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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

GOVERNMENT RESPONSE TO THE STANDING COMMITTEE ON PUBLIC ACCOUNTS REPORT 15: INQUIRY INTO THE *AUDITOR-GENERAL ACT 1996*

Presented by
Ms Katy Gallagher MLA
Chief Minister

Tabled on 16 August 2011

ACT Government Response to the Standing Committee on Public Accounts Report 15: Inquiry into the *Auditor-General Act 1996*

June 2011

ACT
Government

Introduction

The ACT Government acknowledges the important and valuable role the Auditor-General plays in maintaining accountability and confidence in the public administration of the Territory.

The Government provided a submission to the Public Account Committee's (the Committee) Inquiry into the *Auditor-General Act* 1996 (the Inquiry) addressing the Terms of Reference fully. The Committee's report (the Report), however, deviated from the original Terms of Reference. The increased scope means this is the first opportunity the Government has had to address many of the issues canvassed in the Report.

Independence of the Auditor-General

The Report centred on the independence of the Auditor-General through significant discussion on the unique role of Officers of Parliament in the Westminster accountability model and audit system of democratic governance[1].

This principle was used to suggest that, under current arrangements, the Auditor-General is subject to the influence of the Executive. The Government rejects this assertion. The Government remains of the view that the Auditor-General is unquestionably independent in the discharge of the statutory powers and responsibilities and, consistent with the Government's original submission, this response argues that the provisions to safeguard the independence of the Auditor-General in the *Auditor-General Act 1996* are sufficient.

The premise of the Committee's argument is the view that the Auditor-General is not independent, but no evidence is, or can be, produced in support of this claim.

Independence and Funding

The Committee argued that the independence of the Auditor-General is conditional as long as the Executive determines the Auditor-General's budget.

The Government disagrees with this assertion. This was addressed in the Government's submission to the Inquiry. The Government relied on advice from the ACT Government Solicitor (at Attachment A) which was disregarded by the Committee. The argument is summarised below.

The Government believes:

- there are already provisions in the current ACT *Auditor-General Act 1996* to ensure the independence of the Auditor-General from the Executive;
- there are already provisions in the current ACT *Auditor-General Act 1996* that allow the Public Accounts Committee to provide input to the development of the annual Budget appropriation for the Auditor-General and the Audit Office;
- determination of the annual budget for the ACT Auditor-General by the ACT Legislative Assembly is unconstitutional because it is contrary to section 65 of the *Australian Capital Territory (Self Government) Act (1988)* (Cwlth), which provides appropriations can only be introduced by Ministers;

[1] UK House of Commons (2003). Parliamentary Library Research Paper 03/77, 'Officers of Parliament – a Comparative Perspective', 20 October 2003; as sited in Standing Committee on Public Accounts Report 15: Inquiry into the *Auditor-General Act 1996.*

- determination of the annual budget for the ACT Auditor-General by the ACT Legislative Assembly is beyond the capacity of the Legislative Assembly in as much as it purports to provide for the Assembly to direct the Executive; and
- the Territory already funds the Auditor-General to an appropriate level, based on per capita comparisons and comparison with small jurisdictions.

Furthermore, the Australian Council of Auditors-General (ACAG) submitted to the Inquiry that independence can be assured as long as the Audit Office is sufficiently funded to carry out its mandate. The ACT Audit Office was recently found to be able to carry out its mandated functions within current financial arrangements by the Independent Auditor.[2]

The Committee concluded its argument for funding and independence with a recommendation to provide the Committee with a formal role in the determination of the budget for the Auditor-General. However, this is already provided in section 22 of the *Auditor-General Act 1996.* This section provides that the presiding member of the Committee may advise the Treasurer of the appropriation that the committee considers appropriate for the operations of the Auditor-General, and may provide the Treasurer with a draft budget for the operations of the Auditor-General.

The Report made comparisons to Auditor-General legislation in both New Zealand and the United Kingdom. However, these comparisons did not take proper account of the fundamental differences in the constitutional arrangements in these jurisdictions as compared with the Commonwealth of Australia and the ACT.

In considering funding, the Government notes that there is an opportunity to reconsider the scoping methodology used by the Audit Office. The findings of the Independent Auditor, particularly in relation to controlling costs and time indicate that "on average, the final cost per audit was 37 per cent above the original estimate (for all 18 performance audits)."[3]

It is also noteworthy that a recent review of the Queensland Audit Office stated that "in an environment of fiscal restraint, it is incumbent upon the Queensland Audit Office to strive to boost output and productivity within current available levels of funding. In short, the Queensland Audit Office should be expected to achieve more with the resources now at its disposal"[4]. The same imperative applies to the ACT Auditor-General, as it does across the ACT Public Service.

Other Matters

Performance audit

The Government also sees value in including provisions relating to the performance audit function in the *Auditor-General Act 1996.* Currently under Part 3 section 10 (d) of the *Auditor-General Act 1996* the Auditor-General's function is to 'conduct performance audits in relation to any person, body or thing ascertained in accordance with the regulations'. Further, section 12 establishes what the subject of a 'performance audit' may be, however, it is silent on what a performance audit is and, importantly, does not outline the objectives of performance audits.

