

## **Section 37 – Sensitive information not to be included in reports**

### **Introduction**

- 4.1 The Act provides the Auditor-General with wide access powers. These powers mean that the Australian National Audit Office (ANAO) may obtain sensitive information in the course of performing its audit functions. The Act provides for the Auditor-General not to publish sensitive information if, in the Auditor-General's opinion, the publication of the information is contrary to the public interest.
- 4.2 The Act also has another safeguard to stop the Auditor-General from publishing sensitive information. Section 37 outlines the role of the Attorney-General in issuing a certificate preventing the Auditor-General from including sensitive information in a report.
- 4.3 Evidence to the inquiry suggested that section 37 may benefit from some minor amendments. This chapter will examine the role of the Attorney-General in relation to section 37 of the Act and suggest legislative amendments where relevant.

### **Section 37 – Overview**

- 4.4 Section 37 outlines the circumstances where the Auditor-General must not include information in a report. The Act specifies that the Auditor-General cannot include information if it is contrary to the public interest and lists six reasons where information cannot be included. Another major provision of section 37 is the power of

the Attorney-General to provide the Auditor-General with a certificate preventing disclosure of information.

- 4.5 It should be noted that section 37 has not, as yet, been invoked. The ANAO stated:

...in practice it has been found that the ANAO is able to “get its message across” satisfactorily without disclosing sensitive information in its public reports. This includes circumstances where the subject of an audit involves such issues as sensitive Defence information or information considered to be legitimately commercial-in-confidence.<sup>1</sup>

- 4.6 Section 37 is divided into six subsections. The section is reproduced, in full, below:

***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 or for any reason set out in sub-section (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;*

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<sup>1</sup> Auditor-General of Victoria, *Submission No.2*, p.5.

- (e) *it would unfairly prejudice the commercial interest of any body or person;*
    - (f) *any other reasons 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 to, and is not permitted to, disclose to:*
    - (a) *a House of 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 Parliament;*

*information that subsection (1) prohibits being included in a public report.*
  - (4) *If the Auditor-General decides to omit 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 decides:*
    - (a) *not to prepare a public report; or*
    - (b) *to omit 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 the responsible Minister or Ministers (if any).*
  - (6) *In this section:*

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

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

## Attorney-General's Certificate – section 37(1)(b)

- 4.7 A certificate issued by the Attorney-General is a safeguard to prevent the Auditor-General from publishing sensitive information in an audit report. If the Attorney-General considers that the information in a proposed audit report is too sensitive to be published, the Attorney-General can issue a certificate preventing the Auditor-General from publishing the information.
- 4.8 The Attorney-General's certificate is governed by section 37(2) of the Act and clarified in the Explanatory Memorandum (EM). The EM states where:
- ...the Attorney-General has issued a certificate to the Auditor-General stating that disclosure would be contrary to the public interest, the Auditor-General must not include that information in a report which is to be tabled in either House of the Parliament.
- 4.9 The ANAO raised a concern during the inquiry that there is an inconsistency between section 37(1)(b) and section 37(4) of the Act. Section 37(1)(b) specifies that the Auditor-General must not include particular information in a public report if the Attorney-General has issued a certificate to the Auditor-General stating that disclosure of the information would be contrary to the public interest.
- 4.10 However, section 37(4), states that '*If* the Auditor-General *decides* to omit particular information from a public report because the Attorney-General has issued a certificate...' The use of the words *If* and *decides* suggests that the final determination whether to include sensitive information in a report rests with the Auditor-General. To remove the uncertainty, the Auditor-General suggested that the Act be amended to make the power of the Attorney-General consistent with the intentions expressed in the EM.
- 4.11 In considering the Auditor-General's proposal, the Committee noted that the Victorian Auditor legislation gives 'unfettered discretionary authority to the Victorian Auditor-General on the reporting of any material (deemed to be specially confidential or otherwise) to Parliament.'<sup>2</sup> In terms of comparison, the Victorian approach does not include any 'statutory prescription of the
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2 Auditor-General of Victoria, *Submission No.2*, p.3.

evaluative criteria to be applied by the Victorian Auditor-General to disclosure questions.’<sup>3</sup> The Victorian legislation also does not have ‘provision for the direct involvement of a representative of the Executive Government in decisions impacting on the reporting of audit findings.’<sup>4</sup>

- 4.12 The Committee sought comment from the Auditor-General about the alternative approach applying to the Victorian Auditor-General. The Auditor-General stated:

I have discussed this issue with the Victorian Auditor-General. I come back to basic principles, and the basic principle that I come up with is, in terms of government responsibility, the government has access to the widest possible range of information, from the Public Service and elsewhere, on what issues may impact on the question of secrecy and security—particularly the security aspect, which, in many instances, an Auditor-General, no matter what their background and experience, is not necessarily across.<sup>5</sup>

- 4.13 Similarly, DoFA commented that the Attorney-General could advise the Auditor-General that something may in fact have a security implication.<sup>6</sup>
- 4.14 From a practical perspective, the Auditor-General commented that even when examining sensitive issues ‘we have been able to get the major issues across to the parliament without having to run the gauntlet of disclosing unnecessarily confidential and/or secure information.’<sup>7</sup>

## Accountability mechanisms for the Attorney-General

- 4.15 The Attorney-General is part of executive government. One of the roles of the Auditor-General is to review the activities of executive government. Therefore, the Attorney-General may have a conflict of interest, when determining that certain information should be restricted from public access under section 37(1)(b). In view of

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3 Auditor-General of Victoria, *Submission No.2*, p.3.

