

AUDITOR GENERAL AMENDMENT BILL 2022

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Leader of the House)**, read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [9.10 pm]: I move —

That the bill be now read a second time.

I am pleased to introduce the Auditor General Amendment Bill 2022 on behalf of the Treasurer. The McGowan government continues to improve and champion accountability, transparency and integrity across government. This bill will rectify longstanding limitations in the operation of the Auditor General Act 2006, providing the Auditor General with an unprecedented right of access to highly sensitive information. In particular, the major features of the bill are as follows.

Firstly, for the first time the Auditor General will have an express right to access highly sensitive information, including that which is subject to cabinet confidentiality, legal professional privilege and other claims of public interest immunity. Secondly, the confidentiality of any material provided will be expressly maintained. This means that, for example, should the Auditor General access legal advice held by a government department, that access will not constitute a waiver of legal professional privilege. Thirdly, once any highly sensitive information is provided to the Auditor General, the information may be fully utilised as part of any audit, including by informing any audit findings or opinions. However, the information itself may not be further disclosed. For example, although the Auditor General will have a right to access all cabinet documents, the document itself cannot be attached to an audit report and published. Fourthly, parliamentary privilege is preserved, meaning the information-gathering powers do not affect parliamentary privilege.

The Auditor General serves a critical role in public accountability and transparency. The Auditor General is an independent officer of this Parliament who is responsible for scrutiny of the finances and activities of state and local government entities through audits and other investigations. The outcomes of these processes undertaken by the Auditor General are reported to the Parliament, giving members of the Western Australian community assurance that their government is serving their best interests. For some years, the need to amend the legal framework for access to highly sensitive materials by the Auditor General has been a matter of public record. I quote from a 2015 report by the then Auditor General, Mr Colin Murphy, PSM, when he was unable to access legal advice provided to government. Mr Murphy said —

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.

A lack of clear authority in the Auditor General's information-gathering powers was also noted in 2016 by the Joint Standing Committee on Audit in its review of the Auditor General Act 2006. The committee's fourth finding was —

... the Auditor General should have access to all information necessary to conduct an audit, including access to Cabinet documents and documents subject to legal professional privilege.

The committee's second recommendation was the act should be amended to —

... clearly provide the Auditor General with the power to compel a person to provide any information required, including documents subject to legal professional privilege, Cabinet confidentiality or any other public interest immunity.

Further, the fourth recommendation stated that the act be amended —

... to provide that disclosure of a document to the Auditor General does not result in the loss of privilege in other circumstances where the privilege could be claimed and provides protection for the person disclosing the information in such circumstances.

Similarly, the 2018 *Special inquiry into government programs and projects: Final report*, the Langouant report, referred to the 2016 recommendations and the then Auditor General's desire to see enhanced powers provided to his office. The special inquirer called for this matter to be addressed as an important issue in public accountability and transparency. Among the failures of the previous government identified in the Langouant review, the theme of transparency and accountability is one that the McGowan government has consistently addressed. We have provided significant additional funding for the Auditor General to improve governance and accountability across the public sector, including funding to undertake targeted forensic audits of agencies, contract management and systems. A range of additional protections have been put in place for public sector payment practices, such as the segregation of the duties of those issuing the invoice from those paying the invoice. We now have a requirement

for regular rotation of those conducting public sector audits to ensure that auditors maintain their independence from agencies and the audit committees are independently chaired by external parties across the public sector.

This bill is the latest in a series of improvements to the public sector accountability and integrity that the McGowan government has delivered since coming to office and will directly address those recommendations of the Langoulant report and the Joint Standing Committee on Audit's 2016 review. A robust legal framework is essential to ensure that the rights and obligations of both the Auditor General and the public servants who deal with the Office of the Auditor General are clear and unambiguous. This reform will provide officers of the government with custody or control over relevant documents proper guidance, ensuring that they are appropriately protected from legal exposure when acting in good faith.

Although the bill will confer an express power on the Auditor General to access highly sensitive information to carry out their statutory functions, it will also provide for the adoption of sufficiently rigorous processes and procedures so that requests for access can be managed appropriately. I would like to emphasise that in respect of some highly sensitive materials, this bill will largely formalise what already occurs in practice. For instance, access to cabinet-in-confidence information has, under successive governments, been regularly given to the Auditor General under a protocol struck with the then government in 2007 and which has continued in operation since then. Under the protocol, if the Auditor General sought access to a cabinet document, and cabinet approved, they could attend the Department of the Premier and Cabinet and view the document. The Auditor General was permitted to read it and take notes, but not copy it.

Although they will formalise some existing practices, these reforms are a vast improvement on the Auditor General's current access powers. For example, firstly, there will be no need for a cabinet decision to approve access to cabinet materials, as was required under the protocol. This bill will create a statutory right of access by the Auditor General. Secondly, where the Auditor General could view cabinet documents under the protocol, it did not facilitate access to documents subject to legal professional privilege. The absence of such access has led to successive Auditors General being unable to form opinions. In a major enhancement of transparency, for the first time the Auditor General will have a statutory right of access to view the government's legal advice to help inform their audit opinions. Thirdly, where the Auditor General could previously view cabinet documents only in person and take notes, the Department of the Premier and Cabinet has committed to making these sensitive materials available electronically in a secure, read-only format in the Office of the Auditor General. In a digital world, with ever-increasing volumes of information, this will hugely streamline the Auditor General's operations and remove the need for in-person inspection of cabinet records.

