RECEIVED
2 8 JAN 2010
ACT LA
COMMITTEE OFFICE

A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE

SUBMISSION NUMBER 2

DATE AUTH'D FOR PUBLICATION 2/2/2010

ATTACHMENT

SUBMISSION TO THE STANDING COMMITTEE ON PUBLIC ACCOUNTS

INQUIRY INTO THE *AUDITOR-GENERAL ACT 1996*

A. Introduction

This submission is provided to the Standing Committee on Public Accounts in response to its Inquiry into the *Auditor-General Act 1996* (the Act). The terms of reference for the Committee's inquiry are wide ranging:

(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;

(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;

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

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

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

(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;

(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, and

(8) any other relevant matter.

This submission sets out the Office's response to the Inquiry's terms of reference.

B. General comments

There have been a few amendments to the Act since it was passed in 1996. The more significant amendments occurred in 2004, largely informed by the experiences of the former Auditor-General, Mr John Parkinson in conducting audits, particularly the performance audit of the redevelopment of the Bruce Stadium (now the Canberra Stadium) which was undertaken in 2000. Amendments to the Act had been introduced in the 4th Assembly as the Auditor-General Amendment Bill 2001. This

Bill was not debated by the time the Assembly rose prior to the 2001 election and subsequently lapsed. Mr Parkinson wrote to the Chief Minister in early February 2002, suggesting a range of amendments, many of which were subsequently enacted in 2004. The amendments at that time clarified the role and mandate of the Auditor-General and strengthened the Auditor-General's legal capacity to collect and protect information gathered during the audit process.

In general, the Act has provided a reasonably sound legal framework for the effective performance of the Auditor-General's functions to promote public accountability in the public administration of the Territory. However, experience in recent years, and developments within both the public sector and the accounting and auditing profession, have shown some areas of the Act that could benefit from further clarification and strengthening.

As well, the equivalent legislation in some other Australian jurisdictions has been amended recently or is currently subject to review, namely:

- the Queensland Audit Office: the *Auditor-General Act 2009* received Royal Assent in June 2009;
- the Tasmanian Audit Office: the *Audit Act 2008* received Royal Assent in March 2009; and
- the Australian National Audit Office: the Joint Committee of Public Accounts and Audit (JCPAA) is currently conducting an inquiry into the *Auditor-General Act 1997*.

The legislation in Queensland and Tasmania are both new Acts of Parliament and have substantially updated and revised the legislative framework supporting the Auditor-General and the Auditor-General's Office. Although the legislation in other jurisdictions reflects the circumstances of the particular jurisdiction, it also indicates there have been developments in the public sector, the profession, and especially in community expectations. This submission draws on some of the amendments and legislation in other jurisdictions as examples of better practice that could reasonably be implemented in the ACT.

ToR 1. Amendments to take account of developments in auditing standards and public administration

<u>Auditing standards</u>

The professional auditing standards have been subject to considerable change in recent years. For example, in May 2006, all auditing standards were rewritten and issued as legally binding standards for audits completed under the *Corporations Act 2001*. As well, *Auditing Standard APES 320: Quality Control for Audit Firms* was introduced effective from 1 July 2006. This standard establishes governance arrangements and audit practices that must be applied by audit firms, irrespective of the size or nature of the firm. The Audit Office is a firm with an 'assurance practice' for the purposes of the Standard, and thus the Standard applies to the corporate, financial audit and performance audit operations of the Office.

There is a legal requirement for the Audit Office to apply the professional auditing standards to its audits undertaken under the *Corporations Act 2001*. The Office also applies these standards to other audits services, consistent with the strong expectations of those using the Office's services, including the public sector agencies, the Legislative Assembly, and the community.

The enabling legislation for Auditors-General in most Australian jurisdictions contains a requirement for the Auditor-General to apply, or have regard for, recognised professional standards and practices. There may be merit in having a similar requirement in the Auditor-General Act.

The application of professional standards clearly creates obligations on the Audit Office to ensure it has a governance and administrative framework to support consistently high quality auditing services. This can represent a challenge for a small organisation such as the Audit Office, particularly in light of its experience of high staff turnover in a competitive labour market. It is important that the Office receives sufficient resources to support the Auditor-General's role and community expectations of that role. The Office's budget submissions in recent years have identified the challenges faced by the Office.

<u>Assurance and other services</u>

The Audit Office continues to provide a range of services, under the Auditor-General Act, other than financial and performance auditing. Some of the activities are functions given to the Auditor-General by or under other laws of the Territory including:

- the *Government Procurement Act 2001* - the Auditor-General has a discretionary role under this Act to examine and report on contracts containing confidential text; and
- the *Public Interest Disclosure Act 1994* - the Auditor-General has the authority to act on a disclosure where there is not a proper authority to investigate it, or a proper authority has been unable or failed to adequately act on a disclosure.