[2] Sendt. (2010). *Report of the Independent Performance Audit of the Operations of the ACT Auditor-General and the ACT Audit Office.*
[3] Ibid.
[4] Carpenter & Graham (2010). *Report of the 2010 Strategic Review of the Queensland Audit Office.*

Clarifying the status and objectives of performance audit may have a range of benefits, including:

- ensuring that the community is receiving "accurate and complete information on the legality, efficiency and effectiveness with which public sector activities and resources are managed;"[5]
- assisting to develop a more robust scoping methodology (discussed above); and
- recognising that all governments face a range of competing priorities with limited resources, and must therefore balance both the efficiency as well as the effectiveness of service delivery.

Accordingly, the Government recommends the inclusion of provisions similar to section 16 (1) of the New Zealand *Public Audit Act 2001*. This section provides for the Auditor-General to conduct performance audits which may examine:

- the effectiveness and efficiency of public entity activities;
- compliance with statutory obligations;
- acts or omissions of public entities to determine if waste has resulted, or may result; and
- probity or financial prudence of public entities.

The Government Response

The Government agreed with the Committee that there are amendments that would improve the clarity and intention of the *Auditor-General Act 1996*.

However, the Government believes that the *Auditor-General Act 1996* safeguards the independence of the Auditor-General and the Audit Office. The close consultative relationship between the Auditor-General and the Committee, in both legislation and practice, functions well. The Government believes that legislating for the Committee to have an even greater role in the operations of the Auditor-General and Office could have implications for its status as an independent entity.

The Government has noted recommendations which seek either clarification (especially around drafting of legislation) or those which the Government believes are already provided for in the current *Auditor-General Act 1996*.

Finally, the Government has noted the recommendations that are outside the scope of the Inquiry's Terms of Reference or have no relationship to Government process.

The Government has addressed each of the 41 Recommendations individually in the response below.

[5] Carnell, K. (1996). Explanatory Statement – Auditor-General Bill 1996, p. 1

Government Response to Recommendations

RECOMMENDATION 1

The Committee recommends that the Auditor-General Act 1996 be amended to designate the Auditor-General as an Officer of Parliament.

Government Response

Agreed. The Government supports consideration of the incorporation of passages, similar to those in the Commonwealth *Auditor-General Act 1997* section 8 (1), into the ACT *Auditor-General Act 1996*. The ACT Government also supports consideration of an oath or affirmation of office.

The Government does not support the Committee's definition and formulation of an Officer of Parliament as outlined in Chapter 3 of the Report, or that other statutory offices, such as the Ombudsman and the Electoral Commissioner, be considered.

RECOMMENDATION 2

The Committee recommends that the Legislative Assembly's Administration and Procedure Committee inquire into and report on the merit of establishing a framework that formally recognises Officers of Parliament, details the nature and terms of the relationship these Officers have with the Assembly and to the Executive, and highlights that their primary responsibility is to the Assembly.

Government Response

Noted. The Government acknowledges that the Administration and Procedure Committee has already agreed to conduct this inquiry and invited the Government to make a submission. The Government has a number of concerns with the Committee's approach to an Officer of the Parliament as set out in this Report (Inquiry into the *Auditor-General Act 1996)* but will continue this discussion in the context of the new inquiry.

RECOMMENDATION 3

The Committee recommends that should the Standing Committee on Administration and Procedure recommend the establishment of a framework that formally recognises Officers of Parliament:

(i) the Legislative Assembly Secretariat's Strategy and Parliamentary Education Office, where appropriate, should incorporate reference to Officers of Parliament and the unique roles they perform on behalf of Parliaments, into education and information services and activities

(ii) the Legislative Assembly Secretariat's Strategy and Parliamentary Education Office should develop and publish an Assembly fact sheet on Officers of Parliament. The fact sheet should emphasise the unique relationship these Officers have with Parliament and the roles they perform on behalf of Parliaments, and

(iii) the major seminars for ACT public servants, for which the ACT Legislative Assembly Secretariat is responsible, in particular the seminars covering the role of the ACT Legislative Assembly and the workings of Assembly Committees, should specifically include content on the unique role of Officers of Parliament and their relationship with Parliaments.

Government Response

Noted. See Response to Recommendation 2.

RECOMMENDATION 4

The Committee recommends that the Standing Committee on Administration and Procedure review Standing Orders concerning the form of meetings for committees of the ACT Legislative Assembly.

Government Response

Agreed.

RECOMMENDATION 5

The Committee recommends that the Auditor-General Act 1996 be amended to require the Auditor-General to consult with the Standing Committee on Public Accounts regarding its annual performance audit program.

Government Response

Agreed, although only in the context that the amendment does not blur independence of the office, or impact on the provisions that the Auditor-General is not subject to direction.

