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

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Question 1

Page five of your submission notes that the independence of your role as Auditor-General has reduced over the past few years.

a. Can you explain how you measure this?

b. Your submission refers to a ranking system - is that you have fallen behind simply because others have improved? Or can you provide us with some tangible examples of how your independence has reduced?

Response

a. Can you explain how you measure this?

The Auditor-General's submission to the JCPAA dated 27 November 2020 (the Submission) states, in paragraph 18, that the independence frameworks supporting the Auditor-General for Australia have not kept pace with other Australian and New Zealand Auditors-General. The ANAO based this statement on information from the report by Dr Gordon Robertson titled *Independence of Auditors General A 2020 update of a survey of Australian and New Zealand legislation* (the 2020 Independence Update). The overall independence scores in the 2020 Independence Update placed the Commonwealth's independence frameworks 7th in Australia and New Zealand, which is a decrease from 6th in 2013, which was a further decrease from 5th in 2009. The 2020 Independence Update was commissioned by the Australasian Council of Auditors-General (ACAG) and is included as Attachment E to the Submission.

Pages 5 and 6 of the 2020 Independence Update provide an overview of the methodology used by Dr Robertson to measure independence. In summary, the first survey in 2009 identified 60 key legislative 'factors' that contributed to the 8 principles of the International Organisation of Supreme Audit Institutions (INTOSAI) 2007 Mexico Declaration on SAI Independence (Mexico Declaration). The survey was repeated in 2013 and 2020. The same factors and scoring system were used. The factors are not weighted for importance however each factor is given an "Executive Influence Score" based on the extent to which the factor is distanced from control of the Executive Government. The aggregate of these scores gives an overall score for each INTOSAI Principle (refer page 12 of the 2020 Independence Update) and overall independence (refer page 4 of the 2020 Independence Update).

b. Your submission refers to a ranking system - is that you have fallen behind simply because others have improved? Or can you provide us with some tangible examples of how your independence has reduced?

Figure 2 on page 11 of the 2020 Independence Update shows the movement in overall independence scores by jurisdiction for each of the three surveys conducted. This table shows that Australia's ranking has been impacted by improvements in other jurisdictions, most notably Queensland (2013) and the Australian Capital Territory (2020). The table on pages 7 to 10 of the 2020 Independence Update provide details of the major amendments made by jurisdiction.

The overall framework supporting the independence of the Auditor-General for Australia, as set out in the *Auditor-General Act 1997* (the Act) and other legislation, is largely unchanged, and was strengthened in certain respects by the *Auditor-General Amendment Act 2011*, which introduced amendments based on JPCAA Report 419: *Inquiry into the Auditor-General Act 1997.*

There are no current tangible examples of a weakening in the overall independence framework supporting the Auditor-General for Australia.

Question 2

The Auditor-General is a Parliamentary Officer but the ANAO forms part of the Executive Government.

a. Do you see this as a paradox?
b. How do you act fulfil your obligations as both?
c. How did this come about?
d. Has there been previous consideration for the ANAO to become a Parliamentary Department?
e. What would it take for the ANAO to become a Parliamentary Department?
f. Do you know of any other jurisdictions where the Supreme Audit Institution became a parliamentary department sometime after its establishment?

Response

a. Do you see this as a paradox?

Having the Auditor-General designated as an independent officer of the Parliament and the Auditor-General and ANAO administratively forming part of the Executive Government has previously been recognised by the JCPAA's predecessor, the Joint Committee of Public Accounts (JCPA), as a contradiction. The JCPA recognised the paradox in JCPA Report 346: *Guarding the Independence of the Auditor-General*, which refers to the constitutional contradiction of the Auditor-General being an Officer of the Parliament, but located in the executive arm of government and notes that this arrangement exists in other Westminster jurisdictions.[1]

The paradox has become more obvious since the establishment of the Parliamentary Budget Officer, Parliamentary Budget Office (PBO), and the commencement of the *Parliamentary Services Act 1999* (Plty Act) and amendments to the Plty Act, made through the *Parliamentary Service Amendment (Parliamentary Budget Officer) Act 2011* (PBO Amendment Act). The Plty Act established greater distinctions between Parliamentary Departments and the Executive Government. Amendments to that Act, made through the PBO Amendment Act, established the Parliamentary Budget Officer and

[1] Paragraph 3.33 of JCPA Report 346 *Guarding the Independence of the Auditor-General.*

the Parliamentary Budget Office, which represent the most recent model of an independent officer of the Parliament and supporting office.

b. How do you act fulfil your obligations as both?

The Auditor-General:

- is a statutory office holder under the Act, with responsibility for discharging substantive statutory (audit and assurance) powers under that Act;
- discharges substantive statutory (audit and assurance) powers under other relevant Acts, including the *Public Governance, Performance and Accountability Act 2013* (PGPA Act);
- is the accountable authority for a non-corporate Commonwealth entity (the ANAO) under the PGPA Act, with responsibility for the proper use of public resources by the ANAO; and
- the head of a statutory agency (the ANAO) under the *Public Service Act 1999* (PS Act), with employer responsibilities.

