CHAPTER EIGHT

ACCOUNTABILITY AND TRANSPARENCY

> Accountability involves ensuring individuals and organisations are answerable for their plans, actions and outcomes. Openness and transparency in administration, by external scrutiny through public reporting, is an essential element of accountability.[1]
>
> *Commonwealth Procurement Guidelines: Core Policies and Principles* (CPGs)

8.1 A widespread statutory framework sets out public reporting systems that allow external scrutiny of the performance of Commonwealth agencies. These systems include Auditor-General's reports and the reports of parliamentary inquiries such as this one. Criticism of the level of transparency and accountability surrounding the Initiative arose repeatedly during the course of this inquiry.

8.2 Indeed, the Community and Public Sector Union (CPSU) observed in its submission that until the release of the Auditor-General's report in September 2000, over 3 years into the process, very little of the inner workings of the IT outsourcing Initiative was in the public domain. From the CPSU's perspective such a lack of public scrutiny and accountability was unacceptable and a situation that must be addressed if the Government is to ensure 'that any future IT outsourcing is an efficient, effective and ethical use of Commonwealth resources'.[2]

8.3 As outlined in the Committee's Interim Reports I and II, during the inquiry the Committee was frequently frustrated in its attempts to access key information required to closely examine and evaluate the Initiative. It became apparent to the Committee that the lack of transparency it encountered surrounding the outsourcing contracts was the result of two main areas of confusion:

- inconsistency and uncertainty as to what information, relating to managing the Initiative as a whole and government contracts, should remain confidential; and
- a lack of knowledge of parliamentary accountability obligations, in particular, the powers of parliamentary committees.

8.4 This chapter aims to clarify these two matters and to recommend measures that will enhance the capacity of the public and of parliament to scrutinise government procurement.

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1 Department of Finance and Administration (DOFA), *Commonwealth Procurement Guidelines: Core Policies and Principles,* Part 4—Accountability and Reporting, p. 13.

2 Community and Public Sector Union (CPSU), submission no. 10.

Transparency in Government contracting

8.5 The Committee believes from its own experience in this inquiry and from the problems identified in Audit Report No. 38 2000-01, *The Use of Confidentiality Provisions in Commonwealth Contracts*, that the objective of achieving an appropriate level of openness in government contracting to ensure accountability for plans, actions and outcomes required by the Commonwealth Procurement Guidelines: Core Policies and Principles (CPGs) has not been achieved.

8.6 Audit Report No. 38 identifies a lack of guidance government-wide and in agencies of the need for greater awareness in public sector agencies regarding use of confidentiality provisions in Commonwealth contracts. The audit was initiated in response to a request from the Committee in June 2000. The Auditor-General aimed to assess the extent of guidance available for public servants on the use of confidentiality clauses; the appropriateness and implications of agencies' current use of confidential clauses; and the effectiveness of and adherence to existing accountability and disclosure arrangements. As part of the audit, the Australian National Audit Office (ANAO) developed criteria to assist agencies to determine if information in a contract is genuinely confidential.[3]

8.7 The report concluded that there is a lack of both government-wide and agency guidance on the use of confidentiality provisions in contracts. It found deficiencies in the way agencies are currently dealing with confidentiality provisions in contracts. A major contributing factor to these shortcomings in the treatment of commercially confidential material is a lack of guidance in the existing CPGs.

8.8 At the time Audit Report No. 38 was tabled in May 2001, a review of Commonwealth procurement had been underway for twelve months and terms of reference for a review of mandatory reporting requirements were being developed.

8.9 The Committee reported its own conclusions in Interim Report I about the lack of understanding regarding accountability and government contracting that exists in the public and private sectors. Despite protestations from the Department of Finance and Administration (DOFA) and the Office of Asset Sales and I T Outsourcing (OASITO), the Committee maintains that its conclusions are correct. Clearly in the highly centralised environment of the Initiative neither OASITO nor DOFA took responsibility for ensuring that private sector parties to contracts with the Commonwealth were fully informed of consequential public accountability responsibilities.

