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Joint Committee of Public Accounts and Audit

Answers to Questions on Notice

Department/Agency: Australian National Audit Office

Inquiry: Review of the Auditor-General Act 1997

Committee Member: Senator Rex Patrick

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Question 1

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Senator PATRICK: Noting that provision in section 36, are you required to give to a court information related to your audits if that were to be subpoenaed?

Mr Hehir: I don't think we've had definitive advice about that.

Senator PATRICK: If for some reason you were subpoenaed, and I don't know the circumstances in which that might occur, at that point you would seek some advice as to whether or not—I presume your starting point would be to consider resisting it.

Mr Hehir: It comes down to what the matter is. During the legal action with Thales we had conversations with AGS around these types of issues, but we never had to finally resolve the matter, because we weren't asked to provide the information—Thales did.

Senator PATRICK: Sure. I'm exploring other avenues because in other acts there are provisions that say things similar to 'information is not subject to subpoena by a court'. I'm exploring whether or not that is something that we ought to consider in respect of audit material. Have you turned your mind to that? Do you want to think about that? I will give an example. In the Child Support (Registration and Collection) Act there are such provisions.

Mr Hehir: I'm not a lawyer and we have not got advice on it. All of our work is subject to parliamentary privilege. Therefore, the first point is that it's subject to parliamentary privilege and can't be used in the court. The court usually can determine whether or not that's the case. Our first point would be, 'Well, no,' because it's subject to privilege. Then it depends on whether that's contested.

Ms Mellor: It depends on what the action is as well. Is there benefit in that broad thing? Parliaments haven't seemed to do that, because they have operated on the basis that the framework protects the information, because it is produced for the parliament. It's not a question we've considered.

Senator PATRICK: Sure, but you see what I'm trying to do. I'm saying there could be an alternative to the pathway of announcing it subject to privilege. There's another way in which that protection could be afforded: simply the parliament saying that the court can't subpoena documents other than for, maybe, a criminal investigation or something like that.

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Mr Hehir: In our case, all the documents other than draft reports exist in the entities who produce them. I think we might take that on notice, have a think about it and come back to you.

Response

The ANAO has considered Senator Patrick's example of the *Child Support (Registration and Collection) Act 1988* (Child Support Act) in which subsection 16(5) specifically requires that a person to whom the section applies is not required to communicate protected information to a Court, or produce a protected document in Court, except in defined circumstances. The explanatory memorandum to the Child Support Bill 1987 indicates that this provision was inserted to impose an obligation of secrecy on officers or former officers who, in the course of their duties related to the administration of the Bill, have acquired information with respect to the affairs of another person.

Inserting an equivalent provision into the Auditor-General Act may not directly resolve the issue raised in recommendation 3.b(ii) of the ANAO's supplementary submission 2.2 and originally in paragraphs 86 to 94 of the ANAO's first submission dated 27 November 2020. In the Hawkei case the ANAO was not subpoenaed to provide information to the Court, as instead Thales chose to provide information to the Court that it already had received under section 19 of the *Auditor-General Act 1997*. The Auditor-General's agreement was not sought as part of that process. The risk is that subsection 16(5) of the Child Support Act appears to prevent a person from being "required" to communicate information to a Court, but does not explicitly prevent them from providing information if they wished to and disclosure was not otherwise prohibited. Therefore it is not clear that a similar provision would prevent a future instance of a person with an interest in an audit report seeking to provide a report protected by subsection 36(3) of the Auditor-General Act to a Court.

For this reason the ANAO still recommends that the JCPAA consider clarifying the application of parliamentary privilege to ANAO draft reports and working papers. The ANAO provided an example that this could be done through including a clarification note in the Auditor-General Act.

While the Child Support Act approach does not replace the ANAO recommendation, a similar approach could be built into the Auditor-General Act as another protection on top of clarifying the application of parliamentary privilege. It would be necessary to avoid the risk of unintended consequences, such as barring the provision of relevant information in a criminal matter.

The ANAO has not sought specific advice on the question of whether the ANAO is subject to subpoenas. However, the Australian Government Solicitor has provided advice to the ANAO on the question of discovery orders. The advice is that while it is not completely beyond doubt, the better view is that section 36 of the Auditor-General Act would not permit the disclosure of information in response to discovery orders. A provision along the lines of subsection 16(5) of the Child Support Act could, however, clarify that the ANAO is not subject to court orders including subpoenas and discovery orders.