

# CHAPTER 4

## Independence, Transparency and Resourcing

### Introduction

4.1 The independence of the office of Inspector-General, its ability to respond to issues raised by taxpayers and tax professionals, and the transparency of its operations were issues which recurred frequently in the submissions received by the inquiry.

4.2 There was a general consensus in evidence to the Committee that, to fulfil its proposed function effectively, it was critical that the office must be able to determine its own work priorities, and that its reports be made public.

### Work program

4.3 The Bill provides the Inspector-General with discretion to set the office's work program, with at least annual consultation with the Commonwealth Auditor-General and Commonwealth Ombudsman.

4.4 This discretion is not absolute, however, as the Inspector-General must comply with any direction by the Minister to conduct a review.

4.5 The conduct of a review may also be formally requested by the Commissioner of Taxation, a resolution of one or both houses of the Parliament or a resolution of a Parliamentary Committee, however, they may not direct the Inspector-General to conduct a review.

4.6 The Inspector-General may also initiate a review on his or her own initiative, including where a systemic tax administration issue has been raised with the office by taxpayers, tax professionals, the Ombudsman, or any other party.<sup>1</sup> The Bill contains no requirement that the Inspector-General consult with taxpayers or tax professions, or any party other than the Ombudsman and Auditor-General, in the course of setting his or her work program.

4.7 Ms Susan Johnston, Department of the Treasury, told the Committee that;

The bill makes it clear that the inspector-general allocates his time and resources, including to inquiries that are initiated at the direction of the minister. Basically, the inspector-general prioritises all the things he has to do. Obviously, a direction from the minister to conduct a particular inquiry is going to carry weight.<sup>2</sup>

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1 *Explanatory Memorandum*, p. 9.

2 *Committee Hansard*, p. E14.

4.8 A submission from CPA Australia commented on the appropriate balance between reviews directed by the Minister, and those arising from issues put forward from the tax payer perspective:

The main issue is to ensure that an appropriate balance is obtained between issues raised by the Government through the Treasury Ministers and issues raised by taxpayers and their advisers either directly or indirectly. Our view is that priority should be given, in the short-term at least, to genuine and legitimate concerns raised by taxpayers and their representatives given that the existence of such concerns is the primary reason behind the establishment of the IGT in the first place.<sup>3</sup>

4.9 A number of witnesses, however, were concerned that the discretion allowed to the Inspector-General was illusory—that such discretion could be undermined by the demands placed on resources by a ministerial direction.

4.10 In evidence to the Committee, Professor Cynthia Coleman, representing the Australian Institute of Company Directors, noted that:

Currently, the minister can direct the inspector-general to undertake a report into something. The holder of that office has no choice. That could tie up resources on what they perceive as a frivolous irrelevant issue. So we think that clause should go. They should always have a choice on what they do and direct their own work flow.<sup>4</sup>

4.11 Ms Johanna Lowry, Institute of Chartered Accountants in Australia, also agreed that a potential exists for a direction from the Minister ‘to tie up the efforts of the inspector-general so that he is not able to address other things that both houses of parliament, for example, may have thought worthy.’<sup>5</sup>

4.12 Mr Marks-Isaacs, Australian Institute of Company Directors, wanted the necessity for the inspector-general to follow a ministerial direction removed. He stated:

Whilst the inspector-general is established so that the minister can direct it, it is always a question and the inspector-general is always potentially compromised by it.<sup>6</sup>

4.13 The Committee notes, firstly, that the \$2 million budget per annum is small in relation to other bodies such as the Auditor-General, Australian Competition and Consumer Commission and Ombudsman. Secondly, it notes concerns that directions

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3 Submission No. 8, p. 7.

4 *Committee Hansard*, p. E9.

5 *Committee Hansard*, p. E9.