4 Auditor-General of Victoria, *Submission No.2*, p.3.

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

6 Mr Jonathan Hutson, Department of Finance and Administration, *Transcript*, p.35.

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

this, the Committee examined the constraints that apply to the Attorney-General.

- 4.16 The Committee received advice from the Australian Government Solicitor which indicated that the Attorney-General's Certificate was subject to review under the *Administrative Decisions (Judicial Review) Act 1977*. However, the Auditor-General stated that this processes would be 'unduly bureaucratic'<sup>8</sup>. The Auditor-General concluded:

...it would be a very brave Attorney-General and government if an Auditor-General put a fairly persuasive case in the public interest and we could not get satisfactory resolution.<sup>9</sup>

- 4.17 The Auditor-General and DoFA noted that there are other mechanisms to question the appropriateness of the Attorney-General in issuing a certificate to prevent the Auditor-General from reporting. The Auditor-General stated:

What the Auditor-General would do would be to simply say in the report that this element had been excised on the basis of a decision made by the Attorney-General. Then the Attorney-General would be subject to questioning in the House.<sup>10</sup>

- 4.18 Similarly, DoFA stated:

...the Auditor-General still has the right to advise parliament that in fact parts of his report or parts of the information have actually been deleted for reasons that by the Attorney-General has. The Attorney-General is then accountable to parliament directly for that decision making process.<sup>11</sup>

## Conclusions

- 4.19 The Auditor-General proposed that section 37(4) of the Act be amended to reflect the intentions expressed in the Explanatory Memorandum. The Committee agrees with this position.

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8 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.24.

9 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.24.

10 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.24.

11 Mr Jonathan Hutson, Department of Finance and Administration, *Transcript*, p.35.

- 4.20 The Committee acknowledges that the Victorian model provides the Victorian Auditor-General with more discretion and freedom to determine what to report. However, the Committee considers it appropriate to have the Attorney-General provide a safeguard given that, in the context of the Commonwealth Government's broader responsibilities, there may be exceptional circumstances relating to such issues as defence and national security which require the input of executive government.
- 4.21 The Committee notes that there are several accountability mechanisms to ensure that the Attorney-General's certificate is subject to scrutiny. These include the:
- Attorney-General's certificate being subject to the *Administrative Decisions (Judicial Review) Act 1977*;
  - Attorney-General being subject to questions in Parliament; and
  - the risk of public dissent if the Auditor-General put forth a strong case for reporting certain information, and the Attorney-General restricted publication.
- 4.22 In view of this, the Committee considers that the original intention of section 37(1)(b), as expressed in the EM, should be confirmed through amendment to section 37(4). The Auditor-General supports this amendment.

#### Recommendation 4

- 4.23 **The Committee recommends that the Government amend section 37(4) of the *Auditor-General Act 1997*, to read:**
- **If ~~When~~ the Auditor-General decides ~~to~~ is required to omit 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.**

## Privacy as a reason not to report

- 4.24 Section 37(2) lists the possible reasons for excluding sensitive information from the Auditor-General's audit reports. These reasons include the publication of information which would prejudice Australia's national security, defence or international relations, information which would prejudice relations between the Commonwealth and a State, or information which would unfairly prejudice the commercial interests of any body or person.
- 4.25 DFAT's submission drew the Committee's attention to the fact that section 37(2) 'does not make any specific provision for the protection of an individual's privacy.'<sup>12</sup> DFAT is concerned that there could be matters arising from 'consular cases which should not be included in a public report in order to protect the privacy of the individuals, their families or other bodies concerned.'<sup>13</sup>
- 4.26 DFAT argued that individual privacy may become an issue in the future 'as more Australians travel overseas and there is an increased likelihood of long term, complex and potentially litigious consular cases arising.'<sup>14</sup> At the public hearing, DFAT stated:
- The department gathers a considerable amount of detail about individuals and their families in implementing their consular responsibilities. Many of those cases become controversial. Many of those cases are very easily recognised even when the broad parameters of the case are described and individuals' names are not referred to. What I am referring to is the very deep and detailed personal information that the department gathers in implementing that responsibility.<sup>15</sup>
- 4.27 DFAT concluded that as a matter of practice, 'the way the procedures have been conducted to date' has not been a problem.<sup>16</sup> However, it is the potential of future events that DFAT is concerned.

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

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

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

15 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.66.

16 Ms Annabel Anderson, Department of Foreign Affairs and Trade, *Transcript*, p.66.



- 4.28 The Auditor-General is exempt from the majority of the provisions of the *Privacy Act 1988*. Despite this, the ANAO indicated that as a matter of long standing policy, it ‘complies with the Information Privacy Principles contained in the Privacy Act to the extent that it is able within the context of its statutory responsibilities and avoids, to the extent possible, including the names of individuals or other information that relates to an individual, in its audit reports.’<sup>17</sup>
- 4.29 The Auditor-General, in response to the proposal to amend section 37(2) to include privacy issues, commented that ‘we would have no problem in adding privacy.’<sup>18</sup>

## Conclusions

- 4.30 The Auditor-General is not subject to the *Privacy Act 1988*. In practice, however, the ANAO complies with the Information Privacy Principles. The Committee is confident that the ANAO exercises its powers with discretion and has high regard for individual privacy. The Committee considers that the present arrangements are satisfactory.

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17 Australian National Audit Office, *Submission No. 11*, p. 2.

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