Submission No. 1

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CLERK

Hon Barry House MLC

16 June 2011

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1596
SPEAKER

Hon. Shane Rattenbury MLA
Speaker
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Speaker

**INQUIRY INTO FEASIBILITY OF ESTABLISHING THE POSITION OF OFFICER OF THE PARLIAMENT**

Thank you for your recent letter seeking our views on establishing the position of Officer of the Parliament.

Please find attached a submission prepared by the Clerk of the Legislative Council of Western Australia.

The conclusion in this document notes, "It is unnecessary for the independence of the Auditor General, or any similar statutory office holder, for the role to be considered an Officer of the Parliament. Secondly, it creates uncertainty in constitutional terms as to the rights and privileges of such officers".

I hope this assists your enquiry.

Yours sincerely

**Hon. Barry House**
President of the Legislative Council
A297564

PARLIAMENT HOUSE, HARVEST TERRACE, PERTH WA 6000 TELEPHONE: (08) 9222 7211 FACSIMILE: (08) 9222 7814

# Response to the Standing Committee on Administration and Procedure request for submission on establishing the position of Officer of the Parliament.

The Legislative Assembly for the Australian Capital Territory standing committee on Administration and procedure seek a submission on the Officer of the Parliament. In particular should the Auditor General be designated an Officer of the Parliament.

**Is the Auditor General an officer of Parliament?**

The Western Australian Auditor General Act 2006 (***AG ACT***) s.7(1) provides that the Auditor General is an independent officer of Parliament. The Standing Committee on Estimates and Financial Operations reported on the Financial Management Bill 2006 and the Auditor General Bill 2006[1]. The report[2] notes the Auditor General is recognised as an officer of the Parliament, however it is not stated what this status really means in constitutional or practical terms.

There is no statutory definition of or established criterion to identify an officer of Parliament. In the Westminster-style Parliaments, the term has come to imply a special relationship of accountability to Parliament and an independence from the executive[3].

The Standing Committee on Estimates and Financial Operations noted that the Auditor General assists Parliament in its role of overseeing the performance of the executive government, through the provision of independent and accurate information on the performance and financial management of public sector agencies and bodies.

Section 7(2) of the *AG Act* provides that the functions of the Auditor General are as specified in this Act and other written laws and there are **no implied functions** arising from the Auditor General being an independent officer of Parliament. More importantly, s.7(3) provides the powers of Parliament to act in relation to the Auditor General are as specified in or applying under this Act and other written laws and there are **no implied powers of Parliament** arising from the Auditor General being an independent officer of Parliament.

Section 7 recognises the special status and independence of the Auditor General, and that the Auditor General's independence extends to the performance of his or her audit functions. The Auditor General has unfettered discretion in the performance or

[1] Tabled 21 November 2006 - Report No 6.
[2] at chapter 4, paragraph 4.5.
[3] House of Commons Library, Officers of Parliament - A Comparative Perspective, Research Paper 03/77, 2003, p8.

exercise of his or her functions, and is not subject to direction from anyone in the performance of these functions under the Act. However, section 8 does provide that the Auditor General must have regard to the audit priorities of the Parliament and the committees that have an oversight function in relation to the audit.

**Appointment**

The appointment of the Auditor General is contained in Schedule 1 of the *AG Act*. The Auditor General is appointed by the Governor on the recommendation of the Minister. The Minister must consult with the Public Accounts Committee and the Estimates and Financial Operations Committee as to the appropriate criteria for selection for appointment. Further, the Minister must consult with the parliamentary leader of each political party with party status within Parliament and with the Public Accounts Committee and the Estimates and Financial Operations Committee.

The Auditor General holds office for a term of 10 years and cannot be reappointed.