Notwithstanding agreement to this recommendation, the Government considers that current practice and provisions in the *Auditor-General Act 1996* allow for sufficient input of the Committee into the determination of the performance audit program and, further, that these provisions support the independence of the Audit Office. Equally, current practice also supports consultation with government agencies. The Government would also support amendments to require the Auditor-General to consult with ACT Government Agencies regarding its annual performance audit program.

RECOMMENDATION 6

The Committee recommends that the Legislative Assembly Secretariat note the implications of the recommendations of this report on the Standing Committee on Public Accounts' Secretariat.

Government Response

Noted. This is a matter for the Legislative Assembly Secretariat.

RECOMMENDATION 7

The Committee recommends that the Auditor-General Act 1996 be amended to provide capacity for the Standing Committee on Public Accounts to recommend to the Executive an appointment to the Office of Auditor-General.

Government Response

Not agreed. The Government considers that the Committee's consultation and veto powers already provided under section 8 of the *Auditor-General Act 1996* are suitable for a small jurisdiction, and are consistent with the doctrine of the separation of powers.

RECOMMENDATION 8

If recommendation seven is not accepted, the Committee recommends that the Auditor-General Act 1996 be amended to provide that where the Standing Committee on Public Accounts vetoes a proposed appointment to the Office of Auditor-General that the Chief Minister must then propose an alternative appointment for its consideration.

Government Response

Noted.

RECOMMENDATION 9

Where the Standing Committee on Public Accounts repeatedly vetoes proposed appointments to the Office of the Auditor-General, the Committee recommends that the Auditor-General Act 1996 should be amended to provide a default for the Legislative Assembly to be the final arbitrator.

Government Response

Not agreed. This is inconsistent with the doctrine of the separation of powers as the legislature cannot direct the Executive in the exercise of Executive powers or exercise those powers itself. The Government notes that in New Zealand, as in other Australian jurisdictions, the appointment is made by the Governor General or Governor-in-Council. There is no equivalent position in the ACT and in this jurisdiction the Executive represents the Crown. It is outside the constitutional capacity of the Legislative Assembly to be the final decision maker for this appointment.

RECOMMENDATION 10

The Committee recommends that the Auditor-General Act 1996 be amended to provide the Standing Committee on Public Accounts with the power of veto over the appointment of an acting Auditor-General similar to that provided in relation to the appointment of the Auditor-General under section 8 of the Act.

Government Response

Not agreed for the reasons set out above in relation to Recommendation 9. Further, Legislative Assembly intervention in acting arrangements may not be appropriate for other reasons. As a matter of practice, previous Auditors-General have relied on senior Audit Office staff to act during periods of absence. These arrangements have been agreed by the Government. Legislative Assembly intervention may restrict the Auditor-General's independence in staff selection and operational arrangements for the Audit Office.

RECOMMENDATION 11

The Committee recommends that the Auditor-General Act 1996 be amended to provide for power to suspend the Auditor-General in certain circumstances. The process for suspending the Auditor-General should mirror the process for removal of the Auditor-General under Schedule 1 of the Act which requires a resolution to be passed by the Legislative Assembly.

Government Response

Agreed.

RECOMMENDATION 12

The Committee recommends that the admission of an oath or affirmation of Office be referred to the Legislative Assembly's Standing Committee on Administration and Procedure.

Government Response

Agreed.

RECOMMENDATION 13

The Committee recommends that the Auditor-General Act 1996 be amended to include a provision which prevents the Auditor-General from holding other forms of remunerative employment while in the position.

Government Response

Agreed.

RECOMMENDATION 14

The Committee recommends that the Auditor-General Act 1996 be amended to require the Auditor-General to provide the Speaker of the ACT Legislative Assembly with a declaration of interests within one month of appointment to the Office.

Government Response

Agreed.

RECOMMENDATION 15

The Committee recommends that section 9 of the Auditor-General Act 1996 be expanded to recognise that the Auditor-General is not subject to direction by 'any person'.

Government Response

Agreed. While there are already strong provisions to support the independence of the Auditor-General from direction, the Government supports this recommendation.

RECOMMENDATION 16

The Committee recommends that the Auditor-General Act 1996 be amended to prescribe a greater role for the Standing Committee on Public Accounts in managing the arrangements, on behalf of the Legislative Assembly, for a periodic independent performance audit of the operations of the Auditor-General and the Audit Office. This should include amendments that provide for the Committee to: (i) initiate the audit; (ii) determine the terms of reference; and (iii) appoint an appropriate independent auditor to undertake the audit.

Government Response

Not agreed. The Government considers that the legislation provides for the Committee to have a significant role in the arrangements for a periodic independent performance audit of the operations of the Auditor-General and the Audit Office.

Current arrangements, under Part 5 sections 27-29, provide for initiation of the audit by the presiding member of the Committee.

The close collaboration between the Government and the Committee was evident in the most recent audit. This was triggered by the presiding member of the Committee in accordance with the *Auditor-General Act 1996*. The Chief Minister consulted the presiding member to resolve the Terms of Reference and provided information to the presiding member on the appointment. The appointment of the Independent Auditor progressed according to ACT Government procurement requirements and a suitably qualified former Auditor-General was appointed.