Auditors-General have been able to effectively fulfil their obligations as both an independent officer of the Parliament and an accountable authority of an Executive Government entity, as generally these obligations apply to different functions.

The Act sets out Auditor-General functions which are audit focussed and therefore the Auditor-General's parliamentary role takes precedence in relation to Auditor-General functions.

The Auditor-General's obligations as an accountable authority of an Executive Government entity primarily relate to the governance of the ANAO, management of ANAO use of public resources and engagement of Australian Public Service (APS) employees.

Therefore Auditors-General have been able to prioritise their parliamentary role when undertaking the core Auditor-General functions and the executive role when undertaking administrative or support functions. That said, issues can arise when the Auditor-General is expected to implement policies of the Executive Government—such as policies relating to accommodation and shared services—which the Auditor-General may in the future audit, so as to report to Parliament on that aspect of the Executive Government's administration.

A bigger risk is whether ANAO staff, including the Deputy Auditor-General, can effectively perform and be perceived as performing, Auditor-General functions when they form part of the Executive Government. This could be an issue as Auditors-General delegate their power to officials in the ANAO to carry out many Auditor-General functions. The Act has protections in place to protect the independence of ANAO staff, such as subsection 40(2) which requires that only the Auditor-General or authorised delegates can direct ANAO staff in the performance of Auditor-General functions. Further, the Auditor-General ensures that delegated Auditor-General functions are conducted in a manner appropriate for an independent officer of the Parliament, by setting the Australian National Audit Office Auditing Standards and internal policies, such as the ANAO Audit Manual and ANAO Independence Policy.

However, as pointed out in the Submission, independence comprises both independence of mind and independence in appearance. While these protections help ensure independence of mind, there is an appearance issue, in that ANAO auditors are APS employees, the same as staff of many of the audited entities that they are auditing, and are therefore employees of the Executive Government.

c. How did this come about?

The fact that the Auditor-General is an independent officer of the Parliament but the ANAO forms part of the Executive Government is a result of historical circumstances. The key historical circumstance appears to be that the Auditor-General for Australia was modelled upon the United Kingdom Comptroller and Auditor-General. Also relevant is a timing issue, as the Act commenced before there

was a developed model for a Parliamentary Department supporting an independent officer of the Parliament, as established by the Plty Act and its amendments made through the PBO Amendment Act.

JCPA Report 346: *Guarding the Independence of the Auditor-General*, provides extensive commentary on pages 33-57 about whether the Auditor-General should be designated as an officer of the Parliament. This explains that the United Kingdom Comptroller and Auditor-General was styled as an officer of the Parliament, whilst in practice being part of the Executive Government and this model was adopted by Australia and other Westminster jurisdictions.

The JCPA's commentary in Report 346 has a large focus on the risk that making the Auditor-General an officer of the Parliament would actually reduce the Auditor-General's independence, by making the Auditor-General subject to direction of the Parliament. The commentary also included consideration that there is no clear constitutional position for the Auditor-General, as the Auditor-General assists the Parliament but is different from the other officers of the Parliament that the Parliament relies on to function and which at the time were established under Parliamentary rules and not through legislation. The JCPA noted that this unique situation of having executive and parliamentary functions meant that the Auditor-General could be considered as a 'constitutional orphan'.[2]

In report 346, the JCPA affirmed that the Auditor-General needs to be functionally independent of both the Executive and Parliament.[3] Therefore the JCPA concluded that the Auditor-General should be given a new title of "Independent Officer of the Parliament".[4] The title would be different from the title of the existing officers of the Parliament and would have only symbolic effect to ensure that the Auditor-General did not become beholden to the Parliament like other officers of the Parliament.

Timing also appears to be a factor, in that the issue of whether the Auditor-General should be an officer of the Parliament was debated between at least 1989, when JCPA Report 296 was released, and 1996 when JCPA Report 346 was released. Therefore planning for the Act appears to have commenced well before planning of the Plty Act and well before creation of the Parliamentary Budget Officer and PBO in early 2012. The Plty Act established a broader legislative basis for the independence of Parliamentary Departments from the Executive Government and the 2011 amendments created a legislative basis for the Parliamentary Budget Officer to operate as an independent officer of the Parliament. Therefore at the time the Act was being considered, Parliamentary Departments would have been seen as a less independent option than they are now. If the legislative process for the Act had been commenced after commencement of the Plty Act and PBO Amendment Act, then it is likely that the PBO model would have been considered as a potential model for the ANAO.

d. Has there been previous consideration for the ANAO to become a Parliamentary Department?

As noted above, while focussing on the position of the Auditor-General not the ANAO, JCPA Report 346: *Guarding the Independence of the Auditor-General* referred to the position of the ANAO and concluded that it was appropriate for the Auditor-General and the ANAO to remain in the executive arm of government for administrative purposes while also fulling the role of assisting the Parliament.

