of the Auditor-General are not presented in a consolidated listing. However, they are grouped and separated from other provisions in Parts 3, 3A and 3B of the Audit Act.

As stated in the Committee's Discussion Paper, the Auditor-General proposed to the Committee that a new section be inserted in the Audit Act which consolidates and explicitly states the general powers of the Auditor-General. The Committee was informed that such action would clarify the Auditor-General's powers and remove any potential ambiguity.[327]

Situation in other jurisdictions

The approach advocated by the Auditor-General has been adopted in Western Australia and Tasmania as part of recent revisions to the audit legislation in those jurisdictions. The audit legislation in the Australian Capital Territory also contains a consolidated listing of the functions of the Auditor-General.

326 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

327 ibid.

In the Western Australian and Tasmanian legislation, the consolidation of audit functions, mainly relates to functions other than financial audits and includes performance audits and investigatory work associated with public money and/or public property. Unlike the Victorian legislation, those statutes as well as the legislation in the Australian Capital Territory do not include a detailed presentation of the legislation's objectives or a series of provisions relating specifically to the conduct of performance audits.

The Committee confirmed the Western Australian approach to the issue during its visit to that state.

A summary of the situation across jurisdictions on this topic is presented in Appendix 5.

Position reached by the Committee

No further comment on this topic beyond that presented in the Committee's Discussion Paper was provided to the Committee in submissions or in evidence at public hearings.

As mentioned in its Discussion Paper, the Committee recognised that the Auditor-General's proposal to bring together all audit powers in a consolidated listing in the Audit Act could bring greater clarity to their presentation. It also recognises that the consolidated listing of the objectives of the Audit Act in its section 3 goes some way to identifying the powers of the Auditor-General and that those powers are addressed in Parts 3, 3A and 3B of the Act.

The Committee has concluded that this topic relates primarily to the structure of the Audit Act and is a matter for consideration during any future drafting of amendments. It therefore does not recommend as an outworking of its Inquiry any specific changes to the Audit Act pertaining to the topic.

Recommendation 49: **The need for consolidation of the general powers of the Auditor-General within the *Audit Act 1994* be considered during the development of future amendments to the Act.**

6.1.17 Power of the State Services Authority to conduct a special inquiry relating to VAGO

Nature of this topic

The State Services Authority (SSA) is a statutory body established under the *Public Administration Act 2004*. It has been assigned several roles including to:[328]

- identify opportunities to improve the delivery and integration of government services and report on service delivery outcomes and standards;
- promote high standards of integrity and conduct in the public sector;
- strengthen the professionalism and adaptability of the public sector; and
- promote high standards of governance, accountability and performance for public entities.

On the first-named role, section 52 of the *Public Administration Act 2004* empowers the Premier to direct the SSA to conduct a special inquiry into any matter relating to a public service body, a public entity or a special body. For the purposes of the Act, VAGO is included in a listing in section 6 of organisations that are designated as special bodies. This listing includes a department of the Parliament

328 *Public Administration Act 2004*, s. 45

and the offices of Victoria's other independent officers of Parliament, '*the office of the Ombudsman, the Office of Police Integrity and the Victorian Electoral Commission.*'[329]

VAGO's submission to the Committee drew the Committee's attention to the ambit of section 52. The submission commented that:[330]

> *The SSA is part of the Executive and it is entirely inappropriate for an agency of the Executive to have a review* [special inquiry] *power over Parliament's independent auditor. The Auditor-General proposes that this provision of the PAA* [Public Administration Act 2004] *be amended to remove this power as a consequential amendment in any Bill amending the Audit Act 1994.*

At the Committee's public hearing, the Public Sector Standards Commissioner and the Chief Executive Officer of the SSA made a detailed and informative presentation to the Committee on the organisation's role and functions in the Victorian public sector.

During the hearing, the Committee was advised of the relationship between the SSA and the Auditor-General and how the functions of the SSA compared with those of the Auditor-General. The evidence given to the Committee on these two points included:[331]

> *... the need to distinguish the roles of the SSA and the public service standards commissioner, who are essentially within government, and that of the Auditor-General, who, as you know, is an officer of Parliament and seeks to audit the activities of government. So their starting points and their perspectives are different and they look at issues slightly differently. I think it is fair to say that the SSA has an operating style that focuses very much on working with those that are being reviewed to find the best possible outcome, given the various constraints that might exist — be they resources, mandate, or a range of other things that could impact on performance. They have similar roles but they come at things from a quite different perspective.*

On the nature of the SSA's modus operandi, including the use made of any work undertaken by the Auditor-General, the Committee heard that:[332]

> *... we are not an auditor and we do not operate in a way that tells people they have a problem. We assume that there is something on their mind, that something is worrying them, and our job is to go out there and work with them. We try to use very experienced people — we have had a number of very experienced commissioners — and they are not constrained by any model. They go in, work with and talk to people. We have at various times allowed the public to submit, if they wished to, on various issues and on a number of those we have had community submissions. We sit down with them and work through what is feasible.*
>
> *... I talk regularly to the Auditor-General. We have a couple of informal agreements. One of those is that he leaves the workforce planning space to us; he believes that is our role. That came out of some work they did in 2004. We look at the workforce planning space, he leaves that to us, and he leaves the cultural space to us. We often hit upon the same issues when we do our reviews, and sometimes that can be where the governance can*

329 ibid., s. 6

330 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p. 25

331 Mr P. Allen, Public Sector Standards Commissioner, transcript of evidence, 7 April 2010, p.4

332 Ms K. Cleave, Chief Executive Officer, State Services Authority, transcript of evidence, 7 April 2010, pp.4–5

be tightened. We learn from that and change and upgrade and update our governance material.

... We review all literature. We also review all reports, and in that we very much use all the Auditor-General's reports — if the Auditor-General has looked in this space, we definitely use it — and we look at the associated reports.

The Committee also heard, in relation to the power of the SSA to conduct a special inquiry into VAGO under section 52 of the *Public Administration Act 2004*, that:[333]

Section 52 is the only opportunity where the Premier can direct us to review a special body. The Auditor-General is a special body, and if the Premier does direct us to do so, he also under section 55(2) must present the outcome of that report to Parliament.

The Committee was informed that to date the SSA has not been asked to undertake a special inquiry under section 52.

At the Committee's public hearing, the Secretary, Department of Treasury and Finance, was advised of the issue concerning section 52 of the *Public Administration Act 2004* that had been raised by the Auditor-General. The Committee asked the Secretary, in a question on notice, to furnish the views of the department on the issue to the Committee. The information subsequently provided by the department included:[334]

Unlike the Auditor-General, who is an Independent Officer of Parliament, VAGO employees are employed under part 3 of the Act, which deals with "Public Service Employment." It is VAGO, as distinct from the Auditor-General, which is subject to the SSA's power in section 52.

The SSA's 'special inquiry' power is limited in scope to 'identifying opportunities to improve the delivery and integration of government services and report on service delivery outcomes and standards', as articulated in subdivision 2 of the Act.

Importantly the Act provides a reporting mechanism to Parliament and promotes an on-going level of accountability by the Executive Government. The relevant Minister must submit to Parliament any reports prepared by the SSA, and report to Parliament on the details of any action taken or proposed to be taken by the Executive Government within 30 sitting days of the report being provided to the Minister.

Finally, the ability of the SSA to consider a 'special inquiry' is a power by exception, and not one of continual oversight. To date, the Premier has not requested the SSA to undertake any such inquiry of a 'special body'.

In this context, the Committee needs to consider whether there are sufficient safeguards in place within the Act (and other applicable legislation) that allow VAGO's public service staff to be the proper subject of inquiry, whilst simultaneously protecting and preserving the independence of the Auditor-General.

333 ibid., p.8

334 Mr G. Hehir, Secretary, Department of Treasury and Finance, letter to the Committee, received 18 June 2010

Position reached by the Committee

Section 16 of the *Public Administration Act 1994* assigns to the Auditor-General the functions of a public service head in relation to VAGO. Staff of VAGO are employed under Part 3 of that Act.

The Committee recognises the important role and functions undertaken by the SSA on behalf of government in supporting high standards of conduct, governance and performance in the Victorian public sector. The Committee also recognises the special statutory power accorded the Premier which enables a direction to be given to the SSA to carry out a special inquiry under section 52 of the *Public Administration Act 2004*. Such an inquiry can cover any matter pertaining to the SSA's role of identifying opportunities to improve the delivery and integration of government services and report on service delivery outcomes and standards. The Act requires that the results of a special inquiry must be reported to Parliament.

VAGO is defined in the Act as a special body which can be subject to a special inquiry. The staff of VAGO are employed primarily to assist the Auditor-General in the delivery of audit services under the Audit Act and not the delivery of government services. Some functions of VAGO directly involve the management of human resources, as distinct from the planning and conduct of audits. These functions, however, fall within the responsibility of the Auditor-General as the equivalent to a public service head.

Given the focus of any special SSA inquiry directed by the Premier must be on government services and service delivery outcomes and standards, the Committee questions the inclusion of VAGO within the special inquiry provisions of the *Public Administration Act 1994*.

In reaching this view, the Committee appreciates that special circumstances associated with the administration of the public sector may necessitate on rare occasions a special inquiry within a government agency. However, an executive-initiated inquiry into VAGO's delivery of services, which is provided for under the existing framework, could be seen as in conflict with the Auditor-General's independence and the special constitutional protection of that independence.

The accountabilities of the Auditor-General to Parliament arising from the use of the powers and functions established under the Audit Act are derived from that Act and involve statutory responsibilities assigned to this Committee on behalf of Parliament. These responsibilities include the management of an independent performance audit of the Auditor-General and VAGO at least once every three years. Should serious circumstances of a nature that would give rise to a special inquiry by the SSA in a government agency be ever identified or suspected in VAGO, the Committee considers that those circumstances would logically fall within its statutory oversight functions.

The Committee therefore advocates that section 6 of the *Public Administration Act 2004* be amended to delete VAGO from the listing of organisations categorised as special bodies that may be subject to a special inquiry conducted under the Act by the SSA. However, it may be appropriate for the Parliament at the recommendation of this Committee, should circumstances warrant, to utilise the services of the SSA to undertake a special inquiry into VAGO. In that event, such an inquiry would need to be authorised by the Presiding Officers following a motion passed in both Houses. An amendment would be needed to the Public Administration Act to enable this.

Recommendation 50: **Given this Committee's specific oversight functions set out in the *Audit Act 1994* pertaining to the Auditor-General and the Victorian Auditor-General's Office, section 6 of the *Public Administration Act 2004* be amended to delete that Office from the definition of a special body which may be subject to a special inquiry by the State Services Authority under that Act at the direction of the Premier.**

Recommendation 51: **The *Public Administration Act 2004* be amended to allow for Parliament, at the recommendation of this Committee, to utilise the services of the State Services Authority to conduct a special inquiry into the Victorian Auditor-General's Office, should circumstances ever warrant.**

6.1.18 Constitution of VAGO as a statutory authority

Nature of this topic

As mentioned in the commentary under the preceding topic, section 16 of the *Public Administration Act 2004* assigns to the Auditor-General the functions of a public service head in relation to VAGO. Section 7E of the Audit Act provides that as many employees as are required to undertake the functions of VAGO are to be employed under Part 3 of the Public Administration Act.