RECOMMENDATION 17

The Committee recommends that the costs involved in undertaking an independent performance audit of the operations of the Auditor-General be included in the Legislative Assembly's budget of that year.

Government Response

Not agreed. It is not possible, nor feasible, to predetermine costs. The costs of the performance audit are dependent on many factors, including scope, timing and the market.

RECOMMENDATION 18

The Committee recommends that the Auditor-General Act 1996 be amended to provide a fixed timeframe between section 29 audits of the Audit Office. Specifically, a section 29 audit should take place once in each Legislative Assembly term with the timing of the review to be at the discretion of the Standing Committee on Public Accounts.

Government Response

Agreed. The Government notes that this recommendation is consistent with Recommendation 12 of the Independent Review of the ACT Audit Office. The Government considers regular reviews of the Audit Office to be appropriate.

RECOMMENDATION 19

The Committee recommends that section 29 of the Auditor-General Act 1996 be amended to extend the terms of 'performance audit' to include strategic reviews, or other reviews, of the Office to provide more flexibility for the Standing Committee on Public Accounts in deciding which form of external review would be most appropriate at the time a review is requested.

Government Response

Agreed.

RECOMMENDATION 20

The Committee recommends that the Auditor-General Act 1996 be amended to clearly state that the independent auditor engaged to undertake financial and performance audits of the operations of the Auditor-General and Audit Office does not have to be the same auditor.

Government Response

Not agreed. In practice the process of engaging an independent auditor for either financial or performance audits has not been complicated and current practice reflects that it can, and has been, a different auditor. This is an unnecessary layer of detail in the Act.

RECOMMENDATION 21

The Committee recommends that the Auditor-General Act 1996 be amended to prescribe that a performance audit of the operations of the Auditor-General and Audit Office, under section 29 of the Act, can only occur if the Standing Committee on Public Accounts has formally initiated such a review.

Government Response

Agreed in principle – to the extent that amendments to clarify the intent are considered necessary by the Parliamentary Counsel.

RECOMMENDATION 22

The Committee recommends that Part 5 of the Auditor-General Act 1996 be amended to prescribe minimum qualifications for the appointment of the independent auditors to conduct the financial and performance audits.

Government Response

Agreed. The Government supports amendments to the *Auditor-General Act 1996*, similar to those in the Queensland *Auditor-General Act 2009* (Part 4 section 68 (3)).

The Government notes that the references to the Commonwealth provision in the Committee's Report are not accurate. Rather the conditions of appointment of the Independent Auditor refer to pay and leave conditions.

RECOMMENDATION 23

The Committee recommends that the Legislative Assembly's Administration and Procedure Committee should consider amending Standing Orders to formally specify that the Standing Committee on Public Accounts should:

(i) *be chaired by a non-Government Member; and*
(ii) *have a membership that does not constitute a Government majority.*

Government Response

Not agreed. The Government notes this is outside the scope of the Inquiry's Terms of Reference.

RECOMMENDATION 24

The Committee recommends that the Auditor-General Act 1996 be amended to provide the Legislative Assembly, through the Standing Committee on Public Accounts, with a formal role in considering the Audit Office's draft budget estimates and making a report with recommendations to the Legislative Assembly, as part of the Australian Capital Territory's budget process, on the level of funding required by the Auditor-General.

Government Response

Noted. This is already provided for in the *Auditor-General Act 1996*. To the extent that the Committee is proposing that the Legislative Assembly should fix the Auditor-General's budget, the Government provided legal advice to the Committee that the determination of the annual budget for the Auditor-General by the Legislative Assembly is beyond the constitutional capacity of the Legislative Assembly. The Committee has disagreed with this advice.

RECOMMENDATION 25

The Committee recommends that the Audit Office should be funded to conduct a number of performance audits that is determined by the Auditor-General and endorsed by the Standing Committee on Public Accounts within the budget context.

Government Response

Not agreed. The Government believes this would essentially permit the Auditor-General to set his or her own budget.

RECOMMENDATION 26

The Committee recommends that the Auditor-General Act 1996 be amended to ensure consistency between any designated role provided to the Legislative Assembly through the Standing Committee on Public Accounts in considering and recommending the draft budget estimates of the Auditor-General under section 22 of the Act and any additional budget supplementation sought by the Auditor-General under section 22A of the Act.

Government Response

Not agreed. See Government Response to Recommendation 24.

RECOMMENDATION 27

The Committee recommends that the Auditor-General Act 1996 be amended to remove redundant references to the Financial Management Act 1996 in sections 22 and 22A of the Auditor-General Act 1996 respectively.

Government Response

Agreed. The Government agrees that references to section 18 (1) (c) or (d) are redundant as these are no longer in the *Financial Management Act 1996.* However, the Government notes that in order to maintain the intent of section 22 A (3) of the *Auditor-General Act 1996* references to section 18 (2) and (3) of the *Financial Management Act 1996* should be made.

