

2012

LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

AUDITOR-GENERAL AMENDMENT BILL 2012

EXPLANATORY STATEMENT

Presented by
Katy Gallagher MLA
Chief Minister

Overview

The Auditor General Amendment Bill 2012 implements Government's agreed recommendations from the Standing Committee on Public Accounts Report 15 Inquiry into the *Auditor-General Act 1996* (the Committee Report).

These changes include:

- designation of the Auditor-General as an officer of the parliament;
- clarification that the Auditor-General cannot be directed by any person and a complementary provision that Auditor-General staff can be directed only by the Auditor General or a person authorised by the Auditor-General;
- an oath or affirmation of office, a disclosure of interests and prohibition of other remunerative employment for the Auditor-General;
- requirements for the Auditor-General to consult on the annual performance audit program;
- audit of non-government entities in certain circumstances so the Auditor-General can audit funded activities of Government;
- a broader approach to performance audits of the Auditor-General through a wider concept of strategic review and a fixed timeframe each parliamentary term for the conduct of such reviews; and
- changes suggested by the Committee to clarify the intention of the Act.

Other changes are also made to:

- support joint or collaborative audits by Commonwealth, state and territory auditors-general;
- provide Auditor-General access to Legal Aid records for the purposes of performance audits through a consequential amendment to the *Legal Aid Act 1977*, although there is also a restriction on reporting clients' information;
- reflect the role of the head of service in consultation on draft audit reports; and
- update some existing provisions to enhance human rights compliance.

A number of other changes are made to the sequence of the Act's provisions to reflect more recent drafting practice.

Human Rights considerations

Right to privacy

New section 9F requires the Auditor-General to provide a written statement of personal and financial interests to the Chief Minister and the Speaker within one month of appointment and at the beginning of each financial year. The requirement to provide this statement

potentially engages the right to privacy under section 12 of the *Human Rights Act 2004* (HRA)

Section 12 of the HRA provides:

Everyone has the right –

- (a) not to have his or her privacy.....interfered with unlawfully or arbitrarily;
and
- (b) not to have his or her reputation unlawfully attacked.

Any limitation on the right is mitigated by the provision that information received under this section is subject to the protections under section 36 of the Auditor-General Act. The Chief Minister or the Speaker may disclose the information in the statement only in certain circumstances which are detailed in new section 36.

Section 36 (offences - use or divulge protected information) also provides that a person to whom this section applies, commits an offence if they use or divulge protected information, unless it is in relation to the exercise of their function under territory law or in a court proceeding.

A person to whom section 36 applies need not divulge protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for a law applying in the Territory (section 36(5)).

Protected information means information about a person that is disclosed to, or obtained by, a person to whom section 36 applies because of the exercise of a function under this Act by the person or someone else. Such persons include the Auditor-General, anyone acting under the direction or authority of the Auditor-General or anyone else who exercises a function under the Act. Protected information includes information disclosed by the Auditor-General under section 9F in a statement of financial or personal interest.

The extent to which privacy is limited and whether such interference is permissible depends on the context and whether there is an expectation of privacy. Limitations on the right to privacy must be shown to be reasonable and justifiable.

In the case of the Auditor-General, the right to privacy is limited only to the extent that it is necessary to protect the integrity of the office in that no conflicts of interest exist. The provisions of section 36 of the Bill and the provisions of the *Privacy Act 1988* (Cth) ensure that the limitations on the right to privacy are the least restrictive means available to achieve the intended purpose.

Section 12 of the HRA states that privacy is not to be interfered with ‘unlawfully or arbitrarily’. Section 36 clearly defines ‘protected information’ and the circumstances in which protected information may be used or divulged – that is, it may only be done under territory law; in relation to the exercise of the function of a person to whom the section applies; or in a court proceeding, if it is necessary for a law applying in the territory. The interference with privacy in this instance is neither unlawful nor arbitrary.

Right to recognition and equality before the law

Section 8 of the HRA provides:

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Sections 9J (Auditor-General - suspension from office) and 9K (Auditor-General – removal from office) of the Bill potentially engages section 8 of the HRA - the right to equality before the law, without discrimination of any kind. However, the Bill limits this right only to the extent as it relates to performing the inherent requirements of the job and the limitation is reasonable and justifiable (sub-sections 9J(b) and 9K(a)(ii)).

The *Discrimination Act 1991*, section 8 (1) defines discrimination as imposing or proposing to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7. These attributes include disability.

