

Section 19 – Comments on proposed reports

Introduction

- 2.1 A key function of the Auditor-General is to conduct performance audits of government agencies. Performance audits primarily seek to examine the efficiency and effectiveness of program administration and, where necessary, make recommendations to improve performance. The findings of a performance audit are often complex and, in some cases, contentious.
- 2.2 Therefore, natural justice demands that the Auditor-General, in conducting a performance audit, gives agencies the opportunity to comment on the findings that are presented in a proposed report.
- 2.3 Section 19 of the Act provides the framework for ensuring that a proposed report is provided to an agency and, where necessary, persons with a special interest in the report. These groups have 28 days to respond with written comments and the Auditor-General must consider those comments before preparing a final report.
- 2.4 Evidence to the inquiry suggested that section 19 could be enhanced through some minor amendments. In particular, the Auditor-General suggested that the Act be amended to allow extracts of proposed reports, rather than the full report, to be provided to persons with a special interest. This chapter examines this and other matters, and proposes legislative amendments where necessary.

Section 19 – Overview

- 2.5 The Auditor-General’s legislative power to conduct performance audits is set out in Part 4, Division 2 of the Act. Sections 15, 16 and 17 set out performance audit responsibilities in relation to agencies, Commonwealth authorities and subsidiaries, and Commonwealth companies and subsidiaries. Section 18 provides the power to perform general performance audits of the whole or part of the Commonwealth public sector.
- 2.6 The circulation of proposed reports through Section 19 assists both the Auditor-General and the audited agency. The process helps to ensure that information presented as factual in the report is correct, and provides for natural justice to apply by giving agencies the opportunity to respond to recommendations and differences in opinion. Section 19 is divided into four sub-sections shown, in full, below:

19 Comments on proposed reports

- (1) After preparing a proposed report on an audit of an Agency under section 15, the Auditor-General must give a copy of the proposed report to the Chief Executive of the Agency.*
 - (2) After preparing a proposed report on an audit of a body under section 16 or 17, the Auditor-General must give a copy of the proposed report to an officer of the body.*
 - (3) After preparing a proposed report on an audit under section 15, 16, 17 or 18, the Auditor-General may give a copy of the proposed report to any person who, in the Auditor-General’s opinion, has a special interest in the report.*
 - (4) If the recipient of the proposed report gives written comments to the Auditor-General within 28 days after receiving the proposed report, the Auditor-General must consider those comments before preparing a final report.*
- 2.7 There are certain risks in circulating proposed reports of the Auditor-General. First, as the findings in the proposed report are only of a preliminary nature and have not been presented to the Parliament, it is essential that confidentiality be maintained. For example, it would be very serious and may undermine the findings of the Auditor-General if findings in a proposed report were made public. To help protect against this, section 19 of the Act is linked to section 36(3).

- 2.8 Section 36(3) states that ‘a person who receives the report under section 19 must not disclose any of the information in the report except with the consent of the Auditor-General’. The maximum penalty for breach of this section is imprisonment for two years.

Parliamentary Privilege

- 2.9 The term parliamentary privilege refers to the special rights enjoyed by each of the Houses and their Members to enable them to discharge their functions. The *Parliamentary Privileges Act 1987* clarifies these matters and provides that, except to the extent that the Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the Members and the committees of each House, continue as under section 49 of the Constitution.
- 2.10 The tabling of a performance audit report or financial statements audit report in Parliament becomes part of ‘proceedings in Parliament’ and attracts the protection of Parliamentary privilege. The Auditor-General and ANAO officers cannot be found liable in respect of statements contained in a tabled report.¹
- 2.11 The Auditor-General makes recommendations which affect a wide range of government departments, agencies and potentially Ministers and private contractors. In some cases the findings may be contentious. Parliamentary privilege ensures that the office of the Auditor-General can present its findings to the Parliament without fear or favour.
- 2.12 The major concern raised during the inquiry is whether Parliamentary privilege applies to ANAO working papers and draft reports. As indicated in the previous section, draft reports are provided to agencies and persons with special interests under section 19 of the Act. However, these documents have not been tabled in Parliament and, therefore, there is concern that these documents may not be part of ‘proceedings in Parliament.’
- 2.13 The Auditor-General suggested that it would be desirable for audit working documents and draft reports to attract parliamentary privilege. The Auditor-General stated:

1 Australian National Audit Office, *Submission No. 6*, p. 5.

There would be an advantage to the office. The legal opinion seems to suggest that there might be some difficulties in actually getting that kind of clarification. The legal opinion that we have... suggests that there is some protection of parliamentary privilege that goes back through the draft reports to working papers. That is about as far as we can go with our legal advisers, but there is a question of whether we will go one step further to actually try to get advice that makes it somewhat clearer.²

2.14 On 20 February 2001 the ANAO received advice from the Australian Government Solicitor (AGS) about the application of Parliamentary privilege to performance audits and financial statement audits.³ The key parts of the AGS's summary of advice is reproduced, below:

- 'the actual tabling of a performance audit report or financial statements audit report in Parliament is part of 'proceedings in Parliament' and attracts the protection of Parliamentary privilege. The Auditor-General and ANAO officers would not be found liable in respect of statements contained in the tabled report;
- the extent to which the protection of Parliamentary privilege extends, and how it extends, to earlier steps in the performance audit or financial statements audit process is less certain. Where a step in the audit process is not protected by Parliamentary privilege, there is scope for that step to be challenged in court and to give rise to legal liability;
- although the position is not clear, unless and until a court decides to the contrary, the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of 'proceedings in Parliament', thereby attracting the protection of Parliamentary privilege, with the result that the Auditor-General and ANAO officers could not be found liable in respect of statements contained in those draft reports and statements;
- however, because the extent to which the protection afforded by Parliamentary privilege applies to steps earlier than the

2 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.26.

3 Australian Government Solicitor, Performance Audits and Financial Statements Audits by the Auditor-General: Application of Parliamentary Privilege, Exhibit 1.

tabling of reports is unclear, and how that protection extends to those steps is also unclear, it would be prudent for the Auditor-General and ANAO officers to proceed on the basis that their conduct of a performance or financial statements audit is capable of being challenged and of giving rise to legal liability'.⁴

2.15 The AGS advice confirms that while the tabling of a report in Parliament attracts the protection of Parliamentary privilege, the 'earlier steps in the performance audit or financial statements audit process is unclear.' Dot point three above, however, concludes that although, 'the position is not clear, unless and until a court decides to the contrary, the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of proceedings in Parliament'.

2.16 The AGS did place a caveat on the application of Parliamentary privilege to ANAO working papers. The AGS stated:

We note for completeness that it does not follow, of course, that every document in the possession of the Auditor-General that relates to a particular performance audit report would reasonably be argued to attract parliamentary privilege. In order for privilege to be attracted it is necessary that the document be prepared or dealt with in circumstances that attract the privilege. Thus, other material which has been prepared independently of the performance audit report but which is referred to in the report would not necessarily attract parliamentary privilege.⁵

2.17 The AGS advice suggested that the Parliament could enact legislative amendments to clarify the application of Parliamentary privilege. The AGS stated that the 'Parliament could, subject to any applicable constitutional limits, clarify either or both:

- the scope of the application of Parliamentary privilege in relation to the audit process (eg. the extent to which the privilege applies to draft reports and working papers; and

4 Australian Government Solicitor, Performance Audits and Financial Statements Audits by the Auditor-General: Application of Parliamentary Privilege, Exhibit 1, pp. 1-2.

5 Australian Government Solicitor, Performance Audits and Financial Statements Audits by the Auditor-General: Application of Parliamentary Privilege, Exhibit 1, p. 6.

- the nature of the protection or immunity conferred by that privilege (eg. whether it precludes review by a court to determine whether a report was being, or had been, prepared in accordance with administrative law requirements).⁶

2.18 The ANAO was not supportive of legislative amendment. The ANAO commented that while ‘it may be desirable to achieve a greater degree of certainty around the extent to which the protection of Parliamentary privilege extends to the audit process, the ANAO has reservations that legislative amendment is warranted.’⁷

2.19 Following the advice from the AGS, the ANAO received advice from the Solicitor-General, dated 1 June 2001, about the application of Parliamentary privilege to performance audits and financial statement audits by the Auditor-General.⁸ The ANAO asked five questions of the Solicitor-General which are reproduced, in full, below:

- 1. Does parliamentary privilege apply to a report, such as the financial statement audit report, which is first provided to the Agency or Commonwealth body for inclusion in an annual report which is then given to a Minister for tabling in Parliament?
⇒ Yes, such a report falls within the meaning of the expression ‘proceedings in Parliament’ in s.16(2) of the *Parliamentary Privileges Act*.
- 2. Do working papers created by the Auditor-General for the purposes of preparing performance audit reports or financial statement audit reports fall within the expression ‘proceedings in Parliament’?
⇒ Yes.
- 3. Does the High Court’s decision in *Ainsworth v Criminal Justice Commission* affect the availability of parliamentary privilege?
⇒ No.

6 Australian Government Solicitor, Performance Audits and Financial Statements Audits by the Auditor-General: Application of Parliamentary Privilege, Exhibit 1, p. 23.

7 Australian National Audit Office, *Submission No. 6*, p. 6.

8 Correspondence from the Solicitor-General to the ANAO dated 1 June 2001.

- 4. What steps should be taken by the Auditor-General when preparing a financial statement audit report or a performance audit report?

⇒ Despite my conclusions, it is desirable that the Auditor-General comply with procedural fairness and other legal requirements when preparing audit reports.

- 5. Is it desirable for the ANAO to consult or inform the relevant parliamentary officer or committee of an intention to claim parliamentary privilege?

⇒ Yes.⁹

2.20 The ANAO's questions to the Solicitor-General did not specifically seek clarification on whether Parliamentary privilege applies to ANAO draft reports or extracts of draft reports. The advice from the AGS, of 20 February 2001, commented on draft reports.

2.21 The ANAO specifically asked the Solicitor-General whether working papers created by the Auditor-General for the purposes of preparing performance audit reports or financial audit reports fall within the expression 'proceedings in Parliament?' The Solicitor-General responded positively with the view 'that the creation of the working papers for the purposes of preparing audit reports would be regarded as 'acts done ... for purposes of or incidental to, the transacting of the business of a House'. The Solicitor-General stated:

Such a conclusion would be consistent with a broad reading of s.16(2) of the *Parliamentary Privileges Act 1987*. I agree with the conclusion expressed in the AGS advice that it would be proper to proceed on the basis that the creation of the working papers does fall within the expression 'proceedings in Parliament' in s.16(2).¹⁰

2.22 From an operational perspective, the ANAO administers working papers and the circulation of draft reports with care and caution. The Auditor-General stated:

...we are quite conservative in the way that we treat documentation in our dealings with people into the stage before a report is actually tabled. I do not know of one instance where it has created an administrative or other problem for us; it is just that we need to be somewhat

9 Correspondence from the Solicitor-General to the ANAO dated 1 June 2001.

10 Correspondence from the Solicitor-General to the ANAO dated 1 June 2001.

more careful, and we probably get a bit more legal advice than we might otherwise have got.¹¹

- 2.23 The Queensland Auditor-General indicated, in relation to the Queensland Audit Office, that Parliamentary privilege does apply to working documents and draft reports. The Queensland Auditor-General stated:

Parliamentary proceedings extends to cover the preparation of a document to be tabled before the House. As such, privilege attaches to these reports and any relevant extracts both during the report's preparation and after its tabling in Parliament.¹²

- 2.24 The Victorian Auditor-General commented that the principles of Parliamentary privilege 'ought also to apply indirectly to the circulation of proposed findings and recommendations' during the consultative process.¹³ However, the Victorian Auditor-General acknowledged that 'the status of the document until it is tabled is very much at large—in fact, I suspect it is not covered by privilege or even earlier versions of it—but we constantly remind people that the outcome of this exercise is a parliamentary document.'¹⁴

Conclusions

- 2.25 The audit process relies on a free flow of information on a continuous basis. The Committee recognises that the provision of Parliamentary privilege is an essential element in protecting the office of the Auditor-General from legal action so that it may provide a fearless account of the activities of executive government.
- 2.26 This inquiry revealed that there is some uncertainty as to whether Parliamentary privilege applies to Auditor-General working papers and draft reports. Recent advice from the Solicitor-General and the AGS suggested that it would be proper to proceed on the basis that Parliamentary privilege applies to draft reports, and working papers for the purpose of preparing audit reports. The AGS stated that 'unless and until a court decides to the contrary,

11 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.26.