VAGO's submission to the Committee proposed as an additional issue for its consideration during the Inquiry that, through legislative amendment, VAGO be constituted as a statutory authority. The submission stated that '*this amendment would improve accountability and is consistent with emerging trends and better practice.*'[335] The submission indicates that such an amendment is supported by '*the ACPAC Minimum Requirements for Independence, 2.5.*'

This particular minimum requirement for independence, which has been adopted by the Australasian Council of Public Accounts Committees, reads as follows:[336]

> *The Audit Office should be either a statutory authority or established by separate legislation. The Auditor-General should be responsible for the resourcing decisions within the office.*

At the Committee's public hearing, the Auditor-General was asked to identify the advantages of establishing VAGO as a statutory authority. The evidence given to the Committee by the Auditor-General included:[337]

> *Selfishly as a manager, I would be strongly supportive of it. It reinforces the purity of the independence of the office. It separates it a little bit from the public sector, because we do get assertions and allegations to our people — 'You will never get a job back into the sector' — because they are doing their job as auditors. It separates it out.*

335 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p.24

336 Australasian Council of Public Accounts Committees, Minimum Requirements for the Independence of the Auditor-General, Requirement 2.5

337 Mr D. Pearson, Auditor-General, transcript of evidence, 7 April 2010, p.22

> *As with New South Wales, it is a statutory authority. They have their own award, so they are able to take greater consideration of market factors and forces in their remuneration. In fact they have far less turnover of their staff. It is a more purist model.*
>
> *Again if we go back to the UK and Canada, that is a standard model. I would have to check. In a number of jurisdictions in Australia, that is the model they have taken with the ombudsman's office, the more recent creation. All I can say is New South Wales is the only one in Australia that is done on that basis. That was an amendment in the early 90s, reflecting better practice around the world and began in the context of a review. That is an area of consideration.*

On the likelihood of greater recruitment flexibility, the Auditor-General agreed that he currently controls recruitment but added '*the VPS conditions are a given, and yet we are trying to run a professional practice...*'[338]

At the Committee's public hearing with the Public Sector Standards Commissioner and the Chief Executive Officer of the State Services Authority, the Standards Commissioner was asked to comment on the Auditor-General's proposal to constitute VAGO as a statutory authority. The Commissioner's response included:[339]

> *In terms of what is the appropriate constitutional legal basis for the Auditor-General, I think that is a matter for the Parliament. This inquiry will obviously attend to that. Certainly this government has sought to enhance the independence of the Auditor-General and ensure that that is protected through provisions of the Constitution Act. I would need to think more carefully about how establishing it as a statutory authority could strengthen or enhance that sort of independence. My sense would be that it would be very difficult to do. It would end up more, in my terms, as a shorter arm to government then there is currently. In my working life, whenever there has been any sense of that happening, there has been deep disquiet in the broader community.*

Following discussion, the Committee requested the Public Sector Standards Commissioner to prepare and furnish his detailed views on the Auditor-General's proposal to assist the Committee's consideration. In subsequent correspondence to the Committee, the Standards Commissioner identified the three main implications arising from the Auditor-General's proposal as relating to industrial agreements, executive employment and employee entitlements. The information presented by the Standards Commissioner on these implications included:[340]

> ***Industrial agreements***
>
> *VAGO employees are currently employed under terms and conditions specified in the Victorian Public Service (VPS) Agreement 2006. If the Audit Act were amended such that the Auditor-General no longer employed staff under Part 3 of the PAA, the Auditor-General would likely establish a new industrial agreement. Nevertheless, VAGO would remain subject to the employment policies for the Victorian public sector.*

338 ibid.

339 Mr P. Allen, Public Sector Standards Commissioner, transcript of evidence, 7 April 2010, p.6

340 Mr P. Allen, Public Sector Standards Commissioner, letter to the Committee, received 1 June 2010

Executive employment

… The Auditor-General's office is subject to public service executive employment policy and therefore is required to meet an average performance bonus outcome annually. This is between five and seven per cent but is subject to variation…

If the Auditor-General no longer employed staff under Part 3 of the PAA then the extent of applicability of public sector executive employment policy would need to be determined. …executive remuneration levels would be subject to Government Sector Executive Remuneration Panel (GSERP) policy. The transition from public service to public sector employment would mean:

- *VAGO would no longer be subject to the executive employment number cap…;*
- *the average outcome of executive performance bonus would be six per cent;*
- *tighter conditions on executive remuneration would include requirements that the salaries of executives reporting to the Auditor-General average 70 per cent of the Auditor-General's salary and that no executive's salary exceed 80 per cent of the Auditor-General's salary; and*
- *applications for exemptions to exceed GSERP salary or performance bonus policy are by convention referred to the Premier for approval. As the Auditor-General is an independent officer of Parliament, this may be inappropriate and any exemptions should be made to PAEC.*

A further issue for consideration is the right of return provided to executives who were formerly public service non-executive employees prior to their appointment as executives (refer Section 27 of the PAA). The right of return is a valuable benefit intended to support the notion of a career public service. If the employment of executives in VAGO was removed from PAA coverage then executives who currently enjoy the right of return entitlement would need to be considered and a transition arrangement may need to be provided.

Employee entitlements

If VAGO employees were to be employed by a public sector statutory authority under a new Enterprise Agreement, the impact on non-executive mobility and employment entitlements would need to be considered.

Public service employees are readily able to move between employers because of the common terms and conditions of employment in the core VPS enterprise agreement. Mobility between service and sector employers is problematic due to the different employment and remuneration models contained in the various sector enterprise agreements. This may be seen to disadvantage current non-executive employees in the office.

The Standards Commissioner concluded as follows:[341]

341 ibid.

In general it seems that the benefits of moving to a public sector employment model as outlined by the Auditor-General are not clear and would seem to potentially adversely impact current staff. The benefits seem to be limited to some increased flexibility in executive employment numbers, and the capacity to establish an enterprise agreement independent of the core VPS agreement.

Position reached by the Committee

The Auditor-General has flagged this topic as an issue for assessment by the Committee during its Inquiry. It is a complex subject as gleaned from the material on it provided by the Public Sector Standards Commissioner to the Committee. The Commissioner's general conclusion asserts that there appear to be limited benefits from adoption of the Auditor-General's proposal and there is potential to adversely impact on current staff.

At this point in time, the Committee does not consider that a change to the organisational status of VAGO is warranted.

Recommendation 52: **No change to the status of the Victorian Auditor-General's Office be made. The staff of that Office should continue to be employed under public service employment arrangements.**

CHAPTER 7: OTHER POTENTIAL AMENDMENTS

7.1 Other potential options for legislative change

This Chapter addresses potential options for amendments to the *Audit Act 1994* other than those commented on in the preceding chapters. These options, which are mainly of a procedural and housekeeping nature, have been brought to the attention of the Committee by the Auditor General. They reflect the Auditor General's involvement in the day to day management of the provisions of the Audit Act and should be considered as part of any future amendments to the Audit Act.

7.1.1 Notification to the Auditor-General of the creation of new public entities

The Auditor-General has advised the Committee that the Audit Act does not provide that the Auditor-General is made aware of any new public entities such as subsidiaries of public bodies, which should be subject to audit by the Auditor-General.

In correspondence to the Committee, the Auditor-General has proposed that a new section be included in the Audit Act which requires the responsible Minister to notify the Auditor-General of the creation of a new statutory authority or government-owned or controlled entity. The Auditor-General considers that such notification would facilitate the efficient and effective discharge of audit functions and ensure continuing accountability for expenditure of public money by such new entities.[342]

The Committee notes that the Public Finance and Accountability Bill 2009, under consideration by the Legislative Council at the time of preparation of this report, provides for notification by the relevant Minister to the Auditor-General of the creation or abolition of a public body.

7.1.2 Tabling of audit reports when Parliament is not sitting

Section 16AB(4) of the Audit Act sets out the process to be followed for the tabling of reports of the Auditor-General when Parliament is not sitting. The process identified in the Audit Act reflects circumstances when Parliament is 'in recess'.

The Auditor-General has proposed to the Committee that section 16AB(4) be redrafted to take account of new parliamentary sitting arrangements.

The Committee recognises the value of the Auditor-General's suggestion and considers that the matter would be best handled by the Chief Parliamentary Counsel in the event of redrafting of the relevant provision in the Audit Act.

7.1.3 Authority to delegate power to express an audit opinion on financial statements

Section 7G of the Audit Act authorises the Auditor-General to delegate to private sector auditors the power to express an opinion on financial statements of audited entities where reported expenditure is less than a prescribed threshold (currently around $5.2 million).

The legislation provides for the threshold to be automatically adjusted according to movements in the Consumer Price Index.

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342 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 29 May 2009

The Committee notes that the Public Finance and Accountability Bill 2009 currently before the Legislative Council includes reporting provisions relating to the size and materiality of a government body. These proposed thresholds may also be relevant to any consideration of powers of delegation within the Audit Act.

The Auditor-General has proposed to the Committee that the expenditure threshold be removed from the Act and replaced by a regulation. The Auditor-General considers that removal of the threshold will be '*administratively less cumbersome*'.[343]

The Committee considers that this matter would also be best determined by the Chief Parliamentary Counsel.

7.1.4 Provision of a copy of audit opinions on financial statements to the Minister

Section 9(3) of the Audit Act requires the Auditor-General to provide a copy of each audit opinion on the financial statements of an audited entity to the Minister for Finance.

The Auditor-General has proposed to the Committee that the Act be amended to provide that notification is deemed to have taken place when the required information is posted on the website of VAGO. The Auditor-General expressed the view that the suggested procedure would be '*an efficient modern and quick means of providing notification and would reduce administration. The discretion to provide hardcopies would remain.*'[344]

The Committee considers that the Auditor-General's proposal seems reasonable given that VAGO issues in excess of 600 audit opinions each year. If redrafting of the relevant provision did proceed, the nature of any amendment would be determined by the Chief Parliamentary Counsel.

7.1.5 Provision of reasonable assistance and facilities to the Auditor-General and staff

In early correspondence to the Committee, the Auditor-General proposed that the Audit Act be amended to require audited agencies:[345]

> *... to provide all reasonable assistance and facilities to the Auditor-General and authorised staff when on agency premises carrying out an audit….*

The Auditor-General advised the Committee that such an amendment has been '*Recommended by barrister*'.[346]

In its submission to the Committee, VAGO provided the following additional comment:[347]

> *The Auditor-General wishes to draw to PAEC's attention the proposed amendment to require reasonable assistance. In practice, agencies frequently delay and frustrate the audit process by a variety of tactics, on occasion, extending to objection at having audit staff on agency premises. This proposed amendment seeks to strengthen the*

343 ibid.

344 ibid.

345 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

346 ibid.

347 Victorian Auditor-General's Office, submissino to the Committee, received 18 March 2010, p.24

Auditor-General's existing mandate and reduce the costly delays from agency attempts to frustrate the mandate.

The Committee considers that it would be desirable to explicitly identify in the Audit Act the obligation of agencies to provide reasonable assistance in terms of accommodation and facilities to the Auditor-General to enable timely and unhindered discharge of audit functions.

7.1.6 Other procedural matters raised with the Committee by the Auditor-General

In early correspondence to the Committee, the Auditor-General also raised with the Committee some further proposals for legislative change to the Audit Act:[348]

- **Objectives of the Act** — review of the objectives of the Audit Act, which are set out in section 3A, '*... to ensure that the wording of the objectives reflect the proposed amendments to the Act.*' This matter has been addressed by the Committee, where deemed appropriate, as part of its consideration of the topics examined in detail in this report.

- **Accountable officer certification** — amend the Audit Act to require the accountable officer of an entity to certify that their financial statements have complied with the legal requirements for establishing and keeping accounts and that the statements present a true and fair view of the entity's transactions, in accordance with accounting standards, for the financial year. The Committee's view is that this proposal appears to relate more to the financial reporting requirements of agencies under the State's financial management legislation than audit requirements under the Audit Act.

