



# **PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE**

**92<sup>nd</sup> REPORT TO THE PARLIAMENT**

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## **Inquiry into Victoria's Audit Act 1994 Discussion Paper**

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**Parliament of Victoria**  
**Public Accounts and Estimates Committee**

*Inquiry into Victoria's Audit Act 1994*  
Discussion Paper

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# **PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE MEMBERSHIP – 56TH PARLIAMENT**

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# DUTIES OF THE COMMITTEE

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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

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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 is to review the legislation in its entirety, paying particular attention to innovative opportunities to progress it to leading edge status.

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 provisions governing the Auditor-General's appointment, tenure and independence which are enshrined within the *Constitution Act 1975*.

The Audit Act also addresses the relationship of the Auditor-General with the Committee as the representative body of Parliament and the Auditor-General's accountability to Parliament for use of the statutory powers accorded the position and for discharge of the position's responsibilities.

This discussion paper documents the results of the Committee's initial research under its Inquiry. The paper identifies the Auditor-General's unique constitutional and parliamentary status as an independent officer of Parliament in Victoria. Its subsequent chapters address discussion topics associated with potential amendments to the Audit Act pertaining to:

- the special relationship of the Auditor-General with Parliament;
- the audit of non-judicial functions within Victoria's Courts;
- the Auditor-General's operational powers and responsibilities; and
- other possible amendments, which are mainly of a procedural nature.

In developing the discussion paper, the Committee has considered proposals for amendments aimed at strengthening the Audit Act submitted in correspondence by the Auditor-General. References to these proposals have been included in the Committee's commentary on relevant potential amendments.

The Committee has also received correspondence from the Department of Treasury and Finance outlining some suggested discussion issues for the Inquiry. The matters raised by the Department are addressed in chapter 6 and in the narrative relating to relevant potential amendments.

The Committee's commentary under particular discussion topics within the paper also includes references to issues discussed by the Committee with parliamentary committees, Auditors-General, government officials and other organisations during evidence gathering visits to Western Australia and New Zealand in October and November 2009. The commentary also takes into account relevant developments in other Australian and selected overseas jurisdictions.

The potential amendments to the Audit Act discussed in the paper are wide-ranging and, in some cases, involve complex subjects which may ultimately require expert legal input in consultation with the Chief Parliamentary Counsel.

The Committee would welcome submissions from interested parties on the various options for legislative change set out in this discussion paper and on any other matters that are viewed as worthy of consideration by the Committee during its Inquiry. The Committee intends to use such submissions as the basis for public hearings to be held during the first half of 2010.

A handwritten signature in black ink that reads "Bob Stensholt". The signature is written in a cursive, slightly slanted style.

**Bob Stensholt MP**  
**Chair**

# SUMMARY OF DISCUSSION TOPICS

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# 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 *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:<sup>1</sup>

- 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.

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.

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.

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

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 currently 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.

## **1.2 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 Bill has been passed by both Houses of Parliament and approved 'by the majority of the electors voting at a referendum'.<sup>2</sup>

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.

## **1.3 Scope of the Inquiry**

The Committee's work program for the Inquiry comprises:

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

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2 *Constitution Act 1975 (Vic)*, s. 18

- 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;
- meetings with a selection of private sector contractors engaged either currently or in the past in the delivery of services in the Victorian public sector;
- the production 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; and
- the development of findings and recommendations.

On 23 November 2009, the Premier announced a review 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 Premier stated that the review would be conducted by the Public Sector Standards Commissioner, assisted by a newly-appointed Special Commissioner. The review is expected to report by 31 May 2010.

The Committee will be pleased to provide any input that is sought from it by the review in terms of its various legislative responsibilities associated with the functions of the Auditor-General. It will also be pleased to discuss with the Commissioner, if required, any relevant matters relating to the provisions of the Audit Act that have been progressively addressed by the Committee during its Inquiry, including those set out in this discussion paper. The Committee in undertaking its Inquiry will welcome and consider the report of the Special Commission and its findings.

The Committee is also aware that the government has recently completed a major review of Victoria's public finance legislation. The Minister for Finance introduced the Public Finance and Accountability Bill 2009 into Parliament on 8 December 2009. The Committee presented a report to Parliament in June 2009 on the results of its Inquiry into public finances. It recognises that the outcome of the government's review may have relevance to some of the provisions of the Audit Act and intends to consider such outcome during the course of this Inquiry.

The Committee intends to report its findings and recommendations from the Inquiry to the Parliament by October 2010.

## **1.4 Structure of discussion paper**

In developing this discussion paper, the Committee determined to categorise the potential options for legislative change to the Audit Act, identified during its research and discussions to date with external parties, under the following headings:

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

The Committee's discussion paper includes commentary on each identified discussion issue differentiating, where relevant, between areas with potential for new coverage in the Audit Act and possible approaches for amending existing provisions within the Act.

The Committee recognises that some of the issues addressed in its discussion paper may require expert legal advice in consultation with the Chief Parliamentary Counsel.

## **1.5 Public submissions invited**

The Committee would welcome feedback on the options for legislative change set out in this discussion paper and any additional views held by interested parties. Such feedback will assist the Committee's consideration of the nature and direction of its findings and recommendations to be presented to Parliament at the conclusion of the Inquiry.

## CHAPTER 2: THE UNIQUE 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.<sup>3</sup>

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 recent 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:<sup>4</sup>

*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.*

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

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

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.<sup>5</sup>

## **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.

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. This process culminates in the expression of an independent audit opinion on those statements attesting, if appropriate, to the fair presentation of operating results and financial position, in line with professional reporting standards. This financial audit function mirrors the equivalent audit procedure undertaken in the private sector and generally 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 the completeness and accuracy of financial information reported by agencies and explanations of any major changes in key income, expense and balance sheet items. While valuable and critical to public accountability, this focus is of a financial nature only and does not address to any great extent the manner in which the resources underpinning the operations of agencies have been used in the delivery of public programs and services. It was in recognition of this limitation 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 the Audit Act not to question the merits of government policy, performance audits can traverse an unlimited range of topics addressing, for example, social, environmental, health, infrastructure, safety and community issues. Performance audits also widen the skill requirements of audit staff 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 audit teams are therefore common for many performance audits.

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<sup>5</sup> Mr D Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

There is no direct equivalent in the private sector to performance auditing, as undertaken by Auditors-General in the public sector. While certain specialised private sector consultancy exercises may exhibit some similar characteristics, there is little private sector audit work that reports publicly and independently on a recurring basis on the economy, efficiency and effectiveness of management performance. The professional discipline of performance auditing is a distinct public sector function, with Auditors-General the leading proponents of the discipline.

In making this point, the Committee recognises that the practice of program evaluation within the public sector is a long-established profession.

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. The two common features of evaluation that can distinguish the practice from independent performance audits conducted by the Auditor-General with audit results reported to Parliament are that evaluations are generally internal reviews of programs or projects arranged by management and generally do not involve external reporting. Their methodology, however, is similar to that used in performance audits and they are an important element of continuous improvement 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. 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 on a confidential basis for an agency's senior responsible officer.<sup>6</sup> This internal focus is an important feature of the Gateway initiative.

The provisions of the Victorian Audit Act relating to performance audits have been widened by Parliament over the years in recognition of the increasing attention given to such audits in the Victorian Auditor-General's Office (VAGO) and its demonstrated competence and record in their conduct. It is now a feature of VAGO's audit work for which it has received external commendation and recognition from its peers in Australian and overseas jurisdictions.

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 VAGO and of private sector contractors to supplement internal resources whenever deemed necessary. For the 2009-10 financial year, the Auditor-General's budget is expected to total \$33.7 million, comprising \$19.8 million for mandatory audit reports on financial statements and \$13.9 million for discretionary audit work associated with performance audits and other services provided to Parliament. The Auditor-General expects to issue 600 opinions on financial statements and 34 reports to Parliament during 2009-10 which mainly involve performance audit reports.<sup>7</sup>

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6 Department of Treasury and Finance, <[www.gatewayreview.dtf.vic.gov.au](http://www.gatewayreview.dtf.vic.gov.au)>, accessed 27 January 2010

7 Victorian Auditor-General's Office, *2009-10 Annual Plan*, May 2009, pp.31, 33

## 2.3 Progressive strengthening through legislative action of the Auditor-General's relationship with the 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.<sup>8</sup> In the amending Bill's Second Reading Speech, the then Premier stated:<sup>9</sup>

*The intention behind this is to enshrine the relationship between the Auditor-General and the Parliament as the Auditor-General's principal client.*

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. 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 also required significant outsourcing of actual auditing while maintaining the office of the Auditor-General.

The functions and the independence of the Auditor-General and office were directly reinforced and restored in a suite of legislative amendments 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:<sup>10</sup>

*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 to this discussion paper, these provisions cannot be changed by elected governments unless the

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

9 *Victorian Parliamentary Debates*, Legislative Assembly, 30 October 1997, p.897, (Hon. J Kennett, Premier)

10 *Victorian Parliamentary Debates*, Legislative Assembly, 11 November 1999, p.364 (Hon. S Bracks, Premier)



amending Bill has been passed by both Houses of Parliament and approved 'by the majority of the electors voting at a referendum.'<sup>11</sup>

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;
- 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 the Parliament, before an Auditor-General can be suspended from office.

These three protective provisions in the Constitution Act, covering appointment, independence and tenure, distinguish the Auditor-General from Victoria's three other independent officers of Parliament, the Ombudsman, the Electoral Commissioner and the Director, Police Integrity. The independence of the former two positions is protected in the Constitution Act and their other governing provisions such as appointment and tenure are found in their respective enabling legislation<sup>12</sup>. 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.

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.*'<sup>13</sup>

There are 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 accountability regimes is 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.<sup>14</sup>

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11 *Constitution Act 1975* (Vic), s. 18

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

13 *Victorian Parliamentary Debates*, Legislative Assembly, 11 November 1999, p.366, (Hon. S Bracks, Premier)

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

In addition, the Electoral Commissioner has an informal relationship with the Parliament's Electoral Matters Committee. The Ombudsman is therefore the only officer of Parliament without a relationship, formal or informal, with a Parliamentary Committee or a special accountability regime established under legislation.

The combination of the constitutional protections accorded the office of Auditor-General and the special statutory 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 unique instrument of the Parliament with 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 that influenced the Committee to launch its Inquiry into the provisions of the *Audit Act 1994*.

## CHAPTER 3: POTENTIAL 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'.<sup>15</sup>

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.

The provisions of the Audit Act addressing 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 the Auditor-General'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.

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15 *Constitution Act 1975* (Vic), s. 18

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 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 involvement in the determination of the Auditor-General's annual budget and the financial and performance audits.

