



Report 13: 2023-24 | 5 April 2024

OPINION ON MINISTERIAL NOTIFICATION

Provision of Supplementary Information to the Standing Committee on Estimates and Financial Operations



**Office of the Auditor General
for Western Australia**

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ISSN: 2200-1913 (print)
ISSN: 2200-1921 (online)

The Office of the Auditor General acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community. We pay our respects to all members of the Aboriginal communities and their cultures, and to Elders both past and present.

WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

**Provision of Supplementary Information to
the Standing Committee on Estimates and
Financial Operations**

Report 13: 2023-24
5 April 2024

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**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

**PROVISION OF SUPPLEMENTARY INFORMATION TO THE STANDING COMMITTEE
ON ESTIMATES AND FINANCIAL OPERATIONS**

This report has been prepared for submission to Parliament under the provisions of sections 24 and 25 of the *Auditor General Act 2006*.

It deals with four decisions by the Attorney General, the Hon John Quigley MLA, not to provide information to the Legislative Council's Standing Committee on Estimates and Financial Operations as part of the 2023-24 Budget Estimates hearings.

A handwritten signature in grey ink that reads "S. Labuschagne".

Sandra Labuschagne
Acting Auditor General
5 April 2024

Contents

- Introduction..... 5
- What we did..... 5
- Ministerial decisions not to provide information on advice sought from the SSO..... 6
 - Disclaimers of opinion 6
 - Background..... 6
 - Basis for disclaimers of opinion 7
- Ministerial decision not to provide information about reforms to the *Gender Reassignment Act 2000* 8
 - Opinion..... 8
 - Background..... 8
 - Key findings..... 8
- Response from the Attorney General 10

Introduction

This report deals with four decisions by the Attorney General, the Hon John Quigley MLA, not to provide information to the Legislative Council's Standing Committee on Estimates and Financial Operations (EFOC) in relation to:

- Supplementary Information no. A3 – whether advice was sought from the State Solicitor's Office (SSO) on the proposed impact on WA of the federal referendum for the creation of a Voice to the Commonwealth Parliament
- Supplementary Information no. A4 – whether the SSO provided advice in respect of changing the WA Constitution
- Supplementary Information no. A8 – whether the SSO was asked for advice on amendments to the *Aboriginal Cultural Heritage Act 2021* in June 2023
- Supplementary Information no. A9 – whether work has commenced on reform to the *Gender Reassignment Act 2000* and if advice had been provided.

Section 82 of the *Financial Management Act 2006* (FM Act) requires a minister who decides that it is reasonable and appropriate not to provide certain information to Parliament, to give written notice of the decision to both Houses of Parliament and the Auditor General within 14 days of the decision.

Section 24 of the *Auditor General Act 2006* (AG Act) requires the Auditor General to provide an opinion to Parliament as to whether the minister's decision was reasonable and appropriate.

What we did

The Audit Practice Statement on our website (www.audit.wa.gov.au) sets out the process we follow to arrive at our section 82 opinions, including:

- a review of State government entity documents
- a review of any advice provided to the relevant minister by entities, SSO or other legal advisers
- interviews with key entity persons including discussions about our draft findings and the Auditor General's opinion.

Our procedures are designed to provide sufficient appropriate evidence to support an independent view to Parliament on the reasonableness and appropriateness of the minister's decision.

We have not performed an audit; however, our procedures follow the key principles in the Australian Auditing and Assurance Standards.

Ministerial decisions not to provide information on advice sought from the SSO

Disclaimers of opinion

Opinions cannot be formed on whether the Attorney General's decisions not to provide information to Parliament were reasonable and therefore appropriate in relation to Supplementary Information no. A3, A4 and A8, as the Auditor General has been unable to obtain sufficient and appropriate evidence.

The Attorney General's Office has refused to provide unredacted access to the documentation relating to the questions and answers as they consider it is covered by legal professional privilege. Having access to the complete information is fundamental to our inquiry and without it there is insufficient information on which to base opinions.

The inability of an auditor to access the information they need to meet their obligation is a serious matter for the auditor and for those who rely on their opinion. If an auditor is unable to obtain sufficient appropriate audit evidence, they have few options. One of these is to issue a disclaimer of opinion.