**Powers of the Auditor General**

The Act provides wide ranging powers to the Auditor General:

1. Appoints the Auditor General as the auditor of the Annual Report on State Finances submitted by the Treasurer under the Government Financial Responsibility Act 2000, and all state agencies and their local subsidiaries;

   a) Waive annual audits of an agency in certain circumstances;

   b) Carry out an examination or investigation including, among other things, examining the efficiency and effectiveness of an agency or an agency's compliance with legislative provisions, public sector policies or its own internal policies, or investigating any matter relating to public or other money or public or other property;

2. Widens the mandate of the Auditor General to apply his or her power as he or she sees fit to commercial activities of agencies, including partnerships, joint ventures and trusts where these relate to functions performed on behalf of an agency, in partnership or jointly with an agency or as a delegate or agent of the agency;

   c) Carry out any audit that the Treasurer, Public Accounts Committee or Estimates and Financial Operations Committee requests the Auditor General to carry out;

   d) Enter into an arrangement with any person or body to carry out an audit for or in relation to the person or body, and the power to provide services to a person or body that are of a kind commonly performed by auditors;

3. Requires the Auditor General to report at least annually to Parliament;

4. Requires the Auditor General to include in a report to Parliament on an examination or investigation, any submissions or comments made by the Treasurer, an agency or audited local subsidiary, and any other person who, in the Auditor General's opinion, has a special interest in the report, or a fair summary of them;

5. The statutory powers necessary for the conduct of audits and the performance of other functions, information gathering powers and powers to access accounts, information, money and property; and

6. Provides for the appointment of an independent auditor to audit the accounts of the Office of the Auditor General (OAG).

**Overview Committee**

Section 43 of the *AG Act* requires the Houses of Parliament to establish a Joint Standing Committee on Audit comprising an equal number of members appointed by each House. To date this has not occurred although a notice of motion has been listed (2009).

When established the Joint Standing Committee on Audit is to recommend a budget for the Auditor General. The Minister in the determination of the budget of the OAG for a financial year is to give regard to any recommendation by the Joint Standing Committee on Audit.

The Minister is also to have regard to any recommendation as to organisational structure or resources of the OAG made by the Joint Standing Committee on Audit.

The Joint Standing Committee on Audit is to carry out a review of the operation and effectiveness of this Act as soon as is practicable after —

(a) the fifth anniversary of its commencement; and
(b) the expiry of each 5 yearly interval after that anniversary.

In the course of a review the Joint Standing Committee on Audit is to consider and have regard to —

(a) whether there is a need for this Act to continue; and
(b) how the process for appointing an Auditor General has operated in practice; and
(c) whether the Auditor General's information gathering powers are adequate, particularly in relation to claims of legal professional privilege and Cabinet documents; and
(d) the impact of any exercise of the power to audit certain accounts of related entities; and

(e) the efficiency and effectiveness of the provisions for dealing with confidential information; and
(f) any other matters that appear to the Joint Standing Committee on Audit to be relevant to the operation and effectiveness of this Act.

The Joint Standing Committee on Audit is to appoint a suitably qualified person (the reviewer) to conduct a review (**a *performance and legislative review***) as to such matters relating to —

(a) the operation and effectiveness of this Act; and
(b) the performance of the Auditor General's functions by the Auditor General and the OAG, as are within the terms of reference given to the reviewer by the Joint Standing Committee on Audit.

The Joint Standing Committee on Audit is to consult with the Auditor General before appointing the reviewer and determining the terms of reference to be given to the reviewer.

The reviewer is to carry out a performance and legislative review and is to prepare a report based on that review and provide it to the Joint Standing Committee on Audit. Before providing the report the reviewer must —

(a) give a summary of the findings of the performance and legislative review to the Auditor General; and
(b) by written notice invite the Auditor General to make submissions or comments on the summary of findings before a specified day, being —
    (i) not more than 14 days after the summary of findings is given to the Auditor General; and
    (ii) before the report is provided to the Joint Standing Committee on Audit.

The reviewer must include in the report any submissions or comments. The Joint Standing Committee on Audit is to prepare a report based on a review and to be laid before the Legislative Council and the Legislative Assembly. The Joint Standing Committee on Audit may adopt the report provided to it by the reviewer, in whole or in part and with or without modifications. The review is required be undertaken in 2012.