Other legislated functions for the Auditor-General have been debated, such as the Government Agencies (Campaign Advertising) Bill 2008.

The role and responsibilities of the Auditor-General are clear in these instances, but less so in regard to other matters. For example, the Audit Office may be asked to provide assurance services to a government agency – to review and provide advice on the governance and internal control framework and processes applied by the agency for an ongoing activity.

The role proposed for the Auditor-General under Campaign Advertising Bill was similarly an assurance role.

There is also, from time to time, debate about the auditor's role in reviewing major projects at various stages during the conduct of the project. Sometimes known as 'hot audits' or 'real time audits', such activities involve reviews at different points in the project cycle (e.g. strategic decision; design; procurement; implementation; post-implementation), and typically address assurance, accountability and business improvement issues. These are areas of government operations in which the Audit Office has expertise and can well contribute, and the independence and reputation of the Auditor-General are valued by the project stakeholders. While care needs to be exercised in ensuring the continuing independence of the Auditor-General (for example, in ensuring the Auditor-General does not substitute for other quality control mechanisms), there is a role for the Auditor-General to provide such assurance services. Once again, however, the services are not auditing services, although they are clearly related.

Assurance activities are recognised in the auditing standards issued by the auditing profession. Where the Audit Office has engaged in these types of activities (and similar activities such as reviewing or investigating matters raised in representations to the Auditor-General from the community or other parties), the Audit Office has relied on functions under section 10(a) or 10(f) of the Auditor-General Act. There may be merit, however, in clearly providing for the conduct of assurance activities in the functions of the Auditor-General under the Act. This could be accomplished, for example, by amending section 10(d) to read:

> to conduct performance audits *and assurance activities* in relation to any person, body or thing ascertained in accordance with the regulations.

ToR 2. Changes to the audit mandate

Power to audit outsourced activities and services

All governments provide funding to external organisations to deliver certain services on behalf of the Governments, either through grants, contracts, or other partnership arrangements. Increasingly outsourced activities can lead to reduced accountability for the efficient use of taxpayer's money.

Currently, the Auditor-General does not have a mandate to examine whether public funding provided to a non-government body has been applied for the purposes for which it was made and whether the money has been used economically, efficiently, and effectively.

This issue was previously raised in February 2002 when the then Auditor-General, Mr John Parkinson recommended to the Government that the Act be amended to allow for audits of outsourced activities. The amendment was not one of the amendments enacted in 2004, notwithstanding that the Government had agreed to the amendment subject to consultation with relevant stakeholders.

The express power of the Auditor-General to audit outsourced activities of government, which is at times referred to as 'following the dollar', is a matter of high priority. Such authority is included in the relevant legislation for the Auditors-

General of Western Australia and Tasmania (*Auditor-General Act 2006*, and *Audit Act 2008*, respectively), and has been specifically raised by the Commonwealth Auditor-General in his submission to the JCPAA inquiry into the *Auditor-General Act 1997*. The legislation cited provides for the audit of:

> a related entity of an agency to the extent that they relate to functions that are being performed by the related entity —
>
> (a) on behalf of the agency; or
>
> (b) in partnership or jointly with the agency; or
>
> (c) as the delegate or agent of the agency.[1]

In defining the term 'related entity' the legislation notes:

> If an agency performs any of its functions in one or more of the following ways —
>
> (a) in partnership or jointly with another person or body;
>
> (b) through the instrumentality of another person or body;
>
> (c) by means of a trust;
>
> the accountable authority of the agency must give written notice of that fact to the Auditor General, and the person, body or trust is referred to as a ***related entity*** of the agency.[2]

The provisions above are supported in legislation by further provisions authorising the Auditor-General to undertake activities that involve:

> investigating any matter relating to public money, other money or statutory authority money or to public property or other property.[3]

At present, the Audit Office is limited in its ability to 'follow the dollar', depending largely on the adequacy of access provisions in contracts between the relevant government agency and the funded body. Such contract provisions typically allow an audit to form an opinion on whether public funding provided to a non-government body has been applied for the purposes for which it was made, but fall short of allowing an opinion on whether the funding has been applied economically, efficiently, and effectively. These limitations then direct the audit to an examination of what the relevant agency has done to satisfy itself about efficiency, effectiveness, and economy – that is, the focus is on the agency's contract management activities, rather than the direct delivery of services on behalf of government.

In the absence of an express power under the Act to audit outsourced activities and services, the Audit Office is constrained in its ability to provide assurance to the Legislative Assembly on the accountability and performance of these significant public expenses by non-government bodies.