Section 8(3) of the Discrimination Act sets out the factors that need to be considered in making a decision about whether a condition or requirement is reasonable. These include whether the disadvantage is disproportionate to the result sought by imposing the disadvantage.

The Discrimination Act also uses the concept of "the inherent requirements of the job" in defining discrimination and in defining some of the exceptions to the obligation not to discriminate. The term ‘inherent requirements’ is not defined in the Act but needs to be defined in the circumstances of each job.

Further, article 1, paragraph 2 of the ILO Discrimination (Employment and Occupation) Convention states that “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”.

Given the functions performed by the Auditor-General under the *Auditor-General Act 1996* and the importance of being able to perform the inherent requirements of the job, the limitation is proportionate to the purpose.

Detail

A detailed outline of the Bill follows. This cross-references agreed recommendations in the Standing Committee on Public Accounts report (Committee Report).

Clauses 1- 3 are standard preliminary clauses to provide for the name of the Act and its commencement. Definitions are at the end of the Bill.

Clause 4 provides a new division heading – Division 1.1 Preliminary – before section 1 of the Act.

Clause 5 omits section 3 of the Act which applies terms used in the *Financial Management Act 1996*. This is replaced by clause 50 which includes the terms and cross references to the Financial Management Act in the dictionary.

Clause 6 relocates existing section 4 of the Act, which deals with the process of providing Auditor-General reports to the Speaker, to Part 6 – Miscellaneous as new section 37A.

Clause 7 provides a new division heading – Division 1.2 Important concepts.

Clause 8 substitutes new headings to Part 2, a new division heading and sections 6-9L. These sections relate to the establishment and independence of the Auditor-General.

New section 6 replaces existing section 6 without change. This section requires that there must be an ACT Auditor-General.

New sections 7 and 8 designate the Auditor-General as an officer of the Legislative Assembly and provide for the Auditor-General's independence. Subject to the Act, the Auditor-General has complete discretion in the exercise of the role's functions. This section replaces Section 9 of the Act and strengthens the independence of the Auditor-General in line with Recommendations 1 and 15 of the Committee Report.

Section 8 provides that the Auditor-General is not subject to direction by anyone in relation to which audits are carried out, the way in which audits are carried out, or the priority given to audits.

(Note: Existing section 9A that deals with annual reports is relocated here as section 9. See clause 10.)

Division 2.2 provides for the appointment by the Executive of the Auditor-General. These new sections incorporate appointment provisions currently split between Schedule 1 and Part 2 of the Act.

Schedule 1, section 1.1 is amended and relocated here, renumbered as section 9A – appointment of Auditor-General. (See clause 41.) This combines appointment provisions currently in Schedule 1 with existing section 8 which deals with the role of the Public Accounts Committee in the appointment.

The combined provisions (see clauses 39 and 40 in the Bill) provide that the Executive must appoint the Auditor-General. However, the appointment may occur only if the Minister responsible for the Act provides written notice to the presiding member of the Public Accounts Committee. The notice must detail the proposed appointment and state that the Committee may give written agreement or objection within the notice period.

Appointment can be made only if the Committee provides written agreement or fails to object in writing within the required notice period. To object to an appointment, the Committee must provide the objection in writing within the notice period.

The notice period is prescribed – either 14 days after provision of notice to the presiding member or, where the presiding member tells the Minister that more time is required, 30 days after the end of the first 14 days.

The instrument of appointment is a disallowable instrument.

Schedule 1, section 1.5 is also relocated here and renumbered as 9B. This deals with the appointment of the acting Auditor-General. (See clauses 47 and 48.)

New sections 9C and 9D provide for appointment conditions currently in Schedule 1.1 of the Act. Section 9C provides for a non-renewable 7 year term. Section 9D provides for appointment conditions – this incorporates the requirements in new section 9E with existing appointment conditions in Schedule 1.

Division 2.3 sets out a range of other requirements on the Auditor-General.

New section 9E provides for an oath or affirmation of office before the Speaker within a month of appointment. The administration of an oath or affirmation of office implements Recommendation 12 of the Committee Report. The form of oath or affirmation is set out in the *Oaths and Affirmation Act 1986*.

New section 9F requires the Auditor-General to provide a written statement of personal and financial interests to the Chief Minister and the Speaker within one month of appointment. This is to be updated at the beginning of each financial year. This reflects Recommendation 14 of the Committee Report.

The clause also applies the provisions that protect release of certain information in section 36 of the Act. This provides an appropriate level of privacy consistent with the disclosures of interests of other appointed public sector officials as well as reflecting HRA standards.