6 *Committee Hansard*, p. E16.

by the Minister to undertake reviews could potentially ‘tie up the efforts of the inspector-general so that he is not be able to address other things.’<sup>7</sup>

**4.14 The Committee, nevertheless, considers that there is little risk of the Government monopolising the Inspector-General’s resources.**

### **Information gathering powers**

4.15 The Inspector-General will have statutory information gathering powers able to be exercised for the purposes of conducting a review into tax systems or, where necessary, to obtain particular information for the purposes of deciding whether a review may be required.

4.16 The Inspector-General may also invite submissions or hold meetings, and otherwise consult with members of the public, particular people or organisations, in the course of a review.

4.17 The Inspector-General may also publish submissions or records of meetings held in the course of a review, except where publication would be prejudicial to the public interest, reveal confidential information, or allow identification of an individual taxpayer or tax official other than the Commissioner of Taxation.

4.18 Voluntary disclosures of information held by the Commissioner of Taxation and requested by the Inspector-General for the purposes of a review would be authorised disclosures for the purposes of secrecy and privacy laws.<sup>8</sup>

4.19 The Inspector-General will be empowered to compel the production of information and documents by a tax official, or to require a tax official to attend before the Inspector-General or a member of staff to answer questions. This power extends to circumstances where it is necessary to obtain information from a former tax official.

4.20 If the disclosure of information requested by the Inspector-General would be prejudicial to the national interest, the Minister may give a certificate to the Inspector-General with the effect that the information or documents covered by the certificate need not be disclosed.

4.21 There is no provision for the Inspector-General to compel the disclosure of information by any persons other than tax officials or former tax officials.

### **Legal professional privilege**

4.22 The Bill provides that the Inspector-General has access to legal advice obtained by the Commissioner of Taxation that is relevant to an inquiry into a

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7 *Committee Hansard*, p. E9.

8 *Explanatory Memorandum*, p. 1.

systemic tax administration issue, and can see legal advice obtained by parties in the private sector which is relevant to matters under consideration.

4.23 The Bill contains measures to protect client legal privilege, which is not waived by disclosure to the Inspector-General. The Bill states that information or a document does not cease to be the subject of legal professional privilege merely because it is included or referred to in a submission to the Inspector-General, or provided by the Commissioner of Taxation or a tax official in response to a request or requirement made by the Inspector-General under the provisions of the Act.

4.24 The Bill also limits the ability of the Inspector-General to refer to privileged legal advice in a report, including an annual report to Parliament.

4.25 The submission from the Australian Institute of Company Directors recommended that those sections of the Bill dealing with legal professional privilege be amended to ensure they do not provide an opportunity for a challenge in the courts that legal professional privilege has been specifically abrogated in relation to taxation matters.

4.26 The Taxation Institute was also concerned by the provisions of the Bill in respect to legal privilege, and suggested that Clause 27(2) of the Bill should be removed.<sup>9</sup>

4.27 The Committee notes that the provisions of the Bill are not intended to abrogate professional legal privilege in regard to taxation matters and proposes that the Government give consideration to including in the Bill an explicit statement to that effect.

4.28 The Committee also notes that a recent decision of the High Court (*Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*) may have implications for the application of clause 27 and suggests that the Government seek advice from the Attorney-General on this matter.

## **Reporting and publication**

4.29 The Bill provides that after completing a review, the Inspector-General must make a written report to the Minister setting out the subject and outcome of the review, and any recommendations concerning how the system could be improved.

4.30 Reports may not include:

- information that would be prejudicial to the public interest where the Minister has given the Inspector-General a certificate to this effect;
- information about the tax affairs of an individual taxpayer that would allow the identification of that taxpayer;

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9 Submission No. 11.

- the names or specific identifying information of tax officials other than the Commissioner;
- information that has been provided to the Inspector-General in confidence; or
- commentary on legal advice disclosed to the Inspector-General that would result in the waiver of legal professional privilege held by the client.<sup>10</sup>

4.31 The Bill also requires the Inspector-General to provide the Commissioner of Taxation with an opportunity to address criticisms of tax officials where the Inspector-General proposes to include such criticisms in a report, and the report cannot be finalised unless the Commissioner has been given this opportunity.

