ACAG AUSTRALASIAN COUNCIL OF AUDITORS-GENERAL

A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE

SUBMISSION NUMBER 3

DATE AUTH'D FOR PUBLICATION 18/2/2010

4 February 2010

The Committee Secretary
Standing Committee on Public Accounts
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601
e-mail – committees@parliament.act.gov.au

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COMMITTEE OFFICE

Dear Ms Cullen

INQUIRY INTO THE *AUDITOR-GENERAL ACT 1996*

Attached is the Australasian Council of Auditors-General (ACAG) response to the Standing Committee's invitation for public submissions in relation to the inquiry into the ACT *Auditor-General Act 1996*.

The views expressed in this submission represent those of all Australian members of ACAG except the Auditor-General of the Australian Capital Territory.

The opportunity to comment is appreciated and I trust you will find the attached comments useful.

Yours sincerely

Frank McGuiness
Convenor
Australasian Council of Auditors-General

PO Box 275, Civic Square ACT 2608, Australia
Phone/Fax: 1800 644 102 Overseas phone/fax: +61 2 9262 5876
Email: soneill@audit.sa.gov.au
Website: www.acag.org.au
ABN 13 922 704 402

Attachment

Matters for Comment

The following comments are provided to assist the Standing Committee in considering the specific areas identified in the terms of reference for the inquiry.

In addition to the responses provided below we would also refer you to a recent survey conducted by Dr Gordon Robertson that was commissioned by the Victorian Auditor-General's Office. This survey assessed the extent to which Australian and New Zealand legislative provisions addressed Auditor-General independence in relation to eight specific areas, namely:

- statutory framework
- appointment and immunity
- mandate and discretion
- access to information
- reporting rights and obligations
- content, timing and publication of reports
- follow-up mechanisms
- managerial autonomy and resourcing.

The report on the findings and conclusions of this survey, including analysis by jurisdiction, can be located at http://www.acag.org.au/Independence_ANZ_20090702.pdf. The results of the survey were considered in providing the following responses.

(1) whether any amendments to the Auditor-General Act 1996 (the Act) are required to take account of developments in both auditing standards and public administration in the ACT and other jurisdictions

There have been significant developments in recent years in the area of auditing standards and other professional requirements such as APES 320 *Quality Control for Firms* issued by the Accounting Professional and Ethical Standard Board.

In this regard it is noted that, at present, the *Auditor-General Act 1996* is silent on the extent to which the Auditor-General must have regard to relevant auditing standards and other professional requirements. For audits conducted under the *Corporations Act 2001*, the standards issued by the Auditing and Assurance Standards Board (AUASB) carry "force of law" status by virtue of section 336 of that Act.

While the Auditor-General should have the freedom to undertake audits in the manner which he or she deems fit, it would be appropriate to recognise in the legislation that the Auditor-General may take into consideration relevant professional standards and practices including auditing standards issued by the AUASB and other professional standards to the extent relevant. This should not be seen in any way, however, as limiting the matters that the Auditor-General may have regard to in conducting any audits including those under the *Corporations Act*.

(2) whether there should be changes to the coverage and scope of the ACT Auditor-General's audit mandate and, in particular, with the power to audit organisations that receive funds from the ACT Government

An Auditor-General's ability to undertake audits of non-government organisations that receive government funding is a significant public accountability issue given the increased use of these types of organisation to deliver services and manage programs or projects on behalf of governments. The audit legislation in a number of Australian jurisdictions provides broad powers for the Auditors-General to undertake audits where government funds are provided to non-government entities.

In Western Australia and Tasmania the Auditors-General have the power to "*investigate any matter relating to public money, other money or statutory authority money or to public property or other property*."

Further, both the South Australian and Tasmanian Auditors-General may undertake audits of the accounts of individuals or bodies receiving public funds where requested by the Treasurer.

Accordingly, the powers of the Auditor-General would be significantly enhanced if the legislation specifically provided for the ability to undertake audits of individuals or entities who receive government funds for the purposes of ascertaining whether funds have been expended economically, efficiently and effectively in relation to the purpose for which they were intended.