New section 9G prohibits any other paid employment during the term of appointment as Auditor-General, consistent with Recommendation 13 of the Committee Report.

Existing provisions relating to the resignation and retirement of the Auditor-General are relocated here from Schedule 1 and renumbered 9H and 9I. (See clauses 42 - 45.)

Section 9J is a new section providing for suspension of the Auditor-General by the Executive following resolution of the Legislative Assembly. This reflects the Committee Report's Recommendation 11. The grounds of suspension are misbehaviour or physical or mental incapacity that prevents the person from performing an inherent requirement of the Auditor-General's role. This addresses human rights compatibility.

New section 9K relocates provision for removal of the Auditor-General from office from Schedule 1. The existing section provided for removal on the same grounds included in the new suspension power as well as upon bankruptcy or personal insolvency. The existing provision is amended so that incapacity must relate to inherent job requirements to address human rights standards.

New Division 2.4 relocates existing sections 23-26 relating to the office of the Auditor-General. (See also clauses 33 and 34.) These sections deal with staffing, contractors, arrangements with directorate and delegations.

New section 9L amends existing section 23 to state that staff of the Auditor-General are not subject to direction from anyone other than the Auditor-General or another member of staff authorised by the Auditor-General. This implements Recommendation 28 of the Committee's Report.

Clause 9 omits existing section 9 providing for the independence of the Auditor-General. This is now included in the amendments in clause 8.

Clause 10 relocates current 9A to Division 2.1 as section 9. The existing section provides a special exemption from annual reporting where a requirement could prejudice the Auditor-General's independence.

Clause 11 provides new divisions 3.1 and 3.2.

New headings are included before existing section 10.

Clause 12 provides for new subsection 10(2). This provides that the Auditor-General must have regard to recognised professional standards and practices while preserving the

independence of the office. This implements Recommendation 32 of the Committee's Report.

Existing section 13, which provides for the auditor under Corporations Act requirements, is moved and renumbered as section 10A. (See clause 17.)

Clause 13 includes new sections 10B and 10C.

New section 10B permits the Auditor-General to conduct audits of multiple entities. This is an existing provision. New section 10C allows the Auditor-General to conduct joint or collaborative audits with the Auditor-General of the Commonwealth or of a State if the ACT Auditor-General reasonably believes these entities have an interest in the audit. (The dictionary in the *Legislation Act 2001* says a reference to a State includes the Northern Territory.)

This provides formal support for collaborative audits as suggested by Australian Auditors-General.

A new Division 3.3 heading – Financial Audits – is included.

(Note: Existing section 16 is relocated and renumbered as section 11A. This provides for audit fees for financial audits in certain circumstances – see clause 21.)

Clause 14 provides a new division 3.4, with the heading Performance Audits, before existing section 12.

New section 11B includes the existing definition, currently in the dictionary. The amended dictionary cross-references 11B. (See clause 53.)

Clause 15 provides a new heading for section 12 – Performance Audits – Territory.

Clause 16 omits existing section 12(2) which deals with audits of multiple entities. This has been relocated to new section 10B.

Clause 17 relocates section 13 (auditor under the Corporations Act for public sector companies) to new section 10A.

Clause 18 inserts new section 13 which deals with consultation by the Auditor-General on the performance audit program for the forthcoming financial year. Consultation is required with the Public Accounts Committee; each member of the Legislative Assembly (this includes Ministers); the head of the ACT Public Service; and anyone else the Auditor-General considers appropriate. This reflects Recommendation 5 of the Committee Report and the Government response to that Recommendation.

The Auditor-General's annual performance program must be published on the Auditor-General's website each year.

Clause 19 provides a new division 3.5 dealing with audits of non-public sector entities. This reflects Recommendation 30 of the Committee's Report. These provisions permit the Auditor-General, in certain circumstances, to audit non-government organisations in receipt of property for a purpose. Property is defined in the *Legislation Act 2001*. This includes money.

New section 13A defines what is meant by public sector entities, which are already covered by the Act. These are directorates; territory authorities; territory owned corporations; or territory controlled companies, joint ventures or trusts. Under 13B a non-public sector entity is an entity that is outside the definition in 13A.

Under new section 13C, the Minister with responsibility for the Act or the Public Accounts Committee may ask the Auditor-General to conduct a performance audit of a non-public sector entity in relation to Government property provided for a purpose. The audit referral must relate to the property provided to the non-public sector entity.