---

[1] *Auditor-General Act 2006* (WA) s17(2); and 18(f). See also *Audit Act 2008* (Tas), s23(f)
[2] *Auditor-General Act 2006* (WA) s17(1); See also *Audit Act 2008* (Tas), s22
[3] *Auditor-General Act 2006* (WA) s18(2)(c). See also *Audit Act 2008* (Tas), s23(c)

Should the Act be amended to provide the express power to audit outsourced activities and services, it would also be necessary to ensure the Auditor-General's powers to gather information and access premises are suitably amended. Section 14 of the Act appears to allow broad powers to obtain information, in that the reference to 'a person' does not limit the application of that section to government agencies or employees. Section 15, however, which provides for the Auditor-General's access to premises or things, does limit access to 'premises occupied by the Territory or a territory entity'. The *Auditor-General Act 2006* (WA), for example, does not include such limitation, defining 'premises' as 'any land or place'.[4]

Clarification of the term 'controlling interest'

Section 5 of the Act enables the Auditor-General to conduct 'special financial audits' (section 11) or performance audits (section 12) of any entity where the Territory has a 'controlling interest' in a company, joint venture, or trust.

'Controlling interest' in the Auditor-General Act differs from the conventionally understood meaning of controlling interest because the Territory does not need the capacity to 'control' the company, joint venture, or trust for a 'controlling' interest to exist. Currently, a 'controlling interest' will exist for these entities where less than 50 percent interest is held by the Territory provided no other person has a greater interest than the Territory.

This section should be retained because:

- it ensures that the Auditor-General has the discretion to conduct special financial audits of entities in situations where the Territory would otherwise not have control (e.g. land joint ventures), irrespective of whether the entity has appointed the Auditor-General as auditor or has appointed another auditor;
- it ensures the Auditor-General can audit the financial information of entities included in the financial statements of a Territory agency that holds the controlling interest in the company, joint venture, or trust. For example, the Auditor-General audits the information of all land joint ventures included in the financial results of the Land Development Agency; and
- it provides greater assurance that the audited financial results of entities will be available in time for inclusion in the financial reports of the Territory agencies with the 'controlling interest' in these entities.

Although the section can be applied in a relatively straightforward manner to nearly all entities, there would be some merit in clarifying 'controlling interest' in relation to companies that are limited by guarantee because the interest in such companies can be more difficult to determine. For example, legal advice was necessary to establish whether the Auditor-General had mandate to conduct a performance audit of Community Housing Canberra Limited.

---

[4] *Auditor-General Act 2006* (WA) s35(1)

Further, section 5 does not provide the Auditor-General the power to conduct financial audits of non-government bodies that receive substantial government funding or provide government services using government funding. This is similar to the matter raised above (the power to audit outsourced activities and services, which is commonly associated with performance audits). For example, the Auditor-General does not have the authority to conduct financial audits of Calvary Public Hospital, even though that body receives a substantial amount of government funds. Amendments to section 5 of the Act could provide the Auditor-General with a discretionary power to conduct special financial audits of entities that receive government funding or provide services using government funding.

ToR 3. Whether the annual budget for the ACT Auditor-General should be set by the Legislative Assembly and not by the Executive Government; and
ToR 6. Amendments to clarify the intention of sections 22-Proposed appropriations and 22A-Additional amounts for certain audits-of the Act

The XIX Congress of the International Organisation of Supreme Audit Institutions (INTOSAI) meeting in Mexico issued the *Mexico Declaration on Independence*, and adopted eight core principles 'considered to be ideal for an independent SAI'.[5] INTSAI recognised, through the Mexico Declaration, that SAIs should have the functional and organisational independence required to carry out their mandate.

Although the Mexico Declaration refers specifically to Supreme Audit Institutions – that is, national audit offices – the principles have direct application in any jurisdiction.

Resourcing is the subject of a specific core principle:

> **Principle 8**
>
> **Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources**
>
> SAIs should have available necessary and reasonable human, material, and monetary resources—the Executive should not control or direct the access to these resources. SAIs manage their own budget and allocate it appropriately.
>
> The Legislature or one of its commissions is responsible for ensuring that SAIs have the proper resources to fulfil their mandate.
>
> SAIs have the right of direct appeal to the Legislature if the resources provided are insufficient to allow them to fulfil their mandate.

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

[5] International Organisation of Supreme Audit Institutions - *Mexico Declaration on SAI Independence*, accessed from http://www.intosai.org/blueline/upload/issai10mexikodekle.pdf

The Audit Office interprets the policy intent of the provisions in sections 22 and 22A of the Auditor-General Act as to give the Public Accounts Committee a role in determining the annual appropriation funding available to the Auditor-General. The provisions create a process whereby the Legislative Assembly, through the Committee, advises the Treasurer regarding the resources that should be made for the operations of the Audit Office for the year. This implies a strong role for the PAC, more than just being consulted by the Treasurer, or making a recommendation to the Treasurer.