8.10 Unless firm measures are taken, the Committee believes that there is a strong likelihood that this lack of understanding of public accountability obligations will continue under the more devolved approach adopted following the Humphry Review. DOFA's response to the first ANAO recommendation in Report No. 38 supports this

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3 Finance and Public Administration References Committee, *Inquiry into the Mechanism for Providing Aaccountability to the Senate in relation to Government Contracts,* June 2000.

view.[4] While the department agreed with the first part of the recommendation, it disagreed with the second, 'to high level advice being included in the next edition of the Commonwealth Procurement Guidelines' on the grounds that the Minister must approve any changes to the CPGs.[5]

8.11 With this in mind, the framework for the reporting of government contracting needs to be revised to ensure that private sector parties have a thorough understanding of their obligations regarding public accountability when doing business with the Government.

Underlying principles

8.12 Unlike private sector contracts between private sector parties, where it is the privilege of any person who possesses information to determine, require and enforce confidentiality through a contract, the rules that apply to government contracts are different.

8.13 Government contracts concern public money, the expenditure of which must be available for scrutiny. Dr Nick Seddon articulates this as follows:

> the important difference is the so-called 'reverse onus' principle. In order for the court to be persuaded to protect a government secret, the government must establish that it is in the public interest that the information not be disclosed. Further, the courts have been sceptical of government wishing to keep matters secret so that the onus on the government is a heavy one.[6]

8.14 The Committee supports the application of this principle to all government contracts. Contractual provisions should be disclosed by the Government unless a sound basis for their confidentiality is demonstrated.

8.15 The Committee finds it remarkable that it needs to emphasise this underlying principle for publicly-funded contracting activities. To apply the opposite principle and to assume everything is confidential unless an adequately robust argument demonstrates otherwise, has serious implications for a democratic society. Placing limitations on the free flow of information has the effect of bypassing parliament; reducing public scrutiny of important government decisions or programs; denying

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4 Recommendation 1 in Audit Report No. 38 states that agencies include in tender documentation information about public accountability responsibilities applying to Commonwealth contracts, including the 'reverse onus' principle, and that the next version of the CPGs include high level advice to this effect. ANAO, *The Use of Confidentiality Provisions in Commonwealth Contracts*, Audit Report No. 38 2000-2001, p. 21.

5 ANAO, *The Use of Confidentiality Provisions in Commonwealth Contracts*, Audit Report No. 38 2000-2001, p. 21 and p. 67.

6 Dr N. Seddon, 'Is Accountability a Cost of Contracting Out?' in *Administrative Law for the New Millennium, Papers presented at the 2000 National Administrative Law Forum*, Australian Institute of Administrative Law, 2000, p. 42.

citizens access to information about programs affecting them; and restricting citizens access to remedies in the event of poor service delivery.

8.16 Nevertheless, because there appears to be such a lack of understanding or acceptance of the 'reverse onus' principle, there is a need for a clear articulation of the principle to remove the ambiguity concerning public accountability for government contracting that has become evident throughout the inquiry.

Deciding what is genuinely confidential

8.17 Most confidentiality claims regarding contracts are claims about the commercial sensitivity of the material. Commercial-in-confidence claims are described in general terms in the *Freedom of Information Act 1982* (the FOI Act). Section 43 of the Act describes documents exempt from disclosure which include those documents that would reveal:

> (a) trade secrets;
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> (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information would be disclosed.

8.18 Audit Report No. 38 maintained that the following material is likely to be considered confidential: trade secrets; proprietary information of contractors (for example, how a technical or business solution is to be provided); internal costing and profit margin information; pricing structures; and intellectual property matters.

8.19 The audit report went further to develop a set of criteria from which agencies might determine whether a sound basis exists for deeming information in contracts confidential when faced with a FOI request. All of the following criteria need to be satisfied before information is classed 'confidential:

- The information to be protected must be able to be identified in specific rather than global terms. For example, specific clauses within a contract rather than the contract as a whole.
- The information must have the necessary quality of confidentiality. That is, it must not be already in the public domain and it must have continuing sensitivity to a business that would suffer if it were released.
- 'Detriment to the confider' as a result of disclosure must be proved. In the case of government contracts detriment must be established by reference to the relevant public interests that would be damaged upon disclosure. This means, most importantly, that the Commonwealth is obliged to act in the broader public interest.
- The circumstances in which the information is provided or accepted are also important. That is, it is significant if material is provided with the understanding that it will not be disclosed.