Background

In the EFOC hearing on 11 October 2023, the Hon Nick Goiran MLC asked the Attorney General Supplementary Information no. A3, a written question on notice:

Pursuing that line of inquiry a little bit further, did the State Solicitor's Office, during the reporting period, provide any advice to the Premier or any minister with regard to the proposed impact on Western Australia of the federal referendum for the creation of a Voice?

Unaware and with the caveat that you had been there for the final month of the reporting period, or that no such advice provided?

The Attorney General declined to give this information, replying:

Whether or not advice was provided on the specific question of the impact on Western Australia of the Federal referendum for the creation of a Voice is subject to legal professional privilege.

Similarly, the Hon Nick Goiran MLC asked, in Supplementary Information no. A4:

Again, in the reporting period, did the State Solicitor's Office provide advice to the Premier and the minister in respect of changing the WA Constitution? That is something that the health minister has said she is certainly in favour of doing.

The Attorney General declined to give this information, replying:

Whether or not the State Solicitor's Office provided advice to the Premier or any minister in relation to changing the WA Constitution is subject to legal professional privilege.

In Supplementary Information no. A8, the Hon Peter Collier MLC asked the Attorney General:

Just to confirm, the State Solicitor's Office was asked for advice on amendments to the *Aboriginal Cultural Heritage Act 2021* in June of this year?

I would like it to include whether amendments were considered within that question.

The Attorney General declined to give this information, replying:

Whether or not advice was provided in relation to the specific issue of amendment of the *Aboriginal Cultural Heritage Act 2021* at a specific point in time is subject to legal professional privilege.

On 24 November 2023, the Attorney General notified the Auditor General of his decision not to provide the requested information in accordance with section 82 of the FM Act.

Basis for disclaimers of opinion

The Attorney General's Office provided evidence that the Attorney General properly sought advice from the SSO before answering in writing the supplementary questions, and that the Attorney General followed the SSO's suggested response.

However, the Attorney General's Office declined to provide us with full copies of this advice as they asserted that it is subject to legal professional privilege. Without accessing the full advice, we cannot independently verify the content of the advice. In this instance, we cannot assess whether the Attorney General's decisions not to answer the questions were reasonable and therefore appropriate.

We note that case law indicates that, in some circumstances, the mere existence of legal advice, or a request for it, may be covered by legal professional privilege, depending on whether acknowledging its existence may disclose the substance of the advice. However, other cases demonstrate that legal professional privilege is not necessarily waived by acknowledging that legal advice exists.¹ Without viewing the full advice from SSO, we cannot assess whether that would be the case in relation to these questions and cannot make an assessment on whether the Attorney General's refusal to provide the information was reasonable and appropriate.

We also note that some of the information may have already been made public. In Parliament on 17 August 2023, in Question Without Notice 538, the Hon Shane Love MLA asked the Minister for Aboriginal Affairs, the Hon Dr Tony Buti MLA:

I refer to the legal advice provided by the State Solicitor's Office that underpinned the backflip on the *Aboriginal Cultural Heritage Act*.

Did the minister receive a copy of that advice; and, if so, at what stage in the decision to backflip was it received?

The Minister replied:

...With regard to when I received advice, what part and when I used that as part of the formation of the decision is something that Cabinet and I decided and we are not going to disclose it. That legal advice will not be tabled...

The Attorney General's Office has suggested, and there is information to support this claim, that this question and answer:

- inadvertently referred to the SSO, instead of the Solicitor General
- in any event does not include the specificity (June 2023) as the question in A8.

In this context, we cannot determine whether Supplementary Information no. A8 and Question without Notice 538 relate to the same advice and cannot assess reasonableness on this basis.

¹ See for example; [Waived on through: Federal Court highlights the fine distinctions that govern waiver of privilege - Hall & Wilcox \(hallandwilcox.com.au\)](#); [Legal Professional Privilege: Waiver | Herbert Smith Freehills | Global law firm](#); [Fact Sheet - Legal professional privilege \(nsw.gov.au\)](#)

Ministerial decision not to provide information about reforms to the *Gender Reassignment Act 2000*

Opinion

The decision by the Attorney General not to provide information to Parliament about the progress of reforms to the *Gender Reassignment Act 2000* and whether advice was provided was not reasonable and therefore not appropriate.

