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Inquiry into the ACT Auditor-General Act 1996

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The ACT Auditor-General as an "Integrity Agency"

The ACT Auditor-General Act 1996 sets up the office of the ACT Auditor-General as a non-departmental public body (NDPB) of the kind that is now increasingly thought of as an "integrity agency". This submission focuses on the role of this office as such an agency, and on the implications of that role for relationships between the agency, the government that funds it, and the legislature that created it. In the final section, it considers the adequacy of the present legislation, and whether amendments to it might improve the operating conditions for this important agency. The submission flows in part from investigations into the role of NDPBs in general undertaken over many years in the University of Canberra, now extended to a particular concern with integrity agencies.¹

NDPBs have long been used in the governing of states, and Australian Commonwealth, State and Territory governments have made much use of them.² The general category includes statutory authorities and corporations, government-owned companies and executive agencies as the main types, but the issue here obviously relates to the statutory authority group. As Thynne has recently pointed out, such authorities come in three basic kinds, and the relationship to, or alignment with, government and the courts and/or the legislature is a crucial feature of their operation:

If an organization is to have an administrative or managerial role as an executive agent of government, it is important that it be structured and empowered within the limits of what the government itself has the responsibility and power to do. If, on the other hand, it is to have a quasi-judicial role as an administrative tribunal or the like, it is necessary to distance it from the government and to associate it quite closely with the exercise of judicial power by the courts. Or, if it is to be, say an ombudsman or an audit office [with a mission to provide checks on government activity], it will need to be structured and equipped to relate well to the legislature, again at some distance from the government (Thynne 2006: 173).³

The Concept of the Integrity Agency

Audit offices separate from the central executive are classic integrity agencies, the model for the English-speaking world probably being the office of Comptroller and Auditor-General established in the 1860s as part of the "nineteenth century revolution in government" in the United Kingdom (MacDonagh 1958). Today scarcely any reasonably well developed polity lacks one. And the ombudsman institution has spread far-and-wide since its emergence in Sweden in 1809, New Zealand being the first of the English-speaking systems to adopt it in 1962. Gradually other sorts of agencies with checking roles have appeared, similarly characterised by a degree of independence from executive governments.

The international NGO Transparency International (TI) contributed importantly to the development of the concept of the integrity agency as a way of giving definition and clarity to

this group of agencies. Its *TI Source Book* proved highly influential with its identification of a set of "institutional pillars" for a model national integrity system (Pope 2000). The ARC- and TI-sponsored National Integrity System Assessment conducted a few years ago explored the application of those ideas in Australia (Brown & Head 2005; Head, Brown & Connors 2008), and a major international conference in Monterrey, Mexico in 2006, in which I participated, revealed the now-very-large global interest in these issues.⁴

Prominent among the pillars – for Australia and elsewhere -- were auditors-general, ombudsmen and anti-corruption bodies (or other watchdog agencies). These are the quintessential integrity agencies, but it is easy to expand the group to include others like information and data-protection, human rights, police integrity, privacy and electoral commissioners. It has long been proposed – it can be described as a classic view -- that many of them have difficulty in asserting the degree of independence from government necessary for them to discharge their functions properly. And of course they depend on governments for their funding, and can very easily be starved of sufficient funds to enable them to do that job properly.

Appreciation that this is so, and the related emphasis on the importance of the legislature as a protective instrument, was put very clearly in an early analysis by Ian Temby, first Commissioner of the Independent Commission Against Corruption (ICAC) in NSW. Pointing out that agencies such as his were "bound to cause displeasure from time to time", he drew attention to parliament's parenting role:

there will ... be awkwardness caused because an important function of government, whatever it may be, is disclosed as being inadequately performed. It is the need for that demonstration to occur which imposes the requirement of independence. Only a non-partisan body can be authoritative and will enjoy public confidence. Periods of disharmony between government and independent officers are, accordingly, inevitable. If they were never encountered, the only available conclusion would be that the independent officer was not doing his or her job properly.