- **Progress against audit recommendations** — amend the Audit Act to require agencies which have been the subject of a performance audit to report the recommendations specific to their agency and the progress against the recommendations in the agency's annual report. The Auditor-General stated this proposal formalises part of the Minister for Finance's Report on Recommendations Made by the Auditor-General, published annually by the Minister.

- **Consistent use of the term 'performance audit'** — amend sections 15 and 16 of the Audit Act to ensure that the term is used consistently.

- **Regulation-making power** — amend the Audit Act to modernise and update the regulation-making power, and give the Auditor-General the power to make regulations directly.

- **Repeal of spent and redundant provisions** — amend the Audit Act to remove provisions which are no longer necessary or which are spent, such as sections 20B(2)(c) and Part 6.

The Committee considers the latter three proposals are matters for attention at the drafting stage of future amendments to the Audit Act.

Two additional proposed amendments to the Audit Act which might also be examined at a future drafting stage were cited in VAGO's submission to the Committee. These additional proposals related to:[349]

348 Mr D. Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

349 Victorian Auditor-General's Office, submission to the Committee, received 18 March 2010, p. 24

Secrecy provision penalty

> *... it appears that the secrecy provision in section 12(2) of the Act has no penalty attached to it. A penalty consistent with section 20A should be considered.*

Protection from reprisal

> *Given the persistent challenges to the mandate, a provision similar to sections 107 and 108 of the Public Administration Act 2004 might be considered. Such a provision would make it an offence for a person to take detrimental action against an office employee for performing functions under the Act and provide a right for damages.*

Finally, VAGO raised with the Committee in its submission a proposed amendment to the Audit Act that centres on a suggested exemption from the current financial management legislation, the *Financial Management Act 1994*. The proposal set out in the submission reads as follows:[350]

> ***Exemption from Financial Management Act 1994**. Currently, the Act* [section 7C(1)(b) of the Audit Act] *allows the PAEC to exempt the Auditor-General from requirements under the Public Administration Act 2004 or the Financial Management Act 1994. The Auditor-General proposes that this provision be amended such that the Auditor-General be bound by Minister's directions under the Financial Management Act 1994 by consent only, consistent with the fundamental principle of independence and safeguarded by the established PAEC oversight and periodic performance audit.*

This matter may be impacted as a consequence of the Parliament's current consideration of the Public Finance and Accountability Bill 2009. It is also a matter which the Committee may examine, separate from this Inquiry, in the context of its existing authority under section 7C(1)(b) of the Audit Act to alter obligations of the Auditor-General set out in the State's financial management legislation. At this stage, the Committee sees no need for an amendment to the Audit Act.

Committee's recommendation

The Committee advocates that the respective merits of the options for legislative change identified in this Chapter be examined as part of the development of future amendments to the Audit Act. While the amendments are mainly procedural in nature, a number of the proposals do have potential to bring about greater clarity and thus advance the overall standing of the Act.

Recommendation 53: **The merits of the options for amendment to the *Audit Act 1994* set out in this Chapter be examined as part of the development of future amendments to the Act.**

350 ibid.

APPENDIX 1: LEGAL ADVICE ON THE AUDIT ACT 1994

THE PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE OF THE PARLIAMENT OF VICTORIA - ADVICE RE *AUDIT ACT 1994* (VIC)

O P I N I O N

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Public Accounts and Estimates Committee
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Attention: Ms Valerie Cheong, Executive Officer

THE PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE OF THE PARLIAMENT OF VICTORIA - ADVICE RE *AUDIT ACT 1994* (VIC)

OPINION

1. I am asked to advise in relation to certain questions identified by the Public Accounts and Estimates Committee (the "Parliamentary Committee") of the Parliament of Victoria in connection with the Parliamentary Committee's Inquiry into the *Audit Act 1994* (Vic).

2. I set out below each of the questions posed together with my response.

Auditor-General's relationship with the Victorian Parliament

Question 1: Are there any impediments, in terms of Parliament's supreme constitutional status, to incorporating explicit provisions in the *Audit Act* empowering the Auditor-General to undertake audits (both financial and performance) of the administrative functioning of Parliament?

3. Under the *Audit Act* in its present form, the Auditor-General's functions include:

   (a) the financial audit of public "authorities"[1], including the examination of the material accuracy of financial data and reporting (ss 8 and 9) and

   (b) the financial audit of annual financial reports prepared pursuant to s.24 of the *Financial Management Act 1994* (Vic) (s.9A);

   (c) the carrying out of "performance audits"[2], which are directed to determining whether an authority is achieving its objectives effectively,

[1] "Authority" is defined in s.3.
[2] See paragraph (b) of the definition of that term in s.3.

economically, efficiently and in compliance with relevant enactments (s 15(1)(a));

(d) the carrying out of performance audits to determine whether the operations or activities of the whole or any part of the Victorian public sector (including operations performed by authorities) are being performed effectively, economically, efficiently and in compliance with relevant enactments (s.15(1)(b)).

4. The *Audit Act* provides in s.3A for the objectives of the Act. Those presently relevant are stated as follows:

> "(1) The objectives of the Act are:
>
> (a) to determine whether financial statements prepared in the Victorian public sector present fairly the financial position and financial results of operations of authorities and the State;
>
> (b) to determine whether:
>
> (i) authorities are achieving their objectives effectively and doing so economically and efficiently and in compliance with all relevant Acts;
>
> (ii) Victorian public sector operations and activities are being performed effectively, economically and efficiently and in compliance with all relevant Acts;
>
> ...
>
> (2) It is the Parliament's intention that, in pursuing these objectives, regard is had as to whether there has been any wastage of public resources or any lack of probity or financial prudence in the management or application of public resources."

5. The *Constitution Act 1975* (Vic) provides that the Auditor-General is an independent officer of the Parliament (s 94B(1)). Further, s 94B(6) of that Act provides that, subject to that Act, the *Audit Act* and other laws of the State, the Auditor-General:

> "has complete discretion in the performance or exercise of his or her functions or powers and, in particular, is not subject to direction from anyone in relation to -
>
> (a) whether or not a particular audit is to be conducted;
>
> (b) the way in which a particular audit is to be conducted;
>
> (c) the priority to be given to any particular matter."

6. Part II (ss 15 to 74AA) of the *Constitution Act*, headed "The Parliament", does not contain any provision which would prevent the Parliament from authorising external audits of the administrative functioning of the Parliament.

7. There is an implied limitation, arising from the text and structure of the Commonwealth Constitution, which prevents *the Parliament of the Commonwealth* from validly enacting a law which would have the effect of impairing the capacity of the government of Victoria to function as a government, or which would restrict or burden the State in the exercise of its constitutional powers.[3] A Commonwealth law which purported to regulate aspects of the internal workings of the Parliament of Victoria may well be invalid on that ground.

8. There is no such general restraint, however, on the exercise by the Parliament of Victoria of legislative power with respect to the operation, and review, of its own expenditure and management. That power is expressed in the broadest terms in s.16 of the *Constitution Act*. The power extends to amendment of the *Constitution Act* itself (s.18(1)), subject to compliance in appropriate cases with the referendum requirements of s.18.

9. In my opinion, there would be no constitutional impediment, whether derived from the *Constitution Act* or the Commonwealth Constitution, to the conferral upon the Auditor-General, by legislation enacted by the Parliament, of power to conduct financial audits or performance audits in respect of the administrative functions of the Parliament.

Question 2: What legislative provisions can be developed to restrict the scope of such audits to the administrative functioning of Parliament?

10. It would be desirable to include express provisions in the *Audit Act* defining the "administrative" functions of the Parliament to which the power of audit applies.

11. This might include such matters as:

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[3] *Austin v The Commonwealth* (2003) 215 CLR 185 at 249, 258, 264 (Gaudron, Gummow and Hayne JJ); *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 81-82 (Dixon J).

(a) the number, seniority and organisational structure of staff of the Parliament;

(b) the efficiency of the use or allocation of parliamentary resources; and

(c) the expenditure of the Parliament, and its efficiency or otherwise, in respect of such items as library services, public information, entertainment, information technology, or building renovation or maintenance.

12. To make the issue clear beyond argument, it might be thought desirable to include a provision prohibiting expressly the Auditor-General from auditing Parliament's central function as the legislature (and perhaps also on the performance of individual members and of Committees of the Houses).

Question 3: If explicit audit provisions are not considered to be feasible, would it be appropriate to formalise within the *Audit Act* arrangements for audits agreed from time to time between the Presiding Officers of Parliament and the Auditor-General?

13. In my opinion, there would be no constitutional impediment to the conferral upon the Auditor-General, by legislation enacted by the Parliament, of power to conduct such financial audits or performance audits as may be agreed from time to time between the Presiding Officers of Parliament and the Auditor-General in respect of the administrative functions of the Parliament. Section 16E(1) of the *Audit Act* already contemplates some situations where the Auditor-General may enter into arrangements with authorities for the provision to them of auditing services not otherwise required of the Auditor-General.

Question 4: Does the principal/agent relationship between the Parliament and the Auditor-General impact on the assignment of a power to the Auditor-General as the agent to audit Parliament as the principal?

14. As noted above in relation to Question 1, the constitutional status of the Auditor-General is that of an independent officer of the Parliament (*Constitution Act*, s 94B(1)). The Auditor-General is appointed by the Governor in Council

on the recommendation of the Parliamentary Committee (s 94A(2)). Subject to removal by both Houses of Parliament, the Auditor-General holds office for 7 years and is eligible for re-appointment (s 94C).

15. It is by no means self-evident that the relationship between the Parliament and the Auditor-General is that of principal and agent, as understood under the general law. Nonetheless, it may be accurate, in a broad sense, to describe the Auditor-General as acting in certain respects in a representative capacity for the legislature as a whole.

16. In any event, having regard to the constitutional protection contained in s 94B of the *Constitution Act* with respect to the independence of the Auditor-General, it is unlikely that there would be any constitutional impediment to the Auditor-General being invested with statutory power to conduct financial or performance audits of the administrative functions of the Parliament.

Question 5: Please provide confirmation or otherwise of the Committee's understanding that the obligation of the Auditor-General in section 7D(1) of the *Audit Act* to "confer with" the Committee and "have regard to" audit priorities determined by it does not mean the Auditor-General is compelled to adopt those priorities.

17. Section 7D(1) provides that:

> "(1) In performing or exercising his or her functions or powers, the Auditor-General must confer with, and have regard to any audit priorities determined by, the Parliamentary Committee."

The phrase "have regard to", of course, is capable of a number of meanings. One is that the Auditor-General is required to comply with audit priorities determined by the Parliamentary Committee. Another is that the Auditor-General is not bound by such priorities, but must take them into account and give weight to them.

18. Section 7D(1) is not itself clear and in determining the appropriate meaning one needs to consider the other provisions of the *Audit Act*.

19. In this regard it may be observed that s.7D(1) does not specify a time at which "audit priorities" are to be determined by the Parliamentary Committee. Rather the Parliamentary Committee's involvement seems to derive relevantly from s.7A, which provides in s.7A(1) that:

> "(1) Before the beginning of each financial year, the Auditor-General must:
>
> (a) prepare a draft annual plan describing the Auditor-General's proposed work program for that year; and
>
> (b) submit the draft to the Parliamentary Committee."

20. The Parliamentary Committee is to consider the draft annual plan "and may comment on it": s.7A(2). It is to return the draft annual plan, with any comments, to the Auditor-General: s.7A(3). The course then to follow is set out in ss.7A(4) and (5):

> "(4) As soon as practicable after the passage of the annual appropriation Acts for a financial year, the Auditor-General must complete the annual plan for that year, after considering any comments received from the Parliamentary Committee.
>
> (5) The Auditor-General must indicate in the annual plan the nature of any changes suggested by the Parliamentary Committee that the Auditor-General has not adopted."

