

2013

LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

AUDITOR-GENERAL AMENDMENT BILL 2013

EXPLANATORY STATEMENT

Presented by
Katy Gallagher MLA
Chief Minister

Overview

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The Auditor-General Amendment Bill 2013 implements a number of the Government's agreed recommendations from the Standing Committee on Public Accounts Report 15: Inquiry into the *Auditor-General Act 1996*.

In responding to this Public Accounts Committee report, the Government also agreed to nominate the Auditor-General as an officer of the parliament. Changes to the *Auditor-General Act 1996* to effect this and related changes (such as to appointments processes and related recommendations concerning suspension of the Auditor-General) will now be brought forward in a separate Bill.

Changes in this Bill include:

- 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;
- 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.

Other changes are also made to:

- support joint or collaborative audits by Commonwealth, state and territory auditors-general;
- reflect the role of the head of service in consultation on draft audit reports; and
- update some existing provisions to enhance human rights compliance.

Detail

A detailed outline of the Bill follows.

Clauses 1- 3 These are standard preliminary clauses to provide for the name of the Act and commencement. Commencement is on a day fixed by the Minister or, if that does not occur, the Act commences automatically within 6 months. 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*.

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 a new heading – Establishment and independence of the auditor-general.

Clause 9 replaces existing section 9 providing for the independence of the Auditor-General. This amends the existing provision to make clear that the Auditor-General cannot be directed by any person about audits. This clause also provides a new Division heading before existing section 8.

Clause 10 provides two new division headings. The first is 2.3 - Other provisions applying to the Auditor-General. (Subsequent clauses transfer existing provisions from Schedules into the body of the Act.)

The second division heading is 2.4 – Office of the Auditor-General. New section 9C provides for the staff of the Auditor-General. This is an existing provision with an equivalent amendment to clause 9, providing that staff cannot be directed by any person in relation to Auditor-General functions other than the Auditor-General or a member of staff authorised to give directions.

Clause 11 omits existing section 9 which is replaced by clause 9 above.

Clause 12 relocates current 9A as new section 7A. The existing section provides a special exemption from annual reporting where a requirement could prejudice the Auditor-General's independence.

Clause 13 provides for new division headings before existing section 10:

- Division 3.1 - Application part 3
- Division 3.2 – Functions

Clause 14 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.

(Existing section 13, which provides for the auditor under Corporations Act requirements, is moved and renumbered as section 10A. See clause 19.)

Clause 15 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. This provides formal support for suggested collaborative audits by Australian Auditors-General.

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

(Note: Clause 23 relocates and renumbers existing section 16 as section 11A. This provides for audit fees for financial audits in certain circumstances.)

Clause 16 provides a new division heading 3.4, with the heading Performance Audits, before existing section 12.

New section 11 B includes the existing definition, currently in the dictionary. The amended dictionary (clause 51) cross-references 11B.

Clause 17 provides a new heading for section 12 – Performance Audits – Territory.

Clause 18 omits existing section 12(2) which deals with audits of multiple entities. This has been relocated to new section 10B.

Clause 19 relocates section 13 (auditor under the Corporations Act for public sector companies) to new section 10A.

Clause 20 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 (including Ministers); the head of the ACT Public Service; and anyone else the Auditor-General considers appropriate. The Auditor-General's annual performance program must be published on the Auditor-General's website each year.

Clause 21 provides a new division 3.5 dealing with audits of non-public sector entities. 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.

New section 13D permits the Auditor-General to initiate a non-public sector entity audit.

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

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

A new division heading – Division 3.6 – Power to obtain information - is provided.

Clause 22 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 23 relocates section 16 as amended to division 3.3 as section 11A.

Clause 24 creates a new division heading before section 17. The heading is Division 3.7 - Reports for Legislative Assembly.

Clause 25 amends section 17(2) so that reports to the Legislative Assembly must include the substance of any comments received.

Clause 26 replaces existing section 17(6). Reflecting the new head of service role, it includes provision of a report to the head of service as well as to the Minister where the Auditor-General considers either or both of those people have a special interest in the report.

Clause 27 amends a reference to provision of reports to the Speaker in section 37(7) of the Act. This was previously section 4 but this section has been moved to section 37A by clause 6.

Clause 28 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.

Where the proposed report relates to a non-public sector entity, the Auditor-General must not give a copy of the report to anyone else before the non-public sector entity has had an opportunity to comment on the report.

The Auditor-General may also give the report to anyone with a direct interest in the audit.

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 29 adds a new paragraph (h) to existing section 19(1) that deals with reporting sensitive information. This reflects changes to the *Legal Aid Act 1997* made in Legislation Amendment Bill 2013 (No 2). This limits reporting to the Legislative Assembly on the contents of clients' legal files.

Clause 30 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 it clear that this special reporting cannot include information covered by new 19(1)(h).

Clause 31 replaces existing section 19A and provides new processes for reporting of Cabinet material. Under the new provision, the Auditor-General can make a decision to release Cabinet information in an audit report where the Auditor-General considers it is in the public interest. In deciding whether release is in the public interest, the Auditor-General must consult the Chief Minister and must also provide 7 days notice of release of contested material.