**Additional Powers**

In addition to the powers provided by the *AG Act* it could be claimed there are certain parliamentary immunities as a Parliamentary Officer. *Erskine May* states "It is a contempt to obstruct officers of either House or other persons employed by, or entrusted with the execution of the order of either House, while in the execution of their duty[4]".

[4] Erskine May, *Parliamentary Practice*, Eighteenth edition, 1971, p. 150.

Section 36 of the *Constitution Act 1889* provides for the privileges of the House to be defined by any Act. The *Parliamentary Privileges Act 1891* section 1 provides the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989.

It is well established that statutes which limit or extend common law rights must be clearly expressed and unambiguous[5]. It is commonly accepted that the common law provides that when interpreting statutes, they must be construed in a manner that is favourable to parliamentary privilege. If a statute purports to remove, or impinge on parliamentary privilege in any way, it has been held that clear and express words will be required.

The *AG Act* is silent on Parliamentary Privilege. As stated earlier, s.7(3) provides the powers of Parliament to act in relation to the Auditor General are as specified in or applying under this Act and other written laws and there are **no implied powers of Parliament** arising from the Auditor General being an independent officer of Parliament. My reading of s.7(3) reinforces the proposition that the privileges of the Houses are not powers of the Auditor General.

A recent question raised on the ANZCATT web site demonstrates the uncertainty of including the Auditor General an Officer of Parliament:

> *(a) Does parliamentary privilege apply to the draft reports and working papers created by your respective auditors-general during the preparation of audit reports for tabling in parliament? If yes, what is the authority for such an application of privilege?*
> *(b) Are there other 'officers' of the parliament (persons other than parliamentary service staff like us) to whose work parliamentary privilege applies? If yes, who are these officers, and what is the authority for such an application of privilege?*

Responses to this question varied in each jurisdiction. I should highlight the fact that it is dangerous to generalise the legal position across Australia as legislation governing such matters can vary.

As I read the Act, the Auditor General in Western Australia is independent from the executive and the Parliament enabling him to undertake the function without fear or favour.

**Should the Auditor General be named Officer of Parliament**

Prescribing the Auditor General as an "Officer of Parliament" within the Act does no more than that: it does not provide any greater power to the position unless specified. The title "Independent Commissioner" would have the same effect, as it is the

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[5] Ash v Adby (1678) 3 Swan 664; Re cuno, Mansfield v Mansfield (1889) 43 ChD 12 at 17, CA; Pedro v Diss (1981) 2 All ER 59 at 64, DC.

provisions of the *AG Act* that stipulate the functions and powers of the Auditor General, which also provide the independence from the executive or the Parliament.

To support this view I refer to the Commission on Government Report No 5[6] which made the following comment:

> *The Auditor General is often erroneously referred to as an 'Officer of the Parliament'. Although many of the submissions recommended formalising the Auditor General's position as such, the arguments for so doing are not convincing. Officers of the Parliament, as listed in Hansard, are:*
>
> - *Clerk and Deputy Clerk of the Legislative Council;*
> - *Clerk and Deputy Clerk of the Legislative Assembly;*
> - *Chief and Deputy Chief Hansard Reporters;*
> - *The Executive and Finance and Personnel Officers; and*
> - *The Parliamentary and Deputy Parliamentary Librarians.*
>
> *These officials are not answerable in any way to the government of the day and they do not have to rely on political patronage for their continuation in office. Their essential function is to serve exclusively the Houses of Parliament.*
>
> *The Auditor General, as the State's independent financial watchdog, has a role and function that is unique and different from the officers listed above. The Auditor General is not merely the servant of the Houses of Parliament but performs a wider function.*
>
> *Therefore, the Auditor General should not be an officer of the Parliament, even though there is a precedent in the National Audit Act 1983 (UK) s.1(2) wherein the UK Comptroller and Auditor General is described as an 'Officer of the House of Commons'.*

The WA Royal Commission recommended that the Auditor General, the Ombudsman, the Electoral Commissioner and its proposed Commissioner for Public Sector Standards and Commission for the Investigation of Corrupt and Improper Conduct be designated **independent parliamentary agencies** in the legislation establishing their respective officers. I concur with that proposal as it makes a clear distinction between an officer of parliament and a parliamentary agency. I think the VICPAEC report on a Legislative Framework for Officers of Parliament has not considered other important aspects of an officer of Parliament.