RECOMMENDATION 28

The Committee recommends that the Auditor-General Act 1996 be amended to recognise that staff assisting the Auditor-General are not subject to direction of any person other than the Auditor-General, or a person authorised by the Auditor-General, in relation to matters dealing with audit functions and duties performed pursuant to the Auditor-General Act 1996.

Government Response

Agreed.

RECOMMENDATION 29

The Committee recommends that the Auditor-General Act 1996 be amended to permit the Auditor-General, subject to funds being available and subject to the provisions of the Public Sector Management Act 1994 and the Government Procurement Act 2001, to engage persons on terms and conditions the Auditor-General considers appropriate to meet the needs of the audit work of the Audit Office.

Government Response

Not agreed. Conditions of Audit Office staff should be consistent with the ACT Public Service (ACTPS) and capacity already exists for the engagement of contractors where appropriate.

Issues of attraction and retention are periodically experienced in various parts of the ACTPS and are being collectively addressed under the Government's Attraction and Retention Framework. In this respect, existing common provisions in industrial agreements across the ACTPS provide particular terms and conditions that mark the ACT as an 'employer of choice'. These terms and conditions include generous leave entitlements, flexible working arrangements and opportunities for learning and career development.

Provisions equally exist under these industrial agreements for the adoption of 'special employment arrangements' providing additional remuneration where technical or other skills are in high demand. In that sense, and subject to funding, the Auditor-General's Office already has adequate capacity and managerial autonomy within its employment arrangements, as established in its industrial agreement and under the *Public Sector Management Act 1994,* to respond to staffing pressures.

It is noteworthy that Dr Alan Hawke, in his review of the ACTPS, has recommended that the Government progressively work towards establishing a single consolidated industrial agreement across the ACTPS and to simplify its employment arrangements. To provide separate and distinct arrangements for Audit Office staff would be inconsistent with these recommendations and potentially increase complexity in the administration of staff both with the Audit Office and when moving within the ACTPS and result in extra costs.

RECOMMENDATION 30

The Committee recommends that the Auditor-General Act 1996 be amended to provide the Auditor-General with an express authority to audit outsourced activities of the Government. This should provide the Auditor-General with authority to:

(i) access documents of a recipient of public money; and
(ii) audit a recipient organisation itself or the service(s) it provides.

Government Response

Agreed in principle, subject to further examination of the legal and accountability ramifications, and the ability to appropriately define the extent and the application of the Auditor-General's authority in relation to external organisations.

The Government notes that contractual provisions in most grant and other funding agreements with non-government organisations (particularly with not-for-profit organisations) generally include a requirement that the funded organisation permit the Territory to inspect or audit the records of the funded organisation, at least in relation to the funded amount. Therefore, there are already non-legislative measures in which Government funded non-government organisations are required to account for their funding, and allow the Auditor-General to 'follow the public dollar'.

Indeed, the recent review by Carpenter and Gray of the Queensland Audit Office suggested that 'following the dollar' further would only be necessary when:

"The Premier [is] [must be] satisfied that there is *prima facie* evidence of:

- a breakdown or failure of the normal procedures for accounting for the expenditure of funds advanced by the State; or
- other evidence of a failure to acquit such funds in accordance with agreed procedures, including the achievement of agreed performance targets."[6]

RECOMMENDATION 31

The Committee recommends that any other legislation, as necessary be amended to permit performance audits of organisations that receive funding from the ACT Government only in respect of those activities funded by the ACT Government.

Government Response

Agreed in principle, subject to the considerations and provisos set out in the Government response to Recommendation 30.

RECOMMENDATION 32

The Committee recommends that the Auditor-General Act 1996 be amended to include a provision 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 provision should not in any way be seen as limiting the matters that the Auditor-General may have regard to in conducting any audits including those under the Commonwealth's Corporations Act 2001.

Government Response

Agreed.

[6] Carpenter & Graham (2010). *Report of the 2010 Strategic Review of the Queensland Audit Office.*

The ACT Government supports incorporation of passages, similar to those identified in the NSW *Public Finance and Audit Act 1983* (s27B(4)), into the ACT *Auditor General Act 1996.*

The Government agrees that the Auditor-General should adopt appropriate professional standards. However, contrary to the argument of the Committee, the Government does not believe that, in the first instance, increases in appropriation should be provided to cover the cost of office-wide projects and systems. Rather the Government agrees with the position of the Independent Auditor in relation to fee recovery, specifically that the Audit Office should set its financial audit fees with the aim of recovering an appropriate share of the costs of office-wide projects and systems.

RECOMMENDATION 33

The Committee recommends that the Standing Committee on Justice and Community Safety, as part of its inquiry into the Freedom of Information Act 1989, consider the application of the FOI Act with regard to the Auditor-General.

Government Response

Agreed.

RECOMMENDATION 34

The Committee recommends that section 18 of the Auditor-General Act 1996 be amended to reflect section 19(3) of the Commonwealth Auditor-General Act 1997.

Government Response

Agreed. Provision of proposed reports to any person or entity with an interest in an audit would strengthen the approach to finalising draft audits.