## **3.2 Potential options for legislative change**

This chapter addresses various potential options for amending the Audit Act pertaining to the Auditor-General's operational relationship with the Parliament that the Committee considers are worthy for discussion with interested parties at this stage of its Inquiry. The options discussed by the Committee in this chapter encompass potential new areas of coverage in the Audit Act as well as possible avenues for enhancing existing provisions. The Committee would also welcome submissions from interested parties on any other aspects.

The Committee's commentary under particular discussion topics includes references to matters discussed with parliamentary committees, Auditors-General, government officials and other organisations during the Committee's visits to Western Australia and New Zealand in October and November 2009.

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

#### ***Background to this discussion topic***

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 its appointed auditor, 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 Auditor-General conducts an audit of the annual financial statements of Parliament by arrangement. The Parliament's financial statements for the year ended 30 June 2009 prepared by the Department of Parliamentary Services disclose that a total of \$117.2 million in output and special appropriations was provided to the Parliament in that year.<sup>16</sup> The annual financial audit of these statements by the Auditor-General 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.

In correspondence to the Committee, the Auditor-General has proposed that the financial audit of Parliament currently undertaken by arrangement be formalised as a legislative requirement.<sup>17</sup>

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16 Department of Parliamentary Services, *2008-09 Annual Report*, October 2009, p.41

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

The power and jurisdiction of Parliament is addressed by Erskine May in his authoritative publication, *Parliamentary Practice*.<sup>18</sup>

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 performance audits of Parliament's formal functioning as Victoria's legislature.

In recognition of its accountability commitment, the Parliament, through its Presiding Officers, has, in the past, formally invited the Auditor-General to conduct the external audit of its administration, incorporating an annual financial audit component. For example, the Auditor-General advised the Committee that a formal invitation to conduct the external audit of Parliament's administration was extended in April 2000 by the then Presiding Officers to the then Auditor-General.

The impetus for Parliament's action at the time is evident from the following extract from the invitation made to the Auditor-General:<sup>19</sup>

*... 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 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.*

An invitation of the above nature would facilitate performance audits of the administration of Parliament through its departments including the Department of Parliamentary Services.

### ***Discussion issues pertaining to this subject***

Against the above background, the Committee wishes to consider during this phase of its Inquiry the views of interested parties on 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.

18 Erskine May, *Parliamentary Practice*, 23rd edition, 2004, ch. 4

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

### ***Discussion issues continued...***

The Committee recognises that questions regarding legal provisions that directly address Parliament are, given Parliament's unique constitutional status, necessarily complex. Also, the Auditor-General is effectively an agent of the Parliament with a principal/agent relationship in place. It could also be argued that as an officer of Parliament any audit of Parliament by the Auditor-General would perforce be an internal audit rather than an external one. The Department of Treasury and Finance described this relationship in a slightly different way as potentially raising a conflict of interest for the Auditor-General to audit Parliament.<sup>20</sup> Such a view might have greater weight if the Auditor-General were seen as separate from Parliament.

Because of the Parliament's strong commitment to accountability and transparency in relation to its administrative operations and management, the Committee has included this matter as a discussion point for its Inquiry. In doing so, it recognises that the outcome of any discussions is a matter solely for determination by the Parliament.

The Committee therefore intends to explore with the Presiding Officers during the course of its Inquiry 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.

The Committee may also need to consider expert legal and possibly constitutional advice in consultation with the Chief Parliamentary Counsel and the Clerks of both Houses of Parliament.

In a paper to the Committee, the Department of Treasury and Finance has raised as a potential question for the Inquiry whether it is appropriate for the powers of the Auditor-General to be extended to include such bodies as the Parliament and, if so, should such powers be restricted to certain dimensions (for example: financial audits only) or should they cover the full ambit of the Auditor-General's powers.<sup>21</sup>

At this discussion stage of its Inquiry, the Committee invites the views of interested parties on this subject and specifically on the following discussion points:

- To what extent should Parliament be subject to financial and performance audits?
- Should such audits be done by the Auditor-General who is an officer of Parliament or can they be more appropriately done by an external auditor?
- Are there constitutional, legal or conventional factors which automatically rule out any proposal to formalise within the Audit Act audit arrangements entered into between the Parliament and the Auditor-General?
- Assuming there are no insurmountable constitutional, legal or conventional impediments, would it be in the public interest to formalise within the Audit Act arrangements entered into between the Parliament and the Auditor-General for the conduct, from time to time, of performance audits of Parliament's administration?

20 Department of Treasury and Finance, 'Review of the Audit Act 1994', correspondence to the Committee, December 2009, p.3

21 *ibid.*, p.2

**Discussion issues continued...**

- If legislative provisions can be developed, should all of the powers and responsibilities assigned to the Auditor-General under the Audit Act apply to arrangements entered into between the Parliament and the Auditor-General or should they be restricted to certain dimensions, for example financial audits only?
- If legislative provisions can be developed, would it be important to include a provision within the Audit Act which expressly precludes the Auditor-General from commenting on the merits or otherwise of Parliament's formal functioning as Victoria's legislature?
- What legislative provisions might be appropriate if Parliament were to use an external auditor rather than the Auditor-General as an officer of Parliament?
- Are there any other matters considered to be relevant to this subject?

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

#### **Background to this discussion topic**

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.

The requirement for this periodic performance audit is an important component of the Auditor-General's accountability to Parliament for the discharge of the position's wide range of operational powers, including the management and performance of VAGO.

Recommendation 10 of the previous Committee's February 2006 report on officers of Parliament addressed the statutory frequency of this performance audit and stated:<sup>22</sup>

*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.

The Auditor-General has 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

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

*frequency is resource intensive for the office, and presents a risk to the carrying out of VAGO's core functions.*<sup>23</sup>

The Department of Treasury and Finance has also raised this issue in its paper to the Committee. The Department has 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?'*<sup>24</sup>

Provision for a periodic performance audit of the Auditor-General arranged by Parliament is a relatively common feature of audit legislation in many other jurisdictions in Australasia and overseas. The frequency of the performance audit varies across 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.

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.

As pointed out in chapter 2 of this discussion paper, 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 earlier paragraphs, 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.

The Committee's identification of this discussion topic is therefore essentially aimed at building further on an already strong and transparent accountability framework governing the performance of the Auditor-General and the Victorian Auditor-General's Office.

### ***Discussion issues pertaining to this subject***

Given the already strong features of section 19 of the Audit Act, the Committee considers the main issue associated with this potential amendment relates to whether the principles of risk management and administrative convenience should be taken into account in determining what constitutes the ideal frequency of Parliament's periodic performance audit of the Auditor-General. It considers that any legislative change should not weaken the Auditor-General's accountability to Parliament for the discharge of the position's extensive operational and reporting powers.

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

24 Department of Treasury and Finance, 'Review of the Audit Act 1994', correspondence to the Committee, December 2009, p.6



### **Discussion issues continued...**

The Committee invites discussion from interested parties on the frequency of Parliament's performance audit of the Auditor-General and specifically on the following discussion points:

- How valid is the argument that, in terms of risk management and resource availability viewpoints, the current audit frequency of at least every three years is excessive and not cost-justified?
- As raised by the Department of Treasury and Finance, what is the appropriate frequency for the performance audit?
- If an amendment was to proceed, is it desirable to retain the words 'at least' within the legislation to maintain discretion to the Committee for more frequent audits, should prevailing circumstances warrant such action?
- Should performance audits be more frequent if they reveal deficiencies or concerns, or alternatively less frequent if the audits are generally favourable?
- Is it appropriate to take into account the resource requirements and management costs of the Committee in overseeing the independent performance audit, in addition to costs of VAGO, when assessing the optimum audit frequency?
- Are there any other issues considered to be relevant to this potential amendment to the Audit Act?

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

#### **Background to this discussion 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.

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.<sup>25</sup> 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 an Auditor-General. In effect, the previous Committee recommended that

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

Parliament, through the Committee, be given a clear legislative role for both actual and acting appointments to the position of Auditor-General.

The Auditor-General has proposed 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.<sup>26</sup>

During its visit to Western Australia, the Committee identified that the equivalent provisions in the revised audit legislation in Western Australia are a little different to the Victorian position in that they provide that the Deputy Auditor-General 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 Minister 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.<sup>27</sup>

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.<sup>28</sup>

### ***Discussion issues pertaining to this subject***

The Committee considers the main issue associated with this potential amendment is whether the Audit Act should contain provisions governing the appointment of an Acting Auditor-General similar to the approach taken in the Constitution Act for the appointment of the Auditor-General. In such circumstances, the appointment of an Acting Auditor-General would be on the recommendation of the Committee.

In Victoria, past practice 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 with no specified role in the legislation for Parliament.

The process established under section 6 of the Audit Act for temporary appointments by the Governor in Council may have been intended to be a form of safeguard measure if circumstances ever arose, such as the unavailability within VAGO of an appointee, which precluded use of section 7. There is also no specified role for Parliament within the appointment process under section 6.

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

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

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

### **Discussion issues continued...**

In a paper to the Committee, the Department of Treasury and Finance has raised as a suggested question for discussion during the Inquiry 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?'<sup>29</sup>

The Committee invites discussion from interested parties on this potential amendment and specifically on the following discussion points:

- Should the Audit Act contain provisions for the appointment of an Acting Auditor-General consistent with those applying to the Auditor-General under the Constitution Act which would mean that both appointments would be on the recommendation of the Public Accounts and Estimates Committee on behalf of Parliament?
- If such action occurred, would there be any justification for retaining the existing sections 6 and 7 within the Audit Act?
- Should the Audit Act provide that an Acting Auditor-General be an independent officer of Parliament, although this would not provide the same protection that the Auditor-General has under the *Constitution Act 1975*?
- Should the Audit Act provide for the appointment of the Deputy Auditor-General as an officer of Parliament with powers to act as in New Zealand?
- Are there any other issues considered to be relevant to this potential amendment to the Audit Act?

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

#### **Background to this discussion topic**

This issue relates to 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.*'

The Audit Act defines 'Parliamentary Committee' as the Public Accounts and Estimates Committee, which is a joint parliamentary committee established under the *Parliamentary Committees Act 2003*.

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29 Department of Treasury and Finance, 'Review of the Audit Act 1994', correspondence to the Committee, December 2009, p.5

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. The Auditor-General has the authority for determining the composition of the final plan but is required, under section 7A, to identify in it any changes suggested by the Committee which have not been adopted.

The Committee understands 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. Such a requirement would adversely impact on the independence of the Auditor-General. It would be sufficient for the Auditor-General to take those priorities into account in order to comply with the legislative requirements.