The fact of that disharmony, the inevitability of it occurring from time to time, of course brings one to Parliament. It is Parliament that creates all of these bodies and it is Parliament which must look after them. When relations between a particular government and an independent officer, say an Ombudsmen, become strained, the protection and support must be vouchsafed by Parliament. Why is this so? First, because parenthood brings responsibilities. Secondly, because those not directly affected can appreciate that the proper performance of functions, simply doing the job laid down by legislation, can involve the making of inconvenient decisions. Thirdly, because the Parliament directly distils and reflects the will of the people in a way that government and the bureaucracy never can and never will... (Temby 1993: 7-8).⁵

A very big question follows: Is the legislature capable of offering, or prepared to offer, the sort of protection envisaged by Temby? What emerged in the Mexico conference discussions was general agreement that most legislatures are too weak in relation to their own governments to be able to do this.

In the case of the ACT Auditor-General, the press has noted several occasions over the past year or so where reports critical of executive action of one kind or another have been presented. Sometimes the displeasure of executive government has been palpable, and there is little doubt that the present Auditor-General feels she could perform her functions more adequately if her office was better funded. There was an Opposition attempt to legislate to provide that the Audit office would be funded by the Assembly and not the government. The current inquiry was the compromise outcome.⁶

New Zealand, which pioneered in introducing the ombudsman institution to the Anglo-Saxon world, pioneered again in developing a firm concept of "officers of parliament" as a way of meeting some of the considerations stated by Temby. These officers would answer directly to the legislature, and in the governance of their organisations the legislature would play a vitally important role (FECNZ 1989; Beattie 2006). In Australia there has been some movement in this direction in the states, with Victoria having progressed a considerable distance as a result of strong reaction against Premier Kennett's attempt to emasculate that state's Auditor-General and a very significant inquiry by the Victorian Parliament's Public Accounts and Estimates Committee, backed by the ensuing Bracks Government. The result was a carefully researched report which, among other things, traced the evolution of the idea of "officers of parliament" through the experience of a number of English-speaking countries (PAEC 2006).

From all this, a number of propositions about integrity agencies emerge, some essentially in the form of questions. I state them in the next section,⁷ and then go on to consider how well the existing legislation for the ACT Auditor-General deals with these structural and relationship issues, and what if anything might be done to improve its specification of the operating conditions needed for this particular integrity agency.

Propositions about Integrity Agencies

- 1. Many of these integrity agencies are given NDPB status as statutory bodies because it is recognised that they need a measure of real independence from government.*
- 2. However they depend on government financial and other supports and, since they are themselves inspectors/supervisors/regulators of departments and agencies of the same government and so are necessarily sometimes in conflict with it (or parts of it) if they are performing their allocated tasks satisfactorily, not surprisingly government often seeks to curtail their autonomy or otherwise restrict them.*
- 3. So it becomes a major issue of governance to ensure that they are not so weak that they simply capitulate.*
- 4. The question arises: What defences do they have, how are they to be protected against actions by government designed to reduce their effectiveness?*
- 5. Since parliament has usually created and empowered them through its legislation, the easy answer is that it is the parliament that should defend them.*
- 6. But parliament is itself often weakly placed in its relationships with the executive government. So can parliament be strengthened to ensure that it can provide the needed protection?*
- 7. Or are other means available to us to strengthen and improve the work of these agencies?*
- 8. Of course these agencies also need to be accountable, so it is important to establish arrangements for checking that they do perform their allotted tasks satisfactorily. This also directs attention to the importance of the parliamentary role, for it is certain that the executive government cannot be trusted to make these judgments dispassionately.*

The Present Act, and Can It be Improved?

I have read the current Auditor-General Act with these issues in mind. As far as possible, the comments below connect with the propositions stated above. They also connect with items (3), (4) and (5) of the terms of reference for the present inquiry.

Focusing first on Proposition 1, the office of Auditor-General with its supporting staff certainly has statutory authority status, and the formal declaration of independence (from "the Executive or any Minister") comes at s.9. Other items which support this independence are:

- the 7-year term of appointment for the Auditor-General, appropriately extending that term beyond the incumbency of any government and so reducing the possibility of patronage in the appointment (Sch.1/1.1(3));
- the specification that the provisions of the Annual Reports (Government Agencies) Act need not be complied with if they "would prejudice [that] independence" (s.9A);
- the Auditor-General's ability to set and collect fees for financial statement audits (s.16);⁸
- the provision that, in the application of the general Public Sector Management Act, the Auditor-General has the powers of a chief executive as if his/her staff were employed in a department, so that he/she is not subject to any departmental chief executive in exercising those powers (s.23);
- similarly, the agency's treatment as a department in its own right in the application of the Financial Management Act (s.21).