12 Queensland Auditor-General, *Submission No. 8*, p.2.

13 Victorian Auditor-General, *Submission No. 2*, p.3.

14 Mr Wayne Cameron, Victorian Auditor-General's Office, *Transcript*, p.14.

the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of proceedings in Parliament’.

- 2.27 It should be noted that the Solicitor-General’s advice focused on the creation of working papers *for the purpose of preparing audit reports*. The Committee notes that the Solicitor-General’s advice did not comment on the application of Parliamentary privilege to working papers which are not directly linked to the creation of an audit report. The AGS stated that ‘other material which has been prepared independently of the performance audit report but which is referred to in the report would not necessarily attract Parliamentary privilege.’
- 2.28 The AGS suggested that legislative amendments could be enacted to clarify the application of Parliamentary privilege to ANAO draft reports and working papers. The ANAO had reservations that legislative amendment was warranted. The Committee, however, believes that further Parliamentary scrutiny of this matter is warranted.
- 2.29 The Committee, based on the evidence provided, accepts that until a court decides to the contrary, it is proper for the Auditor-General to proceed on the basis that Parliamentary privilege does apply to ANAO draft reports and working papers created for the purpose of preparing audit reports or financial statement audit reports. The legal advice provided to the Committee, however, did not comment on the application of Parliamentary privilege to extracts of draft reports. The significance of extracts of draft reports is examined in the next section.
- 2.30 The Committee considered that there may be justification for amending legislation to provide certainty that draft reports and extracts of draft reports would attract privilege when they are circulated in accordance with the Act. The principal reason for wanting to provide this certainty is to remove the opportunity for a person who might be adversely referred to in a draft report or extract of a draft report, to use the threat of litigation in an attempt to influence the final form of the Auditor-General’s findings. The Committee also considered that there is an argument for giving the Auditor-General certainty as to their privileged status, since the Act requires that they be circulated. The Committee was not persuaded of any need for legislation to give greater clarity to the privileged status of working papers or draft reports and extracts of draft reports before they are circulated.

- 2.31 The work of the Auditor-General is critical to the operation of good government and is a key accountability mechanism which supports the Parliament's scrutiny of Executive Government. Therefore, the Committee believes that it is appropriate that the Privileges Committees of both the Senate and the House of Representatives examine, in more detail, the application of Parliamentary privilege to ANAO draft reports, extract of draft reports and working papers.
- 2.32 The purpose of making the following recommendation, is to ensure that the Privileges Committees of both the Senate and the House of Representatives can participate in the debate about the application of Parliamentary privilege to ANAO draft reports, extracts of draft reports and working papers.

Recommendation 1

- 2.33 **The Committee suggests that the Privileges Committees of both the Senate and the House of Representatives examine whether Australian National Audit Office draft reports and extracts of draft reports attract Parliamentary privilege, and if they do not, should they attract Parliamentary privilege.**

Draft Report Extracts

- 2.34 With the trend towards outsourcing of government services, there are potentially more groups that may have an interest in an Auditor-General performance audit. For example, where a government agency employs a contractor to deliver certain services, a performance audit of this function may include verification of the services provided by the contractor. In this event, the Auditor-General may decide to give a copy of the proposed report to the contractor.
- 2.35 The Auditor-General commented that, in these cases, it is not always necessary to provide a full copy of the proposed report to the contractor but only relevant extracts of the proposed report. Section 19, however, does not provide the Auditor-General with the power to circulate extracts of a proposed report.

- 2.36 In practice, the ANAO provides extracts of proposed reports to affected parties in the interest of natural justice and procedural fairness. However, this is done outside the provisions of section 19 of the Act. Consequently, recipients of the report extracts are not subject to the confidentiality requirement imposed by section 36(3).
- 2.37 The ANAO has compensated for this situation by placing administrative mechanisms to ensure that confidentiality requirements are imposed on the recipients of extracts of draft reports.
- 2.38 The ANAO, in its submission, requested that the Act be amended so that section 19(3) will allow extracts of proposed reports to be sent to those with a special interest in the report. This would ensure that the recipients of such reports would be subject to the confidentiality requirements under section 36(3). The Auditor-General stated:

I will make one particular strong point as to why extracts are important. The main point of section 19 is to ensure that the factual basis of the audit and our recommendations are satisfactory—in other words, they are sustainable and there are no reasons that a person of good faith could not come to valid conclusions as a result. If the whole of the report has to go to every person, no matter if only one sentence is relevant—not even the person mentioned because, as you know, we rarely mention people by name—and can be pointed to that particular person, the problem would be that, if we were wrong in information and that went to a number of people, it may give rise to defamation action and give access to the Commonwealth Treasury unnecessarily, which would not be advisable.¹⁵

- 2.39 The CPA Australia supported amending section 19, as proposed by the Auditor-General, provided there was ‘an opportunity for the contractor to provide a response or address the issue.’¹⁶ Similarly the Department of Finance and Administration (DoFA) indicated that it did not have a problem with the concept of providing extracts of proposed reports. DoFA acknowledged that the provision of report extracts would be more relevant to

15 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.28.

16 Mr Kevin Lewis, CPA Australia, *Transcript*, p.7.

contractors outside the Commonwealth rather than Commonwealth departments who would 'see the whole report under section 19 and to be governed by the provisions of the Act.'¹⁷ DoFA stated:

I suppose we also do not have the issue that the Auditor-General is concerned about – that is, that he may be exposed or the Commonwealth may be exposed to defamation if they actually publish a section 19 report widely because they have to consult with a lot of people.¹⁸

2.40 Similarly, the Departments of Family and Community Services, and Defence indicated that they agreed with the Auditor-General's proposal to amend section 19 to allow the distribution of extracts of a proposed report.¹⁹

2.41 However, the Department of Environment and Heritage (DEH) did not agree with the Auditor-General's proposals to amend section 19. In contrast, DEH advocated that the ANAO should provide full copies of the draft report to affected parties. DEH argued that parties that were subject to criticisms by the Auditor-General should have the right to provide comments, and 'the most direct and simple way of doing this is to provide the entire report to any affected contractor'. DEH insisted that the mere 'provision of extracts may not put the criticism in appropriate context.'²⁰

2.42 In response, the Auditor-General indicated that particular issues in a report are reasonably self contained and can be circulated as extracts. The Auditor-General stated:

There is an argument in one of your submissions that, in order to put the report in context, the individuals concerned with the corporations, agencies, et cetera, should have the right to see the full report. The point is—and the committee would know this from its own experience—that, except where an agency is very heavily involved in particular aspects, most of the other aspects apply in particular areas and those areas are reasonably self-contained. Therefore, they do not have any

17 Mr Jonathan Hudson, Department of Finance and Administration, *Transcript*, p.36.

18 Mr Jonathan Hudson, Department of Finance and Administration, *Transcript*, p.36.

19 Mr Michael Roche, Department of Defence, *Transcript*, p. 49; Dr David Rosalky, Department of Family and Community Services, *Transcript*, p. 76.

20 Department of Environment and Heritage, *Submission No. 5*, p.1.

necessity—nor should they have any concern—that there are any other aspects in the report.²¹

2.43 In addition to the Auditor-General's proposal to amend section 19(3), the Department of Defence (Defence) proposed additional amendments to section 19(3). Section 19(3) states that the 'Auditor-General *may* give a copy of the proposed report to any person who, in the Auditor-General's opinion, has a special interest in the report.' In contrast, section 19(1) states that the 'Auditor-General *must* give a copy of the proposed report to the Chief Executive of the Agency.'

2.44 Defence maintains that in those instances where the Auditor-General invokes his access powers under section 32 and 33 then the Auditor-General must provide a copy of the proposed report or extract to the affected party.²² Defence stated:

I believe that in any case where the Auditor-General has had access under 32 or 33 by virtue of a contractual provision or not the equivalent of section 19(1) should apply to the chief executive officer of any external organisation that has audit access.²³

2.45 As part of the inquiry into Contract Management in the Australian Public Service, the ANAO addressed the circulation of proposed reports under section 19(3). The ANAO suggested that natural justice operates in common law which ensures that relevant parties would be given access to a proposed report. The ANAO commented that unlike 'the discretionary power in 19(3) of the Act, referral of draft reports or relevant extracts under natural justice is a legal requirement.'²⁴

Conclusions

2.46 The Committee recognises the importance of allowing affected parties the opportunity to comment on ANAO reports. Once the reports are tabled in Parliament, their contents are protected by parliamentary privilege. Consequently, it is important for the Auditor-General to provide avenues for affected parties to correct factual errors or provide written comments. However, these

21 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.28.