The Auditor-General when presenting his annual audit plan to Parliament is required under section 7A of the Audit Act to include his responses to suggestions he receives 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 officers on operational matters but can request them to undertake specific investigations.<sup>30</sup> The government's response to the Committee's report indicated that it supports this recommendation.

The Auditor-General has proposed to the Committee that the previous Committee's recommendation be implemented through insertion of a new section in the Audit Act. 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.<sup>31</sup>

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 8 and 20.

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.

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.

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

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

### **Discussion issues pertaining to this subject**

The Committee considers that the enshrining of the Auditor-General's independence in section 94B(6) of the Constitution Act is a key feature of Victoria's accountability framework and obviates the need for any explicit equivalent provisions in the Audit Act. The only reference in the Audit Act that can be linked to the 'subject to' element of section 94B(6) of the Constitution Act is section 7D(1) which protects the Auditor-General's independence but allows the Committee to convey its audit priorities to the Auditor-General for consideration.

The Department of Treasury and Finance, in a paper to the Committee, has also cited the constitutional protection of the Auditor-General's independence and, given that protection, whether there is a need to replicate a clause in the Audit Act.<sup>32</sup> 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?'*<sup>33</sup>

As mentioned in the above background narrative, the inter-relationship between these three concepts is currently addressed in the Audit Act through a requirement for the Auditor-General to confer with the Committee and have regard to its audit priorities, but not be compelled to adopt them. The Act effectively requires consultation as an element of the Auditor-General's accountability but maintains protection of the Auditor-General's independence. The point raised by the Department on whether there is scope to clarify in the legislation this inter-relationship between the three concepts may nevertheless be valid and warrants consideration.

The Department has also asked whether this legislative proposal precluding parliamentary direction on operational matters has broader application to the other independent officers of Parliament, consistent with the previous Committee's recommendation. Such an issue would involve changes to the enabling legislation of those officers and may be relevant for consideration as part of the government's recently announced review of the state's integrity and anti-corruption system.

The Committee invites discussion from interested parties on this subject and specifically on the following discussion points:

- Is it necessary to duplicate or closely mirror the constitutional independence of the Auditor-General by having specific provisions in the Audit Act?
- Is the constitutional guarantee of the independence of the Auditor-General sufficient, bearing in mind that the Constitution Act takes precedence over other acts?
- Would the placing in the Audit Act of a restriction on the Parliament from directing its appointed auditor, the Auditor-General, on operational matters undermine Parliament's supreme position as the legislative arm of government?

32 Department of Treasury and Finance, 'Review of the Audit Act 1994', correspondence to the Committee, December 2009, p.5

33 *ibid.*, p.6

### **Discussion issues continued...**

- Is it necessary to expressly provide in the Audit Act that Parliament may submit for consideration by the Auditor-General requests for particular audits when each House of Parliament is able to formulate such requests through resolutions?
- Rather than encompassing all parliamentary committees, is it desirable to limit the statutory right to submit requests for audits to the Auditor-General to the Public Accounts and Estimates Committee, given its key role in the public accountability process?
- As raised by the Department of Treasury and Finance, is there a need for legislative change which more explicitly addresses the inter-relationship between protection of the Auditor-General's independence, the requirement of the position to consult with the Committee on various matters, and the position's accountability to Parliament?
- Are there any other issues considered to be relevant to this potential amendment to the Audit Act?

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

#### **Background to this discussion topic**

The Victorian Parliament, through legislation, has 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*
- 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.

As mentioned in the opening paragraphs of this chapter, the constitutional protection accorded the position of Auditor-General covers three key elements, appointment, independence and tenure. The breadth of this protection distinguishes the Auditor-General from the three other officers of Parliament, with the independence only of the Ombudsman and Electoral Commissioner enshrined in the Constitution Act. Provisions governing their appointment and tenure are set out in their respective enabling legislation which is the case for all of the provisions relating to the Director, Police Integrity.

As Parliament's appointed auditor, the Auditor-General 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. The reverse situation applies to the Victorian Auditor-General's Office, whose administrative actions may be investigated by the Ombudsman under the *Ombudsman Act 1973*.

While the Auditor-General's financial audits of the officers must be conducted annually, the frequency of any performance audits covering the extent to which their operations have been managed in an economic, efficient and effective manner is a discretionary matter for determination by the Auditor-General, when compiling annual audit plans.

The accountability obligations to Parliament of the Auditor-General, as set out in the Audit Act, for the discharge of that position's statutory powers and functions are quite structured and different to those described above for the other three officers of Parliament. They include, in addition to several areas requiring consultation with the Committee, a set frequency (at least every three years) for a performance audit involving an external appointee with the process managed by the Committee on behalf of Parliament.

The difference in accountability regimes is 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.<sup>34</sup>

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:<sup>35</sup>

- 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.

In its response to this recommendation, the Government stated that it will give the matter further consideration. It also stated:<sup>36</sup>

*In considering this recommendation, the Government will also bear in mind the potential risk that Parliamentary Committee involvement in oversight of the Electoral Commissioner may reduce the independence of the office.*

*The Government fully supports a closer relationship between Parliament and its independent statutory officers. Such a relationship is best established through protocols*

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

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

36 Victorian Government, response to the Committee's *Report on a legislative framework for independent officers of Parliament*, tabled 10 August 2006, p.6

*and existing reporting arrangements, rather than providing for such arrangements in legislation as the recommendation suggests. It is unclear exactly how such a relationship could be enshrined and mandated in the legislation. The Government believes existing processes, including appointment and selection, and reporting are sufficient.*

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 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.

On 23 November 2009, the Premier announced a review 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 Premier stated that the review would be conducted by the Public Sector Standards Commissioner, assisted by a newly-appointed Special Commissioner. The review is expected to report by 31 May 2010. The Committee will look to take appropriate account of the recommendations of this report when preparing its report on this Inquiry.

### ***Discussion issues pertaining to this subject***

In identifying this issue as a discussion point for its Inquiry, the Committee initially 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 results of the government's review of Victoria's integrity and anti-corruption systems announced by the Premier on 23 November 2009, which encompasses the Auditor-General, are 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.

Given that the focus of the Committee's Inquiry is on the provisions of the Audit Act, this discussion paper includes one possible option for addressing within the Act some of the issues raised in 2006 by the previous Committee. This option could take the form of 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 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.



### **Discussion issues continued...**

At this discussion stage of its Inquiry, the Committee invites the views of interested parties on this subject in the context of the Audit Act and specifically on the following discussion points:

- Should a designated audit frequency for performance audits by the Auditor-General of the Ombudsman, Electoral Commissioner and the Director, Police Integrity be incorporated within the Audit Act as a formal signal to the Auditor-General of Parliament's accountability expectations of the three positions?
- What would be the ideal indicative frequency for these performance audits?
- Should such performance audits of officers of Parliament be done by an external independent auditor rather than by another officer of Parliament?
- Do the independent investigative powers of the Special Investigations Monitor set out in the *Police Integrity Act 2008* eliminate wholly or in part any need for strengthening, via the Audit Act, the current accountability obligations of the Director, Police Integrity?
- Are there any other matters considered to be relevant to this discussion issue?

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

#### **Background to this discussion topic**

In Victoria, the Executive presents two appropriation Bills to Parliament, one relating to the departments of Parliament and one addressing the budget estimates of government departments. The Auditor-General's annual budget forms part of Parliament's annual Appropriation Act.<sup>37</sup>

Following parliamentary debate, the Lower House, the Legislative Assembly, votes on the two Appropriation Bills. The Upper House, the Legislative Council, 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 guarantee an excessive budgetary allocation to the Auditor-General which is 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.

<sup>37</sup> See, for example *Appropriation (Parliament 2009/2010) Act 2009* (Vic), Schedule 1

The Committee's role is strictly consultative and enables its views on the Auditor-General's budget to be conveyed, whenever necessary, to the Executive. Final determination of the budget as proposed to Parliament remains the prerogative of the government.

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

For example, the Australian 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.<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup>

In the UK and New Zealand jurisdictions, the legislature 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.<sup>41</sup>

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.

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. That Committee considered that the budgetary arrangements for these two positions should be brought in line 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.<sup>42</sup> This latter element of the recommendation involved extension of the Committee's current consultative function relating to the Auditor-General.

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

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

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

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

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

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.'*<sup>43</sup>

In a submission dated 30 October 2009 to the Committee on its Inquiry, 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.'*<sup>44</sup>

The Auditor-General also stated:<sup>45</sup>

*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 has 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.'*<sup>46</sup>

### **Discussion issues pertaining to this subject**

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.

However, following receipt of the Auditor-General's views and proposal for a more decisive role for Parliament on the position's annual budget, the Committee has 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 impact on the Government's own view that it remains responsible for the expenditure of taxpayers' funds. The Committee is 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.

At this discussion stage of its Inquiry, the Committee invites the views of interested parties on this subject and specifically on the following discussion points:

- Should the Audit Act be amended to provide that Parliament has the decisive role in determining the Auditor-General's annual budget, given the Auditor-General's status as Parliament's appointed auditor and, if so, what form should that decisive role take?

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

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

45 *ibid.*

46 *ibid.*

***Discussion issues continued...***

- Alternatively, should the Committee's current consultative participation in the determination of the Auditor-General's annual budget be varied or extended in the Audit Act, for example, to include tabling of a report to Parliament?
- Are there any other matters considered to be relevant to this discussion issue?

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

***Background to this discussion 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 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, the Auditor-General has 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.<sup>47</sup> The Auditor-General did not outline the rationale for this recent additional suggested amendment but will be available to do so during the Inquiry's public submissions and hearings stages.

The Committee's initial view on the issue is 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. Such input is provided without interfering with the Auditor-General's right to determine the final form 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.

***Discussion issues pertaining to this subject***

The Committee intends to explore this issue in more depth during its Inquiry. At this stage, it invites input from interested parties on:

- The Auditor-General's proposal to remove the statutory requirement in section 15(2) of the Audit Act to consult with the Committee on performance audit specifications.
- Would this removal substantially alter and weaken the relationship between Parliament and the Auditor-General?
- Are there any other matters considered to be relevant to the subject?