The process, as it currently exists, involves the Audit Office preparing a budget for its operations and seeking appropriation funding, consistent with the requirements of the Financial Management Act, and submitting that budget to the Committee. (The Office also submits the budget information, including budget submissions, to the Department of Treasury, as do other agencies). The Committee considers the Audit Office's budget submission, in the context of the Office's program of activities, and the level of activity considered desirable by the Committee. The Committee then advises the Treasurer of the appropriation the Committee considers should be made for the operations of the Auditor-General for the relevant year.

In recent years, the Treasurer has not approved the appropriations for the Audit Office as advised by the Committee; in particular, the Treasurer has not approved funding for the budget initiatives submitted by the Auditor-General and supported by the Committee (and the Estimates Committee). In 2009, the Committee's advice to the Treasurer included a significant increase in appropriation funding to support an expanded audit program, which the Committee considered desirable to meet the needs of the Assembly and the expectations of the community. The Treasurer did not fund the recommended appropriation.

In effect, the Government decisions regarding appropriation funding has constrained the Auditor-General's capacity to provide the level of audit services sought by the Legislative Assembly.

The Audit Office has not, to date, sought additional funding under Section 22A of the Act, as circumstances have not arisen, in the opinion of the Auditor-General, that warrant this type of 'emergency' funding. To date, for example, the Auditor-General has met important, but unforseen, variations to the audit program by deferring other planned audits or audits that are already under way. The Auditor-General has not involved the Committee in deliberations leading to such decisions, but it is open to the Committee to have a greater role in advising the Auditor-General on the audit priorities of the Legislative Assembly, or even requesting the Auditor-General to carry out a particular audit (see comments on ToR 8 below).

The Audit Office interprets the policy intent of the provisions of section 22A of the Act as that if the Committee were to agree that the additional appropriation funds were required, such funds would be made available to the Auditor-General. In short, the Audit Office expects that the wishes of the Assembly, expressed through advice from the Committee on both the funding of the Audit Office and the audit priorities of the Assembly, would be honoured by Government.

The Audit Office considers that amendments to the Auditor-General Act, to clarify the policy intent of the role of the PAC and give effect to the role of the Committee in approving the appropriation funding of the operations of the Auditor-General, are desirable.

Other amendments to sections 22 and 22A

Both sections 22 and 22A contain references to provisions of the Financial Management Act that have long been removed from the FMA. References in section 22 of the FMA were removed from that Act in 2002; and references in section 22A were removed in 2004.

'Technical' amendments to remove these references are required.

ToR 4. Amendments to strengthen the managerial autonomy and resourcing of the Auditor-General

Audit fees

Section 16 of the Act provides authority for the Auditor-General to charge fees for financial audits and special audits of certain bodies. This allows the cost of financial audits to be recovered from the audited entities. Performance audits and other activities of the Audit Office are funded through appropriations under sections 22 (and 22A) of the Act. The Audit Office considers this is a reasonable basis for the funding of the Office's operations.

The requirement for agencies to pay audit fees provides the Auditor-General with the financial capacity to meet the significant and frequent changes to the costs of the annual financial audit program. Costs will change when agencies are created or abolished, new audit or reporting requirements are introduced, or the circumstances of individual agencies change (e.g. due to administrative restructures, implementation of major initiatives, introduction of new systems, or changes to the control environment). These costs can be passed on directly to the audited entity.

The following suggestions are made to improve the fee charging arrangements.

- Section 16(1) applies to audits of the financial statements of entities under the *Financial Management Act 1996*, the special financial audits of entities' accounts and records pursuant to section 11 of the Act, and the audit of entities accounts and records under another territory law.

  It is unclear whether fees can be charged for financial audits that do not fall within the categories specified in Section 16(1). For example, the Auditor-General often conducts other financial audits such as the land joint ventures and Commonwealth grant acquittals. Such audits may not be required by legislation.

In addition, section 16(1) was introduced before the amendments were made to the *Financial Management Act 1996* requiring the Auditor-General to review statements of performance of authorities and departments. The Auditor-General has charged fees for all financial audit work, including the review of annual statements of performance, consistent with the intention of section 16 to fund the financial audit operations of the Auditor-General.

Section 16 would be improved by not prescribing (and therefore potentially restricting) the types of financial audits that audit fees may be charged for. In particular, section 16 should ensure the Auditor-General has the power to charge fees for any audit of a financial report, review of statement of performance, grant acquittals, or other certification as required by the Commonwealth from time to time as a condition for the Territory agencies receiving funding for specific projects (e.g. economic stimulus projects).