In addition the Auditor-General's capacity to undertake audits of organisations that receive government funding would also be enhanced if the powers provided to enter premises and remain on premises under section 15 were extend to include premises not occupied by the Territory or a territory entity where reasonable notice is provided and entry to the premises was necessary for the purpose of conducting an audit.

Legislation in a number of jurisdictions also provides the Auditor-General with the power to undertake audits on a "by-arrangement" basis where this is within the legislative powers of the jurisdiction concerned, and is agreed between the Auditor-General and an individual or entity that would not otherwise fall within the Auditor-General's legislated mandate. This can enhance public sector accountability by allowing the Auditor-General to undertake such audits where the there is a significant public interest (e.g. significant funding or investment in the entity from the government or through a Territory entity).

(3) whether the annual budget for the ACT Auditor-General should be set by the Legislative Assembly and not by the Executive Government

Providing the Auditor-General with sufficient resources to allow his or her Office to effectively discharge his or her responsibilities is an important consideration in ensuring the Auditor-General has an appropriate level of independence from the executive government. In particular, the Auditor-General needs to be provided with sufficient funding and resources to be able to discharge their full legislative mandate.

As the Auditor-General should be viewed as an independent officer of the Parliament (refer comments under item 5 as to how this could be enhanced) the Legislative Assembly has an important role in overseeing the preparation and approval of the budget for the Auditor-General. In particular the Legislative Assembly should ensure the transparency of the budget process and be satisfied that the Auditor-General is provided with sufficient funding to deliver the level of service expected by the Parliament and provided for by the Auditor-General's legislated mandate.

This could be achieved by ensuring that the process for setting the budget for the ACT Audit Office involves the Public Accounts Committee having a formal role in considering the Audit Office's budget and making a recommendation to the Legislative Assembly, as part of the Territory's budget process, on the level of funding required by the Auditor-General. As the Treasurer is ultimately responsible for the Territory's budget pursuant to the provisions of the *Financial Management Act,* consultation between the Auditor-General, the Public Accounts Committee and the Treasurer would be appropriate.

(4) any amendments that could be made which would strengthen the managerial autonomy and resourcing of the ACT Auditor-General

The level of autonomy provided to the Auditor-General in terms of staffing needs to be considered in terms of both the carrying out of the audit function and in relation to the Auditor-General's ability to attract and retain an appropriate level of resources.

As a minimum, the legislation should include a provision recognising that the staff assisting the Auditor-General are not subject to the direction of any person other than the Auditor-General, or a person authorised by the Auditor-General, in relation to matters dealing audit functions and duties performed pursuant to the *Auditor-General Act*.

At present the *Auditor-General Act* provides for all staff to be employed under the *Public Service Management Act* which has the potential to limit the Auditor-General's ability to recruit staff with appropriate skills and experience The Auditor-General's managerial autonomy and ability to resource the Office could be strengthened by including a provision that specifically allows the Auditor-General to engage persons on terms and conditions the Auditor-General thinks fit. In determining the terms and conditions on which the Auditor-General could engage staff it would be appropriate for the Auditor-General to have regard to the general terms and conditions of the Territory's public service employees.

In this context consideration could also be given as to whether it may be more appropriate to establish the office as a statutory authority, but noting that New South Wales is the only jurisdiction which has established its Audit Office as a statutory authority and the practicalities of doing such in the ACT would need to be specifically considered.

(5) any amendments which would strengthen the role of the ACT Auditor-General as an independent officer of Parliament

There are number of aspects which could be considered in order to strengthen the role of the Auditor-General as an independent officer of the Parliament. A number of Australian jurisdictions presently include a provision in their legislation which specifically recognises that the Auditor-General is an independent officer of Parliament. Such a provision could be included in the ACT legislation to give recognition to this role.

Further, the *Auditor-General Act* presently identifies that "*The Auditor-General is not subject to direction by the Executive or any Minister in the exercise of the functions of the auditor-general.*" This provision, however, could be further expanded to recognise that the Auditor-General is not subject to direction by "any person" in relation to:

(a) the way in which the Auditor-General's powers in relation to audits are to be exercised; and
(b) the priority to be given to meeting his or her responsibilities.