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47     *ibid.*

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

#### **Nature of this discussion topic**

Section 94C of the *Constitution Act 1975* provides that the Auditor-General holds office for seven years and is eligible for re-appointment. 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 Committee stated in its report that this arrangement would reinforce the independence of officers of Parliament.<sup>48</sup>

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.<sup>49</sup>

The Auditor-General has proposed to the Committee that the Audit Act be amended in line with the previous Committee's recommendation.<sup>50</sup>

All provisions relating to the Auditor-General's appointment and tenure of office are enshrined in the Constitution Act and cannot be changed without a referendum. In a paper to the Committee, the Department of Treasury and Finance has also identified this circumstance.<sup>51</sup>

The Committee has therefore formed an initial view that the Audit Act should not be the repository for provisions on employment restrictions for a person vacating the office of Auditor-General. Such action would be contrary to the principle of constitutional protection of all matters impacting on the Auditor-General's appointment and term of office.

One possible way to address this issue, without impacting on the constitutional position, would be to establish the recommended 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.

The paper from the Department of Treasury and Finance also asked if it is '*appropriate to support and apply this recommendation to just one independent officer of Parliament, without addressing the broader context and application to all independent officers?*'<sup>52</sup> This is a valid point which extends beyond the Audit Act as provisions governing the appointment of the other independent officers of Parliament are, unlike the Auditor-General, set out in their respective enabling

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

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

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

51 Department of Treasury and Finance, 'Review of the Audit Act 1994', correspondence to the Committee, December 2009, p.5

52 *ibid.*

legislation. As such, there is no constitutional protection applicable and the previous Committee's recommendation could readily apply to the other independent officers if deemed desirable. The Government's recently announced review of Victoria's integrity and anti-corruption system may find this issue relevant to its deliberations.

### ***Discussion issues pertaining to this subject***

The Committee wishes to consider the views of interested persons on this issue and specifically on the following discussion points:

- Should employment restrictions within the Victorian public sector be placed on a person vacating the office of Auditor-General and, if so, what should be the nature of those restrictions?
- If employment restrictions are considered to be desirable, should they be addressed in the Audit Act, in the terms of appointment established for the position of Auditor-General or in some other way?
- Are there any other matters considered to be relevant to this discussion issue?

### **3.2.9 *Production of documents by the Auditor-General to the Committee***

#### ***Nature of this discussion topic***

Section 28 of the *Parliamentary Committees Act 2003* provides that a Joint Investigative 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 investigative 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 or divulgence of such information except when carrying out those functions.

In correspondence to the Committee, the Auditor-General has 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.*'<sup>53</sup>

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

The Auditor-General has proposed to the Committee that a new provision be inserted in the Audit Act that:

*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 ...*<sup>54</sup>

In a paper to the Committee on suggested questions relating to its Inquiry, the Department of Treasury and Finance has raised the issue on whether:

*... 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?*<sup>55</sup>

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 ...'<sup>56</sup> The Department suggested the following issues could be considered:<sup>57</sup>

*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?*

*Is it appropriate for such a proposal to be considered for one independent officer of Parliament, without broader application to all independent officers?*

The first issue on the doctrine of executive privilege (public interest immunity) raised by the Department is relevant to the Committee's Inquiry and has been included as a discussion point at the end of this section. The government's guidelines for appearing before Victorian parliamentary committees define public interest immunity as:<sup>58</sup>

*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.*

The second issue is a matter that extends beyond the provisions of the Audit Act to cover the enabling legislation of other officers of Parliament. It may be relevant for consideration as part of the government's recently-announced review of Victoria's integrity and anti-corruption system.

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54      ibid.

55      Department of Treasury and Finance, 'Review of the Audit Act 1994', correspondence to the Committee, December 2009, p.3

56      ibid., p.6

57      ibid., p.6

58      Premier's Circular No.2003/1, *Guidelines for appearing before State Parliamentary Committees*, October 2002, p.14

### **Discussion issues pertaining to this subject**

The Committee's initial view on this proposed amendment is that it could impede the investigative activities of committees established by Parliament. The Committee also considers 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'.

From a wider accountability viewpoint, the Committee considers that the Auditor-General's special relationship with Parliament extends beyond the carrying out of audit functions on behalf of Parliament to encompass the flow of information and documents to the Committee to assist in upholding accountability in the public sector and maximising the efficiency and effectiveness of Parliament's scrutiny of the management of public resources in Victoria.

The exchange of information and documents 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 this relationship as constituting a risk to the Auditor-General's independence or 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 notes that parliamentary committees have the power to hold hearings *in camera*<sup>59</sup>. 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.

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 monitoring roles in relation to the Auditor-General's statutory functions and to the wider areas of public sector performance and accountability.

The Committee intends to further consider this possible amendment and the Auditor-General's specific proposal during its Inquiry. It therefore invites the views of interested parties on the following discussion points:

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



### **Discussion issues pertaining to this subject**

- Are there any grounds to remove, through legislative amendment, any obligation for the Auditor-General to produce documents or information required by a parliamentary committee?
- As raised by the Department of Treasury and Finance, can or 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?
- Does the special role of the Public Accounts and Estimates Committee in overseeing public accountability and as Parliament's representative in the accountability framework established for the Auditor-General reinforce the importance of ensuring there are no impediments to the flow of documents or information from the Auditor-General to the Committee?
- As raised by the Department of Treasury and Finance, is there scope to further increase the independence of the Auditor-General in relation to the position's interaction and relationship with parliamentary committees?
- Are there any other matters considered to be relevant to this discussion issue?

### **3.2.10 Audit coverage of Ministers and/or Ministers' offices**

#### **Nature of this discussion topic**

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:<sup>60</sup>

*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 ...*

On a related matter concerning ministerial accountability, the Auditor-General and the Department of Treasury and Finance have suggested in correspondence to the Committee that its Inquiry into

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

the Audit Act incorporate as a discussion issue the question of audit coverage of Ministers and/or Minister's offices.

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 2008-09 annual report shows that aggregate expenditure on ministerial salaries and allowances amounted to \$6.5 million in that year. The Department's financial transactions are audited by the Auditor-General.<sup>61</sup>

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.

The Auditor-General has proposed that, through legislative change, Ministers' offices should become subject to an annual financial audit by the Auditor-General.<sup>62</sup> The Department of Treasury and Finance has 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.<sup>63</sup>

### ***Discussion issues pertaining to this subject***

Both the Auditor-General and the Department of Treasury and Finance have not elaborated on their respective suggestions and the Committee intends to further discuss the issues with the two organisations during its Inquiry. The Committee's consideration of the issues will include their feasibility of implementation having regard to the constitutional doctrine of individual ministerial responsibility.

The Committee has also identified one further discussion issue concerning Ministers which it intends to consider during its Inquiry. This issue relates to the value or otherwise of including within the Audit Act a provision that involves the Auditor-General in 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 identified, during its visit to Western Australia, that a provision along these lines is set out in that state's audit legislation.<sup>64</sup>

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61 Department of Premier and Cabinet, *2008-09 Annual Report*, p.77

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

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

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

**Discussion issues continued...**

The Committee invites input from interested parties on the above matters and specifically on:

- Should individual ministers and/or their offices be subject to an annual financial audit by the Auditor-General?
- Should the activities of individual ministers be subject to periodic performance audits by the Auditor-General?
- Alternatively, would such audits run across the responsibility of Ministers to directly report to and be held accountable by Parliament?
- Would audits by the Auditor-General, whether financial or performance, of individual ministers contravene the constitutional status of ministers?
- The desirability or otherwise of amending the Audit Act to require the Auditor-General to express an opinion to Parliament in cases where a Minister has determined not to provide information to Parliament relating to agencies within his or her portfolio.
- Are there any other matters considered to be relevant to the subject?

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

**Nature of this discussion 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 correspondence to the Committee, the Auditor-General has 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 has suggested that advice from the Chief Parliamentary Counsel is likely to be needed on the issue.

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.<sup>65</sup>

In its paper to the Committee, the Department of Treasury and Finance has asked whether it is '*necessary or appropriate for costs of such an audit to be met from a special/standing*

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

*appropriation, and is this consistent with the principles of the budgetary appropriation framework in place?*<sup>66</sup>

On this point, the Committee 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.

***Discussion issue pertaining to this subject***

Subject to the Chief Parliamentary Counsel's assessment of this issue, the Committee's initial view is that there is not likely to be a need for legislative change to the Audit Act. However, interested parties may have a different view and the Committee would welcome their input.

**3.2.12 Tabling of Auditor-General's reports**

Currently, the Audit Act 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 in recent memory has tabled all reports in Parliament. The Committee in principle supports the Auditor-General being required to table or present to Parliament all reports in Parliament on the basis that ultimately the Auditor-General is an officer of the Parliament and, while operating independently, reports to Parliament.

***Discussion issue pertaining to this subject***

Should the Act be amended so that the Auditor-General is required to table all reports in Parliament?

66 Department of Treasury and Finance, 'Review of the Audit Act 2004', correspondence to the Committee, December 2009, p. 6

## 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

#### 4.1.1 *Judicial independence and judicial accountability*

From both constitutional and accountability perspectives, this topic has several distinguishing aspects 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.*'<sup>67</sup>

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.*'<sup>68</sup>

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 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:<sup>69</sup>

*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.*

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.

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67 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

68 Chief Justice Gleeson, *Public Confidence in the Judiciary*, Speech to the Judicial Conference of Australia, Launceston, 27 April 2002

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

### 4.1.2 The current accountability regime for Victoria's Courts

Information relating to the financial operations of Victoria's Courts is included within the annual financial statements of the Department of Justice. The Department's financial statements for the year ended 30 June 2009 show 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 \$370.1 million in the 2008-09 financial year.<sup>70</sup> 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 1: Performance of Victoria's Courts**

Performance Measures	Unit of measure	2008-09 target	2008-09 actual	2007-08 actual	2006-07 actual
<b>Quantity</b> Criminal and non criminal matters disposed <sup>1</sup>	Number	335,614	371,095	359,248	334,477
<b>Quality</b> Quality of court registry services	per cent	85	97.9	95	90
Quality of dispute resolution services	per cent	90	89	92	91
<b>Timeliness</b> Criminal and non-criminal matters disposed within agreed timeframes	per cent	80	80	80	81
<b>Cost</b> Total output cost <sup>2</sup>	\$ million	358.5	370.1	315.5	290.7

#### Commentary on performance

1. *The higher than expected result is attributed to the expansion and increase in offences subject to infringements flowing into the Magistrate's Court and Children's Court, and the inclusion of Children and Young Persons Infringement Notice System matters.*
2. *The higher than estimated total output cost in 2008-09 is caused by additional funds provided to the State Coroner's Office as part of the bushfire response and additional funds provided to the Supreme Court as part of the Reducing Court Delays initiative. Additional resources were provided to assist the higher level of matters disposed.*

**Source: Department of Justice, Annual Report 2008-09**

The accountability regime for Victoria's Courts also includes an annual financial audit by the Auditor-General of the Department's financial statements under the provisions of the Audit Act. This audit, which attests to the material accuracy of reported financial information is, in respect to Court data incorporated in those financial statements, an important manifestation of the administrative accountability of Victoria's Courts for the use each year of significant levels of public funds.

