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MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

RECEIVED
20 APR 2010
ACT LA
COMMITTEE OFFICE

Ms Caroline Le Couteur
Chair, Public Accounts Committee
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Ms Le Couteur

Public Accounts Committee – inquiry into the ACT Auditor-General Act 1996

I write regarding the question taken on notice at the Public Accounts Committee hearing of 12 March 2010. The question related to the ACT Government Solicitor's legal advice on the proposal for the legislature to seek to legislate or appropriate an amount for the Auditor General, and its contravention of the self-government Act. You requested a copy of that advice.

I have attached the ACT Government Solicitor's legal advice which reflects the wider discussion at the hearing.

Yours sincerely

Jon Stanhope MLA
Chief Minister

Authorised for publication

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29.4.10

16 APR 2010

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16 April 2010

Ms Pam Davoren
Deputy Chief Executive
Policy Division
Chief Minister's Department
GPO Box 158
CANBERRA ACT 2601

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
Chief Solicitor