Provision is then made in ss.7A(6)-(10) for the annual plan to be presented to the Parliamentary Committee and transmitted to each House of the Parliament.

21. The provisions of ss.7A(2)-(5), particularly s.7A(5), appear against the view that the Parliamentary Committee may determine priorities in a manner binding on the Auditor-General. So too is the conferral on the Parliamentary Committee of specific powers, but of limited content, to vary obligations or requirements imposed on the Auditor-General or his office by the provisions of s.7C of the *Audit Act*.

22. Again the requirement of s.8(1) to audit the financial statements of each authority at least once a year may only be dispensed with by the Auditor-General: s.8(2). The Auditor-General is also required to audit each "annual financial report": s.9A(1). There are times provided for by the Act for reporting on those audits – see ss.9(2) and 9A(2) – and I would not have thought that those times could be altered by the Parliamentary Committee.

23. Whilst the word "determined" in s.7D(1) gives some support to the view that audit priorities determined by the Parliamentary Committee are binding on the Auditor-General, in the end I do not think that this is the better view of the provision, in the context of the Act.

24. In short, I confirm that, in my opinion, s 7D(1) of the Audit Act neither:

    (a) obliges the Auditor-General to adopt, or act in accordance with, audit priorities determined by the Parliamentary Committee; nor

    (b) empowers the Parliamentary Committee to compel the Auditor-General to do so.

25. The Auditor-General will have complied with the obligation in s 7D(1) if he or she has consulted with the Parliamentary Committee and taken into account any audit priorities identified by the Parliamentary Committee.

Question 6: Would Parliament's status be undermined if it was restricted in the *Audit Act* from directing its appointed auditor on operational matters?

26. In my view, the inclusion in the *Audit Act* of an express provision restricting the Parliament from directing the Auditor-General on operational matters would not, in any legal sense, diminish or undermine the constitutional status of the Parliament. The ambit of the Auditor-General's powers from time to time is a matter for the legislature.

27. It is a matter for political debate whether such a restriction would, in any relevant sense, diminish or undermine any public perception as to the status of the Parliament. It may be said that such a restriction would be consistent with the constitutional objective manifested in s 94B of the *Constitution Act* of safeguarding the independence of the Auditor-General.

Question 7: Are there any constitutional issues arising from the current arrangements under which the Executive, the subject of audit by the Auditor-General on behalf of Parliament, has the decisive role in determining the Auditor-General's annual budget?

28. It is the Parliament, and not the Executive, which has the power under s 89 of the *Constitution Act* to appropriate funds from the Consolidated Revenue, by means of a law made under s 92 appropriating such funds to such specific purposes as may be provided in such law.

29. I assume that the current arrangements by which the Executive determines the Auditor-General's annual budget:

    (a) do not trespass upon, and remain subject to, the ultimate monetary control of the Parliament through its exercise of the power of appropriation from Consolidated Revenue; and

    (b) do not involve or permit any reduction in the Auditor-General's remuneration, within the meaning of s 94A(7) of the *Constitution Act*.

    If that is so, then in my opinion it is unlikely that there would be any constitutional impediment to the continuation of the current arrangements with respect to the Auditor-General's annual budget.

30. Further, a measure of parliamentary oversight is provided by the requirement in s 7D(2) of the *Audit Act* that the Auditor-General's budget for each financial year be determined "in consultation with" the PAEC.

Question 8: Are there any relevant contemporary developments relating to the constitutional convention of individual ministerial responsibility?

31. The content of the convention of individual ministerial responsibility for errors occurring in departments falling within a ministerial portfolio has varied over time. There is force in the view, expressed by one commentator[4], that, as a matter of contemporary practice, a ministerial resignation is now only expected if the minister was implicated in the mistake, failed to remedy the situation or

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[4] Carney, *The Constitutional Systems of the States and Territories* (2006) at 258.

deliberately misled Parliament or the public. Further, these are matters of convention, any sanction for breach of which is likely to lie in the political rather than judicial sphere.

32. It seems to me doubtful that external audit by the Auditor-General of the performance of ministers and their offices, whether financial or performance, would cut across, in any legal sense, the individual responsibility of ministers to the Parliament.

33. It may well be thought that the contemporary decline in the role or significance of the convention of individual ministerial responsibility would enhance, rather than undermine, arguments for additional legislative control by means of external audit. In any event, that again is a matter for political debate. The convention of individual ministerial responsibility is unlikely to be relied upon by a court as defining any constitutional boundary for legislative activity in this field.

Question 9: Does the constitutional status of ministers restrict or rule out any proposals for legislative provisions in the *Audit Act* governing audits of individual ministers and/or their offices?

34. Ministers of the Crown must be, or within 3 months' of appointment become, members of the Legislative Assembly or the Legislative Council (*Constitution Act*, s 51). Save for reserve powers, no executive power may be exercised without receiving the advice of the government responsible to the legislature.[5]

35. Thus, by a combination of constitutional provisions, principles and conventions, ministers are responsible to Parliament for the discharge of their responsibilities, that being an essential component of the system of responsible government which has existed in Victoria, and the other States, since well before federation. It is an aspect of responsible government, in Victoria as in the other States, that ministers are liable to the scrutiny of one or other House of a bicameral legislature in respect of the conduct of the executive branch of government.[6]

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[5] See, eg, *Stewart v Ronalds* [2009] NSWCA 277 at [36] (Allsop P).
[6] See *Egan v Wills:* (1998) 195 CLR 424 at 452-453 (Gaudron, Gummow and Hayne JJ).

36. There is no recognised restriction, arising from the constitutional status of ministers, upon the power of the Parliament to enact legislation regulating or providing for the independent examination of the conduct by ministers, or ministerial officers, of their public functions. On the contrary, the supervision and scrutiny by the legislature of the conduct of the executive branch of government is of the essence of the system of responsible government established by the *Constitution Act*.

37. In my view there is unlikely to be any constitutional or legal impediment to the Parliament amending the *Audit Act* to permit audits (financial or performance) of individual ministers or their offices.

Audits of non-judicial (or administrative) functions within Victoria's Courts

Question 10: Given the "separation of powers" doctrine and the principle of judicial independence, is it feasible to assign explicit authority to the Auditor-General to audit non-judicial or administrative functions within Courts?

38. I commence with an observation about terminology. The Question treats the terms "non-judicial" and "administrative" in relation to courts, as synonymous. In relation to State courts, however, this is not necessarily the case. Unlike federal courts State courts can be given functions (usually to be exercised in a judicial manner) which do not involve the exercise of "judicial power". Some confusion can thus exist. I shall continue to use the expressions "non-judicial" and "administrative" for present purposes, but I treat them in that context as relating to matters of administration of courts. Even that, however, gives rise to some difficulties, as I discuss below.

39. Part III (ss 75 to 87) and Part IIIA (ss 87AAA to 87AAJ) of the *Constitution Act* deal, respectively, with "The Supreme Court of the State of Victoria" and "The Judiciary". However, those provisions do not confer any express protection upon the Supreme Court (or other Victorian courts) from legislative or executive impairment of judicial independence, otherwise than in specific

respects, such as judicial remuneration (s 82), pensions (s 83) and removal from office (s 87AAB).

40. Nonetheless, there are general restrictions, derived from Ch III of the Commonwealth Constitution, upon the power of the Victorian legislature or executive to impair the institutional integrity and independence of the Supreme Court of Victoria (or – but with a qualification discussed below – other Victorian courts capable of exercising the judicial power of the Commonwealth).

41. The Parliament of Victoria could not validly confer upon the Supreme Court of Victoria (or other Victorian courts invested with federal jurisdiction) a function which substantially impaired its institutional integrity and was therefore incompatible with its role as a repository of federal jurisdiction.[7] One important indication that a particular law has that character is that the exercise of the power or function is likely to undermine public confidence in the courts exercising that power or function.[8] The institutional integrity of the court will be impermissibly distorted if the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.[9] Among those defining characteristics, Ch III of the Commonwealth Constitution requires that a court capable of exercising the judicial power of the Commonwealth be, and appear to be, an independent and impartial tribunal.[10]

42. The critical notions of "repugnancy" or "incompatibility" with the institutional integrity of the State courts are insusceptible of further definition in terms which necessarily dictate future outcomes.[11] Accordingly, it is difficult to predict in advance whether a particular measure will be held to fall beyond power.

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[7] *Forge v ASIC* (2006) 228 CLR 45 at 76 (Gummow, Hayne and Crennan JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 (Gleeson CJ), 594 (McHugh J), 617 (Gummow J); *Kable v DPP (NSW)* (1996) 189 CLR 51 at 102-103, 107-108 (Gaudron J), 116-119 (McHugh J), 133-134, 142-143 (Gummow J).

[8] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 (Gummow J).

[9] *Forge v ASIC* (2006) 228 CLR 45 at 76 (Gummow, Hayne and Crennan JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 530 (French CJ).

[10] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

[11] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 (Gummow J).

Invalidity is more likely where the law mandates the taking by the court of particular steps, directs the court as to the manner or outcome of the exercise of jurisdiction, prevents the exercise of discretion or review, requires the court to determine an application in the absence of the affected party or binds the court to accept particular evidence or submissions.[12]

43. The question turns upon the degree of impairment of the institutional independence of the courts and their capacity for independent adjudication, even if the legislation falls short of directing, or directly affecting, the final determination of a pending case.

44. I have difficulty seeing how the carrying out of financial audits (ss 8, 9) or performance audits (s 15) with respect to the Courts' non-judicial or administrative functions, or the reporting to Parliament in respect of such audits (s 16), could be said to amount to an unconstitutional interference with the exercise of judicial power, within the meaning of these authorities.

45. Obviously, it would be a separate question whether particular legislative or executive action subsequently taken in response to such audits, in the nature of new restrictions upon or other regulation of the exercise by the Court of its functions, might be beyond power.

46. In my opinion, it is unlikely that there would be any constitutional impediment, derived from either the *Constitution Act* or the Commonwealth Constitution, to the conferral upon the Auditor-General of statutory authority to carry out financial audits or performance audits of the non-judicial or administrative functions of Victorian courts.

47. I assume, of course, that the carrying out of financial or performance audits would not interfere with the exercise of the Courts' jurisdiction in any pending case and would not direct the Court as to, or directly affect, the manner or outcome of the exercise of the judicial function in any case or category of case.

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[12] See, eg, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 531-532 (French CJ), 542-543 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354-356 (French CJ), 363-364, 366 (Gummow and Bell JJ), 379-388 (Heydon J).

48. However, there is a significant likelihood that the compulsory powers presently contained in the *Audit Act* in respect of:

(a) the production of documents (s 11(1));

(b) the search of, and taking of extracts from, documents (s 11(2));

(c) the examination upon oath of persons (s 11(3)); and

(d) access to otherwise confidential or secret information (s 12(1));

could not validly be conferred upon, or exercised by, the Auditor-General in respect of:

(i) a judicial officer personally or his or her personal staff (as opposed to an administrative officer employed by the court); or

(ii) any documents in the possession of a judicial officer (or his or her personal staff) relating to the exercise of judicial functions.

49. There would be a significant argument, in my opinion, that the conferral or exercise of such coercive powers against judicial officers or their personal staff would be incompatible with the institutional integrity and independence of the courts mandated by Ch III of the Commonwealth Constitution. The risk could be minimised if the legislation expressly:

(a) prevented the Auditor-General from compelling the examination (or interview) of judicial officers or their personal staff; and

(b) made the production, for the purpose of any audit, of documents in the possession of judicial officers (or their personal staff) a matter for voluntary disclosure by the relevant judicial officer or court.

