



15 October 2009

Ms Sharon Grierson MP  
Chair  
Joint Committee of Public Accounts and Audit  
Parliament House  
CANBERRA ACT 2600

Dear Ms Grierson

At the Committee's hearing on 16 September 2009 I undertook to provide a further submission to the Committee on the ANAO's experiences relating to claims of legal professional privilege made by agencies during the conduct of our audits. The Committee was particularly interested in situations where agencies had made access to legal advice conditional on it not being included in the final audit report.

By way of brief background, legal professional privilege (LPP) is a common law immunity that protects the confidentiality of certain communications made in connection with giving or obtaining legal advice in relation to existing or anticipated judicial or quasi-judicial proceedings as well as non-judicial investigatory procedures. LPP applies to legal advice in relation to a range of matters including litigation. In the context of disclosure within the Commonwealth, the ANAO understands that disclosure of legal advice to another Financial Management and Accountability Act agency (such as the ANAO) does not amount to a waiver of LPP. The ANAO also understands that the position may be different where disclosure involves a Commonwealth body that is a separate legal entity.

This issue of LPP has arisen from time to time over a number of years, and more recently concerns were raised by agencies during the course of the following three audits:

- Audit Report No 27 2008-09 *Management of the M113 Armoured Personnel Upgrade Project*
- Audit Report No 41 2008-09 *The Super Seasprite*, and
- Audit Report No 6 2009-10 *Administration of Parliamentarians' Entitlements by the Department of Finance and Deregulation*.

In each of these audits, the agencies concerned had obtained legal advice on issues that were directly relevant to the audit objectives. In the Super Seasprites audit, the Defence Materiel Organisation had received extensive legal advice concerning the prime contract; in the M113

audit, Defence had also obtained legal advice on a number of contractual issues and in the Parliamentary Entitlements audit, Finance had obtained legal advice on a number of issues including the extent and limits on various entitlements.

In both Defence audits, the agencies involved initially raised concerns about the ANAO's access to legal advice on the basis that it was protected by legal professional privilege. In both audits, access was eventually granted but during the reporting phase of both audits, concerns were raised about the disclosure of the legal advice or parts thereof in the final audit reports. In both of these audits, the ANAO was able to reduce the extent to which the contents of legal advice was referred to in the final audit report without impacting the audit conclusions or key findings.

In the case of the audit of Parliamentary Entitlements, while the ANAO obtained full access to all legal advice that it sought, the agency raised concerns about the ANAO quoting or referring to the advice in the audit report. This issue was resolved through communications with the agency. The audit report referenced and cited legal advice when it was appropriate to do so.

Where legal advice is central to a discussion of the audit findings, our reports refer to, or quote extracts from, the legal advice received. Where the legal advice is used to better inform the ANAO about the issues involved, we are able to deal with any sensitivities through appropriate drafting of the audit report. In all circumstances, as the Committee is aware, the disclosure of information in an audit report is governed by s37 of the *Auditor-General Act 1997* (copy attached).

The ANAO considers that, in a number of instances, agencies' claims about legal professional privilege being waived by providing ANAO access to the advice are not valid. Nevertheless, as outlined in our submission of 9 April 2009, the ANAO considers that such experiences, that can involve quite time consuming discussions and, in some instances, correspondence with the relevant agency, could be avoided through an appropriate amendment of the *Auditor-General Act 1997*. As outlined in our earlier submission, a provision along similar lines to that included in the *Inspector-General of Taxation Act 2003* would seem appropriate. Such a provision would make it clear that the Auditor-General has access to all legal advice that is relevant to the objectives of an audit and that such access does not amount to a waiver of legal professional privilege.

The Committee also sought clarification about the provision of the *Human Rights and Equal Opportunity Act 1986* that we referred to in our submission of 9 April 2009. (The title of this Act was changed to the *Australian Human Rights Commission Act 1986* by the *Disability, Discrimination and other Human Rights Legislation Amendments Act 2009*.)

The relevant section of that Act is s24 (3)(c) which states that:

Notwithstanding the provisions of any law, a person is not excused:

- (a) from giving any information, or producing a document, when required to do so pursuant to this Act; or
- (b) from answering a question that the person is required to answer by a member before whom the person is attending in compliance with a notice served on the person under subsection 21(5);

on the ground that the giving of the information, the production of the document or the answering of the question:

- (c) would disclose legal advice furnished to a Minister, to a person or body that acts on behalf of the Commonwealth, or to an authority of the Commonwealth.

The legal advice we have received is that the effect of s24 (3)(c) is that, notwithstanding the provisions of any law (including the Common Law), a person could not claim legal professional privilege to prevent the giving of information, the production of a document or the answering of a question where required under the Act.

Yours sincerely



Ian McPhee

*Auditor-General Act 1997*

**Section 37 Sensitive information not to be included in public reports**

- (1) The Auditor-General must not include particular information in a public report if:
  - (a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or
  - (b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).
- (2) The reasons are:
  - (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;
  - (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.
- (3) The Auditor-General cannot be required, and is not permitted, to disclose to:
  - (a) a House of the Parliament; or
  - (b) a member of a House of the Parliament; or
  - (c) a committee of a House of the Parliament or a joint committee of both Houses of the Parliament;information that subsection (1) prohibits being included in a public report.
- (4) If the Auditor-General omits particular information from a public report because the Attorney-General has issued a certificate under paragraph (1)(b) in relation to the information, the Auditor-General must state in the report:
  - (a) that information (which does not have to be identified) has been omitted from the report; and
  - (b) the reason or reasons (in terms of subsection (2)) why the Attorney-General issued the certificate.
- (5) If, because of subsection (1), the Auditor-General:
  - (a) decides not to prepare a public report; or
  - (b) omits particular information from a public report;the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a copy of each report under this subsection to the Prime Minister, the Finance Minister and any responsible Minister.

- (6) In this section:

**information** includes written comments on the proposed report or the extract that are received by the Auditor-General under subsection 19(4).

**public report** means a report that is to be tabled in either House of the Parliament.

**State** includes a self-governing Territory.