4.32 Taxpayers Australia, in a submission to the inquiry, supported this latter clause but felt it did not go far enough, preferring that the Inspector-General be required to seek the ATO's input or commitment on recommendations prior to the report being submitted to the Minister.<sup>11</sup>

4.33 Both the Taxation Institute of Australia and the Australian Institute of Company Directors expressed a concern that there was not a stipulated time period within which the Commissioner must respond to such criticism, and suggested that a time period of 21,<sup>12</sup> or 30 days with the option of a mutually agreed extension of time,<sup>13</sup> be imposed. The Committee concurs with these views and suggests that the Bill be amended to impose a time period for response by the Commissioner of Taxation.

**4.34 The Committee is of the view that the Government should consider amending Clause 25 of the Bill to replace the reference to 'a reasonable opportunity' with a time limit of within 30 days of being invited to do so by the Inspector-General, or within such longer period as is mutually agreed.**

4.35 The Bill authorises the Minister to publicly release or table reports by the Inspector-General, and the action of releasing reports attracts statutory protection against legal action. The Minister may publish part of a report where there is concern about the reporting of sensitive or confidential information.<sup>14</sup>

4.36 A number of submissions commented on this reporting framework, contending that leaving the publication of the Inspector-General's reports to the discretion of the Minister detracted from the authority and accountability of the office.

4.37 The Explanatory Memorandum for the Bill states that the Inspector-General is required to prepare written reports on reviews 'to facilitate public dissemination of the

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10 *Explanatory Memorandum*, p. 10.

11 Submission No. 4, p. 3.

12 Submission No. 11.

13 Submission No. 13, p. 7.

14 *Explanatory Memorandum*, p. 11.

findings of the review.’<sup>15</sup> Witnesses to the inquiry referred to this point as indicating a general intention to publicly release review reports.<sup>16</sup>

4.38 The recommendation of the Board of Taxation in this regard was that:

The Inspector-General should be able to publish reports of reviews of the systems used by the Australian Taxation Office to administer the tax system, and recommendations to the Government about where these systems could be improved (but not advice to the Government), but only after giving the Minister a reasonable opportunity to comment. A person whose interests would be adversely affected by the publication should be given a reasonable opportunity to comment, and to have their comments included in the publication. The Inspector-General should not be liable to be sued for an act done in good faith in exercise of any power conferred by the legislation, including the power to publish.<sup>17</sup>

4.39 In arriving at this position the Board considered at length the possible impact of allowing the Inspector-General as an adviser to Government to independently release reports, and on the relationship that should exist between the Inspector-General and the Minister. It also acknowledged that the weight of submissions to the inquiry was strongly in favour of the power to publish.

4.40 The Government’s response to the Board of Taxation recommendation agreed that it was important that the Inspector-General’s reports become public. It concluded, however, that:

A key function of the Inspector-General of Taxation will be to advocate the concerns of taxpayers to the Treasury Ministers to enable fast resolution of any systemic problems in the tax system. For this reason, the Inspector-General will report to the Treasury Ministers.

The Inspector-General’s inquiries and reports may include recommendations for legislative amendments or changes in administrative processes. It is desirable for recommendations involving changes to the tax system to be released simultaneously with the Government’s decision on such changes to avoid speculation and uncertainty about the taxation system. Accordingly, it is proposed that the Treasury Ministers would have the responsibility for releasing reports by the Inspector-General.<sup>18</sup>

4.41 The Government response also noted that the Inspector-General of Taxation is not intended to duplicate the roles of the Auditor-General nor the Ombudsman, both of whom have a continuing public reporting role on tax administration.

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15 *Explanatory Memorandum*, p. 10.

16 *Committee Hansard*, p. E10.

17 Board of Taxation, p. 30.

18 Senator the Hon Helen Coonan, *Minister Responds to Inspector-General Report*, Media Release C98/02, 16 September 2002.