- Section 16(2) refers to audit fees 'based on a scale of fees', and section 16(5) requires the Auditor-General to include details of 'the basis on which fees ... were decided' in the annual report of the Auditor-General. The term 'scale of fees' is not defined in the Act, was not referred to in the Explanatory Statement for the Act, and was not debated when the Auditor-General Bill was considered in 1996.

  The Audit Office's long standing practice has been to charge fees that recover the estimated costs of financial audits based on the estimated time needed to complete each audit and the hourly cost of audit staff. The Audit Office prepares these time estimates using information on the actual time taken to complete these audits in previous years and takes into account any major factors that would cause significant changes to the resources needed to complete the audit.

  Overall, the Audit Office seeks to recover costs, and the term 'scale of fees' has no particular relevance to the Audit Office. Accordingly, Section 16 would be improved by removing reference to a 'scale of fees'

- The *Territory-owned Corporations Act 1990* (the ToC Act), which was notified in December 1990, prior to the *Auditor-General Act 1996,* also refers to the authority of the Auditor-General to charge audit fees. However, the fee charging arrangements contained in section 18(2) of the ToC Act are not consistent with the requirements of section 16 of the Auditor-General Act. The ToC Act states that a company that has appointed the Auditor-General as its auditor must pay 'the Auditor-General's reasonable fees and expenses'. Under section 18(3), in default of an agreement, the reasonable fees and expenses of the Auditor-General are to be decided by the Treasurer.

  The Audit Office considers that audit fee arrangements for Territory-owned corporations should be on the same basis as that which applies to other agencies (departments and authorities). Further, it is appropriate that all financial audit fee setting arrangements be contained within the Auditor-

General Act. The Audit Office considers that the ToC Act should be amended to remove the sections 18(2) and (3).

A suitable example of a broad fees framework may be found in the Western Australia *Auditor-General Act 2006*, which includes the following provision:

> **21. Audit fees**
>
> (1) The Auditor General is to determine whether a fee is to be charged for an audit carried out by the Auditor General under this Division and, if so —
>
> (a) the amount of that fee; and
>
> (b) the person or body who or which is liable to pay that fee.
>
> (2) A fee determined under subsection (1)(a) is to be paid by the person or body determined under subsection (1)(b).

Providing advice and information

An area of activity that is placing increasing pressure on the Audit Office is the provision of advice and information to various entities.

The Audit Office's annual report for 2008-09 noted that:

> During 2008-09, the Audit Office continued to experience a high demand for technical advice on accounting and reporting requirements from the Department of Treasury and other reporting agencies.
>
> The Audit Office provides input to the Department of Treasury on its whole-of-government accounting and reporting guidance material prior to it being released to agencies. This is an effective way of improving the quality of reporting by agencies, because this guidance material is used by most agencies in the preparation of their financial reports.
>
> In 2008-09, the Audit Office provided advice to the Department of Treasury on its 'model' financial reports and a number of whole-of-government accounting policies.
>
> Consistent with its goal of promoting public accountability, the Audit Office also assisted agencies in improving the quality of their annual financial reports and statements of performance.
>
> ... the Audit Office again provided an information seminar to reporting agencies [which] included a discussion of the major changes to reporting requirements. A separate seminar was also provided to staff of the Shared Services Centre involved in the preparation of agencies' financial reports. The growing attendance at these seminars shows there is a high demand for information and guidance on accounting developments and reporting issues, particularly by those involved in the preparation and review of agencies' financial reports and statements of performance.

Where such advice or information relates directly to the financial statement audits of the relevant entity, the Auditor-General may recover the costs through audit fees charged. More typically, however, the advice and services are provided at a broader level, and have been funded through the appropriation funding of the Office. The Audit Office does not have specialist technical advisors, as some other larger audit offices do, and therefore has to constantly balance the extent of the general assistance provided against the relative priorities of other matters at hand. This is not always ideal.

The Audit Office considers there would be benefit in having the clear capacity to recover the costs of providing advice or information. The Western Australia *Auditor-General Act 2006* offers a suitable example of relevant arrangements:

> **23. Provision of advice or information**
>
> (1) In this section —
>
> *Auditor-General's responsibilities* means —
>
> (a) the Auditor-General's functions; and
>
> (b) any matter that the Auditor-General could consider when performing those functions.
>
> (2) The Auditor-General may provide advice or information to a person or body relating to the Auditor General's responsibilities if, in the Auditor-General's opinion, the provision of the information or advice —
>
> (a) would be in the State's interests; and
>
> (b) would not compromise the Auditor-General's independence.
>
> (3) The Auditor-General may determine that a fee determined by the Auditor General is payable to the Auditor-General by a person or body to whom advice or information is provided under subsection (2).