8.20 The Committee supports agencies' use of the ANAO criteria to assist them to assess private sector claims and determine what is genuinely commercially confidential in government contracts.

8.21 It is important to note, however, that a commercial-in-confidence claim is not grounds for the non-disclosure of documents or information to a parliamentary committee**.**

Current Commonwealth reporting requirements

8.22 As Audit Report No. 38 notes, there is little guidance provided to agencies as to what aspects of contracts should be made publicly available. Some limited information about government contracts is made public in different domains and to varying degrees. The CPGs require that agencies provide summary details of all contracts and standing offers with a value of $2,000 or more in the *Gazette Publishing System* (GaPS). Contracts containing matters such as trade secrets and national security information are exempt from notification.

8.23 The audit report examined the GaPS system and confirmed the preliminary findings of this Committee regarding GaPS' integrity.[7] Significant deficiencies in the mechanism were identified, including confusion in agencies about the purpose of gazettal and the reporting of new arrangements such as cluster contracts, panels and multi-year arrangements.[8]

8.24 The *Requirements for Annual Reports* state that annual reports must include a summary statement showing the number of consultancy services' contracts over $10,000 let during the year and the total expenditure on consultancies. A statement in relation to competitive tendering and contracting must also be included. The requirements include that the statement refer to the total value and period of contracts worth more than $100,000, the nature of the activity and the outcome of the tendering and contracting processes.

8.25 On 20 June 2001, the motion put forward by Australian Democrats Senator Andrew Murray for the production of departmental and agency contracts and examined by the Committee in June 2000 was passed by the Senate. The order requires each minister in the Senate, in respect of each department or agency administered by that minister, or by a minister in the House of Representatives represented by that minister, to table a letter advising that a list of contracts has been placed on the Internet by each department or agency. The order applies to the contracts of agencies (as defined by the *Financial Management and Accountability Act 1997*, the FMA Act) that have a value of $100,000 or more and have not been fully performed or have been entered into within the previous 12 months. The

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7 Finance and Public Administration References Committee, *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, June 2000, pp. 25-27.

8 ANAO, *The Use of Confidentiality Provisions in Commonwealth Contracts,* Audit Report No. 38 2000-2001, pp. 74-85.

information must include the name of the contractor; the subject matter of the contract; whether the contract contains any provisions requiring the parties to maintain confidentiality of provisions; whether any provisions are regarded by a party as confidential; and a statement of the reasons for the confidentiality. The order also seeks an estimate of the cost of complying with the order. The letters are to be tabled twice a year commencing on 28 August 2001.

8.26 The Senate order requests that the Auditor-General provide to the Senate within six months of each tabling date a report on a selection of the contracts containing confidentiality provisions, indicating whether the audit has detected any inappropriate use of the confidentiality provisions.

8.27 The Committee fully supports the Senate order as measure to increase transparency in government contracting and to curb the current trend to claim that contractual information is confidential without adequate explanation or grounds. However, during this inquiry the Committee has concluded that there is a need to do more. The Committee emphasises that government contracting needs to adhere to and promote accountability standards based on the reverse onus of proof principle.

Other Government approaches to openness in contracting

8.28 The Committee notes that some other jurisdictions have taken this and other public accountability measures even further. While government contracts remain the source of regular disputation about commercial confidentiality claims, a number of Australian states and other countries have introduced measures to ensure that there is greater openness surrounding the contracting out of government services.

8.29 The Victorian government has developed a policy regarding the confidentiality of government contracts whereby the burden of proof to disclose government contracts lies with the government agencies. If there is a compelling reason, information need not be disclosed but this non-disclosure period extends for only a limited amount of time. The details of all department contracts worth more than $100,000 are accessible on the internet. Contracts over $10 million are published in full on the internet. If a clause has been removed from a contract, a statement is included explaining the reason and scope of the exclusion. As of 10 July 2001, 8 contracts worth over $10 million dollars were listed in full on the website as well as the details of 343 contracts worth more than $100,000.

8.30 In Western Australia all details of contracts over $20,000 are published on the Western Australian Government Contracting Information Bulletin Board after the contract is signed. Other documents may be disclosed if required by law, under the FOI Act, by tabling of documents in Parliament or under a Court Order. The contractor shall not have, make or bring any action against the Principal for any loss, injury, damage, liability or expense resulting from public disclosure of contract details.