The legislation in a number of jurisdictions also requires the Auditor-General to complete a formal declaration before undertaking the role of Auditor-General recognising that the Auditor-General will act impartially/independently in carrying out the relevant functions. In Queensland the Auditor-General is required to provide the Speaker with a declaration of interests within one month of commencing employment which is to be prepared on the same basis as if the Auditor-General were a member of the Legislative Assembly.

The survey of Australian and New Zealand legislation referred to above identified that in relation to the use of oaths and /or affirmations:

"An oath or affirmation of office is used in some jurisdictions to reinforce the Auditor General's independence and impartiality and in some cases to symbolically mark the special relationship with an allegiance to the Parliament. In a number of jurisdictions the oath is sworn before the Speaker or the Clerk of the Parliament, symbolically strengthening the relationship between the Auditor General and the Parliament. In other jurisdictions it is sworn before the Governor. In several jurisdictions the legislation is silent regarding an oath."

The status of the Auditor-General as an independent officer of the Parliament could also be seen as being enhanced by including a provision in the *Auditor-General Act* which prevents the Auditor-General from holding other forms of remunerative employment while in the position.

In conducting the survey, Dr Robinson found that opportunities for the executive government to influence the position of the Auditor-General can also arise where there is a need to appoint an individual to act as Auditor-General. This can arise during a temporary absence of the Auditor-General or where a vacancy arises in the position. Schedule 1 of the *Auditor-General Act* allows the Executive to appoint an acting Auditor-General after consulting with the presiding member of the Public Accounts Committee. Consideration could be given to strengthening this requirement by providing the Committee with a power of veto over acting appointments similar to that provided in relation to the appointment of the Auditor-General under section 8.

(6) what amendments, if any, are required to clarify the intention of sections 22—Proposed appropriations and 22A—Additional amounts for certain audits—of the Act

As mentioned in the comments provided in relation to item (3), it is considered important for the legislation to ensure that the Auditor-General is provided with sufficient financial autonomy to be able to discharge his or her mandate. The proposed amendments contained in the *Auditor-General Amendment Bill 2009* would address a number of the comments raised in relation to item (3) and would enhance the transparency of the budget process by providing greater clarity of roles and responsibilities. In particular the new provisions provide greater clarity in terms of the role of the Auditor-General and the timing of the process.

It is noted, however, that the amendments included in the Auditor-General Amendment Bill do not include an amendment of section 22A. This would lead to an inconsistency in the requirements whereby the Legislative Assembly was responsible for the initial budget of the Auditor-General but would still provide the Treasurer with responsibility for approving additional amounts requested during the year. To ensure there is consistency between these requirements the Legislative Assembly should have responsibility for approving both the initial budget, based on a recommendation of the Public Accounts Committee, and any additional funds requested by the Auditor-General during the year. It would also be appropriate for the Committee to consider any additional budget supplementation sought by the Auditor-General.

(7) the recommendations of an independent performance audit of the Auditor-General to be conducted in accordance with Part 5 of the Act during 2009–10

While it is understood this audit has not yet commenced, the following comments are provided in relation to the present provisions of the *Auditor-General Act* in relation to independent performance audits of the Auditor-General.

Presently, the *Auditor-General Act* does not provide a timeframe for regular independent performance audits to be conducted. Instead an independent performance audit is only required where requested by the presiding member of the public accounts committee. To this extent it is noted that an external performance audit of the Auditor-General has not been undertaken since 1998-99.

The provisions relating to independent performance audits of the Auditor-General would be enhanced by providing a timeframe for the regular conduct of such audits. A requirement to have such reviews conducted within a period of up to 5 years is common across a number of other jurisdictions within Australia. Having the reviews undertaken on a regular basis would provide valuable feedback to both Parliament and the Auditor-General.

Under the present requirements, responsibility for undertaking the performance audit rests with the independent auditor who also has responsible for undertaking the audit of the annual financial statements prepared by the Auditor-General. The ability to have more regular performance audits undertaken could also be enhanced by providing an option to have these audits undertaken by an auditor not responsible for annual financial statement audit. This would potentially allow for broader consideration of appropriately qualified persons available to undertake the performance audit.

(8) any other relevant matter.