On the financial data of Courts, the Auditor-General has proposed in correspondence to the Committee that legislative action occur to provide that the operations of the Courts are subject to the Auditor-General's financial audit.<sup>71</sup> The Auditor-General has not elaborated on this point and the Committee intends to explore the issue further with the Auditor-General during its Inquiry.

<sup>70</sup> Department of Justice, *2008-09 Annual Report*, October 2009, p.116

<sup>71</sup> Mr D Pearson, Auditor-General, correspondence to the Committee, received 30 October 2009

In terms of the accountability of Courts beyond the reporting of financial data, the Department of Justice obtained legal advice in 1996 which 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 is argued 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.

With regard to the administrative functions of the Courts, the Auditor-General advised the Committee that a protocol has been adopted by Victoria's Heads of Jurisdiction, after consultation initiated by the Auditor-General. This protocol enables, from time to time and subject to specified conditions, the Auditor-General to conduct performance audits of non-judicial functions under the Audit Act. The protocol, effective from July 2006, is premised on the following two key principles:<sup>72</sup>

- 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 five 'guidelines' which establish conditions to apply to a performance audit planned or undertaken by the Auditor-General:

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 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 would 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.<sup>73</sup>

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.<sup>74</sup> When responding to the Committee on this issue, 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:<sup>75</sup>

*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.<sup>76</sup> 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.

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

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

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

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



### **Discussion issues pertaining to this subject**

The Committee seeks the views of interested parties on the appropriateness or otherwise of formalising within the Audit Act the right of the Auditor-General to enter into arrangements with Victoria's Heads of Jurisdiction (the Heads of Courts) for the conduct from time to time of performance audits of non-judicial functions of Courts. If such action is viewed as appropriate, the Committee wishes to consider during its Inquiry the extent to which the legislation could detail the scope of such performance audits.

By way of example, the State Services Authority is precluded under its enabling legislation from conducting an Inquiry or special review into the exercise of functions of a judicial or quasi-judicial nature. The legislation also requires that reviews conducted by the Authority in relation to a body which exercises judicial or quasi-judicial functions, must not impede in any way the exercise of such functions by that body.<sup>77</sup> Equivalent restrictions could be inserted into the Audit Act if it is ultimately determined as feasible to formalise audit arrangements on the non-judicial functions of Courts within the Act.

Relevant to this latter point are suggested questions for the Committee's Inquiry submitted by the Department of Treasury and Finance in a recent paper to the Committee that ask whether, as a matter of principle, the Audit Act should *expressly articulate the role and 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*.<sup>78</sup>

As with the discussion in the preceding chapter on the administrative functioning of Parliament, the Committee recognises 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. The Committee's visits to Western Australia and New Zealand reinforced to it the sensitivity and complexity of the matter.

The Committee notes the views expressed to it by the Auditor-General and the increasing importance attached by the Courts to accountability and transparency in relation to their administrative operations. It recognises that the outcome of its deliberations on this matter is likely to ultimately require expert assessment by the Courts and the Chief Parliamentary Counsel.

At this discussion stage of its Inquiry, the Committee invites the views of interested parties on this subject and specifically on the following discussion points:

- To what extent should the non-judicial functions of Victoria's Courts be subject to financial and performance audits by the Auditor-General?
- Are there constitutional or legal factors which automatically rule out any proposal to establish a statutory backing within the Audit Act for audit arrangements entered into between the Heads of Jurisdictions and the Auditor-General?

77 *Public Administration Act 2004* (Vic), s. 60

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

***Discussion issues continued...***

- Assuming there are no insurmountable constitutional or legal impediments, would it be in the public interest to formalise within the Audit Act arrangements entered into between the Heads of Jurisdiction and the Auditor-General for the conduct, from time to time, of performance audits of the administrative functions of Courts?
- If legislative provisions can be developed, should all of the powers and responsibilities assigned to the Auditor-General under the Audit Act apply to arrangements entered into between the Heads of Jurisdiction and the Auditor-General?
- If legislative provisions can be developed, would it be important to include a provision within the Audit Act which expressly precludes the Auditor-General from commenting on the judicial functioning of Victoria's Courts?
- From an accountability viewpoint, are the conditions underpinning the current protocol adopted by the Heads of Jurisdiction in consultation with the Auditor-General reasonable, unduly restrictive or in need of strengthening?
- Are there any other matters considered to be relevant to this discussion issue?

# **CHAPTER 5: OPERATIONAL POWERS AND RESPONSIBILITIES OF THE AUDITOR-GENERAL**

## **5.1 Scope of the audit role**

As mentioned in section 2.2, 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 the key areas of focus. A major aspect of the Auditor-General's role in the public sector is now through performance audits, which evaluate the effectiveness of government agencies in achieving outcomes and their efficiency in managing public resources.

Public sector agencies increasingly use external bodies such as private companies and non-government organisations 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 schools.

## **5.2 Potential options for legislative change**

This chapter addresses potential options for changes to the Audit Act that pertain to the Auditor-General's operational powers and responsibilities. The bulk of the amendments to the Act advocated by the Auditor-General in correspondence to the Committee relate to the strengthening of operational powers.

The potential options discussed by the Committee in this chapter encompass both changes to existing provisions and possible new areas of legislative coverage. They include issues raised by the Auditor-General and the Department of Treasury and Finance as well as issues identified by the Committee during its research.

The Committee's commentary under particular discussion topics includes references to matters discussed with parliamentary committees, Auditors-General, government officials and other organisations during the Committee's evidence gathering visits to Western Australia and New Zealand in October and November 2009.

### **5.2.1 *Right of access to premises and records of private sector contractors***

#### ***Background to this discussion topic***

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, overriding secrecy restrictions and Cabinet confidentiality, to any information held by government agencies.

While the 'call for' power under section 11 is strong, it does not enable audit verification that all requested documentation has been produced and constitutes accurate and reliable evidence. In addition, the 'right of access' power under section 12 limits access to the premises of government agencies.

The Auditor-General is able under section 16C of the Audit Act to conduct performance audits of private sector bodies in receipt of financial benefits or assistance from government. 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.

The above limitations in sections 11 and 12 and the exclusion clause in section 16C of the legislation mean that the Auditor-General could face the constraint of an inability to gain access to material and information, such as electronic records, of private sector contractors engaged by the government or one of its agencies in the delivery of a public service or program. Such 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.

In fact, 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 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.

The Auditor-General has 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. The Auditor-General stated to the Committee that:<sup>79</sup>

*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.*

*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.*

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

The Auditor-General regards changes in this area to allow audit to ‘follow the public dollar’ as vital to maintaining strong accountability and protecting the public interest. This view stems from the increasing involvement of the private sector in the delivery of public projects and services, including through Public Private Partnerships (PPPs). The position outlined to the Committee by the Auditor-General also included the following points:<sup>80</sup>

*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.*

*In particular, the provision of a power to carry out a performance audit on matters relating to public money or property is necessary to maintain the Auditor-General’s clear ability to examine the expenditure of public funds, particularly in areas where the sector enters into commercial arrangements with private parties for provision of services. The purpose of this access is not to be able to audit the private sector provider. Rather the object is to provide access to private sector staff who possess or control assets and information of the state to enable sufficient and appropriate audit evidence to be collected to enable the formulation of an independent audit conclusion or opinion.*

*...Failure to make the amendments will result in a loss of transparency and assurance as the mandate of the Auditor-General is eroded by new service delivery models ...*

As pointed out by the Auditor-General, the power of access sought in this instance is essentially a last resort measure to ensure the audit process is not impeded if serious problems are experienced with a contractor.

A live example of the need for a reserve access facility of this nature 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 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. The circumstances ultimately led to a Royal Commission which included as its first recommendation that the public accountability powers of the Auditor-General be extended to circumstances where private sector providers are contracted to provide public services.<sup>81</sup>

Legislation in several other jurisdictions such as Western Australia, Tasmania, New Zealand and the UK provides specific authority for the Auditor-General to gain access to the premises and records of private sector contractors whenever deemed necessary.

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80     ibid.

81     Royal Commission into Metropolitan Ambulance Service, *Report*, Summary Volume, November 2001, p.13

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:<sup>82</sup>

*... 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 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 applies to both contractors and subcontractors engaged in the delivery of public services.

The above commentary focuses on factors which support the granting to the Auditor-General of a right of access to private sector contractors. There is a case against the need for such action and the Committee wishes to ensure that both sides of this issue are open for discussion and fully addressed during its Inquiry.

The main approach to date on this issue in Victoria has centred on the accountability of government and its agencies to effectively manage contracts. 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.

The Committee sees the main supporting rationale for this approach, from the viewpoint of this particular discussion point, as 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.

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. There are no express references in the standard contract to right of access by the Auditor-General as Parliament's appointed auditor. However, some contracts for PPPs, for example the service agreement for the Emergency Alerting System, place an obligation on the contractor to grant access to the Auditor-General.

An emphasis on the quality of contract management and the associated accountability of government and its agencies for effective overseeing of contracts also applies in the Commonwealth. 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 information held by contractors, including third party subcontractors, for the purpose of audits.

The Committee intends to liaise with the Australian Parliament's Joint Committee on Public Accounts and Audit on its findings on this subject following completion of that Committee's current Inquiry into the Commonwealth's audit legislation.

A further issue which is relevant to this subject is the position of contractors and whether any statutory right of access assigned to the Auditor-General would unnecessarily impede their right

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82 *Western Australian Parliamentary Debates*, Legislative Assembly, 29 June 2006, p.4590 (Hon. E Ripper)

to manage their contractual obligations without external pressure or interference. The question of adequate protection of their intellectual property and competitive strengths is also worthy of assessment. The Committee intends to address these issues during discussions with a sample of contractors during the course of its Inquiry.

### ***Discussion issues pertaining to this subject***

It can be seen from the above commentary that the Auditor-General has drawn attention to the increasing involvement of the private sector in the delivery of public services in Victoria and the associated implications and challenges of this changing environment to the audit mandate assigned to the position as Parliament's appointed auditor.

Some Australasian and overseas jurisdictions have responded to similar developments with the creation of a statutory basis for the Auditor-General to access, whenever deemed necessary for official audit purposes, the premises and records of private sector contractors. Other jurisdictions, including Victoria, have directed attention outside audit legislation to the quality of contract management by the responsible government agencies and clear specification of contractual obligations.