This replaces the existing provision that prohibits release of Cabinet information where the Chief Minister has certified that release is contrary to the public interest.

Clause 32 renumbers section 19A as section 20.

Clause 33 includes a new heading – Application – Office of the Legislative Assembly – pt 3.

Clause 34 relocates existing section 20 (as amended with the new heading) to a new section 9G. This existing section provides the Office of the Legislative Assembly with the

equivalent status of a directorate in relation to the operation of the *Auditor-General Act 1996*.

Clause 35 makes minor amendments to Section 21 so that references to the parts in the *Financial Management Act* include descriptions of those parts.

Clauses 36 and 37 amend section 22A which permits the Auditor-General to tell the presiding member of the Public Accounts Committee whether there are sufficient funds to conduct audits. The amendments include references to audits under section 13C and 13D, which are the new provisions for non-public sector entity audits.

Clause 38 omits section 23 as it is now located in new section 9C by clause 10.

Clause 39 relocates sections 24 to 25 to sections 9D to 9E.

Clauses 40 and 41 replaces the reference to section 24 that is in section 26 with new section 9D, and then moves section 26 to a new section 9F.

Clause 42 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.

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. The Public Accounts Committee decides on the timing. Under new section 25, which provides for the appointment of the strategic reviewer, the Public Accounts Committee asks the Speaker to engage a person on behalf of the Territory to conduct the review. The Speaker 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.

The Public Accounts Committee must consult the minister on the terms of reference.

New section 27 sets out the powers of the strategic reviewer. These are the same powers the Auditor-General has for section 12 Territory performance audits, except for the power relating to inclusion of Cabinet information in a report.

The powers are powers to obtain information (division 3.6); reporting sensitive information (section 19); and directions about protected information (section 35). Section 36, which deals with offences for use of or divulging protected information, also applies.

The strategic reviewer may include Cabinet deliberative material in a report only if it has already been published – for example, by the Government or in a performance audit report by the Auditor-General.

Under new sections 28 and 29, where a report is being prepared for the Legislative Assembly, the strategic reviewer must provide a copy of a proposed report to the Auditor-General for comment. The substance of any comments must be included in the report provided to the Speaker under new section 29. The Auditor-General has a minimum of 14 days in which to comment.

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 sections provide for the annual independent financial audit; the appointment by the Speaker 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 accorded to the strategic reviewer.

The independent auditor may include Cabinet information in a report only if the material has already been published.

Clause 42 also sets up a new Part 5A that contains provisions on protected information that are currently in Part 6 – Miscellaneous. In conjunction with **Clauses 43 - 46**, this provides a new structure for existing protected information provisions, with changes that reflect current drafting practice.

The new Part 5A contains four sections: section 34 which defines protected information; section 35 which provides for directions by the Auditor-General about protected information and related offences; section 36 which provides for offences about the use of or divulging protected information; and section 36A which reflects an existing provision (section 36(2)) that provides the minister with power to authorise disclosure of otherwise protected information.

Section 34 provides a definition of protected information and gives an example. (The definition is currently in section 33.)

Section 36 provides a section for offences in relation to use of or divulging protected information by the Auditor-General, anyone acting under authority of the Auditor-General

or anyone who has exercised a power under the Act. This provision is currently in section 35 of the Act.

Section 36 also provides exceptions relating to protected information that reflect existing provisions.

Release is authorised under section 36(3) if information is used, or relates to, the exercise of a function under this Act or another ACT law or in a court proceeding. Authorised release as part of carrying out a function under the Act would now include sharing of information in a joint or collaborative audit by auditors-general of the Commonwealth or State (see new section 10C).

Section 36(4) provides for release of information about a person with their consent or in accordance with a ministerial direction made under section 36A.

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 Human Rights Act – rights in criminal proceedings.

A new note is included to provide examples of protected information. One example is information obtained by the Auditor-General under section 14 in the course of conducting an audit.

Clause 43 omits existing sections 33 and 34 which relate to the meaning of protected information and offences for disclosure of protection information. (Existing section 35, which provides for directions by the Auditor-General about protected information and related offences, is retained.)

Clause 44 provides new sub-sections 35(5) and (6). This builds on existing section 35 which provides for directions about protected information by the Auditor-General and creates an offence for breaching the direction. This clause restates exceptions consistent with those provided in new section 36 of the Act.

Clause 45 moves the protected disclosure provisions under the new Part 5A heading.

Clause 46 omits existing section 36 because it is replaced under clause 42.

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).

Clauses 47 – 49 relocate existing provisions in the schedule into the body of the Act. No changes are made to these provisions other than this re-ordering. The detail of these changes is as follows:

- **Clause 47** moves the appointment provisions in Schedule 1.1 to new section 7B.
- **Clause 48** moves provisions relating to resignation, retirement and removal from office from Schedule 1.2, 1.3 and 1.4 to sections 9, 9A and 9B.
- **Clause 49** moves provisions for an acting Auditor-General from Schedule 1.5 and 1.6 to section 8A and 8B.

Clauses 50 – 58 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*.