We found that the key information, namely the progress of reforms, had already been provided to Parliament on 13 June 2023 by the Attorney General, and on 10 October 2023 by the parliamentary secretary representing the Attorney General.

Background

In the EFOC hearing on 11 October 2023, the Hon Dr Brad Pettitt MLC, asked the Attorney General Supplementary Information no. A9:

I have got a similar question in relation to the reform to the *Gender Reassignment Act 2000*. Similarly, has that work commenced, and has the (SSO) advice been provided?

The Attorney General declined to give this information, replying:

Matters regarding the drafting of Bills is a matter for Cabinet and the status of this proposed enactment is Cabinet in Confidence.

On 24 November 2023, the Attorney General notified the Auditor General of his decision not to provide the requested information in accordance with section 82 of the FM Act.

Key findings

The Attorney General's Office provided evidence that the Attorney General properly sought advice from the SSO before answering the question, and that the Attorney General followed the SSO's suggested response.

However, the Attorney General's Office declined to provide us with full copies of this advice as they asserted that it is subject to legal professional privilege. Without accessing the full advice, we cannot independently verify the content of the advice.

However, we have identified that the key information had already been made public. On 13 June 2023, the Attorney General made a statement to the Legislative Assembly about the Gender Reassignment Board. In it, he said:

The Cook government is progressing legislation to repeal the *Gender Reassignment Act 2000*, abolish the Gender Reassignment Board, and amend the *Births, Deaths and Marriages Registration Act 1998* to implement a new streamlined administrative process for sex and gender recognition. ... The new legislation is currently being drafted and is expected to be introduced into this Parliament later this year.'

Further, on 10 October 2023, the Hon Dr Brad Pettitt MLC, asked the parliamentary secretary representing the Attorney General, the Hon Matthew Swinbourn MLC, in the Legislative Council Question Without Notice 1165:

- (1) Has legislation to address these reforms been drafted?
- (2) If not, why not?

- (3) Will the government commit to legislating reform to the *Equal Opportunity Act 1984* and *Gender Reassignment Act 2000* and to banning the use of conversion practices in this term of government?

The parliamentary secretary representing the Attorney General replied:

- (1)–(3) The Cook government remains committed to reform of the Equal Opportunity Act and the Gender Reassignment Act and implementing the recommendations of the inquiry into the Esther Foundation, which included banning conversion practices and establishing a civil response scheme with supports for survivors. These complex reforms are under development.

While these statements do not contain information about whether advice has been provided, they do address the progress of reforms to the *Gender Reassignment Act 2000*. The Attorney General could have provided a similar statement rather than declining to answer this question in its entirety.

We recommend that minister's offices and entities confirm that information has not already been provided prior to advising ministers not to answer parliamentary questions.

Response from the Attorney General

Thank you for the opportunity to provide feedback in relation to the summary of findings.

In response to the disclaimer of opinions in the summary of findings, I confirm that on the basis that the information being sought constitutes a confidential communication between the State of Western Australia and its legal advisers for the purpose of providing advice the information is therefore subject to legal professional privilege. It is not possible to voluntarily provide this information to Parliament without waiving that legal professional privilege and I did not consider it appropriate to waive legal professional privilege in relation to this information.

Auditor General's 2023-24 reports

Number	Title	Date tabled
13	Provision of Supplementary Information to the Standing Committee on Estimates and Financial Operations – Opinions on Ministerial Notifications	5 April 2024
12	Digital Identity and Access Management – Better Practice Guide	28 March 2024
11	Funding for Community Sport and Recreation	21 March 2024
10	State Government 2022-23 – Financial Audit Results	20 December 2023
9	Implementation of the Essential Eight Cyber Security Controls	6 December 2023
8	Electricity Generation and Retail Corporation (Synergy)	8 November 2023
7	Management of the Road Trauma Trust Account	17 October 2023
6	2023 Transparency Report: Major Projects	2 October 2023
5	Triple Zero	22 September 2023
4	Staff Exit Controls for Government Trading Enterprises	13 September 2023
3	Local Government 2021-22 – Financial Audit Results	23 August 2023
2	Electricity Generation and Retail Corporation (Synergy)	9 August 2023
1	Requisitioning of COVID-19 Hotels	9 August 2023

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