Under new section 13D the Auditor-General may decide to conduct the referred audit only if satisfied that a number of conditions are met. These are:

- the usual acquittal procedures for use of the property have been exhausted;
- there no are other mechanisms reasonably available to the public sector entity that provided the property to resolve the audit issue; and
- failure to conduct the audit may result in significant risk to the Territory.

If an audit proceeds, the reason for conducting the audit must be included in the audit report.

The Auditor-General can exercise performance audit powers only to the extent that it relates to the property provided to the non-public sector entity.

Not all existing investigation powers are extended to these audits. Under existing provisions, the Auditor-General has powers to obtain information, including under oath or affirmation, and direct people to attend and answer questions. These powers, and the related offences, as well as protection from the use of information gained in an audit in civil or civil proceedings (excepting offences under the Act), will apply to non-public sector entity audits.

Powers to access premises in existing section 15 will not apply to non-public sector entity audits. These powers continue to apply only to Territory entities (see clause 20 below).

This clause also provides a new heading - Division 3.6 Power to obtain information.

Clause 20 provides a new heading for section 15 – Access to premises and things – Territory. This makes clear that existing section 15, which allows the Auditor-General or staff to enter premises occupied by a Territory entity, does not apply to non-government entities.

Clause 21 relocates section 16 to division 3.3 as section 11A.

Clause 22 creates a new division heading before section 17. The heading is Division 3.7 Reports for Legislative Assembly.

Clause 23 amends section 17(2) so that reports must include the substance of any comments received. This takes into account the need to incorporate comments from non-public sector entities under section 13D audits.

Clause 24 replaces existing section 17(6). Reflecting the new head of service role, it includes provision of a report to the head of service or to the Minister where the Auditor-General considers those people have a special interest in the report.

Clause 25 replaces section 18 which provides for comments on draft reports. The revised section provides for comments from relevant heads of government entities; non-government entities (whether an individual or the head of an entity); and the head of service where a proposed report is a multi-government agency report.

The Auditor-General may also give the report to anyone with a direct interest in the audit. This is consistent with Recommendation 34 of the Committee Report.

The section also provides a notice period in which to provide written comments and that the Auditor General must consider any comments in finalising the report.

Clause 26 adds a new paragraph (h) to existing section 19(1) that deals with reporting sensitive information. This reflects consequential changes to the *Legal Aid Act 1997* (see Schedule 1 of the Bill) that clarify access to Legal Aid Commission legal files for the purposes of performance audits. Clause 26 limits reporting to the Legislative Assembly on the contents of clients' legal files.

Clause 27 makes a related change to existing section 19(3). This sub-section permits the Auditor-General to make a special report for the public accounts committee on information excluded from a public report under 19(1). The amendment makes clear that this special reporting does not include information omitted under new 19(1)(h).

Clause 28 inserts a new heading before section 20 – Application - Legislative Assembly secretariat-pt 3.

Clause 29 relocates section 20 with the new heading to become section 9P.

Clause 30 makes minor amendments to section 21 so that references to the parts in the *Financial Management Act* include descriptions of those parts.

Clauses 31 and 32 amend section 22 to include reference to audits under section 13D. This section permits the Auditor-General to tell the presiding member of the Public Accounts Committee whether there are sufficient funds to conduct audits.

Clause 33 omits section 23 as it is now located in new section 9L. (See clause 8.)

Clause 34 relocates sections 24 to 26 to sections 9M to 9O.

Clause 35 substitutes a new Part 5 – Review of Auditor-General.

Division 5.1 deals with strategic reviews of the Auditor-General. This replaces current Part 5 (sections 27 – 32) currently headed “Audit of auditor-general’s operations”.

Division 5.2 deals with the independent financial audit of the Auditor-General, replacing section 28. Amendments to these arrangements relate to Recommendations 18 – 22 of the Committee Report.

New section 23 introduces the concept of strategic review which is defined to mean a review of the Auditor-General’s functions as well as a performance audit of the Auditor-General.

Under new section 24, strategic reviews are to be carried out in each Assembly term, with the Public Accounts Committee deciding on the timing. Under new section 25, which provides for the appointment of the strategic reviewer, the Public Accounts Committee asks the Minister responsible for the Act to engage a person on behalf of the Territory to conduct the review. The Minister must then engage an appropriately qualified reviewer. Once a strategic reviewer is engaged, new section 26 provides that the Public Accounts Committee must ask the reviewer to conduct the review according to stated terms of reference. A strategic review may occur only when requested under this section.