Given the significance of providing the Auditor General unfettered access to highly sensitive materials, it is necessary and appropriate for the bill to include some safeguards for the management and use of that information, and protections for those individuals who provide it. The bill will include the key information-gathering provisions in part 4, division 2 of the act. Subdivision 1 will include definitions of key terms, including the precise scope of what is considered "protected" or "restricted". However, the scheme will create a clear right of access to them regardless of which category they fall under.

Subdivision 2 sets out the information-gathering powers of the Auditor General and confirms an ability to direct a person to provide that information, even where it is considered protected or restricted. It will establish that failure to do so without reasonable excuse would be committing an offence.

Subdivision 3, in balance, will make it clear that given this legal obligation to comply, equally clear requirements, obligations and rights in relation to making these requests exist. For example, no copies or extracts are to be taken without express approval.

Subdivision 4 provides that the Auditor General must not disclose, communicate or give access to this highly sensitive material, or disclose the substance of it, to any person, other than a person who is assisting in the performance of the audit. It will allow for the Auditor General to identify in reports to Parliament that highly sensitive material has been omitted from those reports, and expressly preserves any reporting obligations of the Auditor General under the Corruption, Crime and Misconduct Act 2003 and any duty to comply under section 53 of the Criminal Investigation Act 2006 should any criminal or corrupt conduct be identified.

Should the Auditor General decide not to make a report to Parliament due to this obligation not to disclose, or omits the material, they may prepare a report including the material and provide it to the Premier, Treasurer, responsible minister, or director general of the Department of the Premier and Cabinet. The bill will allow for regulations to empower specific requirements to be imposed in relation to the manner of reporting, so as to ensure that conventions regarding cabinet materials and legal advice of former governments are upheld and not provided to opposing political parties. Importantly, the bill will confirm that the privileges of Parliament are unaffected by the act and that documents to which parliamentary privilege applies are properly the remit of Parliament. In line with this, the bill provides for an individual to decline a request from the Auditor General to produce information that may be privileged unless the Parliament has authorised its release.

There is no nationally consistent approach for the access of highly sensitive materials that are subject to the privileges and immunities addressed by these reforms. Many jurisdictions adopt a position that this highly sensitive information can be accessed only for specified purposes, whether some or all functions of the auditor, or remain silent on how privileged or immune information is to be handled. Where access is expressly provided, there are controls that are placed on the use and disclosure of that information. In the commonwealth, for example, the Auditor-General Act 1997 allows access to highly sensitive information, but confers on the Attorney-General a broad discretion to issue a certificate to prevent the Auditor-General reporting that information in public reports.

There are other jurisdictions where the Auditor General may not have a statutory right to access certain types of sensitive information. New South Wales, for example, makes clear that the Auditor-General does not have a right to access cabinet information, but through established protocols, the government can choose to provide it. A similar position is adopted in Tasmania, where despite the broad terms of the relevant information-gathering powers, the Auditor-General is unable to compel production of materials that are subject to public interest immunity.

This bill enshrines the right of access by the Auditor General into law, and to not just cabinet information, but also other highly sensitive materials, such as legal professional privilege. The bill will ensure that the operation of the act in Western Australia will remain generally consistent with the practices of other Australian jurisdictions, while accounting for the broad functional mandate Western Australia has provided our Auditor General.

In 2020, a survey of Australian and New Zealand legislation by the Australasian Council of Auditors General recognised the strong overall independence and the breadth of functional mandate conferred by the Western Australian legislative framework. This favourable recognition was provided despite the limitations of the current legislative scheme. However, despite these strengths, we cannot become complacent. This bill will further strengthen the Auditor General's independence by ensuring that the Auditor General's access to highly sensitive information will no longer be at the discretion of the government of the day. The reforms will help ensure that Western Australia continues to strive to deliver the best public governance of our democratic institutions and systems.

During the development of these reforms, the government consulted with key stakeholders, including the Office of the Auditor General, the Office of the Information Commissioner, the Corruption and Crime Commission, the Ombudsman of Western Australia, the Public Sector Commission, the State Records Office, the Solicitor-General and the Presiding Officers of the Parliament. All feedback was taken into account in the development of this bill.

I would like to particularly extend our thanks to the Auditor General, Ms Caroline Spencer, and her office for their close engagement with the government in developing these much-needed amendments. This bill represents another step by the McGowan Labor government towards providing the Western Australian community assurance that the decisions and actions of government are accountable, and that public money is spent appropriately. This bill will empower the Auditor General to further assist Parliament in holding governments to account, strengthening the trust, transparency and accountability of government with the community.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper [1825](#).]

Debate adjourned, pursuant to standing orders.