50. I would add a further comment. The comments made above should not be treated as meaning that Victorian courts cannot be reconstituted. There must be a Supreme Court for Commonwealth constitutional purposes – a matter dealt with below – but the position of other courts can be altered.

Question 11: Is it possible to explicitly distinguish between judicial and administrative functions of Courts within legislation?

51. In my opinion, it would be possible, and desirable, to include in the *Audit Act* clear definitions of the "administrative" or "non-judicial" functions of the courts in respect of which any audit function may be carried out by the Auditor-General. This will require careful drafting, with particular attention being given to the function which the audit is required to perform. Little difficulty is likely to arise in relation to financial audits of courts, but performance audits give rise to more complicated questions.

52. For example there would be difficulties, it seems to me, if the Auditor-General sought to inquire into whether a Judge had "taken too long" to hear or decide a particular case of a kind. On the other hand it does not seem particularly offensive to the judicial function to inquire whether all cases of that species were taking too long.

53. To put it in more specific terms, the "administrative" or "non-judicial" functions might be defined to include such matters as:

    (a) the number, seniority and organisational structure of staff of the courts;

    (b) the average expense incurred, and time consumed, in the disposition of cases or the delivery of judgments;

    (c) the efficiency of the use or allocation of judicial resources;

    (d) the expenditure of the courts, and their efficiency or otherwise, in respect of such items as library services, public information, entertainment, information technology, or building renovation or maintenance; and

    (e) the satisfaction, or otherwise, of "performance measures" or "performance targets" relating to average or aggregated statistical data in respect of case-load, disposition of cases, number of reserved judgments, delivery of reserved judgments, hearing time and other like matters.

    No doubt some of these matters overlap with, or involve review of, the administration of courts by those otherwise responsible (including the heads of

those courts) but whether that should occur is, in my opinion a question for the legislature and an issue on which different views may well be held.

54. I should add that in any such legislation it would be desirable to include a specific prohibition upon the Auditor-General examining, investigating or commenting upon the exercise by a court, acting judicially, of power in any particular case or the merits of any determination made by a court in any proceeding.

55. The risk of contravention of any constitutional limit upon legislative or executive power would be further minimised if the *Audit Act* were to confer upon the head of jurisdiction of the relevant court the final power to determine, in the event of a dispute, whether a function proposed to be examined in an audit is "non-judicial" or "administrative" in nature and therefore amenable to audit.

Question 12: Are there any constitutional or legal factors which would impede an alternative course of action of incorporating within the *Audit Act* a statutory backing to a performance audit protocol entered into from time to time between the Courts and the Auditor-General?

56. I do not see any constitutional or legal impediment to the Parliament amending the *Audit Act* so as:

(a) to authorise the Auditor-General, from time to time, to enter into, and carry into effect, a performance audit protocol agreed with the Chief Justice (or Chief Executive Officer) of the various Victorian courts; or

(b) to give such protocols, once agreed and in accordance with their terms, statutory force and effect.

Question 13: Would any move by the Victorian Parliament to establish a legislative basis within the *Audit Act* for audits of the administrative functions of the Supreme Court of Victoria be contrary to elements of the judgment of the High Court in the *Kirk* case?

57. In *Kirk v Industrial Relations Commission of NSW*, the High Court (relevantly) concluded that[13]:

(a) Chapter III of the Commonwealth Constitution requires that there be a body fitting the description "the Supreme Court of a State".

(b) It is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description.

(c) A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide, by granting relief in the nature of prohibition, mandamus and certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error.

(d) A privative provision in State legislation, which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature.

(e) Such a provision is beyond power because it purports to remove a defining characteristic of the Supreme Court of the State.

58. In my view it is unlikely that freedom or immunity from independent examination as to expenditure, efficiency or effectiveness, by way of financial or performance audits, is "a defining characteristic" of the Supreme Court of Victoria, in the sense spoken of in *Kirk*. The use of formalised external financial audits by an independent officer of Parliament, and the extension of such audits to "performance" measures, are comparatively modern developments. Their application to the Supreme Court, in respect of non-

[13] (2010) 239 CLR 531 at 566, 580-581 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

judicial functions, would appear to have no historical analogue at or prior to federation. I think it unlikely, however, that the High Court would conclude that these measures would so alter the constitution or character of the Supreme Court that it would cease to meet the constitutional description.

59. Further, for the reasons given in answer to Question 10 above, it seems to me unlikely that such measures would impermissibly impair that institutional independence or impartiality which is a defining characteristic of the Supreme Court.

60. Accordingly, I consider it unlikely that an amendment to the *Audit Act* conferring power upon the Auditor-General to carry out financial or performance audits of the non-judicial or administrative functions of the Supreme Court of Victoria would contravene the limitations upon legislative power identified in *Kirk*.

Question 14: Please comment on the usefulness of the provisions relating to the State Services Authority in section 60 of the *Public Administration Act 2004* (Vic), or any other example, as a precedent for this issue.

61. Sub-Division 2 (ss 49 to 60) of Part 4 of the *Public Administration Act* 2004 (Vic) deals with "systems reviews", "special inquiries" and "special reviews" conducted by the State Services Authority constituted under s 37 of the Act.

62 Section 60 of the *Public Administration Act* provides:

> "(1) Nothing in this Subdivision empowers the Authority to conduct, or a Minister to direct or request the conduct of, a special inquiry or special review into any exercise by a body of a function that is of a judicial or quasi-judicial nature.
>
> (2) The conduct of a systems review of, or a special inquiry or special review into any matter relating to, a body that exercises functions that are of a judicial or quasi-judicial nature must not in any way impede the exercise by the body of those functions."

63. In my view, this provides a useful illustration of the type of provision which could be drafted so as to prevent the Auditor-General from conducting any audit of a judicial function or otherwise impeding in any way the exercise of judicial functions. It would be prudent for a provision to this, or substantially similar,

effect to be included in the *Audit Act* in the event that Act were amended to confer upon the Auditor-General power to conduct financial or performance audits of Victorian courts.

Legal professional privilege

Question 15: What legislative action is necessary to ensure the information gathering powers of the Auditor-General under sections 11 and 12 of the *Audit Act* override claims of legal professional privilege?

64. It is well established that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities, including legal professional privilege, in the absence of clear words or a necessary implication to that effect.[14] A compulsory power expressed in general terms, which does not refer to legal professional privilege and does no more than indicate that a significant purpose of the section is the investigation of contraventions of the law, will not give rise to any necessary implication that the power abrogates legal professional privilege.[15]

65. In my opinion, ss 11 and 12 of the *Audit Act*, as presently framed, would not be construed as abrogating legal professional privilege.

66. In order to ensure that the compulsory powers of production and investigation in ss 11 and 12 override claims of legal professional privilege, it would be necessary to amend the *Audit Act* to include new provisions stating, in unmistakably clear terms, that legal professional privilege does not justify the withholding of information or documents in answer to the exercise of those compulsory powers.

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[14] *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 561-564 (McHugh J), 575-578 (Kirby J), 591-595 (Callinan J).

[15] *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 559-560.

Question 16: It is desirable to develop separate provisions covering legal professional privilege and the privilege against self-incrimination?

67. The privilege against self-incrimination is "deeply ingrained in the common law" and is subject to the same presumption against abrogation that applies to legal professional privilege: it is not abrogated by statute except in very clear terms.[16]

68. If the intention of the Parliament, in respect of the Auditor-General's powers of investigation, is to abrogate legal professional privilege and the privilege against self-incrimination, it would be necessary to do so by separate, express and unambiguous provisions dealing with each of these privileges.

69. In order to be effective, it would be necessary for each provision to refer expressly to the relevant privilege and to state in plain terms that the privilege provides no lawful excuse for failing to comply with a requirement by the Auditor-General for the production of documents or information or for examination on oath.

With compliments,

D.F. Jackson QC

23 August 2010

[16] *Valantine v Technical and Further Education Commission* (2007) 97 ALD 447; (2007) 166 IR 459; [2007] NSWCA 208 at [46] (Gzell J, with whom Beazley JA and Tobias JA agreed).

APPENDIX 2: POWERS OF AUDITORS-GENERAL TO CONDUCT AUDITS

Inquiry by the Victorian Public Accounts and Expenditure Review Committee

Request from the PAEC on 23 April 2010 for ACAG to provide information as follows:

> "Verbal information given to the Committee at the hearings suggests that Victoria might be one out in terms of the Auditor-General's power to conduct audits of courts. It would be great if ACAG could provide relevant material from Auditors-General for both courts and Parliament showing the relevant legislative authority, if applicable, for both financial and performance audits of administrative functions or whether, as in Victoria such audits are undertaken by arrangement or protocol."

There are a number of request here:

1. Power of Auditors-General to conduct financial and/or performance audits of the Courts
2. Power of Auditors-General to conduct financial and/or performance audits of Parliamentary agencies
3. If such powers exist, under what legislative authority?
4. If no such power exists, can audits be performed by arrangement or protocol?

Responses from the various ACAG Offices were:

1. Courts

South Australia	Tasmania	Victoria	New Zealand
We have a Courts Administration Authority that was established pursuant to the *Courts Administration Act 1993*. The Authority is constituted as the State Courts Administration Council (SCAC), the State	In Tasmania the financial transactions entered into by the Courts are carried out as part of the Department of Justice which we audit. We are able to conduct performance audits of the activities of the Courts	Has no legislative authority to conduct either financial or performance audits. Audit work can be done by arrangement/protocol .	In NZ both the Courts and Parliamentary Services are within the AG's mandate. Obviously we only look at the administrative arrangements, we don't review any of the decision making by either body. However, we have

Courts Administrator, and other staff of the Council. Subsection 31(1)(b) of the *Public Finance and Audit Act 1987* (PFAA) and section 27 of the *Courts Administration Act 1993* provide for the Auditor-General to audit the accounts each financial year. In undertaking the audit of any agency, the South Australian Auditor-General has the power pursuant to the PFAA to undertake both financial and economy and efficiency audits however the Auditor-General has not exercised the power to economy and efficiency audits for either of these agencies	but must avoid questioning judicial decisions.		conducted a recent performance audit into the management of Court workloads and have previously reviewed the system for MPs expenses and allowances within Parliamentary Services. In NZ the AG's mandate comes from the *Public Audit Act 2001*.

2. Parliamentary agencies

South Australia	Tasmania	Victoria	New Zealand
Auditor-General undertakes the audit of the Legislature which comprises the: - House of Assembly established under the *Constitution Act 1934* - Legislative Council established under the *Constitution Act 1934* - Joint Parliamentary Service established under the *Parliament (Joint Services) Act 1985.* The audit is undertaken pursuant to subsection 31(1) of the PFAA which provides for the Auditor-General to audit the public accounts in respect of each financial year. In undertaking the audit of any agency, the South Australian Auditor-	We audit the four Parliamentary agencies which must prepare annual financial reports and submit them for audit under section 18 of the *Audit Act 2008.* Section 23 of the Audit Act empowers us to conduct performance pr compliance audits or investigations. It is current policy only to conduct compliance audits.	Has no legislative authority to conduct either financial or performance audits. Audit work can be done by arrangement/protocol .	In NZ both the Courts and Parliamentary Services are within the AG's mandate. Obviously we only look at the administrative arrangements, we don't review any of the decision making by either body. However, we have conducted a recent performance audit into the management of Court workloads and have previously reviewed the system for MPs expenses and allowances within Parliamentary Services. In NZ the AG's mandate comes from the *Public Audit Act 2001.*

General has the power pursuant to the PFAA to undertake both financial and economy and efficiency audits however the Auditor-General has not exercised the power to economy and efficiency audits for either of these agencies.			