It does not, of course, constitute a "department" in the generally understood meaning of that word (ie with a ministerial head), and it is fortunate that most involved in ACT governance do not fall into the trap of regarding it as such.⁹

Turning now to the other propositions: Inevitably the Auditor-General Act refers to other actors within the ACT public governance system, raising the question of the relationship with those actors. On my reading, the references in the Act to several such other actors are as listed in the Appendix to this submission. I have to say that I do not find any of these references particularly threatening to the independence of the Auditor-General. The impression is rather one of an Act which is, in several respects, clumsily put together, with some surprising gaps in it and eg with provisions relating to appointment of the Auditor-General appearing in several places whereas consolidation would enhance comprehension. I think the Act would be easier to read, and better able to serve as a guide to appropriate behaviour by all concerned, if it could be tightened up and better structured.

Within this general view, I thought the following points were deserving of particular notice:‘

- The provision for an Independent Auditor goes a long way to satisfying Proposition 8. But no qualifications are stated for the Independent Auditor, and I think they should be.
- The Act does not specify the action to be taken if the Public Accounts Committee continues to object to the Minister's proposed appointment of an Auditor-General, but I think it should do so.
- Similarly the Act is silent on what would/should happen if the Treasury and the Auditor-General, probably communicating formally through the Public Accounts Committee, had a significant disagreement on matters relating to appropriations.
- The spread of "powers" between the Executive, the Chief Minister, and "the Minister" (the reference to the Treasurer is probably appropriate here, as it relates only to

budgetary matters) is confusing, raising again the issue of clarity in machinery-of-government matters referred to earlier in this submission. It is usual for heads of government to hold administrative authority for these "supreme integrity institutions", and it is probably never likely that the ACT would depart from that tradition. So could not "the Minister" references be consolidated with "the Chief Minister" ones, so suggesting clearer lines of authority? -- but of course requiring reinforcement that, in this case, authority relates not to the operations of the Audit office but only to a few essential administrative actions that have to be taken by executive government within the context of applicable constitutional arrangements, such as setting up the office and putting its chief in place.

In any revision of the Act, I think it would be desirable to have regard to the New Zealand "officers of parliament" system, and to embrace as much of that system as is possible within this small jurisdiction. Recalling Propositions 4-7 above, the legislature has a special responsibility to monitor the operations of the Audit office closely and to be ever-conscious:

- that the Audit office will not always please executive government in what it reports,
- that earning governmental displeasure will probably mean that it is discharging its functions diligently in the public interest, and
- that the protection of the legislature is therefore called for.

I raise one other matter here which refers to ACT legislative drafting practice in general, but also in my view touches on the status of the Auditor-General. This is the use of the lower case in references to "the auditor-general" (the same applies to references to the "public accounts committee" and "presiding member"), as against upper-case Executive, Chief Minister, Minister, Speaker and Deputy Speaker. I believe this is regrettable, and likely to diminish the importance of those actors, and particularly the Auditor-General, in the minds of many readers.

NOTES:

1. This work was previously undertaken in the University's Centre for Research in Public Sector Management (CRPSM), and has now passed to the ANZSOG Institute of Governance within the University. This Institute has absorbed CRPSM. [ANZSOG = Australia New Zealand School of Government.]
2. For a survey of their use in the ACT, see Wettenhall & Laver 2002.
3. This was part of an introduction to the use of such bodies in Hong Kong and Singapore, but it has virtually universal application. Thynne is Professor of Governance in Charles Darwin University, Darwin, NT, and an Adjunct Professor in the ANZSOG Institute of Governance in the University of Canberra.
4. See Söderman 2006; Mxakato-Diseko 2006; Wettenhall 2006a, 2006b, 2007. Söderman, a former Swedish and then EU Ombudsman, was Rapporteur-General for the IIAS Conference. Mxakato-Diseko, South African Public Service Commissioner, was chair of the Conference sub-theme in which I presented my paper.
5. While focused on authorities headed by single statutory officers (as was the case with Temby's own organisation), this analysis has wider application.
6. See, for example, discussion and reporting (journalists' reports, editorials, letters to the editor) in the *Canberra Times* on the following days in 2009: 20 June, 23 June, 24 June, 14 August, 29 August, 7 September, 30 September. It is likely, of course, that tensions between the Audit agency and the government are exacerbated for the very reason that the press "lies in wait" (as it were) for reports from the agency, mines them for critical comment, and then sensationalises them in its own reporting in the hope of boosting sales.