RECOMMENDATION 35

The Committee recommends that section 36 of the Auditor-General Act 1996 be examined to ensure that the Auditor-General has the ability to disclose information to the Legislative Assembly (or relevant parliamentary committees); the police and other agencies, such as the Australian Securities and Investment Commission, and the courts to assist with the investigation and prosecution of offences.

Government Response

Noted. The Government will seek advice on further amendments to the *Auditor-General Act 1996*, including section 36.

RECOMMENDATION 36

The Committee recommends that the ACT Government seek advice on the effect of section 13 of the Auditor-General Act 1996 on the powers of the Auditor-General.

Government Response

Agreed.

RECOMMENDATION 37

The Committee recommends that the ACT Government clarify its definition of the term 'controlling interest' in all applicable legislation and amend any, or all, Acts as required.

Government Response

Agreed. The Government will seek advice.

RECOMMENDATION 38

The Committee recommends that section 16 of the Auditor-General Act 1996 be amended to improve clarity and transparency with regard to its application. The provisions in section 21 of the Western Australian Auditor-General Act 2006 relating to 'Audit fees' could be used to assist with framing any amendments.

Government Response

Not agreed. The Government considers there is no lack of clarity regarding the operation of section 16 of the *Auditor-General Act 1996* and, further, that provisions of section 21 of the Western Australian *Auditor-General Act 2006* are not relevant. This issue is a policy issue rather than imprecise legislative drafting.

RECOMMENDATION 39

The Committee recommends that sections 18(2) and 18(3) of the Territory-owned Corporations Act 1990 be removed as they are not consistent with the requirements of section 16 of the Auditor-General Act 1996.

Government Response

Not agreed. These provisions are complementary and provide for the *Auditor-General Act 1996* to decide fees in relation to audits under the *Territory-Owned Corporations Act 1990.*

RECOMMENDATION 40

The Committee recommends that the Auditor-General Act 1996 be amended to provide the Audit Office with the ability to recover the costs of providing advice and information. The provisions in section 23 of the Western Australian Auditor-General Act 2006 relating to 'Provision of advice or information' could be used to assist with framing any amendments.

Government Response

Not agreed. This is outside the core business of the Auditor-General and the office.

RECOMMENDATION 41

The Committee recommends that the Auditor-General Act 1996 be amended to allow the Auditor-General to conduct joint investigations and/or performance audits with other statutory office holders tasked with oversighting institutional integrity within government.

Government Response

Not agreed. Statutory office holders have different purposes, objectives, and legal frameworks. Given the risk of conflicting legal frameworks and powers, particularly relating to the rights of individuals and organisations, the Government does not agree with this recommendation.

Your Reference

Our Reference
616689:PG:dh

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16 April 2010

Ms Pam Davoren
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Dear Ms Davoren

SETTING THE AUDITOR-GENERAL'S BUDGET

I refer to your letter dated 11 April 2010 and our subsequent discussions.

A. Background

1. You have requested legal advice on behalf of the Chief Minister in response to a question from the Public Accounts Committee of the Legislative Assembly about the funding of the Territory's Auditor-General function as part of its inquiry into the *Auditor-General Act 1996*.

2. At the hearing, the Chief Minister was asked for his view of one of the Inquiry's terms reference– whether the annual budget for the Auditor-General should be set by the Legislative Assembly and not by the Executive Government.

3. In his response the Chief Minister referred to constitutional impediments and legal advice about proposals that the Assembly legislate for or appropriate the budget for the Auditor-General. In response to a request from the Chair of the Committee, the Chief Minister has agreed to provide this advice.

4. The advice in question was provided by me and related to an earlier proposal that the Legislative Assembly would determine the annual budget of the Auditor-General and addressed the specific proposal under consideration. As we recently discussed, as my earlier advice specifically addressed the proposal then under consideration, you now seek my advice in a form that addresses the Chief Minister's commitment to provide legal advice more generally to the Public Accounts Committee on whether it is possible for the Legislative Assembly to determine the Auditor-General's budget.

B. What principles are involved?

1. The issue under consideration is whether the Assembly can determine the Auditor-General's budget independently of the Executive.

2. Whilst the Executive may only expend monies appropriated by the Legislative Assembly, the capacity of the Assembly, either by resolution or enactment, to determine an allocation of public monies is limited by two factors.

3. First, the specific statutory framework established by the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**Self-Government Act**), the Territory's constitution. Secondly, by reason of general constitutional principle arising from the necessary implications of the system of responsible government and the doctrine of the financial initiative in particular.

4. Caution must be exercised in drawing examples from other jurisdictions as, although the doctrine of the financial initiative applies, they are bound by their own constitutional frameworks and evolved conventions.

C. Limitations set by the Self-Government Act

1. Public monies may only be expended as authorised by enactment. Sections 57 and 58 of the Self-Government Act provide:

> **57 Public Money**
>
> (1) The public money of the Territory shall be available for the expenditure of the Territory.
>
> (2) The receipt, spending and control of public money of the Territory shall be regulated as provided by enactment.
>
> **58 Withdrawals of Public Money**
>
> (1) Subject to subsection 16(4), no public money of the Territory shall be issued or spent except as authorised by enactment.
>
> (2) The public money of the Territory may be invested as provided by enactment.