1. Courts continued

NSW	Commonwealth ANAO	ACT	WA	QLD
The audit of financial transactions entered into by the Courts is carried out as part of the audit of the Department of Justice and Attorney General (the Department). The legislative authority to carry out the audit of the Department is Schedule 3 of the *Public Finance and Audit Act 1983* (the Act). Regarding performance audits, Section 38A of the Act provides that we can undertake a performance audit of an authority or other body, whose financial report is subject to audit by the Auditor-General under this Act or any other Act. Courts don't produce financial statements but they are part of the Department which	The ANAO mandate includes conducting an audit of the annual financial statements prepared by the Federal Court of Australia, the Family Court of Australia, the Federal Magistrates Court of Australia and the High Court. The ANAO is also able to conduct performance audits of these Courts , except the High Court (the first 3 agencies are audited in accordance with the provisions of the *Financial Management and Accountability Act 1997* (FMA Act)and the High Court's financial statements are audited in accordance with its own enabling legislation). The ANAO's performance audit mandate does not extend to a review of judicial decisions	The Auditor-General can audit administrative arrangements the Courts under the current *Auditor-General Act 1996* and the *Financial Management Act 1996*. The administration of the Courts falls within the Department of Justice and Community Safety (JACS). As we audit JACS, we can audit court administration as one of JACS' function, both for financial audits and performance audits.	The relevant section of the Western Australian legislation (*Auditor General Act 2006*) is principally s15(1) - which gives the authority to audit the financial statements, KPIs and other information submitted by agencies under the *Financial Management Act 2006* s63(1). That legislation defines "agency" as 'a department, a sub-department or a statutory authority'. Therefore we audit the Administration of the Legislative Assembly and of the Council, and the court administration and finances etc (ie everything except the judges and their roles). Similarly, s18 of the *Auditor General Act 2006* enables us to undertake	Under *the Auditor-General Act 2009*, the Queensland Auditor-General has the legislative power to conduct the annual financial audit of the Department of Justice and Attorney-General (JAG) and its controlled entities and related statutory bodies, including their administered accounts (s.30). Financial audits of the courts are conducted as part of the audit of JAG, and their financial information is incorporated in JAG's financial statements. At the Auditor-General's discretion, an audit of the performance management systems of the Department (including its courts), its controlled entities or

does, so a performance audit on Courts is possible. We are of the view that this could include administrative functions, but not the decision-making functions.	of Commonwealth judges, as outlined in the Explanatory Memorandum. In view of this, no separate arrangements or protocols are required to conduct financial statement or performance audits of the Australian Government Courts (except the High Court). It would be open to the ANAO and the High Court to agree to the conduct of a performance audit of the Court under the provisions of S20 of the Auditor-General Act 1997 (By Arrangement Audits). No such arrangement has been made to date		performance and compliance audits.	related statutory bodies, can also be conducted (s.38).

2. Parliamentary agencies continued

NSW	Commonwealth ANAO	ACT	WA	QLD
There is no authority under the Act for us to perform a financial audit of the Parliament. Our audit of the Legislature is only done at the request of the presiding Officers, and thus has no legal basis. For reasons set out above, a performance audit of the Parliament is not possible.	The ANAO's mandate also includes conducting an audit of the annual financial statements of the three Parliamentary Departments, the Departments of the Senate, House of Representatives and Parliamentary Services. The ANAO is also able to conduct performance audits of these departments. These audits are conducted under the provisions of the FMA Act. In view of this, no separate arrangements or protocols are required to conduct financial statement or performance audits of the Parliamentary Departments.	The Auditor-General can audit administrative arrangements of the ACT Legislative Assembly under the current *Auditor-General Act 1996* and the *Financial Management Act 1996.* The Legislative Assembly Secretariat and ACT Executive are separately defined as "Departments" under the FMA Act, and are subject to financial audits and performance audits by the Auditor-General.	Details included in the comment under Courts.	Under *the Auditor-General Act 2009,* the Queensland Auditor-General has the legislative power to conduct the annual financial audit of the Legislative Assembly (s.30). The Legislative Assembly is classified as a Department under the section 8 of the *Financial Accountability Act 2009.* The Auditor-General must also conduct an annual audit of ministerial expenses for each ministerial office (s.41).

1. Courts continued

Northern Territory
The Department of Justice is responsible for the administration of financial transactions conducted on behalf of the courts. Flowing from this, audits of courts' financial transactions can be performed pursuant to section 13 of the *Audit Act*. The *Audit Act* also provides for performance management system audits and special audits, but limits those audits to Agencies (as defined) and in the case of performance management system audits, an "organisation in respect of the accounts of which the Auditor-General is required or permitted by a law of the Territory to conduct an audit" may be included. Those provisions put the courts beyond the reach of the Auditor-General for auditing purposes. Advice provided previously suggests that any decision to conduct an audit of the courts themselves would require the approval of the Chief Justice, recognising the independence of the courts.

2. Parliamentary agencies continued

Northern Territory
In the Northern Territory there is a Department of the Legislative Assembly, which is responsible for the day-to-day administration of the Parliament. Audits of the transactions and systems of that Department are conducted under the provisions contained in the *Audit Act*. The Auditor-General has no mandate to examine activities conducted by the Legislative Assembly itself.

Attachment 1

The table below summarises details of some performance audits conducted in Australia in recent times

ACT	*Courts Administration*, September 2005	*Performance audit*
ANAO	*Client Service in the Family Court of Australia and the Federal Magistrates Court*, 2004	*Performance audit*
NSW	*The Management of Court Waiting Times* (follow up audit), 2001	*Performance audit*
QLD	*Administration of Magistrates Court Services in Queensland*, 2010	*Performance audit*
SA	*Report of the Auditor-General Part B - Agency Audit Reports – Courts Administration Authority (annual)* (Section 27 of the *Courts Administration Act 1993* provides for the Auditor-General to audit the accounts in respect of each financial year).	*Financial audit*
TAS	*Timeliness in Magistrates Court* - 2008	*Performance audit*

APPENDIX 3: LIST OF WITNESSES AT PUBLIC HEARINGS

Date and time	Witnesses
Wednesday 7 April 2010	
9.30am to 11.30am	**Victorian Auditor-General's Office** Mr Des Pearson, Auditor-General Mr Peter Frost, Chief Operating Officer Mr Marco Bini, Director, Policy and Coordination
11.30am to 1.00pm	**Departments of Premier and Cabinet and Treasury and Finance** Ms Helen Silver, Secretary, Department of Premier and Cabinet Mr Grant Hehir, Secretary, Department of Treasury and Finance Mr Steve Mitsas, Director, Budget and Financial Management
2.00pm to 2.45pm	**Department of Transport** Mr Jim Betts, Secretary Mr James Lavery, Executive Director, Legal Dr Len Gainsford, Director, Audit and Assurance
2.45pm to 3.30pm	**State Services Authority** Mr Peter Allen, Public Sector Standards Commissioner Ms Karen Cleave, Chief Executive Officer
3.30pm to 5.00pm	**Australasian Council of Auditors-General** Mr Mike Blake, Auditor-General, Tasmania
Thursday 29 April 2010	
9.30am to 11.00am	**CPA Australia, Institute of Chartered Accountants of Australia, National Institute of Accountants** Dr Gary Pflugrath CPA, Policy Adviser, CPA Australia Mr Andrew Stringer, Head of Audit, Institute of Chartered Accountants of Australia
11.00am to 11.30am	**Department of Innovation, Industry and Regional Development** Mr Alf Smith, Acting Secretary Mr Rob Barr, Deputy Secretary, Corporate Services and Development Ms Rosemary Martin, Director, Legal, Audit and Risk Mr Dan Kirtley, Chief Internal Auditor
11.30am to 12.30pm	**Australian National University** Professor Kerry Jacobs
Monday 10 May 2010	
12.15pm to 12.45pm	**Parliament of Victoria** Hon. Jenny Lindell MP, Speaker of the Legislative Assembly Hon. Robert Smith MLC, President of the Legislative Council Mr Ray Purdey, Clerk of the Legislative Assembly Mr Wayne Tunnecliffe, Clerk of the Legislative Council Mr Peter Lochert, Secretary

APPENDIX 4: SUBMISSIONS

All submissions are available from the Public Accounts and Estimates Committee's website:

www.parliament.vic.gov.au/paec

Submission No.	Date received	Contact / Organisation
1	15/21/2010	Carol O'Donnell
2	12/3/2010	Mr Ray Butters Peechelba Water Supply
3	18/3/2010	Professor Kerry Jacobs Australian National University
4	18/3/2010	Dr Peter Frost Victorian Auditor-General's Office
5	18/3/2010	Mr Frank McGuiness Australasian Council of Auditors-General
6	18/3/2010	Mr Jim Betts Department of Transport
7	26/3/2010	CPA Australia, Institute of Chartered Accountants of Australia, National Institute of Accountants
8	7/4/2010	Department of Innovation, Industry and Regional Development
9	24/5/2010	Mr Brendan Lyon Infrastructure Partnerships Australia

APPENDIX 5: COMPARISONS OF POSITIONS IN AUDIT LEGISLATIONS ACROSS AUSTRALASIAN JURISDICTIONS

Table A5.1: Comparison of positions in audit legislation in Victoria, Commonwealth – ANAO, Western Australia, Tasmania and New South Wales[a]

Jurisdiction	Victoria	Commonwealth – ANAO	Western Australia	Tasmania	New South Wales
Name of Act	***Audit Act 1994***	***Auditor-General Act 1997***	***Auditor General Act 2006***	***Audit Act 2008***	***Public Finance and Audit Act 1983***
Audit Office constituted as a Statutory Authority	No.	No.	No - however the Office of the AG is not an office in the Public Service, s. 9(1).	No.	Yes.
Financial audit of Parliament[b]	No legislative authority; annual financial audit conducted by arrangement.	Yes.	Yes.	Yes.	At the request of the Presiding Officers.
Performance audits of Parliament's administration[b]	No legislative authority.	Yes.	Yes.	Yes.	No authority.
Frequency of performance audits of the Auditor-General	At least every three years, s.19.	The independent auditor must conduct an annual fianncial audit and may at any time conduct a performance audit, ss.44, 45.	A review by parliamentary committee every five years, s. 48.	A periodic review at least once every five years, s. 44(1).	At least once every three years, s. 48A(1)(2).
Parliamentary involvement in the appointment of an Acting Auditor-General	No specified role for Parliament in the process set out in the legislation, ss. 6, 7.	The Minister may appoint an acting Auditor-General if there is a vacancy or during a period of absence of the Auditor-General, Schedule 1 part 7.	The Govenor on the recommendation of the Minister may appoint an acting Auditor-General, Schedule 1 part 8.	The Deputy Auditor-General is to act as Auditor-General during any vacancy in the office, s. 13.	The Deputy Auditor-General is to act as Auditor-General during any vacancy in the office, s. 30(1).
No direction from Parliament on operational matters	Legislation requires the Auditor-General to consult with the Public Accounts and Estimates Committee on auidt priorities, s. 7. The Act does not explicitly peclude Parliament or any of its committees from directing the Auditor-General on operational matters.	The Auditor-General has discretion in performing his functions but must have regard to the priorities of Parliament, determined by the Joint Committee for Public Accounts and Audit (JCPAA), s. 8, 10.	The Auditor-General is not subject to direction from anyone s.7(6) but must have regard to the audit priorities of either house of Parliament, the Public Accounts Committee or the Estimates and Financial Operations Committee, s. 8.	The Auditor-General is not subject to direction from anyone, s. 10(2).	The Auditor-General may exercise his functions in such manner as he sees fit, s. 27B(4).