While not specifically considering whether the ANAO should be a Parliamentary Department, JCPA Report 296 recommended that the then Australian Audit Office share the appropriations arrangements of Parliamentary Departments, by recommending that "The Australian Audit Office's appropriations be included in the Appropriation (Parliamentary Departments) Bill".[5]

[2] Paragraph 3.28 of JCPA Report 346 *Guarding the Independence of the Auditor-General.*
[3] Paragraph 3.68 of JCPA Report 346 *Guarding the Independence of the Auditor-General.*
[4] Paragraph 3.89 of JCPA Report 346 *Guarding the Independence of the Auditor-General.*
[5] Recommendation 15 on page xix.

As well as this indirect consideration of whether the ANAO should be a Parliamentary Department, there has been previous consideration of whether the ANAO should have a governance model that is more independent of both the Executive Government and the Parliament. In JCPA Report 296, the JCPA recommended that the then Australian Audit Office be a statutory authority in which the Auditor-General could determine the terms and conditions of employment of Australian Audit Office staff. NSW uses a similar model where the Audit Office of New South Wales (NSW) forms part of the Executive Government of NSW but the *Government Sector Employment Act 2013* (NSW) does not apply to employment of staff of the Audit Office. Another governance model used by some Supreme Audit Institutions (SAIs) is to establish the SAI as a separate body corporate and in 2011 the United Kingdom moved to a model where its National Audit Office (NAO) is a corporate entity. In the Australian Government context a body corporate has a separate legal identity to the Commonwealth.

e. What would it take for the ANAO to become a Parliamentary Department?

The ANAO has received preliminary draft advice from the Australian Government Solicitor and understands that no major legislative changes are likely to be required.

Minor legislative changes would likely include:

- Redrafting section 40 of the Act. The protection in subsection 40(2) should be retained but references to the PS Act and the ANAO being a Statutory Agency would be amended.
- Ensuring that the definition of Department in section 7 of the PS Act can accommodate the ANAO as a Parliamentary Department.
- Ensuring that existing protections for the independence of the Auditor-General continue to be effective and applying protections that apply to the Parliamentary Budget Officer as appropriate.

No major practical issues have been identified by the ANAO, considering that both the PS Act and Plty Act have arrangements to ensure mobility for employees transferring between the two services.

More significant changes would be required if the ANAO was to adopt parts of the NSW model (mentioned in response to question 2(d) above) by becoming a Parliamentary Department in which the Auditor-General could determine the terms and conditions of employment of ANAO staff. Those changes would mostly be practical not legislative as the ANAO would need to establish its own employment arrangements.

f. Do you know of any other jurisdictions where the Supreme Audit Institution became a parliamentary department sometime after its establishment?

The ANAO is aware that the Office of the Auditor-General of New Zealand became an Office of the Parliament in 2001, well after its establishment.

In 2001, New Zealand enacted the *Public Audit Act 2001* (NZ) to establish the statutory position of the Controller and Auditor-General as an officer of Parliament. The New Zealand Office is an Office of the Parliament. New Zealand appears to have three types of organisation supporting its Parliament, being the Office of the Clerk, the Parliamentary Service and three Offices of the Parliament. The three Offices of the Parliament are the Office of the Auditor-General, the Office of the Ombudsman and the Office of the Parliamentary Commissioner for the Environment[6].

Therefore the New Zealand model seems to be similar to the option of having the ANAO as a Parliamentary Department, except where Australia uses the umbrella term 'Parliamentary Department', our understanding is that New Zealand has three different types of organisation supporting its parliament.

[6] See website: Offices of Parliament - New Zealand Parliament (www.parliament.nz)

Question 3

Access to information is a theme of your submission. Under FOI laws ANAO documents cannot be subject to requests directed to the ANAO. But, it is unclear when FOI requests are made to departments that hold ANAO documents.

a. Has this situation ever eventuated? What was the outcome?

b. Do you see ANAO documents being held by audited entities as a risk?

c. How can the Committee clarify whether ANAO documents are subject to FOI laws? Is there anything we need to be mindful of - so we don't accidentally create more confusion?

d. Would becoming a parliamentary department help with this problem?

Response

a. Has this situation ever eventuated? What was the outcome?

In recent years the ANAO has been made aware of several FOI requests that related to the ANAO or included ANAO documents in their scope. The ANAO was consulted about two such FOI requests in 2020 and three in 2019. There may have been FOI requests that the ANAO was not consulted about.

To date, most Departments that have consulted the ANAO about FOI requests have released ANAO communications of an administrative nature but have relied on existing *Freedom of Information Act 1982* (FOI Act) exemptions to protect ANAO documents that the ANAO does not consider should be released, such as documents protected by the statutory confidentiality obligation in section 36 of the Act. The ANAO is not aware that any FOI requests have resulted in the release of ANAO documents that are subject to statutory confidentiality obligations that the ANAO wished to protect.

b. Do you see ANAO documents being held by audited entities as a risk?

The ANAO considers that application of FOI to ANAO documents is a risk, albeit not a high risk. The consequence of the risk eventuating is potentially significant due to the sensitivity of the information involved, but the likelihood of the risk eventuating is low, as at this time standard FOI exemptions have been sufficient to protect this information.