4.42 Submissions to the Committee which argued that the new office should report to the Parliament also generally argued that the model outlined in the Bill was substantially flawed in not incorporating the taxation functions of the Ombudsman in the new office, and in serving too much as an adviser to government rather than an independent taxpayer advocate.

4.43 Whether the Inspector-General reports to the Treasury Ministers or to Parliament, and whether the Inspector-General has the authority or requirement to publish or table its reports, are key and recurring themes in submissions to the Committee. A number strongly urged that the Inspector-General be authorised to report to the Parliament rather than to the Minister, who has discretion to either make the report public or not.

4.44 Even when reporting to the Minister was accepted as the preferred model, concerns remained that reporting be as open and transparent as possible, as indicated by Mr Mitch Hooke, Business Coalition for Tax Reform, in evidence:

In terms of reporting, again our submission to the Board of Taxation and subsequently to this committee said that we want to see the public reporting quite broad—obviously, to the Treasurer then back to parliament. It has to be open, accountable and transparent if it is going to be effective and of course qualified by any commercial sensitivities.<sup>19</sup>

4.45 The International Banks and Securities Association of Australia also remained concerned at the control exercised by the Minister over the release of reports:

[T]he purpose of the Ministerial control over the public release of the Inspector-General's review reports is not clear and it could detract from the transparency and independence of the review process. We would favour a process that would make public the Inspector-General's review reports on a timely basis, subject to the limitations contemplated in Division 4 of the Bill.<sup>20</sup>

4.46 The submission from Mr John Morgan proposed a solution to concerns that this Ministerial control over publication diminished the independence of the office. The submission supported the Inspector-General reporting to the Minister, noting that mandatory reporting to the Parliament might have cramped the advice and the effectiveness of the Office in identifying systemic problems with tax administration and then precipitating remedial action, but suggested that the Inspector-General be able to report to the Parliament when he or she considered it necessary to do so.<sup>21</sup>

4.47 The Institute of Chartered Accountants in Australia suggested, in its submission, a similar option:

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19 *Committee Hansard*, p. E4.

20 Submission No. 14.

21 Submission No. 3.

Given that the detailed provisions of Sections 22 to 27 [of the Bill] limit any adverse effects that may occur on making the report public, the ICAA believes that the Bill should give the Inspector-General of Taxation the specific authority to make any report public, after consulting with the Minister as to whether the Minister wishes to exercise his or her powers under Section 22.

The ICAA strongly recommends that where the Minister does exercise his or her discretion under Section 22 to disallow the public release of any part of the Inspector-General's report, that the Minister is required to publicly state under which sub-section they are exercising that discretion.<sup>22</sup>

4.48 The Inspector-General is also required to provide an Annual Report to the Minister, to be tabled in the Parliament, which will include details of any directions given by the Minister during the year to conduct a review. Ms Johanna Lowry, noted, however, that 'there is no requirement for the annual report to say why certain reports were not publicly released.'<sup>23</sup>

4.49 The Australian Chamber of Commerce and Industry recommended that the annual report be a detailed report of the issues lodged with the Inspector-General, matters which have been addressed, and the outcomes of those matters.<sup>24</sup> A supplementary submission from the Department of the Treasury provides some advice in this regard:

There are annual reporting requirements and conventions that apply to all Commonwealth agencies. These include statutory requirements in the *Financial Management and Accountability Act 1997* and annual reporting guidelines approved by the Joint Committee of Public Accounts and Audit under subsections 63(2) and 70(2) of the *Public Service Act 1999*. The Inspector-General's annual report would need to conform to such requirements and, in practice, this would involve reporting on reports prepared and submitted to the Minister.<sup>25</sup>

4.50 The Committee accepts that there may be occasions when the tabling of a review report, or parts of a report, is not appropriate. For example, where information is in the form of advice to Government, and where the disclosure of such material would be prejudicial to the public interest. Nonetheless, the Committee has noted the views expressed in evidence to the inquiry in regard to the publication of reports and considers that the independence of the Inspector-General as well the transparency of his reviews could be enhanced by tightening the reporting obligations contained in the Bill. The Committee accepts that there are already certain limitations placed on information that can be included in an Inspector-General's report to safeguard the public interest, individual privacy and confidentiality.