8.31 The Australian Capital Territory has issued ‘Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies’ which

outlines the means by which information in a contract can be determined as confidential at the time a contract is being negotiated. The ACT has also enacted legislation (*Public Access to Government Contracts Act 2000*) that ensures that agencies prepare a public text of a contract within 21 days of making that contract. The public text includes the full contract, excluding only clauses deemed genuinely commercial-in-confidence. The Auditor-General maintains a register of contracts containing confidentiality clauses.

8.32 In the United States of America, the Freedom of Information Act (FOIA) provides that any person has the right to request access to federal agency records or information. All agencies of the United States government are required to disclose records upon receiving a written request for them, except for those records that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. Information about trade secrets is one of the exemptions.

8.33 When determining whether information should be made public, the onus is on the contractor to show why information in a contact should be exempt from disclosure. Contractors are provided with information explaining why information might be exempt from disclosure.

8.34 In its submission to the inquiry outlining the system in the United States, Unisys told the Committee:

> In the United States it is accepted that government IT contracts are open to public scrutiny. In fact, after the government announces a winning bid, not only are the details of the winning bid made public, all bidders' proposals are publicly available. Specific details of the contract are only made public after the winning bidder has signed the contract.
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> Whilst commercial-in-confidence is often formally requested and granted for information relating to trade secrets or future company plans, typically requests for keeping pricing confidential are rejected. For cost-plus type contracts actual company cost information is usually kept confidential, and a company's profit margin would never be made public.
>
> In addition to bidders' proposals being open to public scrutiny, so too is the particular government's procurement process, decision criteria and evaluation results for selecting a winning contractor…

8.35 A major benefit from publicising the winning proposal is that unsuccessful tenderers can find out more information about why they did not win the contract. This is likely to increase competition for future bids. It is unlikely that the successful bidder or a competitor would re-use the same proposal in the future because the conditions of each project differ and the approach must be tailored to each project.[9] Consequently,

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9 Except in pure product bids where the winning unit price sets the standard for the next similar bid. Unysis, submission no. 30.

commercial information obtained by a competitor will only have a minor impact on the successful tenderer. As Unysis went on to tell the Committee:

> It is important to note that the public disclosure of information relating to a winning bid in the United States does not in any way impact on the outcome of the procurement.[10]

Recommendation No. 17

The Committee recommends that the Government give serious consideration to introducing legislation that will provide a greater degree of transparency in Commonwealth contracts by making them publicly available. The Victorian legislation, which requires contracts valued at over $10 million to be placed on the Internet, provides a starting point. In this context the ANAO criteria would provide guidance on what, in such circumstances, would still be considered genuinely confidential and may be withheld from publication.

8.36 This would ensure that government contracts were available for a greater degree of scrutiny and, if coordinated with a review of reporting systems, could simplify the existing complementary but overlapping mechanisms such as the GaPS system, the Senate order of 20 June 2001 and the current level of annual reporting on contracting and consultancies.

Accountability to Parliament and parliamentary committees

8.37 Quite separate from the issue of FOI and similar obligations is the obligation of parties to a government contract to be accountable to the parliament.

8.38 Section 49 of the Australian Constitution declares the powers of the Senate and the House of Representatives as at 1901 and grants the Commonwealth Parliament the power to declare the powers, privileges and immunities of its Houses, members and committees. Section 50 provides the authority to make rules and orders as to the extent of these powers, privileges and immunities.

8.39 Section 50 empowers the Senate to delegate to committees certain powers to conduct inquiries. The Senate Standing Orders, the Senate's rules for the conduct of its proceedings made in accordance with Section 50 of the Constitution, confer on committees the power to invite the attendance of a person or the production of a document, and if that invitation is declined, to require the attendance of that person, or that document.[11]

8.40 The power of a committee to send for persons and documents is rarely used. In reality witnesses are invited to make submissions and appear before a committee at

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10 ibid.