ANAO documents held by audited entities include report preparation papers and proposed audit reports issued under section 19 of the Act and protected by the confidentiality obligations in section 36. Report preparation papers are intended to help audited entities understand the ANAO's preliminary analysis and provide an opportunity for the audited entity to provide further audit evidence. This additional detail may include sensitive information that may not appear in the final audit report. It is not uncommon for audited entities to provide additional evidence that leads to a change in the ANAO's analysis and therefore it would be inappropriate to release preliminary analysis that may evolve as the audit progresses.

c. How can the Committee clarify whether ANAO documents are subject to FOI laws? Is there anything we need to be mindful of - so we don't accidentally create more confusion?

There are three options for simple legislative amendments that the Parliament could make that would resolve this issue.

The first two options involve applying section 38 of the FOI Act to section 36 of the Act. Section 38 of the FOI Act provides exemption to disclosure of documents that are protected by a secrecy provision specified in Schedule 3 of the FOI Act or that states that it is expressly applied to section 36. Therefore section 38 of the FOI Act can be applied to section 36 of the Act by either listing section 36 of the Act in Schedule 3 of the FOI Act, or redrafting section 36 to make section 38 of the FOI Act expressly apply. The two options deliver the same outcome, with the difference being mainly a drafting preference.

The advantage of redrafting section 36 of the Act is that it only requires amendment to the Act with no amendment to the FOI Act, potentiality simplifying the legislative process. The advantage of including section 36 in Schedule 3 of the FOI Act is that an audited entity is less likely to overlook the exemption, as the exemption would be within the FOI Act. The ANAO considers that these two options are simple amendments to ensure that section 36 of the Auditor-General Act is respected by the FOI Act and does not consider that there would be anything that the JCPAA would need to be especially mindful of in recommending these options.

The third option is to list the Auditor-General and ANAO in subsection 7(2A) of the FOI Act, which would provide a broader protection to all documents created by the ANAO. The JCPAA would have to be mindful that this option would place a complete ban on all ANAO documents being subject to the FOI Act and not just documents protected by section 36 of the Act. Therefore it would include the ANAO's administrative correspondence that to date the ANAO has not objected to being released by audited entities under the FOI Act and non-public audit reports issued under section 37 of the Act.

d. Would becoming a parliamentary department help with this problem?

No, becoming a parliamentary department would not change this problem.

Parliamentary Departments currently receive an FOI exemption in the Plty Act similar to the Auditor-General's existing exemption. The ANAO understands that like ANAO documents, documents of Parliamentary Departments require an additional specific exemption to protect them when held by other entities. For example, section 45A of the FOI Act provides a specific exemption to protect documents of the PBO. The ANAO does not consider that there is anything unique to the ANAO that requires a standalone section in the FOI Act like section 45A.

The ANAO considers that the three potential options outlined above are appropriate measures to resolve this issue.

Question 4

Page 12 of your submission refers to the PGPA Act – and whether the Executive should retain the ability to demand reports, documents and information of the ANAO's activities under s19 of the Act.

a. Can you give an example of this happening?

b. How do you share information with the Executive?

c. What, if any, is the problem with s19?

Response

a. Can you give an example of this happening?

To our knowledge, this has not occurred in practice. Page 12 of the submission refers to an independence risk that presents a threat to the independence of the Auditor-General.

b. How do you share information with the Executive?

The ANAO currently shares a range of information with the Executive Government that is required by Commonwealth law and policy, such as:

- Section 44 of the PS Act requires the ANAO to provide information to the Public Service Commissioner to assist with preparation of the State of the Service Report and the ANAO provides a range of associated APS employment information.
- ANAO contracts are provided to the Department of Finance and reported on AusTender in accordance with the requirements of the Commonwealth Procurement Rules.

- Information about ANAO legal expenditure is shared with the Office of Legal Services Coordination in accordance with the *Legal Services Directions 2017*.

For completeness we note that the Act and PGPA Act require that a range of finalised audit reports are provided to the Executive Government, as well as being tabled in both Houses of Parliament. Responsible Ministers and accountable authorities also receive an embargoed copy of a final performance audit report a few days before the report is tabled in Parliament.

c. What, if any, is the problem with s19?

The issue with section 19 of the PGPA Act is that it is not clear whether it overrides section 36 of the Act and how it interacts with Auditor-General functions. Section 54 of the Act provides protections against section 19 of the PGPA Act by specifying that requirements to comply with requests for information from the responsible Minister, or the Finance Minister must be in writing, must be reported to the JCPAA and must be disclosed in the ANAO annual report. However, it does not change the fact that section 19 is very broad and could apply to Auditor-General functions.

While the ANAO has no issues with section 19 of the PGPA Act applying to ANAO administrative functions, there could be an independence issue if section 19 applied to Auditor-General functions.

Section 19 of the PGPA Act specifically states that it only applies to the administrative functions of Courts. This was a deliberate additional protection in the PGPA Act, which could simply be extended to the Auditor-General and ANAO.