Exemption from provisions of the *Freedom of Information Act 1989* (the FOI Act)

In all Australian jurisdictions, other than the ACT, the Auditor-General is either fully or partially exempt from the provisions of the FOI Act. The Audit Office understands that the Auditor-General in Tasmania is not currently exempt, but a recent review of the FOI legislation has agreed that an exemption is appropriate.

In December 2009, the Audit Office made a submission to the Standing Committee on Justice and Safety inquiry into the FOI Act, which stated that:

> ....To protect the integrity of the independent audit process, the Auditor-General should be able to have full access to information to undertake her or his work unimpeded, and to have the confidence that the information obtained as part of the audit process is fully protected against disclosure outside the public audit reports tabled in the Assembly.
>
> ... there is merit in providing, in any reformed legislation, for the specific exemption of the Auditor-General from the provisions of the FOI Act, insofar as they relate to the audit functions of the Office.

An exemption from the FOI Act could be effected by amendments to either the FOI Act or the Auditor-General Act.

Access to legal opinions

The Auditor-General has broad powers of access to information and premises, and it is widely accepted that such powers are essential for the effective conduct of the Auditor-General's functions. However, there has been concern expressed in other audit jurisdictions that claims of legal professional privilege may inhibit the Auditor-General's access to legal documents and legal opinions.

Although this has not been a significant concern in the ACT, there have been occasions when an agency showed reluctance to release such documents.

There would be merit in removing the doubt in such circumstances by amending the Auditor-General Act to make clear that the Auditor-General has the power to access legal documents and legal opinions notwithstanding the protection of legal professional privilege.

Further detail can be obtained from submissions from the Commonwealth Auditor-General to the JCPAA inquiry into the *Auditor-General Act 1997*.[6]

ToR 5. Amendments to strengthen the role of the Auditor-General as an independent officer of Parliament

The Auditor-General Act does not include the term 'independent officer of Parliament', although it is a term sometimes used to describe an Auditor-General, and is specifically included (although not defined) in the *Auditor-General Act 1997* (Cwth). The term is largely symbolic, but nevertheless emphasises the independent role of the Auditor-General. The Committee may wish to consider whether there is merit in formally designating the Auditor-General as an 'independent officer of Parliament'.

Appointment of an Auditor-General

The Committee, in its letter of 26 November 2009, asked the Audit Office to comment on the process for the appointment of the Auditor-General, and in particular, whether the process used in New Zealand for the appointment of an Officer of Parliament might be suitable for the ACT.

In the ACT, the appointment of the Auditor-General is managed by the Chief Minister, who will, on behalf of the Executive, convene a process to identify and consider suitable candidates. Under section 8 of the Act, before appointing a person to be Auditor-General, the Minister must first invite the presiding member of the PAC to comment on the proposed appointment. The Committee has the power to veto the proposed appointment.

[6] Ian McPhee 9 April 2009 and 11 August 2009, available from http://www.aph.gov.au/house/committee/jpaa/agact/index.htm

A similar process applies to the appointment of a person to act as Auditor-General (Schedule 1), although the power of veto by the PAC is not specifically mentioned.

The process that applies in New Zealand provides the Parliament with a much greater role in the nomination, selection, and appointment of an Auditor-General. This extends beyond a veto of the proposed appointment. Indeed, the process appears to largely remove the direct involvement of the government of the day in the appointment process. The requirement to commence consultation a minimum of six months before the end of the term of an existing Officer of Parliament recognises the importance of ensuring continuity of the office, and the sometimes protracted nature of senior appointments.

The Audit Office considers the New Zealand process, suitably tailored to the smaller operating environment of the ACT Legislative Assembly, combined with public advertising for the position, would offer a more independent, transparent and effective means of appointing an Auditor-General.

Clarification of appointment of independent auditor

Part 5 of the Auditor-General Act refers to the independent audit of the Auditor-General's operations. Under section 27, the Minister may engage a person to conduct an independent audit of the Office's annual financial statements or a performance audit of the Office.

Although the PAC may make a written request for the conduct of a performance audit under section 29 of the Act, the legislation does not provide for the Committee to otherwise have a role in setting the terms of reference or the selection of the auditor.

Further, the Act is open to the interpretation that the independent auditor is engaged to undertake both financial statements and performance audits, and that the Minister may require a performance audit of the operations of the Auditor-General regardless of whether an audit is requested by the Committee. Neither situation would appear to be the most desirable for an effective and independent audit. For example, the independent auditor engaged for the Office's financial statement audits may not have the skills and capacity to undertake a performance audit of the Office.