2. This makes it clear that the mere making of a resolution by the Assembly is not sufficient legal authority to authorise the expenditure of public monies and hence any resolutions purporting to fix the appropriation of the Auditor-General can be of no legal effect to achieve that end.

3. It follows that public monies may only be appropriated by an enactment which, relevantly, is a law made by the Assembly (section 3 of the Self-Government Act). Thus the only lawful mechanism for the fixing of the appropriation for the Auditor-General by the Legislative Assembly is by way of the making of an enactment.

4. Section 65(1) of the Self-Government Act provides that:

> An enactment, vote or resolution (***proposal***) for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister.

This means that only a Minister may initiate laws, votes or resolutions for the appropriation of public monies.

5. Once a proposal is made by a Minister, section 65(2) permits a member other than a Minister to move an amendment, unless it is to increase the amount of public money to be appropriated.

6. This is a specific articulation of the general principle regarding the "financial initiative", which I discuss below.

D. Relevant Constitutional Principles

1. The Self-Government Act is the constitutional document under-pinning government in the Territory. It was enacted by the Commonwealth Parliament pursuant to section 122 of the Commonwealth Constitution and relevantly:

   (1) establishes the ACT as a body politic;

   (2) establishes the Legislative Assembly; and

   (3) establishes the Executive and confers upon it the general powers set out in the Act.

2. This framework and arrangements satisfy the criteria for a system of representative and responsible government. The Territory has the same legislative and executive powers and responsibilities, relevantly, as the States and the Northern Territory.

3. Section 24 of the Self-Government Act provides that the Legislative Assembly can make laws with respect to its powers, privileges and immunities. Until the Assembly and its members and Committees make laws with respect to its powers, however, they will have the same powers as the House of Representatives and its members and committees. Such laws have not been made and thus the Assembly (largely, save for matters not relevant for this advice) has the same powers as the House of Commons in 1901 and the House of Representatives, including those powers expressed or modified in the *Parliamentary Privileges Act 1987* (Cth). The Legislative Assembly has not yet exercised its powers under Section 24.

4. The High Court held (in *Egan v Willis* (1988) 195 CLR 424) that the privileges of a legislature are derived from the principle of responsible government and that the scope of its particular powers are defined by what is reasonably necessary for the proper exercise of its functions. One central principle of responsible government is ministerial responsibility, both individual and collective, of which the Cabinet (the

executive) is clearly a core element. Another central principle is that expenditure of public monies must be approved by the legislature, subject always to the caveat that the initiative in respect of financial matters rests with the executive (recently re-stated by the High Court in *Pape v Commissioner of Taxation* [2009] HCA 23).

5. The principle that the executive may only draw public money by statutory authority was said in *Pape* to be "central to the idea of responsible government" and one of "three fundamental constitutional principles" implied in the *Bill of Rights Act* 1689 (see French CJ at [54] – [67]). The court discussed at some length the underlying concepts and their historical development.

6. This must, naturally, be guided by the principle of ministerial responsibility, or the principle that the executive is accountable to the legislature through its ministers. But it must also, of course, respect the overriding doctrine of separation of powers.

7. The doctrine is widely accepted as an implied element of the Commonwealth Constitution and that it thereby flows through to other elements of the Australian constitutional framework. There is a legal debate as to the extent of the separation required between the judiciary and other branches in some jurisdictions (including the ACT). There is little question, in my respectful view, however, that the fundamental principle of the separation of powers doctrine, that the functions of the executive and the legislature must remain sufficiently distinct, underpins the principles of responsible government in the ACT. That is, whilst the legislature, aside from its role in respect of the passage of legislation, properly retains a role to provide the means for the scrutiny and criticism of the performance of the government, it is not for the legislature to trespass onto the functions of the executive. This must, plainly, apply in respect of financial matters – what has been widely described within countries adhering to the Westminster system of government as the "financial initiative".

8. It is the function of the executive to determine the policy of the government and to propose and introduce legislation required to give effect to that policy and otherwise to administer the powers and responsibilities of the executive. Section 65 of the Self-Government Act, discussed above, recognises this by vesting exclusive responsibility for appropriations and (implicitly) for financial initiatives in the government. Like its counterpart in section 56 of the Australian Constitution, this provision effectively confers on the executive responsibility for the design, drafting and introduction of appropriation bills and for the management of their consideration by the legislature. In the Australian Constitution, the financial initiative is entrenched by the requirement that a money bill must be recommended by the Governor-General. In the Self-Government Act it is entrenched in the requirement that a money bill must be proposed by a Minister.

9. This exclusive responsibility for appropriations and for financial initiatives is also reflected in the Standing Orders and Continuing Resolutions of the Legislative Assembly which state:

Money proposals submitted – without notice

200 An enactment, vote or resolution for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister. Such proposals may be introduced by a Minister without notice.

Limitations on amendment

201. A Member, other than a Minister, may not move an amendment to a money proposal, as specified in standing order 200, if that amendment would increase the amount of public money of the Territory to be appropriated.