Question 5

Page 13 of your submission raises whether it is appropriate for information to be withheld from the ANAO or information removed from ANAO reports under s105D of the PGPA Act. Page 22 of your submission refers to s37 of the Auditor-General Act – and how this gives the Attorney-General power to omit information from an audit report.

a. Can you explain how s105D of the PGPA Act could affect a report conducted by the ANAO?

b. Why would s37 of the Auditor-General Act be used rather than s105D of the PGPA Act or vice versa?

c. The one example of s37 of the Auditor-General Act being used related to a Department of Defence program. What did you learn from this experience? Did the legislation work as intended?

d. How do you balance the need to have access to and report on information that may be extremely sensitive and have national security ramifications – such as defence capability, spending and programs?

Response

a. Can you explain how s105D of the PGPA Act could affect a report conducted by the ANAO?

As discussed in paragraph 69 of the Submission, section 105D instruments can apply to annual financial statement audits. The effect of a section 105D instrument would depend on the contents of that instrument.

While no such instruments have been issued, the most serious risks that the ANAO can foresee are that an instrument could specify that a Commonwealth entity or company is not required to prepare financial statements or be audited, or an instrument could require the Auditor-General to remove information from a public audit report without redactions to make it clear that information has been removed. A section 105D instrument could require the Auditor-General to remove qualifications to

the audit opinion from an audit report and therefore the Parliament would not have visibility of the basis for the qualification.

b. Why would s37 of the Auditor-General Act be used rather than s105D of the PGPA Act or vice versa?

Section 37 of the Act and section 105D of the PGPA Act have different purposes, although there is some overlap in that they can both be used to limit the information that can be included in public audit reports.

Section 105D instruments modify the application of the PGPA Act, including parts 2-3 and 3-2. A section 105D instrument can be determined by the Finance Minister, in relation to activities designated by a responsible Minister of an intelligence agency, security agency, listed law enforcement agency and Commonwealth entities forming part of intelligence or security agencies. Therefore the scope of application of section 105D is confined to the designated activities of intelligence, security and law enforcement agencies.

Except that section 105D instruments are confined to modification of application of the PGPA Act to certain activities of certain agencies, section 105D has a broad purpose and section 105D instruments can be very broad. For example, a section 105D instrument could provide an exemption from certain requirements, such as reporting contracts under the Commonwealth Procurement Rules. The ANAO's concern is that section 105D could impact the Auditor-General's powers, such as by exempting a Commonwealth entity or company from the requirement to prepare annual financial statements, requiring that the Auditor-General not audit a particular entity's financial statements, or by limiting the information that could be included in an audit report.

Section 37 of the Act relates to the Auditor-General not including particular information in a public report where the Auditor-General or Attorney-General forms a view that it is contrary to the public interest for any of the reasons set out in subsection 37(2). Therefore section 37 cannot be used to prevent an audit from taking place but can only prevent certain information from being included in a public audit report. The particular information and reasons set out in subsection 37(2) can cover a broad range of government activities.

The ANAO considers that section 105D should not be able to apply to Auditor-General functions and considers that all use of public resources should be subject to financial statement audits. The ANAO agrees that there are situations where information should not be included in public audit reports, but where this is the case, section 37 of the Act should be used and there is no need for section 105D of the PGPA Act to apply.

c. The one example of s37 of the Auditor-General Act being used related to a Department of Defence program. What did you learn from this experience? Did the legislation work as intended?

The ANAO notes that there is one example of a section 37 certificate being issued by the Attorney-General. That process was reviewed by the JCPAA in its report Report 478: *Issuing of a Certificate under section 37 of the Auditor-General Act 1997*.

Section 37 has also been used by the Auditor-General, such as in issuing a non-public version of Auditor-General Report No.5 of 2017-18: *Protecting Australia's Missions and Staff Overseas: Follow-on*. A key lesson learned from that process is that the Auditor-General should very carefully consider the consequences of using paragraph 37(1)(a) of the Act. The risk is that once subsection 37(1) applies, subsection 37(3) does not permit the Auditor-General to disclose a broad range of information to Parliament. If, for example, the Auditor-General was to form a view that disclosure of a certain piece of information relating to an audit would be contrary to the public interest, the Auditor-General will not just be prohibited from directly revealing that sensitive information but also indirectly revealing that information. Therefore the Auditor-General may also be unable to reveal non-sensitive

information, if by deduction, the non-sensitive information could indicate the nature of the sensitive information. This would put the Auditor-General in a difficult position, if for example the JCPAA or other committees asked questions about non-redacted parts of paragraphs of an audit report that contain redactions.

Therefore any use of section 37 will limit the assistance that the Auditor-General can provide to the JCPAA and the Parliament.