The Audit Office considers there is considerable merit in reviewing and amending the appointment process of the independent auditor by making clear, firstly, that it is the PAC (rather than the Minister) who engages the auditor, and secondly, that different auditors may be engaged for the financial and performance audits of the Office.

In addition, the Committee may consider extending the terms of 'performance audit' to include strategic reviews or other reviews of the Office to provide more flexibility for the Assembly in deciding which form of review would be most appropriate at the time requested by the Assembly.

Periodic independent audit of the operations of the Auditor-General

Although Part 5 of the Auditor-General Act provides for a performance audit of the operations of the Auditor-General, there is no guidance as to the regularity (or otherwise) of such audits. To date, there has been only one performance audit of the Audit Office, conducted in 1998 (reported in 1999).

Enabling legislation for Auditors-General in other jurisdictions tends to provide for a review within a fixed period, generally either every three or five years.

The Audit Office considers it is important for the Auditor-General and her or his Office to be accountable to the ACT Legislative Assembly for the performance of the Auditor-General's statutory functions. A well-performed independent review of the Office can inform the Assembly and through it, the ACT community, on whether the Office has operated efficiently and effectively and in compliance with relevant legislation. Further, recommendations from such a review can contribute to the continuous improvement of the Office's operations.

It is appropriate that an independent review of the operations of the Auditor-General occurs at least once in the term of each Auditor-General's seven-year appointment. The Audit Office considers there is merit in amending the Act accordingly.

ToR 7. Recommendations of an independent performance audit of the Office

Given that the independent audit proposed during 2010 has not yet commenced, the Audit Office has no comment on this term of reference.

ToR 8. Any other relevant matter

Involvement of the PAC in advising the Auditor-General on the audit priorities of Parliament and commenting on the Auditor-General's program of audits

In commenting on ToR 3 above, the Audit Office has suggested that amendments to the Auditor-General Act are desirable to give effect to a greater role of the Committee in approving the appropriation funding of the operations of the Auditor-General. Parallel with a greater role in approving funding, the Assembly, through the PAC, should have a greater role in considering the Auditor-General's proposed program of audits. This relates more specifically to performance audits, since the program of financial audits is effectively mandated by other legislation (e.g. the Financial Management Act and the Territory-owned Corporations Act).

Relevant legislation in some other jurisdictions (e.g. the ANAO, Western Australia) provides that the Auditor-General must have regard 'to the audit priorities of Parliament'. For example, the *Auditor-General Act 2006* (WA) states:

> **8. Auditor General to have regard to audit priorities of Parliament**
>
> Despite section 7(6)(e), the Auditor General must have regard to the audit priorities of Parliament as determined by —

(a) either House of Parliament; or

(b) the Public Accounts Committee; or

(c) the Estimates and Financial Operations Committee.

This is not seen as conflicting with the provision within the enabling legislation that the Auditor-General is not subject to the direction of anyone in the performance of her or his duties.[7]

Over recent years the Committee has also shown an increasing interest in the performance audit program of the Audit Office. Such an interest helps to ensure the Audit Office delivers a program of audits that addresses the interests and priorities of the Legislative Assembly. Further, through this process, and the frequent contact the Auditor-General has with the PAC, the Committee is well informed of the performance audit activities of the Audit Office.

Some other jurisdictions have a requirement for the Audit Office to consult the PAC (or equivalent) annually regarding the audit program (e.g. the *Audit Act 2008* (Tas), section 11). Although in a small ACT Legislative Assembly, the less formal arrangements between the Auditor-General and the PAC are generally effective, the Committee may wish to consider whether a formal requirement for consultation in developing the Auditor-General's audit program would be a useful adjunct to any greater role the PAC has in considering the budget for the Audit Office.

<u>Responses to proposed reports of the Auditor-General</u>

Sections 17 and 18 (in particular) of the Auditor-General Act provide certain requirements for finalising and reporting audits. An important feature of these provisions is the requirement of the Auditor-General to offer the responsible chief executive of audited agencies the opportunity to comment on the proposed reports, and to have the substance of any written comments made to the Auditor-General taken into account in the report.

The provisions have worked well, but developments in other jurisdictions might warrant consideration.

Section 18 of the Act requires that, before finalising an audit report, the Auditor-General must:

(a) give a copy of the proposed report to the responsible chief executive; and

(b) by written notice, invite the chief executive to provide written comments about the proposed report to the Auditor-General within a period specified in the notice.