The report states there are four characteristics of an officer of Parliament:

- established in a general standard way by an Act of Parliament;
- appointed and dismissed with parliamentary involvement;

[6] Commission on Government Report No 5 at page 218 at 5.3.1.4.

- overseen by a statutory parliamentary committee which is also responsible for the budget approval of the Officer; and
- required to report to a specific parliamentary committee.

I suggest this is incorrect and there are other important aspects. For example, the Constitution Act 1889 s. 35 provides that various officers of the Legislative Council shall be the same as those of the corresponding officers of the Legislative Assembly; and the Chief Clerk for the time being of the Legislative Council and of the Legislative Assembly shall be removable from office only in accordance with a vote of the House of which he is an officer. I contend these are the officers of Parliament and no others. It is these officers who by virtue of the Constitution Act and the Parliamentary Privileges Act make them distinct from independent parliamentary agencies. None of the above characteristics, except removal from office in two cases, applies to these officers.

In the UK Parliament it is the convention for the officers take an oath of allegiance to the House. The last time this occurred was this year in April.

**Independence**

As was recommended by the WA Inc Royal Commission, and was subsequently reviewed by the Commission on Government the following are the major aspects of the reform in Western Australia in relation to the Auditor General:

(a) The office of the Auditor General be constituted by a separate Audit Act.
(b) The Auditor General be appointed for a period of up to 10 years, rather than to the age of 65 as the Financial Administration and Audit Act 1985 currently provides.
(c) The Auditor General report directly to Parliament.
(d) A Joint Parliamentary Committee be responsible for the overseeing of the Auditor General.
(e) The Parliament exercise a direct role in the selection of the person to be the Auditor General.
(f) The Parliament, with the advice of the Joint Parliamentary Committee, be responsible for recommending to the Treasurer the appropriate budget for the office.

Independence is a crucial pre-requisite to the effectiveness of an Auditor General. The Western Australian Report of the Royal Commission into Commercial Activities of Government and Other Matters (1992) concluded that:

> The office of the Auditor General provides a critical link in the accountability chain between the public sector, the Parliament and the community. It alone subjects the practical conduct and operations of the public sector as a whole to regular, independent investigations and review. This function must be fully guaranteed and its discharge facilitated. The

Auditor General is the Parliament's principal informant on the performance of the administration of the system. The Parliament therefore has a special responsibility to ensure both that the independence and the effective resourcing of the Auditor General are secured.

Further the Auditor General can only be removed or suspended from office by the Governor on addresses from both Houses of Parliament.

The Governor may suspend the Auditor General from office if the Governor is satisfied that the Auditor General —

- (a) is incapable of performing the functions of the Auditor General properly; or
- (b) has performed the functions of the Auditor General incompetently or has neglected to perform those functions; or
- (c) has been guilty of misconduct; or
- (d) has contravened clause 3; or
- (e) is an insolvent under administration as defined in the Corporations Act section 9.

Either House of Parliament may order the Joint Standing Committee on Audit to inquire into and report on any motion for suspension or removal of the Auditor General.

If the Auditor General has been suspended from office by the Governor, the Auditor General is restored to office by operation of this subclause if—

- (a) by the end of the seventh sitting day of a House of Parliament following the day of the suspension, a full statement of the grounds of the suspension has not been laid before that House; or
- (b) by the end of the relevant day for a House of Parliament, that House has not passed an address requesting the removal of the Auditor General from office.

This ensues the tenure of office and independence not only from the executive but also to a degree the Parliament.

**Conclusion**

It is unnecessary for the independence of the Auditor General or any other similar statutory office holder for the role to be considered an Officer of the Parliament. Secondly, it creates uncertainly in constitutional terms as to the rights and privileges of such officers.

*Prepared by the Clerk of the Legislative Council of Western Australia.*