The Auditor-General's concerns with whether the legislation worked as intended are set out in the Auditor-General's first submission of 4 October 2018 to the JCPAA Inquiry into the issuing of a certificate under section 37 of the Act (JCPAA Report 478). That submission observed that the Act sets out a framework which recognises that it is in the public interest for the Auditor-General to report independently and publicly to the Parliament, unless there is a countervailing public interest in the non-disclosure of particular sensitive information. The Act therefore permits the Auditor-General to disclose information, as audit evidence, which might not otherwise be made public. In administering section 37(1)(a) of the Act, a key consideration for the Auditor-General is, therefore, whether there is any legal or other prohibition on the release of particular information in the form of audit evidence collected by the ANAO. However, the certificate was not limited to preventing the disclosure of 'particular information' to which prohibitions on release otherwise applied. The certificate went further and required the Auditor-General to omit analysis by the ANAO and part of the Auditor-General's audit conclusion relating to the audit objective, which was to assess the effectiveness and value for money of this Defence acquisition.

d. How do you balance the need to have access to and report on information that may be extremely sensitive and have national security ramifications – such as defence capability, spending and programs?

To fulfil the mandate given to the office of Auditor-General by the Parliament it is necessary that the Auditor-General have access to all information including sensitive information. Under the ANAO Auditing Standards, access to all relevant information, including information with national security ramifications, is required to enable a valid conclusion to be drawn. The Auditor-General is required to balance this need with the public interest. The Act provides a framework for doing this.

Sections 30 to 33 of the Act provide extensive information gathering powers and the ANAO considers that on balance they have been working well. The information-gathering powers are balanced by sections 36 and 37 of the Act. Section 36 provides a strict confidentiality provision with maximum 2 years imprisonment for unauthorised disclosure of information. Section 37 protects sensitive information by prohibiting the Auditor-General from including it in a public report, where disclosure of the information would be contrary to the public interest for any of the following reasons:

(a) it would prejudice the security, defence or international relations of the Commonwealth;

(b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;

(c) it would prejudice relations between the Commonwealth and a State;

(d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the Commonwealth;

(e) it would unfairly prejudice the commercial interests of any body or person; and

(f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

At the operational level, the Auditor-General has imposed internal information access protocols to ensure ANAO staff members have the appropriate level of security clearance to access the relevant information only on a need to know basis.

The treatment of sensitive information arises regularly in audits of a broad range of entities. For example, it frequently occurs in the context of Defence auditing and the ANAO works through all national security issues with the Department of Defence in the course of an audit. As discussed in the ANAO's first submission to the JCPAA inquiry into the Attorney-General's use of section 37, a key issue was that after having worked through all national security issues with the Department of Defence, the Auditor-General remained unaware as to why the reasons set out in paragraph 37(2)(a) of the Act—relating to prejudice to the security, defence or international relations of the Commonwealth—applied to the information that the certificate required be omitted from the report to Parliament.

The ANAO's submission also observed that in administering the Act, the Auditor-General's approach has been in favour of disclosure, in the public interest, unless the Auditor-General is of the opinion that the public interest is served by not disclosing 'particular information' which is otherwise prohibited from public release (for example, information with a national security classification). In the defence context, the ANAO seeks the advice of the Department of Defence to inform the Auditor-General's consideration of such matters, and the Auditor-General has also met on occasion with the Secretary of Defence and the Chief of the Defence Force to personally discuss the disclosure of sensitive information. There is always a balance to be struck between the public interest in not disclosing information and the broader public interest in reporting transparently to the Parliament.

Question 6

Audits of Government Business Enterprises (GBEs) require a request from the JCPAA. This Committee previously recommended the Auditor-General have the power to initiate audits of GBEs. On page 19 and 20 of your submission you note that GBEs have changed substantially in the past decade.

a. Can you describe what these changes are?

b. Why would it be prudent to readdress this issue now?

Response

a. Can you describe what these changes are?

As discussed at the public hearing of 9 December 2020[7], the Auditor-General considers that the nature of GBEs has changed over time. The Auditor-General explained that his historical interpretation was that the GBE framework was developed in the context of a privatisation agenda and the GBE framework introduced in the late 1980s was intended to make public sector entities like Qantas, Telstra, the Commonwealth Bank and Commonwealth Serum Laboratories operate more like public companies before privatisation.

The Auditor-General also observed that GBEs in existence now have a more public-purpose focus, generally receive significant government investment and operate in a different competitive environment than was previously the case. In the hearing the Auditor-General gave a range of examples including inland rail through the Australian Rail Track Corporation, Snowy 2.0 through Snowy Hydro Limited as well as the Western Sydney Airport. GBEs have received significant government equity to invest in projects that may not have occurred without public investment. For example, there

[7] Pages 5-6 of Cth, Joint Committee of Public Accounts and Audit Hansard 9 December 2020, https://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/c20facd0-90bc-4a25-ab1e-6af99f71d145/toc_pdf/Joint%20Committee%20of%20Public%20Accounts%20and%20Audit_2020_12_09_8415.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/c20facd0-90bc-4a25-ab1e-6af99f71d145/0000%22

are no private sector companies directly competing to build an inland rail route, a Snowy 2.0 equivalent or a Western Sydney airport.