The Committee wishes to consider input from interested parties on these respective approaches. It is particularly interested in views on the nature of any action, within the provisions of the Audit Act, that could be taken to ensure that there is no potential for any erosion of Parliament's scrutiny of public administration in Victoria from the changing patterns of service delivery in the public sector. Such action could include the assignment of complete access authority to the Auditor-General or the segmenting of access authority according to specified tiers of contracts based on criteria such as expenditure thresholds, contract categories (for example PPPs and alliance projects) etc.

In a recent paper to the Committee, the Department of Treasury and Finance has cited the following questions pertinent to this issue:<sup>83</sup>

- Do changes 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?
- Is it appropriate to extend the information-gathering powers of one independent officer of Parliament (the Auditor-General) beyond the public sector, without broader application to other independent officers (such as the Ombudsman and the Electoral Commissioner) so that their powers are also not limited?
- 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?

83 Department of Treasury and Finance, 'Review of the Audit Act 1994', correspondence to the Committee, December 2009, pp. 2-3

### **Discussion issues continued...**

- Could the extension of powers beyond the public sector have a direct impact on the rights of individuals within the community?

During its Inquiry, the Committee intends to seek the Department's views on these questions. At this point, it invites the views of interested parties on the questions raised by the Department as well as on the following related discussion points which focus on the right of access powers:

- Should the Audit Act be amended to assign to the Auditor-General a right of access to the premises and records of private sector contractors engaged in the delivery of public services in Victoria?
- If legislative amendments are considered to be warranted, what form should they take? For example, should complete access authority be assigned to the Auditor-General or should access authority be segmented according to specified tiers of contracts based on particular criteria such as types of contracts and expenditure thresholds etc?
- If legislative amendments are considered to be warranted, are there any conditions that should be placed on the Auditor-General's right of access, such as the ring-fencing of access to records and systems relating to the delivery of contracted services, and an expectation of use only as a last resort measure etc?
- If legislative amendments are not deemed as necessary, should any non-statutory action be taken in Victoria to better address this issue, such as a strengthening of contractors' obligations in standard clauses to provide suitable access to the Auditor-General?
- Are there any other matters considered to be relevant to this discussion issue?

## **5.2.2 Extent of legislative authority to investigate and audit matters pertaining to public money and public property**

### **Background to this discussion topic**

The Audit Act does not contain an explicit omnibus investigative provision governing the right of the Auditor-General to examine any matter pertaining to the use of public money or public property.

Section 3A, which was added to the legislation as part of a suite of amendments in 2003, addresses this issue in a non-explicit manner. It sets out the objectives of the Act covering the various main audit 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 of public resources.*

While not an all-embracing omnibus provision, 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 5.2.1, section 16C(3) excludes in the definition of financial benefit contractual arrangements with the private sector for the provision of goods and services on a commercial basis.

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 Auditor-General has proposed 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.*'<sup>84</sup>

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 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.<sup>85</sup> In New Zealand, the Committee was informed during its visit that the subject was widely discussed in the lead-up to its 2001 revised audit legislation but it was determined that no action was necessary as the Auditor-General's functions and powers were sufficiently clear in the amending Bill.

One 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, as mentioned above, is currently addressed across a number of sections of the Audit Act. Such clarity would remove any

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

85 *Auditor General Act 2006* (WA), s. 18(2); *Audit Act 2008* (Tas), s. 23

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 is 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.

The use of public moneys by non-government bodies, other than for contractual services, is already within the purview of the Auditor-General. It is a moot point therefore as to whether there is any need to strengthen or extend the Auditor-General's investigative powers covering public moneys and public property if a statutory basis was established within the Audit Act for the Auditor-General's right of access to private sector contractors.

### ***Discussion issues pertaining to this subject***

For the above reasons, the Committee regards this issue, at the discussion stage of its Inquiry, as directly connected to the preceding discussion point 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 does 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.

In its recent paper to the Committee concerning this Inquiry, the Department of Treasury and Finance has 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 has also suggested as a discussion issue if such a notion is '*an infringement of the intended spirit of the Constitution Act 1975 and the Westminster model of Government.*'<sup>86</sup>

It is against the above background that the Committee invites the views of interested parties on this subject and specifically on the following discussion points:

- Should the Audit Act be amended to assign to the Auditor-General an explicit investigative power covering all matters relating to the use of public money or public property?
- As raised by the Department of Treasury and Finance, would extension of the Auditor-General's powers to cover entities outside the Executive Government be contrary to the intended spirit of the Constitution Act and the Westminster system of government?
- Would the case for legislative change on this issue be reinforced, weakened or unaffected if a statutory basis was established for the Auditor-General's right of access to records and systems of private sector contractors?
- Are there any other matters considered to be relevant to this discussion issue?

86 Department of Treasury and Finance, 'Review of the Audit Act 1994', correspondence to the Committee, December 2009, p.3

### 5.2.3 Provisions relating to policy objectives of government

#### **Nature of this discussion topic**

As is common in most audit statutes, 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.

#### **Discussion issues pertaining to this subject**

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 considers there may be scope through its Inquiry to identify avenues for refreshing the legislative approach to this important topic without eroding the essential requirement of preserving the right of an Executive Government to unfettered determination of policy.

In identifying this issue as a discussion topic, the Committee recognises that the subject may ultimately require expert input by the Chief Parliamentary Counsel.

The Committee invites the views of interested parties on this subject and specifically on the following discussion points:

- The feasibility of defining policy at its highest or macro level within the legislation.

**Discussion issues continued...**

- The feasibility of identifying the characteristics of subsets of macro policy which could assist audited agencies and the Auditor-General in their reaching of agreement on the boundaries of policy and on matters of an operational nature, applicable to particular audits.
- The extent to which the existing statutory definition of policy assists audited agencies and the Auditor-General in their deliberations on the boundaries of policy concerning particular audits.
- The desirability or otherwise of removing the existing definition of policy objectives from the Audit Act
- Any other matters considered to be relevant to the subject.

**5.2.4 Incidental functions of the Auditor-General**

**Nature of this discussion topic**

Section 16E was inserted in the Audit Act in 2003 to allow the Auditor-General to provide 'other auditing services' to audited agencies. The section addresses the issue from an agency perspective and requires consent by the agency from the relevant Minister.

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.*'<sup>87</sup>

The Auditor-General has for example produced in recent years a range of guidance material in association with its 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 traditionally held the 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 would encompass the services component of the above output.

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 incidental services.

In correspondence to the Committee, the Auditor-General has drawn attention to the absence of an explicit authority for the provision of incidental functions in the Audit Act and indicated that such

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87 Victorian Auditor-General's Office, 2009-10 Annual Plan, May 2009, p.30

functions have expanded significantly in the contemporary environment. The Auditor-General has proposed 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 of Commonwealth funding spent by the State.<sup>88</sup>

### ***Discussion issues pertaining to this subject***

The Committee recognises that care needs to be exercised with incidental services in an audit environment to ensure audit independence is not impaired.

It also recognises the potential value of the action suggested by the Auditor-General and that such action is not likely to weaken 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.

The Committee invites input from interested parties on:

- The level of significance that should be directed in the Audit Act to non-audit functions of the Auditor-General.
- Any other matters considered to be relevant to the subject.

## **5.2.5 Consolidation of Auditor-General's general powers**

### ***Nature of this discussion 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 which represent, for all but one objective, the individual powers of the Auditor-General.

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.

The various powers of the Auditor-General are not presented in a consolidated form but are spread throughout the Audit Act.

The Auditor-General has 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.<sup>89</sup>

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 Committee confirmed the Western Australian approach to the issue during its visit to that state.

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

89 *ibid.*

### **Discussion issues pertaining to this subject**

The Committee considers that, while the powers of the Auditor-General are fully addressed in the Audit Act, the Auditor-General's proposal to bring together such powers in a consolidated listing could bring greater clarity to their presentation and therefore warrants discussion.

The Committee invites input from interested parties on:

- The need to bring together in the Audit Act the various powers of the Auditor-General.
- Any other matters considered to be relevant to the subject.

## **5.2.6 Application of Auditing Standards**

### **Nature of this discussion 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* (Clth).

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 also apply additional standards, not inconsistent with professional auditing standards, with any additional standards summarised in the Auditor-General's annual report.

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:<sup>90</sup>

*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 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 Western Australian, Commonwealth and New Zealand audit statutes assign this discretion, with the latter two jurisdictions going further and providing the Auditor-General with the power to set the standards that are to apply to the conduct of audit functions.

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 New 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.

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90     ibid.

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.<sup>91</sup> 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.

### ***Discussion issues pertaining to this subject***

The Auditor-General has no direct control over the direction and content of future standards. The Committee therefore invites input from interested parties on the following discussion issues:

- The desirability or otherwise, of assigning to the Auditor-General within section 13 of the Audit Act a more explicit discretionary power in relation to adoption of professional auditing and assurance standards.
- The value of inserting within the Audit Act a power for the Auditor-General to set the official standards to apply to the performance of audit functions, accompanied by a responsibility to explain in VAGO's annual report the nature of adopted standards and the reason for any departures from professional standards.
- Any other matters considered to be relevant to the subject.

## **5.2.7 Legal Professional Privilege**

### ***Nature of this discussion topic***

As pointed out in an earlier section of this chapter, the access powers of the Auditor-General to documents and information required for the efficient and effective conduct of audits, as set out in sections 11 and 12 of the Audit Act, are extensive. In particular, the access powers under section 12 relating to information held within government agencies override secrecy provisions in legislation and Cabinet confidentiality.

91 Australian Auditing and Assurance Standards Board, Standard on Assurance Engagements ASAE 3500, *Performance Engagements*, July 2008

What is less evident to the Committee is the extent to which sections 11 and 12 apply if claims of legal professional privilege are made to the Auditor-General by audited agencies and/or individual members of the community, when requested to furnish information.

Some jurisdictions have addressed this issue in audit legislation. 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.<sup>92</sup> 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 legal proceedings.

While the Australian Auditor-General has received legal advice confirming that legal professional privilege does not limit the Auditor-General's right of access under the Australian audit legislation, the Auditor-General has advised the Australian Parliament's Joint Committee of Public Accounts and Audit that agencies or their legal advisors have at times made claims to the contrary. The Auditor-General has advocated to the Joint Committee that the legal provisions in the Australian audit legislation be strengthened based on the Western Australian approach and the approach taken in section 9 of the *Commonwealth Ombudsman Act 1996*.<sup>93</sup>

### ***Discussion issues pertaining to this subject***

Because of the absence of any explicit reference in the Audit Act to legal professional privilege, the Committee invites input on the subject from interested parties and particularly on:

- The need or otherwise for the Audit Act to explicitly address legal professional privilege in the context of the Auditor-General's information gathering powers.
- The extent from a legal perspective that audit legislation can fully address this matter.
- Any other matters considered to be relevant to the subject.