7. First presented at a Workshop on Integrity Agencies at the ANZSOG Institute of Governance, University of Canberra, on 24 July 2009.

8. This gives control over the financing of over half the agency's activities; it does not cover the costs of performance audits and other investigations which have to be covered by appropriations – from statement of Auditor-General associated with Integrity Agencies Workshop, University of Canberra, 24 July 2009.

9. This is not the case with all statutory bodies operating within the ACT public sector, and I have argued in other submissions (or been associated with argument) that the cause of good administration is not helped when confusion exists on this matter: in evidence to Standing Committee on Planning and Environment Inquiry into Exposure Draft Planning and Development Bill 2006 (on planning agencies: Wettenhall 2006c), and more generally in submission to the (ultimately secret) Costello Strategic and Functional Review on machinery of governance issues generally (CRSPM 2006).

APPENDIX: REFERENCES IN ACT TO OTHER ACTORS IN THE A.C.T. PUBLIC GOVERNANCE SYSTEM

Executive and Chief Minister:

- Power to appoint and remove Auditor-General and Acting Auditor-General after consultation with Public Accounts Committee: s.8, sch.1/1.1, 1.4, 1.5.
- CM to certify that inclusion of a particular matter in an Auditor-General's report would disclose a deliberation or decision of "the Executive" (ie cabinet) and would not be in the public interest (s.19A).
- Power to make regulations (s.38).*

[*Presumably limited to some degree by a requirement that all such regulations are subject to approval or non-disallowance by the Legislative Assembly itself – I have not had time to check this.]

Minister:

- Responsibility to advise Principal Member of Public Accounts Committee of proposed appointment of an Auditor-General, and to receive notices of objection or need for longer time to consider (s.8).
- Right to receive, at the Auditor-General's discretion, a copy of a report where he/she is judged to have "a special interest in the report" (s. 17(6)).
- Responsibility to engage Independent Auditor (s.27).
- Power to authorise disclosure in an audit report of otherwise protected information (s.36).

Treasurer:

- responsibility to be advised by the Public Accounts Committee of the appropriation it considers should be made for the annual operations of the Auditor-General (or additional amount: ss.22, 22A).
- Power to authorise additional funds from the Treasurer's advance (s.22A(3)).

Chief executive officers:

- Before finalising a report, the Auditor-General must give a copy of the proposed report to "the responsible chief executive" and invite him/her to provide written comments, and the Auditor-General is obliged to take them into account in finalising the report (s.18)

Legislative Assembly, members and officers:

- A resolution of the Assembly is necessary to approve terms and conditions of appointment for the Auditor-General not provided in the Act itself (sch.1/1.1(2)).
- The Assembly may pass a resolution that the Auditor-General should be removed on grounds of misbehaviour or physical or mental incapacity, and the Executive must comply (sch.1/1.4).
- The Speaker/Deputy Speaker/Assembly Clerk to receive Auditor-General reports on behalf of the Assembly (s.4, 17). The Speaker is, for purposes of the Financial Management Act, the "responsible Minister of a department" in relation to the Auditor-General and staff (s.21).
- See entry below for Public Accounts Committee and Presiding Member.

Public Accounts Committee and Presiding Member:

- May notify Minister of objection to proposed appointment of an Auditor-General, or need for further time to consider (s.8).
- To receive special reports from Auditor-General containing sensitive information excluded from main reports (s.19).
- To advise Treasurer of the appropriation it considers necessary for the operation of the agency for a further year (s.22).
- To receive advice from the Auditor-General that the annual appropriation is insufficient, and to advise the Treasurer accordingly (s.22A).

Independent Auditor:

- Appropriately included to cover the need registered in Proposition 8 above (ss.27-32).

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