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22 Submission No. 10, p. 2.

23 *Committee Hansard*, p. E7.

24 Submission No. 16, p. 4.

25 Submission No. 7 (a), Attachment A p. 2.



**4.51** The Committee recommends that the Government give consideration to amending the Bill to require the Minister to cause a copy of each review report to be tabled in each House of the Parliament within 15 sitting days of that House after the day on which the Minister receives the report, except where the Minister determines that the disclosure of the report would be prejudicial to the public interest or would breach the privacy of a taxpayer.

**4.52** Where the Minister does not table a report, or part of a report, the Minister should cause to be tabled in each House of the Parliament within 15 sitting days of that House after the day on which the Minister receives the report an explanation outlining the reasons for not releasing the report.

## **Budget**

4.53 Funding of \$2 million per year for four years for the office of Inspector-General of Taxation, commencing in 2002-03, was included in the 2002-03 Budget.<sup>26</sup>

4.54 Although not a provision of the Bill as such, a significant proportion of the submissions received by the Committee expressed concern at the proposed budget for the new office.<sup>27</sup>

4.55 A number of submissions contended that the proposed level of resourcing was insufficient to enable the Inspector-General to fulfil the functions of the office to a satisfactory degree.

4.56 Taxpayers Australia Inc considered that the budget was most unlikely to be sufficient to ‘enable the Inspector-General to attract sufficient experienced and knowledgeable staff to fulfil the required statutory role.’<sup>28</sup>

4.57 The Institute of Chartered Accountants in Australia submitted that the proposed budget suggests either that:

- the Inspector-General would have to restrict the number of projects that are undertaken, in which case important issues may never be addressed; or
- the Inspector-General’s core role would become merely an instrument for raising potential issues, leaving it up to the ATO or government to fund further investigation, which detracts from the independence and transparency of the role.<sup>29</sup>

4.58 The Institute considered both propositions unacceptable, making the role of the Inspector-General a token position.

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26 *Explanatory Memorandum*, p. 3.

27 See Submissions No. 2, 4, 6, 8, 9 and 10.

28 Submission No. 4. p. 3.

29 Submission No. 10, pp. 3-4.

4.59 A different view, however, was taken by the Australian Chamber of Commerce and Industry:

The new position, despite being limited in resources, should be able to make a significant addition to taxation oversight. In spite of being limited in funds, the Inspector General should be able to perform the role of objectively monitoring and examining taxation administration within the allocated funding.<sup>30</sup>

4.60 The Committee also appreciates the evidence provided by the Taxation Ombudsman that his office has the equivalent of about ten full-time resources devoted to taxation matters, at a cost of about \$1.6 million.<sup>31</sup>

4.61 The Committee notes that concerns about the level of funding are linked with those about the ability of the Minister to direct that reviews be undertaken, and the potential that this could curtail the capacity of the office to address issues raised by parties other than the Minister.

4.62 The Committee believes that this matter of funding requires close monitoring and should be covered in detail in the annual report.

## Review of the office

4.63 The Board of Taxation recommended that the efficiency and effectiveness of the new office should be reviewed within five years of the appointment of the first Inspector-General of Taxation, and this recommendation was subsequently agreed to by the Government. The desirability of an independent review of the effectiveness of the office after a period of operation was also endorsed by submissions received by the Committee.<sup>32</sup> This review commitment, however, is not included in the Bill.

**4.64 The Committee recommends that the Government consider amending the Bill to require an independent review of the efficiency and effectiveness of the office of Inspector-General of Taxation within a period of five years from the appointment of the first Inspector-General. The review is also to include consideration of the scope of the functions of the Inspector-General and the adequacy of its budget.**

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30 Submission No. 15, p .2.

31 *Committee Hansard*, p. E19.

32 Submission No. 9, Submission No. 14.