## **5.2.8 Annual audits of performance indicators developed by government and its agencies**

### ***Nature of this discussion 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 annual report on operations. The

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92 *Auditor General Act 2006* (WA), s. 36; *Public Audit Act 2001* (NZ), s. 31

93 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



form and content of performance information included by relevant agencies in their annual report on operations is determined by the responsible portfolio Minister.<sup>94</sup>

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.

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.

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.

The Committee wishes to consider 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, for all agencies, by the two additional elements of accounting controls and key performance indicators.

In correspondence to the Committee on its Inquiry, the Auditor-General has proposed 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.<sup>95</sup>

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.

Clause 39 of the Public Finance and Accountability Bill 2009, introduced to Parliament by the Minister for Finance on 8 December 2009, requires 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. .

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94 Department of Treasury and Finance, *Presentation and Reporting of Performance Information*, FRD 27A, January 2009

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

### ***Discussion issues pertaining to this subject***

Subject to the passage of the Public Finance and Accountability Bill 2009 through Parliament in 2010, the Committee intends to consider the desirability or otherwise for the Audit Act to be amended to provide for the audit of the government's annual outcomes progress report by the Auditor-General.

The Committee welcomes input from interested parties on the above points and specifically on:

- Should the Auditor-General's annual attest audit functions set out in the Audit Act include the additional two elements of accounting controls and all key performance indicators developed by agencies?
- Should the Auditor-General be given the power to dispense with all or part of an annual audit of performance statements prepared by agencies?
- The desirability or otherwise for an amendment to the Audit Act which, subject to passage of the Public Finance and Accountability Bill 2009 through Parliament, requires the Auditor-General to audit the government's annual outcomes progress report.
- Any other matters considered to be relevant to the subject.

### **5.2.9 Audit of overseas entities**

#### ***Nature of this discussion topic***

The Auditor-General has proposed to the Committee 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 remove any doubt that subsidiaries of agencies established overseas fell within the mandate of the Auditor-General.

In the Western Australian audit legislation, this matter is addressed by provisions that define foreign subsidiaries and require the appointment of the Auditor-General as their auditor.<sup>96</sup> The Commonwealth audit legislation covers this matter through inclusion of subsidiaries in the provisions identifying the authority of the Auditor-General to audit companies.<sup>97</sup>

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96 *Auditor General Act 2006 (WA)*, s.16

97 *Auditor-General Act 1997 (Cwlth)*, s. 13

### ***Discussion issues pertaining to this subject***

While an entity controlled by an agency or the state, such as 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 position may be less clear for companies and subsidiaries incorporated under overseas legislation. The Auditor-General's proposed amendment to the Audit Act aims to clarify the issue.

The Committee welcomes input from interested parties on the issue, including:

- The need or otherwise for the Audit Act to clarify the authority of the Auditor-General to conduct audits of overseas subsidiaries.
- Any other matters considered to be relevant to the subject.

#### **5.2.10 Disclosure of information to external parties**

##### ***Nature of this discussion 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.

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 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.

In correspondence to the Committee, the Auditor-General has expressed the view 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.<sup>98</sup>

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 later suggested amendment of the Auditor-General would apply to the circumstances identified by the Auditor-General in the initial proposal in that, if that proposal proceeded,

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

investigative or regulatory bodies could use received information to assist in the discharge of their responsibilities but could not disclose such information to other parties.

### **Discussion issues pertaining to this subject**

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 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 Committee welcomes input from interested parties on:

- The desirability or otherwise of legislative action to strengthen within the Audit Act the provisions dealing with disclosure of information to external parties.
- Are there other entities with disclosure provisions that might elucidate this issue?
- Are there any other matters considered to be relevant to the subject?

### **5.2.11 Legal issues experienced by the Auditor-General concerning sections 3, 12 and 15(1)(b) of the Audit Act**

#### **Nature of this discussion topic**

The Auditor-General included the following narrative in the performance audit report *Managing Complaints Against Ticket Inspectors* tabled in Parliament in July 2008. The narrative 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).<sup>99</sup>

*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*

99 Victorian Auditor-General's Office, *Managing Complaints Against Ticket Inspectors*, July 2008, p.2

*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 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.*

*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 legal issues that were reported to Parliament at the conclusion of this particular performance audit, the Auditor-General has 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.<sup>100</sup>

### ***Discussion issues pertaining to this subject***

One possible avenue for consideration with regard to this subject is the legislative approach relating to the control concept adopted in the Canadian audit legislation. That legislation, when addressing control and its underlying meaning, includes an additional subsection which looks to have some relevance to the circumstances experienced by the Auditor-General with the PTO Ltd.

The relevant provision within the Canadian audit legislation addresses corporations without a share capital and states that:<sup>101</sup>

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

101 *Auditor General Act* (Canada) s. 2.1(2)

### **Discussion issues continued...**

*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.*

This issue, which may require legal input, will be considered by the Committee during its Inquiry. The Committee welcomes the views of interested parties on the matter including:

- Should the Audit Act be amended to address the circumstances reported by the Auditor-General to Parliament concerning the PTO Ltd and, if so, the nature of such amendment?
- Are there any other matters considered to be relevant to the subject?

## **5.2.12 Charging of audit fees**

### **Nature of this discussion 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.

In correspondence to the Committee, the Auditor-General has advised 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.

The Auditor-General has 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:<sup>102</sup>

*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 more recent correspondence to the Committee, the Auditor-General has 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 and was necessary '*to give flexibility in applying financial audit fees across agencies. It ensures the validity of write-ons and write-offs.*'<sup>103</sup>

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

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

### ***Discussion issues pertaining to this subject***

Adoption of the Auditor-General's proposal would formalise a longstanding budgetary principle underpinning the charging of audit fees in Victoria. Under this principle, the costs of mandatory attest audits are recoverable by the Auditor-General from audited entities while the costs of discretionary performance audits, which 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.

The output framework established for the Victorian Auditor-General's Office under the annual Appropriation Act reflects these two categories of audit functions.

The Committee invites input from interested parties on this subject, including:

- The benefit or otherwise of formalising within the Audit Act the power of the Auditor-General to charge fees for all annual attest functions, extending the current fee regime beyond financial audits.
- The desirability or otherwise of statutory action which validates the use of write-ons and write-offs by the Auditor-General in the computation of audit fees.
- Any other matters considered to be relevant to the subject.

### **5.2.13 Application of the statutory definition of 'Authority' to Administrative Offices and multiple entities**

#### ***Nature of this discussion 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.

Notwithstanding the apparent direct link between a department and any related Administrative Offices, the Auditor-General has 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 ...*'<sup>104</sup>

The Committee notes that the *Public Finance and Accountability Act 2009* has changed definitions pertaining to matters previously addressed in the *Financial Management Act 1994* and other related legislation. It will consider this and similar issues in the context of the Audit Act.

### **Discussion issues pertaining to this subject**

Of relevance to the Auditor-General's proposal is the approach taken in section 45(4) of the *Financial Management Act 1994* which 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 related department.

A second matter raised with the Committee by the Auditor-General concerning the statutory definition of an 'Authority' relates to whether the definition extends beyond singular entities to include multiple entities. The past stance of the Victorian Auditor-General's Office 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*. The Auditor-General has advised the Committee that, based on more recent legal advice, a suitable amendment to the definition would remove any doubt on the matter.<sup>105</sup>

The Committee invites input from interested parties on the above two issues and on:

- Should action be taken to include Administrative Offices and multiple entities within the statutory definition of an 'Authority' within section 3 of the Audit Act?
- Are there any other matters considered to be relevant to the subject?

### **5.2.14 Involvement of the Auditor-General as the auditor of State companies**

#### **Nature of this discussion topic**

Section 16D of the Audit Act enables the Auditor-General to 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, control is defined as having the same meaning as the accounting standard governing the preparation of consolidated statements under the Corporations Act.

The current accounting standard on consolidation of financial statements is AASB 127 *Consolidated and Separate Financial Statements* issued by the Australian Accounting Standards Board in March 2008. This standard defines control as '*the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.*' The standard contains several explanatory paragraphs relating to the application of the concept of control to the public sector.

The Auditor-General has 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.*'<sup>106</sup> 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.*'<sup>107</sup>

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

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

107 *ibid.*



Because State companies are controlled by either the state or an authority, their financial statements automatically become subject, for public accountability purposes, to audit under the Audit Act by the Auditor-General on behalf of Parliament. In addition, for the same reason, their operations may from time to time be subject to performance audit scrutiny by the Auditor-General in accordance with the powers assigned by Parliament.

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 for Parliament's purposes.

### ***Discussion issues pertaining to this subject***

The Auditor-General's proposal to stipulate within the Audit Act the automatic appointment of the Auditor-General as the corporations auditor of State companies would ensure there is one audit process, involving the Auditor-General as Parliament's appointed auditor, to meet the financial reporting requirements of both State and companies legislation.

The Committee invites the views of interested parties on:

- The appropriateness or otherwise of requiring in the Audit Act that State companies appoint the Auditor-General as their auditor under the Corporations Act.
- Is it appropriate for Parliament to remove the discretion of a company's Board that it holds under the Corporations Act?
- Are there any other matters considered to be relevant to the subject?

### ***5.2.15 The Auditor-General's power to call for documents***

#### ***Nature of this discussion topic***

Section 11(1) of the Audit Act sets out the Auditor-General's powers 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. This would then cover 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' powers under section 11 appear to be strong, they do not necessarily facilitate, particularly where an examination upon oath has not been made under subsection 11(3), audit verification that all requested documentation has been produced and constitutes accurate and reliable evidence.

In addition, the Auditor-General has advised the Committee in correspondence that legal advice relating to section 11 has identified that the inter-relationship 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.<sup>108</sup>

### ***Discussion issues pertaining to this subject***

The Committee intends to examine during its Inquiry the information-gathering provisions of section 11 and to also consider the Auditor-General's proposal. The Committee invites the views of interested parties on:

- The need or otherwise to clarify the Auditor-General's information-gathering powers under section 11 of the Audit Act.
- Any other matters considered to be relevant to the subject.

## **5.2.16 Incorporation of comments of audited agencies in reports of the Auditor-General tabled in Parliament**

### ***Nature of this discussion 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.

The requirements of section 16(4) are longstanding and have been a traditional practice of the Auditor-General in Victoria. The requirements ensure that the principles of natural justice or procedural fairness are 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.

Similar requirements, though not totally identical to those in section 16(4), have been included in audit legislation of many jurisdictions.