New section 27 sets out the powers and obligations of the strategic reviewer, which are the same as the Auditor-General’s powers and obligations under the identified provisions for section 12 Territory performance audits. The powers and obligations relate to obtaining information (division 3.6), reporting sensitive information (section 19), reporting deliberations of the executive (section 19A), and section 36 relating to protected information offences.

Under new sections 28 and 29, the strategic reviewer must provide a copy of a report being prepared for the Legislative Assembly to the Auditor-General for comment. The substance of any comments must be included in the final report under new section 29.

Division 5.2 provides for the audit of the Auditor-General's annual financial statements that are prepared under section 21, which applies the financial reporting requirements of the *Financial Management Act 1996*.

The new sections provide for the annual independent financial audit, the appointment by the Minister of a suitably qualified independent auditor to exercise the applied Financial Management Act functions, provision of a draft report to the Auditor-General, and provision of the audit to the Speaker. The sections also apply to the independent financial auditor the same powers and responsibilities that the Auditor-General has in relation to section 12 performance audits.

Clause 36 omits existing sections 33 and 34 which related to the meaning of protected information and offences for disclosure of protection information. These provisions, as amended, are now in new section 36, inserted by clause 37 below. Existing section 35, which provides for directions by the Auditor-General about protected information, is retained.

Clause 37 provides new section 36 which includes provisions for offences for use of or divulging protected information. It also provides for the authorised release of protected information.

Release is authorised under section 36(3) if it is used, or relates to the exercise of a function, under this Act or another ACT law or in a court proceeding. An additional ground for authorised release is provided by section 36(4)(d). This where the information is released as part of a joint or collaborative audit by auditors-general of the Commonwealth or State (see new section 10C). This removes any doubt about applying the existing power to divulge information relating to the exercise of Auditor-General functions to these new collaborative audits.

The existing provisions have been changed slightly to ensure that information obtained in an audit cannot be used in civil or criminal proceedings other than in relation to offences under the Act. This is consistent with the principles in section 22 of the HRA – rights in criminal proceedings.

A new note provides examples of protected information. One example is information obtained by the Auditor-General under section 14 in the course of conducting an audit. Another example is the information disclosed in the Auditor-General's statement of personal and financial interests required under new section 9F.

Note: Existing section 37 (protection of the Auditor-General from liability) is the next section in the Act, followed by existing section 4, renumbered as section 37A by clause 6, which deals with the provision of reports to the Speaker. This is followed by existing section 38 (regulation making power).

Clause 38 provides a new part 10 – Transitional. There is a break in section numbers before the transitional provisions to reduce the likelihood that section numbers at the end of the Act will need to be re-used. New section 50 provides a definition of “commencement day” for this part. The meaning of this term is the day that the Act commences.

New section 51 provides, in effect, that an existing Auditor-General will need to make an oath or affirmation and a disclosure of interests required under new sections 9E and 9F within a month of the commencement day.

Clauses 39-41 amend Schedule 1 sections 1.1(2) to (4) with a new heading (Appointment of the Auditor-General) to include the provisions on the Public Accounts Committee role in approving Auditor General proposed appointments currently in section 8. The combined provisions relating to the Auditor-General appointments are then relocated by clause 41 to new section 9A.

Clauses 42-43 amend Schedule 1, section 1.1 with a new heading (Auditor-General-resignation) and relocate the existing provision in the Schedule to new section 9H.

Clauses 44 -45 transfer existing provisions in the Schedule dealing with the Auditor-General’s retirement to new section 9I.

Clause 46 omits Schedule 1.4 (removal from office) as this is now dealt with under new section 9K inserted by clause 8.

Clauses 47-48 relocate the section in the Schedule dealing with appointment of the Acting Auditor-General to new section 9B.

Clause 49 omits application of the Legislation Act division 19.3.3 in Schedule 1.6. Specific consultation arrangements on the appointment of the Auditor-General are dealt with in the Auditor-General Act.

Clauses 45 – 57 amend definitions in the dictionary at the end of the Act.

Schedule 1 of the Bill provides consequential amendments to the *Annual Reports (Government Agencies) Act 2004* and the *Public Sector Management Act 1994* to update section references in the amended *Auditor-General Act 1996*.

Consequential amendments are also made to section 92 of the *Legal Aid Act 1977*. This permits the Auditor-General or anyone acting under the authority of the Auditor-General to access Legal Aid Commission files in relation to a performance or financial audit of the Commission under the *Auditor-General Act 1996*.