201A. An amendment in accordance with standing order 201 must in accordance with the resolutions agreed to on 23 November 1995 – i.e. "That this Assembly reaffirms the principles of the Westminster system embodied in the 'financial initiative of the Crown' and the limits that that initiative places on non-executive Members in moving amendments other than those to reduce items of proposed expenditure."

10. The fact that Government has exclusive responsibility for appropriation bills, and for initiating the procedures which relate to their tabling and passage, leads inevitably to the conclusion that a power which may effectively pre-empt the procedures is not reasonably necessary for the proper exercise of functions by the Assembly and is, accordingly, not one that the Assembly may exercise.

11. It follows that it is not within the competence of the Assembly to pass a resolution or an enactment that purports to direct the executive as to how public monies are to be appropriated.

E. Adherence to the doctrine of the financial initiative

1. The concept of the executive's responsibility under the Crown for the control of public expenditure, subject to the supervision of the Parliament, has developed over several centuries, principally in the United Kingdom until the 20th Century. Its detailed application in a jurisdiction will depend upon the constitutional and other constraints, including parliamentary conventions, which relevantly apply. A few examples will suffice.

2. The United Kingdom has no written constitution and the Comptroller & Auditor General (an individual) is appointed by the Crown under legislation and is funded directly from the "consolidated fund" and the National Audit Office on the vote of the Parliament after recommendation of Public Accounts Commission.

3. The financial system of the British government is acknowledged as being most complex and its structure, together with the role of the Comptroller & Auditor General, has been the subject of significant consideration over the course of the last decade.

4. It is fair to say that the current circumstance of the funding arrangements for the Comptroller & Auditor General and the National Audit Office reflect the evolution of the financial initiative doctrine in an environment governed largely by convention that has evolved to meet relevant demands and recognising the supremacy of parliament. Otherwise, broadly, the financial initiative rests with the executive government. That is, in the absence of strict constitutional constraints, the financial initiative doctrine is, to a degree, malleable to meet the ebb and flow of current thinking on principles of governance and accountability.

5. In the United States a quite different model applies, where the Congress need not accept the Executive's proposed budget but can also propose its own. So much for the financial initiative. Of course the principles of responsible government operate very different under the system of government in the United States.

6. In the State of Victoria, the function of the Auditor-General is embodied in that State's constitution, creating the role as an officer of the Parliament (*Constitution Act 1975* (Vic), section 94B(1)). The significance of this may be limited to issues around tenure, direction and control. For example, no express power is conferred on the Victorian Parliament in respect of budget appropriations for the Auditor-General and it is unlikely that any power could be implied (see section 94B(5)).

7. Moreover, the financial initiative is entrenched in Victoria in the same way as it is in the Commonwealth, by a requirement that a money bill be introduced with the recommendation of the Governor of that State (*Constitution Act 1975* (Vic), section 63).

8. In most jurisdictions the budget of the Auditor-General is the subject of an appropriation in the usual way but following consultation between the Public Accounts Committee (or its equivalent) of the legislatuure and the executive. In the Territory, the advice of the Committee to the Executive in relation to the appropriation for the Auditor-General is addressed in sections 22 and 22A of the *Auditor-General Act 1996*. This follows the Commonwealth model.

F. Conclusion

1. In the United Kingdom, the Comptroller & Auditor-General holds a degree of independence from the Executive in respect of his or her appointment and annual budget, which forms part of a distinct statutory and administrative process. They are an officer of Parliament, appointed by the Crown under a constitutional framework in which the financial initiative is recognised but is not entrenched. Significantly, the financial initiative has evolved in the absence of a written constitutional framework and, accordingly, as one might reasonably expect, permits of greater flexibility in respect of appropriations for particular functions.

2. In Victoria, where some aspects of these arrangements exist, the financial initiative remains entrenched with the result that the parliament has a lesser degree of control over the annual budget of the Auditor-General as in the United Kingdom.

3. In the Territory only a Minister may introduce an enactment into the Legislative Assembly for the appropriation of money.

4. The executive has exclusive responsibility for appropriations and (implicitly) for financial initiatives by operation of section 65 of the Self-Government Act and it is thus beyond the necessary functions of the Assembly for it to purport to pass laws relating to appropriations other than as proposed by the executive.

5. It is not within the competence of the Assembly to pass a resolution or enactment which purports to direct the executive as to how public monies are to be appropriated or that an appropriation law should be in certain terms. It may of course amend an appropriation, but not so as to increase the appropriation.

6. Under the model of the financial initiative applying in the Territory the budget for the Auditor-General is the responsibility of the Executive. Although the *Auditor-General Act 1996* provides for consultation between the Assembly and the Executive in relation to the Auditor-General's budget, the Assembly cannot fix that budget. For it to attempt to do so would be to exceed its constitutional powers.

I trust this advice is sufficient for present purposes but please do not hesitate to contact me should you have any further queries.

Yours sincerely

ACT Government Solicitor

Peter Garrisson
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