22 Mr Michael Roche, Department of Defence, *Transcript*, p. 49.

23 Mr Michael Roche, Department of Defence, *Transcript*, p. 45.

24 Australian National Audit Office, Submission 75 to the inquiry into Contract Management in the Australian Public Service, 16 August 2000, p. 2.

avenues also need to be protected by confidentiality requirements to ensure that distribution of draft reports or extracts of draft reports are provided only to the relevant stakeholders.

- 2.47 The Committee supports the ANAO proposal that section 19(3) be amended to allow extracts of draft reports to be provided to affected parties. While the Auditor-General currently provides extracts of the report to parties with a special interest, this is done outside the legislative framework and therefore recipients are not subject to the confidentiality requirements of section 36(3).
- 2.48 The Department of Defence proposed that section 19(3) be amended to ensure that the Auditor-General *must*, if sections 32 or 33 are used, give a copy of the proposed report to any person with a special interest in the report. This may prove impracticable if the ANAO used its access powers in relation to an organisation but does not use the information gathered or comment on the organisation in the report. Under Defence's proposal, the organisation would be entitled to have a copy of the proposed report even though there was no mention of the organisation or its operations in the proposed report. For this reason, the Committee does not support Defence's proposal of connecting access powers with the requirement to circulate a draft report under section 19(3).
- 2.49 The ANAO advised that while section 19(3) is discretionary, natural justice operating under common law requires the ANAO to provide a person with access to the report if there are matters in the report that relate to that person. In view of this, there should be no objection to amending section 19(3), by changing *may* to *must*, to ensure that any ambiguity is removed about providing a report or extract to a person with a special interest in the report.
- 2.50 Therefore, section 19(3) should be amended to ensure that the Auditor-General *must* give a copy *or an extract* of the proposed report to any person who, in the Auditor-General's opinion, has a special interest in the report.
- 2.51 It should be noted that if section 19(3) is amended then consequential amendments will need to be made. For example, section 36(3), relating to confidentiality of proposed reports circulated under section 19, will need to be amended to include 'or extracts of a proposed report.'

Recommendation 2

2.52 The Committee recommends that the Government amend section 19(3) of the *Auditor-General Act 1997*, to read:

- After preparing a proposed report on an audit under sections 15, 16, 17 or 18, the Auditor-General ~~may~~ *must* give a copy or an extract of the proposed report to any person who, in the Auditor-General's opinion, has a special interest in the report.

The Government will need to ensure that all consequential amendments arising from this amendment are made.

Extending time to comment on ANAO draft report

2.53 Under section 19(4) recipients of a proposed report have 28 days to provide written comments for consideration by the Auditor-General. This time period is intended to provide affected parties with sufficient time to check for any factual errors, consider their response to the report, and provide a written reply.

2.54 The Department of Foreign Affairs and Trade (DFAT) reported that 28 days is sometimes not adequate given the complexities of the issues involved. DFAT explained that audits conducted by the Auditor-General are resource intensive and may affect a number of different areas in the department. In addition, DFAT indicated that its complicated bureaucratic structure means that it may sometimes be difficult to meet the 28 day time frame. DFAT stated:

In essence, the rationale for that request is that the final audit report does not always contain the comments that are made by the audited agencies. So, while the report itself as a whole is not a surprise there can be elements, particularly difficult elements of the report, where departmental or agency views are not reflected.²⁵

2.55 DFAT, therefore, requested that the Act be amended so that section 19(4) will allow recipients of draft reports to have 35 days to make written comments. DFAT argued that this 'would seem a

25 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.62.

more manageable timeframe.²⁶ DFAT maintained that the extra seven days, which it did not consider significant, would 'ensure a better quality response and a more considered response in cases where there are differences of opinion in the final reports.'²⁷

- 2.56 The ANAO did not support DFAT's proposal. The ANAO commented that in practice if agencies make a good case for the extension of the 28 days, the ANAO will 'inevitably grant it.'²⁸ In addition, the ANAO suggested that the time for responding was quite generous compared to the timeframes given by some State Auditors-General.²⁹ The Auditor-General stated:

I would be very loath to go beyond the 28 days, because it does add an unnecessary cost to the audit. It also creates more problems in terms of finalising the audit with the specific agencies involved. Time and experience have shown that 28 days is more than satisfactory.³⁰

- 2.57 The Auditor-General also explained that the ANAO provides agencies with issues papers sometimes months before a draft report. This is in addition to the draft report process. The Auditor-General stated:

It seems to me that another 28 days is not exactly a great burden for agencies to respond when they have had so many opportunities to be intimately involved in the audit process and in many cases have known for months where the audit really is coming out.³¹

- 2.58 The Committee also sought the views of the Department of Education, Training and Youth Affairs (DETYA) and from the Department of Family and Community Services (FaCS) on the issue of extending the time period for agencies to comment on draft reports. DETYA stated:

I must say that we have not found any problem with the 28-day time limit as it has operated for some time. We

26 Department of Foreign Affairs and Trade, *Submission No. 9*, p.2.

27 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.62.

28 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.28.

29 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.28.

30 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.29.

31 Mr Pat Barrett, Australian National Audit Office, *Transcript*, pp.29.

have found that to be a reasonable period within which to prepare comments and responses to draft reports.³²

- 2.59 FaCS expressed similar views, concluding that 28 days is sufficient to comment on draft reports. FaCS stated:

The 28 days has not been a constraining parameter for us, except from our own fault: with any deadline one will leave these things because of other priorities.³³

Conclusions

- 2.60 The Committee does not support DFAT's proposal to increase the number of days available for agencies to comment on draft reports from 28 days to 35 days.
- 2.61 The Committee is satisfied that 28 days is sufficient time for agencies to adequately consider their response and prepare a written reply. The Committee also heard that if a department provided the ANAO with a good case for extension, the ANAO may be flexible with the deadline.
- 2.62 Furthermore, the Committee does not believe that extending the time will solve DFAT's problem - which is essentially about how to ensure the Auditor-General accurately reflects and captures agency comments in an audit report. Extending the time will only add to the ANAO costs and delay the timeliness of the tabling of the audit report in Parliament.

Agency comments on ANAO reports

- 2.63 The Auditor-General, usually, includes agency comments in the final report. Agency comments are usually in response to recommendations made by the Auditor-General. This provides an opportunity for agencies and affected parties to provide written comments in relation to the draft report and the ANAO recommendations.
- 2.64 The Act does not direct the Auditor-General to include comments provided by recipients of draft reports. Defence indicated that the

32 Mr Peter Grant, Department of Education, Training and Youth Affairs, *Transcript*, p.60.

33 Dr David Rosalky, Department of Family and Community Services, *Transcript*, p.70.

fact that the power is discretionary does not give due consideration to the interests of agencies. Defence stated:

... if you reply within 28 days he must consider these comments. It does not say that he has to do anything with them other than consider them.³⁴

2.65 Similarly, DFAT considered that there was scope for improving this section. DFAT stated:

One way the procedures could be improved would be for there to be more clarity in the procedures if there is a difference of view. If a department does have a different view, the Auditor-General is required to consider the departments views, but it is never been made clear what that means in terms of inclusion or otherwise in the final report. We certainly see room for improvement there.³⁵

Conclusions

2.66 The Committee agrees that section 19(4) be amended to require the Auditor-General to include agency comments in the final report. The Auditor-General, however, is an independent officer of the Parliament and should not be subject to direction when it comes to findings and conclusions.

2.67 In practice, the Auditor-General usually includes agency comments in performance audits. However, under the Act at the present time, the decision is left to the Auditor-General as to what should or should not be included. In order to avoid disputes about the representation of agency views, the ANAO should include agency comments, in full, in performance audits.

Recommendation 3

2.68 **Subsection 19(4) of the *Auditor-General Act 1997* should be amended to read:**

- **If the recipient of the proposed report gives written comments to the Auditor-General within 28 days after receiving the proposed report, the Auditor-General must consider, and include, those comments, *in full*, before preparing a *in the* final report and any summary documents.**

34 Mr Claude Neumann, Department of Defence, *Transcript*, p.45.

35 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.68.