---

[7] For example, the WA Audit Act also includes the following:

(6) In particular, the Auditor General is not subject to direction from anyone in relation to —

(a) whether or not a particular audit is to be conducted; or

(b) the way in which a particular audit is to be conducted; or

(c) whether or not a particular report is to be made; or

(d) what is to be included in a particular report; or

(e) the priority to be given to any particular matter.

It is not uncommon for audits, especially performance audits, to examine the operations of a range of entities. In finalising the audit report, the Auditor-General will seek comment from the chief executive (or equivalent) of all affected entities, including where appropriate, non government entities such as contractors or other service providers. To provide natural justice, it is indeed important that the Auditor-General also allows affected parties in non-government bodies or individuals who are not ACT public servants, the opportunity to respond to adverse comments and findings affecting them. To maintain the confidentiality of the report, the practice of the Audit Office is to provide related parties with an extract of the relevant sections of the proposed report. Although consistent with the intent of the Act, the provision for such practices was not included in Section 18.

Appropriate amendments to the Act would put this matter beyond doubt. In this regard, a useful example is the *Auditor-General Act 1997* (Cwth). Section 19(3) of that Act states:

> After preparing a proposed report on an audit , the Auditor-General may give a copy of, or an extract from, the proposed report to any person (including a Minister) who, or any body that, in the Auditor-General's opinion, has a special interest in the report or the content of the extract.

The Act then requires the Auditor-General to have regard for any comments provided by the recipient of the proposed report or an extract before preparing the final report.

Accountability measures for the Audit Office

The Auditor-General is not required by the *Financial Management Act 1996* to include accountability indicators in its budget or to prepare a statement of performance against these indicators. Accordingly, Section 28 only refers to the independent audit of the Office's financial statement.

Notwithstanding the above, the Office, consistent with its commitment to be fully accountable, has also prepared in recent years an annual statement of performance discussing its performance results against the accountability indicators, and has arranged for the independent auditor to review this statement as part of the audit of the Office's financial statements. The Office reports its performance in its Annual Reports tabled in the Legislative Assembly.

The Committee may wish to consider whether public reporting against accountability measures should be formally required of the Auditor-General. Amendments to the *Financial Management Act 1996* would be necessary to require the Audit Office to include accountability indicators in its published budget and to prepare a statement of performance in the same way that departments and authorities are currently required to do. Section 28 of the Auditor-General Act would then need to be amended to require the independent auditor to consider the Office's statement of performance.

C. Conclusion

This is the first full inquiry into the Auditor-General Act since it was enacted in 1996, notwithstanding several amendments to the Act, most notably in 2004.

Although the Act has provided a sound basis for the effective performance of the Auditor-General's functions, experience over recent years and developments within both the public sector and the accounting and auditing profession, have shown some areas of the Act that could benefit from further clarification and strengthening.

In this context, the Audit Office submits that the Committee during this inquiry gives consideration to:

- the power to audit outsourced activities and services;
- providing the Legislative Assembly, through the PAC, a greater role in approving the appropriation funding for the operations of the Audit Office;
- clarification of audit fees provisions;
- clarification of arrangements for the periodic review of the operations of the Audit Office by an independent auditor, including the appointment of the auditor and the determination of the terms of reference, and
- exempting the Auditor-General from the provisions of the FOI Act, insofar as they relate to the audit functions of the Office.

ACT Auditor-General's Office
22 January 2010

References:

Parliament of Australia, Joint Standing Committee of Public Accounts and Audit: Inquiry into the *Auditor-General Act 1997* (Cwth)
(http://www.aph.gov.au/house/committee/jpaa/agact/index.htm)
Submissions by the Australian National Audit Office and other parties are available from the website

Enabling legislation for other Australian audit jurisdictions:

Australian (Commonwealth) Auditor-General: *Auditor-General Act 1997* (Cwth)
http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200403854?OpenDocument

Queensland: *Auditor-General Act 2009 (Qld)*
http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2009/09AC008.pdf

NSW: *Public Finance and Audit Act 1983 (NSW)*
http://www.austlii.edu.au/au/legis/nsw/consol_act/pfaaa1983189/#pfaaa

Victoria: *Audit Act 1994 (Vic)*
http://www.austlii.edu.au/au/legis/vic/consol_act/aa199471/

Tasmania: *Audit Act 2008 (Tas)*
http://www.austlii.edu.au/au/legis/tas/consol_act/aa200871/

South Australia: *Public Finance and Audit Act 1987 (SA)*
http://www.austlii.edu.au/au/legis/sa/consol_act/pfaaa1987189/

Western Australia: *Auditor-General Act 2006* (WA)
http://www.austlii.edu.au/au/legis/wa/consol_act/aga2006157/

Northern Territory: *Audit Act (NT)*
http://www.austlii.edu.au/au/legis/nt/consol_act/aa71/