In recognition that the responses to reports of audited agencies are not subject to any specific evidentiary or accuracy requirements, the Auditor-General now includes in reports to Parliament the following introductory paragraph on agency responses:<sup>109</sup>

*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.*

During its Inquiry, the Committee will 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.

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108 Mr D Pearson, Auditor-General, correspondence to the Committee, received 14 October 2009

109 See, for example, Victorian Auditor-General's Office, *Responding to Mental Health Crises in the Community*, November 2009, p. xiii

In correspondence to the Committee, the Auditor-General has proposed 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.*’<sup>110</sup>

The Committee notes that on occasion the Auditor-General has included in his report commentary or responses to the material provided by agencies. Agencies are not provided with the opportunity to further comment or respond to such inclusions by the Auditor-General in reports.

The Auditor-General has also proposed that, as part of consideration of amendments to Section 16, the consultative process around proposed reports – for example, the application of natural justice to third parties named in reports – be clarified. The Audit Act does not currently address this issue.

The Auditor-General did not outline the rationale for removal of the obligation to incorporate agency comments in reports but will be available to do so to the Committee during the Inquiry’s public submissions and hearings stages.

### ***Discussion issues pertaining to this subject***

Given the specific purpose of section 16(4) of the Audit Act in terms of the application of natural justice and procedural fairness, the Committee’s initial view, pending elaboration on the issue by the Auditor-General, is that there would need to be strong grounds for its removal.

At this stage of its Inquiry, the Committee invites input from interested parties on:

- The soundness or otherwise of the Auditor-General’s proposal that the statutory requirement to include agency comments in audit reports tabled in Parliament be removed from the Audit Act.
- The need or otherwise for clarification within the Audit Act of the application of natural justice to consultations by the Auditor-General with third parties named in proposed reports.
- Any other matters considered to be relevant to the subject.

## **5.2.17 Reporting of sensitive material**

### ***Nature of this discussion 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 to be in the public interest. The Act does not authorise the Auditor-General to report to the Committee in lieu of Parliament.

The Auditor-General has 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.*’<sup>111</sup>

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

111 *ibid.*

During its visits to Western Australia and New Zealand, the Committee was informed that the audit legislation in those jurisdictions assigned a discretionary power to the Auditor-General to report to a parliamentary committee.<sup>112</sup> The New Zealand legislation extends this discretionary power to include a Minister, a public entity or any person.

### **Discussion issues pertaining to this subject**

The Committee invites input from interested parties on:

- The need or otherwise for a separate provision within the Audit Act for the reporting of sensitive or other material by the Auditor-General to the Committee in lieu of Parliament.
- Any other matters considered to be relevant to the subject.

## **5.2.18 Immunity protection**

### **Nature of this discussion topic**

Section 7H of the Audit Act indemnifies the Auditor-General and staff for anything done or omitted to be done in good faith in the performance of audit functions.

The Auditor-General has 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.*’<sup>113</sup> In recent correspondence, the Auditor-General has elaborated on this proposal. The supporting rationale submitted by the Auditor-General for this proposed change included:<sup>114</sup>

*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 also indicated that immunity protection had been assigned to the Victorian Ombudsman in section 29 of the *Ombudsman Act 1973* and to the Western Australian Auditor-General in section 45 of the *Auditor General Act 2006*. This latter matter was confirmed during the Committee’s visit to Western Australia.

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

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

114 Mr D Pearson, Auditor-General, correspondence to the Committee, received 7 December 2009

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.*’<sup>115</sup>

***Discussion issues pertaining to this subject***

The Committee invites the views of interested parties on:

- The soundness or otherwise of the Auditor-General’s proposed amendment to replace in the Audit Act indemnity protection with immunity protection.
- Any other matters considered to be relevant to the subject.



# CHAPTER 6: CONTEMPORARY DEVELOPMENTS AND EMERGING ISSUES – MATTERS RAISED BY THE DEPARTMENT OF TREASURY AND FINANCE

## 6.1 Introduction

In a paper to the Committee on suggested issues for this Inquiry, the Department of Treasury and Finance identified a range of broad scope questions revolving round the role and scope of the Auditor-General within a Westminster system of government, and the independence of the Auditor-General. It also identified some discussion points and questions relating to recommendations in the previous Committee's February 2006 *Report on a legislative framework for independent officers of Parliament*.<sup>116</sup>

The Department's broad scope questions and discussion points dealing with the previous Committee's report are referred to as part of the Committee's commentary on relevant potential amendments to the Audit Act set out in the preceding chapters.

The Department's paper to the Committee also included some high-level comments and suggested questions pertaining to the concepts of continuous improvement and risk management.<sup>117</sup>

## 6.2 Continuous improvement

The Department's comments and suggested questions on continuous improvement, in the context of the Audit Act, are as follows:

*It is imperative that the focus of current and future accountability and financial management reforms within the public sector embrace the concept of continuous improvement so that the best possible outcomes in delivery can be achieved for the Victorian community, while operating within an environment that has a defined base of resources (that is: resource scarcity).*

*With this theme in mind, the following questions are posed:*

- *Do the current provisions of the Act facilitate effective collaboration between the auditor and government entities, to drive optimum outcomes for the public sector?*
- *Recent audit practice has shown that the focus of audit reports has been on matters of compliance. Should the focus of audit be only on compliance with frameworks, or on matters of performance, which is the primary focus of public sector entities?*
- *Should the Auditor-General's role in facilitating continuous improvement across the public sector also be expressed in the Act?*

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116 Department of Treasury and Finance, 'Review of the Audit Act 1994', correspondence to the Committee, December 2009, pp.2-3, 5-6

117 *ibid.*, p.4

### 6.3 Risk management

The Department's comments and suggested questions on risk management are as follows:

*Managing risk is an integral and central element of public sector governance, and one that directly supports the achievement of public sector objectives. To this end, the effective management of risk and opportunity is seen as critical to ensuring government entities effectively and efficiently deliver on their commitments to the Victorian community.*

*In achieving a high standard of risk management, entities are required to comply with relevant legislation, reporting obligations, ministerial directions and compliance frameworks, and to use available best practice guidance materials to develop and maintain appropriate risk plans and risk management strategies.*

*A core principle of an effective risk management system is accountability, where all parties involved have a clear understanding of what is to be achieved and the standards against which performance is assessed.*

*With this theme in mind, the following questions are posed:*

- *What could the public sector auditor do to promote more effective risk management practices across all public sector entities?*
- *Do the current provisions of the Act effectively support a risk management culture, or do they drive risk aversion?*
- *Should the auditor's responsibility for ensuring recommendations have due regard to risk management objectives be expressed in the Act?*

#### **Discussion issues pertaining to these matters**

The Committee welcomes the Department's comments and suggested questions to assist the Inquiry. The discussion issues arising from its comments and suggestions have been listed as discussion points in the earlier chapters under relevant discussion topics.

With regard to the points pertaining to continuous improvement and risk management, while the Auditor-General's independence in determining the manner in which audit functions are conducted – including the extent of emphasis in particular areas – is protected within the Constitution Act, the Department has posed some pertinent issues which will be further considered by the Committee during the course of its Inquiry. As part of this process, it intends to seek the views of the Department on the various questions raised by it at an appropriate point in the Inquiry.

The Committee would welcome input from interested parties on the matters concerning continuous improvement and risk management identified by the Department.



## 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 three, four and five. 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.

These options will be considered further by the Committee during its Inquiry as part of its assessment of individual sections and subsections within the Audit Act.

#### ***Discussion issues pertaining to these matters***

At this point, the Committee would welcome the views of interested parties on the following matters raised by the Auditor-General and on any other issue concerning the Audit Act that is not addressed in this discussion paper.

#### **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 entity 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.<sup>118</sup>

The Committee intends to consider this issue having regard to the Government's Public Finance and Accountability Bill which, under Clause 4(12), provides for notification by the relevant Minister to the Auditor-General of the creation or abolition of a public body. It also will explore with the Auditor-General the impact to the audit process of any past non-notifications or late notifications of new public entities.

#### **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.

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

The Committee recognises the value of the Auditor-General's suggestion and that the matter would best be handled by the Chief Parliamentary Counsel if redrafting of the relevant provision was to proceed.

### **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.

The Committee notes that the Public Finance and Accountability Bill currently before Parliament 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.

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 removal of the threshold will be '*administratively less cumbersome*'.<sup>119</sup>

The Committee intends to seek further elaboration from the Auditor-General on the need for this amendment.

### **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 the Victorian Auditor-General's Office (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.*'<sup>120</sup>

The Committee's initial view is 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 a matter for determination by the Chief Parliamentary Counsel.

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119    ibid.

120    ibid.

### **7.1.5 Provision of reasonable assistance and facilities to the Auditor-General and staff**

In recent correspondence to the Committee, the Auditor-General has proposed that the Audit Act be amended to require audited agencies:<sup>121</sup>

*... to provide all reasonable assistance and facilities to the Auditor-General and authorised staff when on agency premises carrying out an audit. Failure to do so should be an offence attracting a penalty of 50 penalty points, consistent with section 14.*

The Auditor-General advised the Committee that such an amendment has been ‘Recommended by barrister’.<sup>122</sup> The Committee intends to address this matter with the Auditor-General during the course of its Inquiry.

### **7.1.6 Other procedural matters raised with the Committee by the Auditor-General**

In correspondence to the Committee, the Auditor-General has also raised with the Committee some further proposals for legislative change to the Audit Act:<sup>123</sup>

- 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.’
- Accountable officer certification – ‘Amend the 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 initial view is that this proposal appears to relate more to the financial reporting requirements of agencies under the *Financial Management Act 1994* than audit requirements under the Audit Act.
- Progress against audit recommendations – ‘Amend the 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. This proposal formalises part of the Minister for Finance’s Report on Recommendations.’
- Consistent use of the term ‘performance audit’ – ‘Amend section 15 and 16 to ensure that the term “performance audit” is used consistently.’
- Regulation making power – ‘Amend the 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 Act to remove provisions which are no longer necessary or which are spent, such as sections 20B(2)(c) and Part 6.’

The Committee intends to seek further information from the Auditor-General on these additional procedural issues during the course of its Inquiry.

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

122 *ibid.*

123 *ibid.*

As a final comment, the Committee is of the view that it is the role of the Auditor-General and VAGO to improve the performance of the public sector. The goal should be not 'to shoot the wounded' but to create positive relationships and a culture of strong performance and outcomes achievement within the Victorian Public Sector.

***Discussion issue pertaining to this subject***

In relation to the positive role of the Auditor-General, the Committee welcomes any suggestions that will reinforce this to guide the Committee in its considerations.



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