The Auditor-General also noted that GBEs are performing activities that could be undertaken through other mechanisms, such as grants programs or subsidies to private sector bodies. There is no requirement to have GBEs perform public policy functions and the implementation of public policy through GBEs is a deliberate choice. Therefore it is the choice of mechanism for undertaking public policy, rather than any intrinsic feature of the public policy itself, that is determining whether particular public policy is subject to performance audit without a request of the JCPAA. For example, inland rail would be subject to performance audit without JCPAA request if it was delivered through a grants program, subsidy to private rail networks, or even by a Commonwealth company that is not a GBE. The ANAO considers that all use or management of public resources should be within the Auditor-General's mandate and the choice of implementation methods should not result in the potential for less oversight. This will ensure that the Auditor-General can always provide independent reporting to the Parliament with respect to GBEs and ensure consistency with principle 3 of the Mexico Declaration.

b. Why would it be prudent to readdress this issue now?

The inability of the Auditor-General to undertake performance audits of GBEs without a request from the JCPAA reduces the Auditor-General's independence.

In its report 419, the JCPAA recommended that the Act be amended to give the Auditor-General this power but the Australian Government did not agree. In report 419, the JCPAA noted that the nature of GBEs was changing and that GBEs had less market significance.

This trend has continued and in 2014 Medibank Private Ltd was privatised, which was possibly the last of the GBEs facing direct market pressure in all aspects of its business. Recently created GBEs have generally had limited specific public purposes, such as Moorebank Intermodal Company Limited, NBN Co Limited and WSA Co Ltd (Western Sydney Airport).

As a result of GBEs focussing more on public purposes, all of the recent GBE performance audits identified in footnote 18 of the Submission have focussed on public purpose issues and none have audited areas where the GBE competes directly with the private sector.

As the nature of GBEs has changed, the arguments as to why there should be controls over performance audits have less resonance and the JCPAA should consider reiterating the previous JCPAA recommendation in report 419.

Question 7

Your submission also notes (p 21) that, under section 40 of the PGPA Act, the ANAO can only conduct an audit of annual performance statements if it is requested by a Minister.

a. Why is it important to change this process? What is the ideal approach to annual performance statement audits?

b. What legislative amendments or other changes would be necessary to change this? Would undertaking these audits require additional resourcing for the ANAO?

c. Are there other jurisdictions that approach this issue in a way the Commonwealth could draw on?

Response

a. Why is it important to change this process? What is the ideal approach to annual performance statement audits?

High quality performance information is essential for the Parliament in holding the Executive Government to account. Performance information could be considered to be more important than financial information as ultimately the core purpose of Commonwealth entities is to perform their designated functions and generate a benefit from public expenditure. In 2013, the Explanatory Memorandum accompanying the PGPA Bill noted that under the framework then in place, the information that was most readily available from Commonwealth entities was financial in nature. It noted that financial information, of itself, does not provide insights into whether publicly funded programs and activities are achieving their objectives and outcomes.

The public sector has a well-established basis from which to present financial information in Portfolio Budget Statements and financial statements. Commonwealth entities have mature systems for capturing and reporting this information, audit committees are experienced in providing their views to accountable authorities on these statements and the Department of Finance has well developed guidance on preparing and disclosing financial statements information. The ANAO has long-standing systems and processes in place to deliver its legislated function of auditing the annual financial statements of Commonwealth entities in accordance with the PGPA Act and these audits have contributed to high quality, reliable financial statements information.

In the absence of systematic auditing of non-financial performance information, the public sector's presentation of reliable, accurate and complete non-financial information is less entrenched. ANAO audits have consistently highlighted that the information presented in the performance statements falls short of fully meeting the object of the PGPA Act - to provide the Parliament and the public with meaningful information.

JCPAA Report 469: *Commonwealth Performance Framework*, recommended that the Australian Government amend the PGPA Act and accompanying rules and guidance to enable mandatory annual audits of performance statements by the Auditor-General of entities selected by the Auditor-General for review. The JCPAA also referred this recommendation to the *Independent Review into the operation of the Public Governance, Performance and Accountability Act 2013 and Rule* (the PGPA Independent Review). The Auditor-General's first submission to the PGPA Independent Review highlighted that a robust framework and good guidance (including better practice examples) may not be sufficient for successful implementation.[8] That submission stated that strong incentives for accountable authorities are also likely to be important and that transparency and external assurance, such as ANAO audits, are likely to be the strongest incentives.

While the Auditor-General may conduct a performance audit at any time, section 40 of the PGPA Act constrains the Auditor-General's independence in conducting an audit of the annual performance statements of Commonwealth entities unless requested by either the Minister for Finance or the responsible minister. In August 2019, the Minister for Finance requested that the Auditor-General conduct a pilot program of audits of annual performance statements in consultation with the JCPAA. The pilot considered the 2019-20 performance statements of three entities and has recently completed. The ANAO has reported on the pilot to the Minister for Finance and the JCPAA. In the report to the JCPAA the ANAO outlined that it intended to include in its 2021 Budget Submission a

[8] PGPA_Act_Rule_Independent_Review-ANAO_0.pdf (finance.gov.au)

proposal to implement performance statements audits from the commencement of the 2021-22 financial year. This would be a staged transition to performance statement audits of the 19 material entities by the end of the forward estimates. The ANAO also outlined that the next step in delivering mandated performance statements audits is to seek Parliament's support for this and the associated legislative changes to the PGPA Act.