Jurisdiction	Victoria	Commonwealth – ANAO	Western Australia	Tasmania	New South Wales
Name of Act	***Audit Act 1994***	***Auditor-General Act 1997***	***Auditor General Act 2006***	***Audit Act 2008***	***Public Finance and Audit Act 1983***
Parliamentary involvement in determining budget	The Act requires the Auditor-General's annual budget to be determined in consultation with the Public Accounts and Estimates Committee, s. 7.	The Finance Minister must draw the full amount that Parliament appropriates for the Australian National Audit Office, s. 50. The JCPAA can review budget of ANAO and make a recommendation, s. 53.	In determining the budget, regard is to be had to any recommendation made by the Joint Standing Committee on Audit to the Treasurer, s. 44(2).	No specific provisions on funding.	No specific provisions on funding.
Consultation by the Auditor-General on performance audit specifications	The Auditor-General must consult with the Public Accounts and Estimates Committee in the preparation of specifications for individual performance audits, s. 15.	No specific provisions.	No specific provisions.	No specific provisions.	No specific provisions.
Employment in the public sector of a vacating Auditor-General	Appointment provisions for the Auditor-General are set out in the Constitution Act, s. 94C. There are no provisions restricting employment in the public sector for a vacating Auditor-General.	No specific provisions.	No specific provisions.	No specific provisions.	No specific provisions.
Audit coverage of Ministers and/or Ministers' offices	No specific provisions.	No specific provisions.	No specific provisions.	No specific provisions.	No specific provisions.
Financial audit of the Court[(b)]	No specific provisions; financial operations of Courts audited as part of financial auidt of Department of Justice.	Yes.	Yes.	Yes.	Yes.

Jurisdiction	Victoria	Commonwealth – ANAO	Western Australia	Tasmania	New South Wales
Name of Act	***Audit Act 1994***	***Auditor-General Act 1997***	***Auditor General Act 2006***	***Audit Act 2008***	***Public Finance and Audit Act 1983***
Performance audit of the administrative functions of Courts[(b)]	No specific provisions; performance audits of non-judicial functions conducted from time to time in accordance with a protocol between the Courts and the Auditor-General.	Yes.	Yes.	Yes.	Yes.
Right of access to premises and records of private sector contractors	No explicit legislative authority to access premises of private sector contractors.	No legislative provisions for right of access to private sector contractors, however the Auditor-General is able to access information held by contractors under non-mandatory standard contract clauses developed jointly with the Department of Finance and Deregulation.	The Auditor-General has full and free access, including premises, at all times to all accounts, information, documents and systems considered relevant, s. 35.	The Auditor-General is entitled to full and free access at all reasonable times to accounts, information, documents, systems and records the Auditor-General deems appropriate, public money or other moneys and public property or other property, s. 38(1).	The Auditor-General has access to any person, group of persons, body, fund or account and is entitled at all reasonable times to full and free access to the books, records, documents and papers, s. 36(1).
Authority to investigate matters pertaining to public money and property	No explicit investigative authority but Act specifies it is Parliament's intention to have regard to matters of waste, financial prudence and probity in the pursuit of the Act's objectives, s. 3A.	The Auditor-General is entitled to full and free access to documents or property related to Commonwealth depeartments, companies or authorities, s. 33.	The Auditor-General may at any time carry out an examination or investigation relating to public money or public property, s. 18(2)(c).	The Auditor-General may at any time carry out an examination or investigation relating to public money or public property, s. 22(c).	The Auditor-General is authorised or required to audit into whose possession or under whose control any public money, public proerty or other property has come, s. 35(2).
Incidental functions of the Auditor-General and the audit role in promoting performance improvement	Auditor-General may provide other auditing services if requested by an agency, s. 16E, but there is no explicit authority to promote performance improvement as an ancillary function.	Audits by arrangement with a person or body, s. 20.	Provision of advice in the State's interest and will not compromise the Auditor-General's indepenedence, s. 23.	The Auditor-General may enter into an agreement to provide other services of a kind commonly performed by auditors, s. 28.	N/A.

Jurisdiction	Victoria	Commonwealth – ANAO	Western Australia	Tasmania	New South Wales
Name of Act	***Audit Act 1994***	***Auditor-General Act 1997***	***Auditor General Act 2006***	***Audit Act 2008***	***Public Finance and Audit Act 1983***
Consolidation of Auditor-General's powers	The objectives of the Act, s. 3, correspond with the key powers of the Auditor-General but there is no consolidated lsiting of the powers wihtin the body of the Act.	No.	Yes, s. 18.	Yes, s. 23.	No.
Application of auditing standards	Professional auditing standards must be applied, as appropriate, and any additional standards must be summarised in Auditor-General's annual report, s. 13.	The Auditor-General must set his own auditing standards, s. 24.	The Auditor-General must give regard to the Auditing and Assurance standards, s. 28.	The Auditor-General must give regard to the Auditing and Assurance standards, s. 31(1).	The Auditor-General is required to have regard to recognised professional standards and practices and comply with relevant requirements imposed by law, s. 27B(4)(a)(b).
Legal professional privilege	While access powers relating to information held by agencies override secrecy provisions,a rule of law and Cabinet confidentiality, s. 12, legal professional privilege is not expressly abrogated for the purpose of the Auditor-General's information gathering powers.	N/A.	Section 48 specifies that after the fifth anniversary of the Act's commencement, the Auditor-General's information gathering powers in regard to legal professional privilege will be examined.	N/A.	The Auditor-General is entitled to exercise functions under this section despite any privilege of an authority, other than a claim based on legal professional privilege, s. 36(5).
Privilege against self-incrimination	As per legal professional privilege.	Legislation expressly stipulates that privilege is not an excuse for not providing information requested by the Auditor-General, s. 35.	Privilege expressly abrogated wihtin the legislation for purposes of the Auditor-General's powers to obtain information from persons, s. 36.	Privilege expressly abrogated within the legislation for purposes of the Auditor-General's powers to obtain information from persons, s. 39.	Although the privillege is not expressly identified in the legislation, the above provision upholding only legal professional privilege presumably abrogates the self-incrimination privilege in relatipon to information requested by the Auditor-General from an authority, s. 36.

Jurisdiction	Victoria	Commonwealth – ANAO	Western Australia	Tasmania	New South Wales
Name of Act	***Audit Act 1994***	***Auditor-General Act 1997***	***Auditor General Act 2006***	***Audit Act 2008***	***Public Finance and Audit Act 1983***
Annual attest audit functions relating to performance statements and internal controls	Auditor-General must audit annual performance statements of municipal councils, (s. 133 of Local Government Act) and has discretionary power in Audit Act to audit performance indicators included in agencies' annual reports, s. 8.	N/A.	A longstanding legislative requirement for the Auditor-General to audit the key performance indicators of, and controls exercised by, agencies, s. 15(1)(3).	NIL.	NIL.
Audit of overseas entities	All entities controlled by the State, which by implication encompasses controlled foreign subsidiaries, are subject to audit, s. 3, but there is no express reference to cover circumstances relating to overseas subsidiaries.	The Auditor-General's functions include auditing the financial statements of Commonwealth companies, authorities and their subsidiarities, ss. 12, 13, 21.	If an agency has a foreign subsidiary, the Auditor-General nominates the auditor, s. 16(1)(6).	NIL.	NIL.
Disclosure of information to external parties and power to conduct joint audits and/or investigations	Disclosure of information to other investigative bodies is limited to that acquired during audits, s. 16F – Victorian Government proposes legislative action to address this issue. Also, the Audit Act does not explicitly authorise sharing of information with other Auditors-General or the conduct of joint audits.	The Auditor-General may disclose information to the Commissioner of the Australian Federal Police, if it is in the public interest, s. 36(2).	Confidentiality must be preserved, however information can be communicated to the Joint Standing Committee on Audit, the Public Accounts Committee or the Estimates and Financial Operations Committee, s. 46(2)(3).	Confidentiality must be preserved, however information can be communicated to the Public Accounts Committee, House of Assembly or Legislative Council or another Committee established by Parliament, s. 46(2)(3).	Infiormation may be disclosed for proceedings for an offence, disciplinary proceedings, a report made under the Act or a report or communication that the Treasurer authorises, s. 38.
Charging of audit fees	Fees can be charged for financial statement audits, s. 10, but there is no authority to charge fees for other attest functions such as the performance statements of municipal councils.	A person or body whose financial statements are audited is liable to pay a fee, determined by the Auditor-General, s. 14(1).	The Auditor-General is to determine whether a fee is to be charged for an audit, as well as the amount and the liable authority, s. 21.	The Auditor-General is to determine whether a fee is to be charged for an audit, as well as the amount and the liable authority, s. 27.	The Department head shall pay the Auditor-General for the inspection and audit an amount as the Treasurer decided, s. 45(3).

Jurisdiction	Victoria	Commonwealth – ANAO	Western Australia	Tasmania	New South Wales
Name of Act	***Audit Act 1994***	***Auditor-General Act 1997***	***Auditor General Act 2006***	***Audit Act 2008***	***Public Finance and Audit Act 1983***
The Auditor-General as auditor of state companies	A controlled company is subject to audit, for State purposes, under definition provisions, s. 3, and Auditor-General may accept appointment as company auditor under Corporations Act, s. 16D. There is no legislative requirement for State companies to always appoint the Auditor-General as their auditor under the Corporations Act.	The Auditor-General may accept appointment under the Corporations Act as the auditor of a Commonwealth company, s. 21.	The Auditor-General may accept appointment under the Corporations Act as the auditor of a State company, s. 16(4).	The Auditor-General may accept appointment under the Corporations Act as the auditor of a State company, s. 21.	NIL.
Incorporation of submissions or comments of audited agencies in reports	The Auditor-General must include in reports any submissions or comments of audited agencies, received within specified timelines, or a summary of those submissions or comments in an agreed form, s. 16.	The Auditor-General must include all written comments received, s. 19(5).	The Auditor-General must include any comments or submissions made or a fair summary of them, s. 25(3).	The Auditor-General must include any comments or submissions made or a fair summary of them, s. 30(3).	The Auditor-General must include any comments or submissions made or a fair summary of them, s. 52E.
Reporting of sensitive material	No specific provisions.	Provisions specifically prohibit disclosure of sensitive material, s. 37.	The Auditor-General has discretionary reporting power but the legislation does not explicitly link this power to the reporting of sensitive material, s. 25.	The Auditor-General has discretionary reporting power but the power is not explicitly linked to the reporting of sensitive material, s. 30.	No specific provisions.
Immunity protection or indemnity protection	Indemnity protection, s. 7H.	Indemnity protection, s. 55(1).	Immunity protection, s. 45(1).	Immunity protection, s. 45.	N/A.

Notes:

(a) The information presented in this table reflects the legislation in place at the time of the Committee's research.

(b) See Appendix 2 for further information.