Additional matters that could be considered in reviewing the legislation include:

Audits conducted under the Corporations Act not seen as limiting powers of Auditor-General

Under section 13 of the *Auditor-General Act*, the Auditor-General is required to accept appointment under the *Corporation Act 2001* as auditor of a public sector company. While this section identifies that it does not by implication limit the Auditor-General's power to engage a person under section 24, it does not make any reference to the impact on any other of the Auditor-General's powers when undertaking audits under the *Corporations Act 2001*. This section could also include a statement similar to –

"For the audit of a public sector company, the powers and functions conferred and imposed on the Auditor-General under this Act are in addition to the powers and functions conferred under the Corporations Act or any other written law in relation to the audit."

Ability to dispense with audits or otherwise have entities exempt from audit by the Auditor-General

Audit legislation in a number of Australian jurisdictions provides the Auditor-General with the ability to dispense with all or part of an audit that would otherwise need to be undertaken in any particular financial year. Such provisions are beneficial in circumstances where there are a number of smaller audits undertaken on annual basis which are considered to represent low risk to the whole of government and for which there is little, if any, public benefit in requiring the Auditor-General to undertake these audits. By dispensing with the need to undertake these audits the Auditor-General has greater flexibility and capacity in undertaking audits which have a greater impact at the whole of government level.

Some jurisdictions also provide for foreign subsidiaries to be exempt from audit by the Auditor-General subject to the auditor of the entity being approved by the Auditor-General, or at least consulted prior to appointment. These exemptions are provided at the discretion of the Auditor-General and may be required where it is either impracticable for the Auditor-General to undertake these audits or where the powers of the Auditor-General are not recognised in the relevant foreign country. It is acknowledged, however, that issues relating to foreign subsidiaries may not present a practical difficulty for the ACT Auditor-General at this point in time.

Power to suspend Auditor-General in addition to being removed

The *Auditor-General Act* currently only provides for the resignation, retirement or removal of the Auditor-General. Most Australian jurisdictions also include provisions allowing for the temporary suspension of the Auditor-General in certain circumstances. This allows for further consideration of whether, in the circumstances, the Auditor-General should be restored to or removed from office. To maintain the independence of the office of the Auditor-General, it is suggested that the process for suspending the Auditor-General be the same as for removal of the Auditor-General under Schedule 1 of the Act which requires a resolution to be passed by the Legislative Assembly.

Disclosure of protected information

Section 18 of the Act presently requires the Auditor-General to provide copies of proposed reports to certain officers prior to finalising a report for the Legislative Assembly. This section, however, does not include a specific provision restricting these officers from disclosing the information contained in the proposed report. While the Auditor-General could provide a direction under section 35 to prevent disclosure of protected information in relation to the proposed report, such protection should be afforded as a matter of course without the need for a direction under section 35.

Accordingly, this provision would be significantly strengthened if persons receiving proposed reports under section 18 were specifically prevented from disclosing the information received except to the extent it was necessary to provide comments or submissions to the Auditor-General or obtaining advice on matters raised. This should also be supported by appropriate penalties for non-compliance. This would ensure an appropriate level of confidentiality is maintained prior to the report being finalised and tabled in the Legislative Assembly. These requirements and penalties should apply to public servants and to boards and staff of non-government entities that may be subjected to audit under item 2 above.

Section 36 also provides circumstances in which protected information may be disclosed. This section could be expanded to specifically recognise the Auditor-General's ability to disclose information to the Legislative Assembly or relevant parliamentary committees. Further consideration should also be given to providing the Auditor-General with the ability to disclose information to police and/or other agencies (e.g. Australian Securities and Investments Commission) and the courts in relation to the investigation and prosecution of offences.

It is also suggested that consideration be given to more clearly stating the relationship between the confidentiality provisions of the *Auditor-General Act* and the requirements of the *Freedom of Information Act (FOI Act)*. While the *FOI Act* includes general provisions which exempt the disclosure of certain information there are no specific exemptions provided in relation to the Auditor-General. To this extent the requirement to maintain the confidentiality of protected information under the *Auditor-General Act* would be significantly strengthened if there was a specific exemption from the operation of the *FOI Act* for this information.