Therefore the ANAO recommends that the JCPAA reconsider implementation of its recommendation in JCPAA Report 469 to enable mandatory annual audits of performance statements by the Auditor-General.

b. What legislative amendments or other changes would be necessary to change this? Would undertaking these audits require additional resourcing for the ANAO?

Legislative amendment would be required to amend the PGPA Act to mandate performance statement audits. Such amendments would need to mandate that Commonwealth entities provide performance statements to the Auditor-General and there would also be an amendment, to either or both the Act and PGPA Act, to mandate that the Auditor-General audit the provided statements.

Associated amendments would be required to mandate that audited performance statements are included in annual reports. This could be implemented through either legislative changes to the PGPA Act, or else the Minister for Finance could amend annual reporting rules in the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule).

Any move to mandated performance statement audits will need to be staged to allow time for the ANAO to increase its capacity to undertake these audits and therefore the legislative amendments will need to take account of the staged implementation.

The ANAO does not consider that any of these amendments would be complicated and features of the existing sections in the Act and the PGPA Act which mandate compulsory annual financial statement audits could be used as the basis for new sections.

Undertaking annual performance statement audits would require additional resourcing for the ANAO.

c. Are there other jurisdictions that approach this issue in a way the Commonwealth could draw on?

The Australian and New Zealand jurisdictions that the Commonwealth could draw on are the Australian Capital Territory, New Zealand and Western Australia. These jurisdictions conduct annual audits of performance information as part of annual financial statement audits.

The ACT audits statements of performance as an adjunct to its audits of financial statements. The Auditor-General must audit statements of performance under the *Financial Management Act 1996* (ACT).[9] Therefore each year the ACT Audit Office audits both the financial and performance statements of around 70 public sector entities.[10]

The Office of the Auditor-General New Zealand also audits performance statements, where legislation requires a performance statement be prepared, as an adjunct to its annual financial statements.[11]

The Office of the Auditor-General of Western Australia has a similar process, but refers to key performance indicators not performance statements. The Auditor-General must audit all key performance indicators submitted in accordance with the *Financial Management Act 2006* (WA).[12]

[9] See section 30C of the *Financial Management Act 1996 (ACT)*
[10] See ACT Audit Office website page: Audit Services - ACT Audit Office
[11] See section 45D of the *Public Finance Act 1989* (NZ)
[12] See section 15 of the *Auditor General Act 2006* (WA)

From a private sector perspective, the concept of integrated reporting continues to develop. This form of external reporting focuses on non-financial performance as well as financial performance. In response to this, the International Auditing and Assurance Standards Board (IAASB) has, since 2014, had a project to develop guidance in applying existing auditing standards to provide assurance in respect of emerging forms of external reporting. The IAASB is in the final stages of issuing a guidance document *Extended External Reporting Assurance* as part of this project.

Question 8

Do most audited entities cooperate or start to fix problems before the report is tabled? If so, what's stopping certain agencies from engaging?

Response

It may be the case that audited entities will start to fix problems before a performance audit is tabled and audited entities have ample opportunities to do so. Unless a performance audit is in response to a recent event or recent Parliamentary request, most audit topics are published in the Annual Audit Work Program (AAWP) on the ANAO website well before they commence. Therefore audited entities could decide to start fixing any problems before a performance audit even commences. During the audit process, audited entities receive a report preparation paper months before an audit has concluded and therefore will be aware of potential issues or problems that will be raised in the audit report well before an audit report is tabled. This is in addition to the proposed report under section 19 of the Act, which audited entities receive before the report is tabled and have 28 days to respond to.

Where an audited entity has started to fix problems, this might be referred to by the ANAO in its audit report, or in the entity's response to the audit.

The ANAO supports audited entities seeking to fix problems before an audit report is tabled. The ANAO considers that a benefit of the performance audit program is that audited entities may choose to fix problems in potential audit areas, even if an audit never eventuates.

The ANAO's program of follow-up audits provides the Parliament with assurance on action taken to implement audit recommendations.

Question 9

The 28-day timeframe for audited entities to provide comments has remained unchanged since 1979.

a. Have you consulted with any stakeholders about your suggestion of a 21-calendar day timeframe (p 27)?

b. Are there other efficiencies that could be introduced?

Response

a. Have you consulted with any stakeholders about your suggestion of a 21-calendar day timeframe (p 27)?

The ANAO has not consulted audited entities about the suggestion of reducing the timeframe for providing comments on proposed performance audit reports. The ANAO has not sought to pre-empt the Committee's consideration of this matter by undertaking such consultations.

b. Are there other efficiencies that could be introduced?

The ANAO has not identified any other potential legislative changes that could create efficiencies with the performance audit process. If efficiencies were identified they would most likely be at the operational level, such as the further use of data analytics techniques, that can be implemented by the Auditor-General and ANAO without legislative change.