Table A5.2: Comparison of positions in audit legislation in South Australia, Queensland, Australian Capital Territory, Northern Territory and New Zealand[(a)]

Jurisdiction	South Australia	Queensland	Australian Capital Territory	Northern Territory	New Zealand
Name of Act	***Public Finance and Audit Act 1987***	***Auditor-General Act 2009***	***Auditor-General Act 1996***	***Audit Act***	***Public Audit Act 2001***
Audit Office constituted as a Statutory Authority	No.	No.	No.	No.	Yes, s. 10(1).
Financial audit of Parliament[(b)]	Yes.	Yes.	Yes.	Yes.	As stated in the information provided to the Committee (see Appendix 2), Parliamentary services are wihtin the mandate of the Auditor-General.
Performance audits of Parliament's administration[(b)]	The powers exist but the Auditor-General has not exercised them.	N/A.	Yes.	No.	Yes, s. 10(1)
Frequency of performance audits of the Auditor-General	N/A.	A strategic review at least every five years, s. 68.	At the request of the Presiding member of the Public Accounts Committee, s. 29.	Not less than once every three years, s. 26(1)(2).	House of Representatives must each year appoint an independent auditor to audit the Auditor-General's financial statements and other information – latter reference may incorporate a performance audit, s. 38.
Parliamentary involvement in the appointment of an Acting Auditor-General	The Deputy Auditor-General is to act as Auditor-General during any vacancy in the office, s. 28.	The Deputy Auditor-General is to act as Auditor-General during any vacancy in the offices, s. 23(2).	The Executive may appoint a person to act as the Auditor-General, however the Minister must consult with the presiding member of Public Accounts Committee first, Schedule 6.	The Minister may appoint an acting Auditor-General, s. 6.	The Deputy Auditor-General is to act as Auditor-General during any vacancy in the office, s. 11(3).

Jurisdiction	South Australia	Queensland	Australian Capital Territory	Northern Territory	New Zealand
Name of Act	***Public Finance and Audit Act 1987***	***Auditor-General Act 2009***	***Auditor-General Act 1996***	***Audit Act***	***Public Audit Act 2001***
No direction from Parliament on operational matters	The Auditor-General is not subject to direction, s. 24(6).	The Auditor-General is not subject to direction, s. 8(1). If the Legislative Assembly requests the AG to conduct an audit, he must conduct the audit, s. 35(1).	The Auditor-General is not subject to direction, s. 9.	The Minister may direct the Auditor-General to carry out an audit, s. 14(1).	The Auditor-General is not subject to direction, however must consider any comments from the Speaker or any Committee of the House of Representatitves when preparing his annual plan, s. 36.
Parliamentary involvement in determining budget	No specific provisions on funding.	The Auditor-General must determine his estimate for the audit office, this is provided to the Treasurer, who then must consult with the Parliamentary Committee in developing the proposed budget s.21.	The presiding member of the Public Accounts Committee may advise the Treasurer of the appropriation the Committee considers should be made for the operations of the Auditor-General and provide the Treasuer with a draft budget, s. 22.	No specific provisions on funding.	A parliamentary committee, the Officers of Parliament Committee, presents the Auditor-General's annual budget to Parliament, after considering input from government, for Parliament's consideration and approval.
Consultation by the Auditor-General on performance audit specifications	No specific provisions.	No specific provisions.	No specific provisions.	No specific provisions.	No specific provisions relating to individual performance audit specifications – legislation addresses communication with the Speaker of the House of Representatives on draft annual audit plan, s. 36.
Employment in the public sector of a vacating Auditor-General	No specific provisions.	No specific provisions.	No specific provisions.	No specific provisions.	No specific provisions.
Audit coverage of Ministers and/or Ministers' offices	No specific provisions.	The Auditor General must audit the full year report of expenditure of ministerial offices and prepare a report about it, s. 41.	No specific provisions.	No specific provisions.	No specific provisions.

Jurisdiction	South Australia	Queensland	Australian Capital Territory	Northern Territory	New Zealand
Name of Act	***Public Finance and Audit Act 1987***	***Auditor-General Act 2009***	***Auditor-General Act 1996***	***Audit Act***	***Public Audit Act 2001***
Financial audit of the Courts[b]	Yes.	Yes.	Yes.	Yes.	Yes.
Performance audit of the administrative functions of Courts[b]	Yes.	N/A.	Yes.	N/A.	Yes.
Right of access to premises and records of private sector contractors	The Auditor-General's powers to examine accounts, records or other documents held by persons extend to access to the premises of those persons, s. 34.	The Auditor-General's access powers encompass premises of persons subject to the occupier of those premises consenting to the entry, s. 46.	No legislative right of access to premises of persons such as private sector contractors.	No legislative right of access to premises of persons such as private sector contractors.	The Auditor-General's right of access to premises other than those of a public entity requires authorisation by warrant issued by a District Court Judge, s. 29.
Authority to investigate matters pertaining to public money and property	No specific provision.	No specific provision.	No specific provision.	No specific provision.	No specific provision.
Incidental functions of the Auditor-General and the audit role in promoting performance improvement	N/A.	The Auditor-General may enter into an arrangement to audit a non public sector entity, s. 35.	The Auditor-General's functions include to promote accountability in the public administration of the Territory, s. 10(a).	N/A.	The Auditor-General may enter into an agreement to perform services of a kind reasonable and appropriate for an auditor to perform, s. 17.
Consolidation of Auditor-General's powers	No.	No.	Yes, s. 10.	No.	No.

Jurisdiction	South Australia	Queensland	Australian Capital Territory	Northern Territory	New Zealand
Name of Act	***Public Finance and Audit Act 1987***	***Auditor-General Act 2009***	***Auditor-General Act 1996***	***Audit Act***	***Public Audit Act 2001***
Application of auditing standards	N/A.	The Auditor-General must have regard to recognised standards and practices, s. 37(2). The Auditor-General must prepare a report to the Legislative Assembly on the general standards being applied, s. 58(1)(a).	N/A.	The Auditor-General should have regard to recognised professional standards and practices, s. 13.	At least once every three years, the Auditor-General must publish a report to the House of Representatives of the auditing standards to be applied, s. 23(1)(2).
Legal professional privilege	N/A.	N/A.	N/A.	N/A.	N/A.
Privilege against self-incrimination	Privilege expressly cited in legislation as not a ground precluding a person from producing information requested by the Auditor-General, s. 34.	The legilation stipulates it is not a reasonable excuse for any person to rely on the privilege for all aspects of the Auditor-General's information gathering powers, ss. 46, 47, 48.	Privilege expressly abrogated for purposes of information requested by the Auditor-General, s. 14D.	No specific provisions.	Privilege expressly abrogated within the legislation for purposes of the Auditor-General's information gathering powers, s. 31.
Annual attest audit functions relating to performance statements and internal controls	N/A.	The Auditor-General may conduct an audit of performance management systems of a public sector entity and this can include performance measures, s. 38(1)(6).	N/A.	N/A.	The Committee was informed during an information gathering visit to New Zealand that the Auditor-General audits annual statements of service performance prepared by departments and examines accounting controls as a component of the annual financial audit.
Audit of overseas entities	N/A.	The Auditor-General has the right to appoint an auditor if a controlled entity is based in or has significant operations in a country other than Australia, s. 32(1)(a).	N/A.	N/A.	The Auditor-General has authority to audit subsidiaries controlled by government, s. 5.

Jurisdiction	South Australia	Queensland	Australian Capital Territory	Northern Territory	New Zealand
Name of Act	***Public Finance and Audit Act 1987***	***Auditor-General Act 2009***	***Auditor-General Act 1996***	***Audit Act***	***Public Audit Act 2001***
Disclosure of information to external parties and power to conduct joint audits and/or investigations	N/A.	Disclosure of information can be made to the parliamentary committee, the Crime and Misconduct Commission, a police officer or an entity responsible for investigation or prosecution of offences or a Court, s. 53(3).	N/A.	N/A.	The Auditor-General may disclose information considered appropriate, however must consider the public interest and an auditor's professional obligations concerning confidentiality, s. 30(2)(3).
Charging of audit fees	The Auditor-General, with the approval of the Treasurer will fix an audit fee for audits of the accounts of public authorities or bodies, s. 39(1)(2).	The Auditor-General may charge fees for an audit conducted as well as reasonable costs and expenses, with the Treasurers approval the Auditor-General sets the fees, s. 56(1)(2)(3).	A prescribed person whose annual financial statements or accounts or records are audited will be liable for a fee, determined by the Auditor-General, s. 16(1).	N/A.	The Auditor-General may charge fees to a public entity. The fees must be reasonable, having regard to the nature and extent of service provided and the requirements of the auditing standards, s. 42.
The Auditor-General as auditor of state companies	The Auditor-General may audit the accounts of a company and examine efficiency and economy if a public authority is the legal or beneficial owner of more than 40% of the issued share capital of the company, s. 33(3)(6).	The shareholders of a company that is a public sector entity must appoint the Auditor-General ass the auditor, s. 34.	The Auditor-General shall accept appointment under the Corporations Act as the auditor of a public sector company, s. 13.	N/A.	Definition of a public entity subject to auidt by Auditor-General includes controlled companies but legislation does not specifically address appointment of the Auditor-General as the auditor under the companies legislation, s. 5.
Incorporation of submissions or comments of audited agencies in reports	The Auditor-General must deliver the report and any reply from the Chief Executive Officer, s. 37.	The Auditor-General must include any comments or submissions made or a fair summary of them, s. 64(5).	The Auditor-General shall take account of any comments received when finalising a report, s. 18.	The Auditor-General shall include all submissions or comments received, or a summary, in an agreed form, s. 25.	No specific provisions evident.

Jurisdiction	South Australia	Queensland	Australian Capital Territory	Northern Territory	New Zealand
Name of Act	***Public Finance and Audit Act 1987***	***Auditor-General Act 2009***	***Auditor-General Act 1996***	***Audit Act***	***Public Audit Act 2001***
Reporting of sensitive material	No specific provisions.	If the Auditor-General considers disclosure to be against the public interest, the information must be reported to the parliamentary committee, s. 66(1).	The AG shall not include particular information should it have a serious adverse impact, reveal trade secrets, prejudice a trial or prejudice relations between Governments. The AG may prepare a special report to the PAC that includes that information, s. 19(1)(3).	Specific provisions.	The AG may discluse such information as the AG considers appropriate to disclose in the exercise of his or her functions, duties or powers Before disclosing any information, the AG must consider the public interest and an auditor's professional obligations concerning confidentiality of information, s. 30(2)(3).
Immunity protection or indemnity protection	Immunity protection, s. 30A.	Immunity protection, s. 55.	Indemnity protection, s. 33.	Immunity protection, s. 12.	Immunity protection, s. 41.

Notes:

(a) The information presented in this table reflects the legislation in place at the time of the Committee's research.

(b) See Appendix 2 for further information.

APPENDIX 6: ACRONYMS AND ABBREVIATIONS

AASB	Australian Accounting Standards Board
ACAG	Australasian Council of Auditors-General
ACPAC	Australasian Council of Public Accounts Committees
A-G, AG	Auditor-General
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
APES	Accounting Professional & Ethical Standard
ASX	Australian Stock Exchange
Audit Act	*Audit Act 1994*
BER	Building the Education Revolution
Committee	Public Accounts and Estimates Committee
DIIRD	Department of Innovation, Industry and Regional Development
DOT	Department of Transport
DPS	Department of Parliamentary Services
DTF	Department of Treasury and Finance
EPA Victoria	Environment Protection Authority Victoria
EWOV	Energy and Water Ombudsman (Victoria)
FOI	Freedom of Information
GSERP	Government Sector Executive Remuneration Panel
ICT	Information and Communication Technology
INTOSAI	International Organisation of Supreme Audit Institutions
IPA	Infrastructure Partnerships Australia
JCPAA	Joint Committee of Public Accounts and Audit
PAA	*Public Administration Act 2004*
PAEC	Public Accounts and Estimates Committee
PPP	Public Private Partnerships
PTO	Public Transport Ombudsman
PTO Ltd	Public Transport Ombudsman Limited
PTOV	Public Transport Ombudsman (Victoria)
SSA	State Services Authority
VAGO	Victorian Auditor-General's Office
VPS	Victorian Public Service