11 The Senate, *Standing Orders and other orders of the Senate,* February 2000, Standing Orders 25 (15), p. 27 and 34, p. 31.

a public hearing. A set of resolutions made by the Senate to provide for procedures to be observed by its committees for the protection of its witnesses are known as the Privilege Resolutions. They contain a requirement that a committee first invite a witness to give evidence or produce documents and to issue a summons or make an order to produce documents only when the committee has made a decision that it is warranted in the circumstances.[12]

8.41 A witness may object to giving evidence on a number of grounds:

- the question is not relevant to the committee's inquiry;
- answering the question may incriminate the witness;
- the information is otherwise protected from disclosure—although a committee is not bound to follow prohibitions on disclosure which operate elsewhere, the committee may take notice of this fact; and
- the disclosure of the information would be prejudicial to the privacy or the rights of a third person, particularly parties in legal proceedings.[13]

8.42 A witness cannot claim that provision of information would place a party at risk of litigation. As the Clerk of the Senate has advised the Committee:

> the presentation or submission of a document to a…parliamentary committee is a proceeding in Parliament, and as a proceeding in Parliament it cannot be impeached or questioned before any court or tribunal, and nor can it be used against a party in any proceedings relevant or irrelevant.[14]

8.43 Various guidelines, such as the Auditor-General's criteria for confidential contract clauses put forth in Report No. 38, may provide some guidance as to whether information is genuinely confidential. If confidential information is sought, a witness should present their concerns to the committee by reference to the relevant criteria. Regardless of the status of information, for example, its commercial confidentiality, if the committee requires the information to conduct its inquiries the witness must provide it. To refuse may constitute contempt of the Senate.[15]

8.44 A committee may resolve to receive the material or to hear the evidence *in camera*. It is important to note that the decision as to whether the committee will receive the evidence *in camera* is a decision made by the committee. A witness cannot demand that the evidence be received *in camera* or refuse to provide it.

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12 ibid., Privilege Resolutions 1(1) and (2).

13 ibid., Privilege Resolution 1(10); *Odgers' Australian Senate Practice*, 9th edition, 1999, p. 427.

14 Mr H Evans, Clerk of the Senate, Letter to the Committee, 25 January, 2001.

15 The Senate, *Standing Orders and other orders of the Senate,* February 2000, Privilege Resolution 6(8), p. 107.

8.45 While a committee may resolve to conduct a hearing or receive a submission *in camera*, no guarantee can be given to a witness that the evidence or the document will remain protected. Both committees and the Senate have the power to publish subsequently the *in camera* evidence. Under Privilege Resolution 1(8), witnesses are to be made aware of this possibility before giving evidence. Should a decision be made to release information received *in camera*, Standing Order 37 sets out the need for advance notice to be given to the witness and requires that the opportunity be provided for them to object wherever practicable.

8.46 If a committee is faced with a refusal by a witness to attend or produce documents it has a range of options. The first is to report the refusal to the Senate where an outcome may be pursued with the full force of the Senate. Alternatively, it is open to committees not to exercise their powers and to agree to act in accordance with a witness's wishes. However, if the issue is of serious concern, the committee may identify an alternative avenue to resolve the matter, as was done after the Minister for Finance and Administration refused to provide documents relating to the unauthorised disclosure that occurred during the tendering of the Health Group's IT.[16] In the case of this inquiry, the Auditor-General was requested to consider conducting an audit of the Health tender process.

8.47 A witness might argue that a contract contains provisions aimed at maintaining the contract's confidentiality even in the face of parliamentary reporting requirements. Such clauses do not carry any weight if a government contract is sought by a parliamentary committee. As Dr Nick Seddon writes, if there is statutory duty to disclose information 'a contractual confidentiality clause would be ineffective'.[17]

Public servants, ministers and evidence to committees

8.48 An officer of the public service is not required to comment on policy decision or the advice tendered in the formulation of policy or to express a personal opinion on matters of policy. In addition, public servants must be given reasonable opportunity to refer questions to a superior officer or to a minister.[18]

8.49 Unlike public servants, ministers are able to claim public interest immunity for withholding information. Some reasons for making such claims include that the information will disclose deliberations or decisions of the Cabinet or the Executive Council; advice and recommendations forming part of the deliberative processes of government; or information obtained in confidence from other governments.

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16 Finance and Public Administration References Committee, *Inquiry into the Government's Information Technology Outsourcing Initiative: Accountability Issues— TwoCase Studies*, June 2001, pp. 15-31.

17 Dr N. Seddon, 'Is Accountability a Cost of Contracting Out?' in *Administrative Law for the New Millennium, Papers presented at the 2000 National Administrative Law Forum*, Australian Institute of Administrative Law, 2000, p. 43.

18 The Senate, *Standing Order and other orders of the Senate*, February 2000, Privilege Resolution 1(16), p. 102.

8.50 Public interest immunity claims are only claims, and the Senate does not accept them automatically. If the Senate disagreed with the claim, that is, the executive government were to lose a vote in the Senate on whether the claim should be accepted, the Senate has a legal right to the information.[19]

8.51 During the inquiry, the Minister for Finance and Administration used public interest immunity as a ground to deny access to the evaluation reports of the Health Group, citing the sensitivity of the information and claiming the reports are part of the deliberative processes of government. The Committee accepts that the information contained in the evaluation reports is probably sensitive, but questions the Minister's right to refuse the Committee access to the documents. By referring the matter to the Auditor-General, the Committee identified a way to satisfy itself that a thorough investigation of the tender process would take place. In doing so the Committee avoided putting the reports at risk of disclosure through a Senate debate that might have followed a report to the Senate on the Minister's refusal. Although the Committee chose not to exercise it powers, it nonetheless reserves the right to do so in the future.

The experience of this inquiry

8.52 Responses to this inquiry's attempts to gain access to documents are indicative of the degree of misunderstanding of committee powers in both agencies and the private sector, as well as the extent to which such a lack of knowledge can disrupt the conduct of an inquiry. While this report will not again detail the frustrations the Committee encountered (a full account is contained in the Interim Reports tabled in April and June), it will highlight a number of areas of misunderstanding that made the process difficult.

- The powers of parliamentary committees exist regardless of the Freedom of Information Act, commercial-in-confidence classifications and other legislative provisions.
- Witnesses cannot place conditions on the provision of information—a decision to receive information *in camera* or not is a decision for a committee.
- The powers of parliamentary committees in respect of government contracts are not affected by contractual provisions.
- The act of providing information to a parliamentary committee is not the same as making that information public— with the exception of legislation committees hearing estimates, committees have the ability to receive documents and evidence *in camera*.
- Documents provided to committees are protected by parliamentary privilege and cannot be questioned before any court or tribunal or used against a party in any proceedings.

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19 *Odgers' Australian Senate Practice*, 9th edition, 1999, p. 465.

8.53 The cumulative experience of this inquiry demonstrates the need for contractors to be clearly informed of their parliamentary reporting requirements. Although clauses regarding such requirements were included in most requests for tender (RFTs) and contracts, OASITO clearly did not ensure that contractors understood the implications of such clauses. This inhibited the Committee's ability to examine and evaluate the Initiative.

8.54 The Committee considers that it was OASITO's responsibility to fully inform contractors of their parliamentary reporting requirements and the powers of committees, in particular the fact that private contractors cannot place conditions on the provision of documents to parliamentary committees. Unfortunately, the lack of understanding of such requirements displayed by OASITO itself makes it unlikely that this role would have been effectively carried out.

Summary

8.55 There is confusion in both the private and public sectors regarding parliamentary committees' right of access to information and their powers that adversely affects public and parliamentary accountability.

8.56 A greater understanding of committee powers would significantly improve the effectiveness of parliamentary scrutiny and ensure that it proceeds more smoothly than has occurred during this inquiry.

Recommendation No. 18

The Committee recommends that budget funded agencies take immediate action to ensure that before they enter into any formal or legally binding undertaking, agreement or contract that all parties to that arrangement are made fully aware of the agency and contractor's obligation to be accountable to Parliament.

Recommendation No. 19

The Committee further recommends that any future Requests for Tender (RFTs) and contracts entered into by a Commonwealth agency include provisions that require contractors to keep and provide sufficient information to allow for proper parliamentary scrutiny, including before parliamentary committees, of the contract and its arrangements.

8.57 The powers of parliamentary committees should be stated explicitly in the RFTs and the contract. The following clause in the Department of Health and Aged Care's contract with IBM GSA provides a good model:

> Subject to clause 24 (Privacy), nothing in this Services Agreement prohibits the use or disclosure of any confidential information by either party to the extent that:

… the disclosure is sought by Parliament or any Parliamentary Committee where the disclosing Party has made reasonable efforts to notify the other Party prior to disclosure.