

# AUDITOR GENERAL AMENDMENT BILL 2022

## EXPLANATORY MEMORANDUM

### Overview

The purpose of this Bill is to provide a clear framework for disclosure to, and use by, the Auditor General of certain kinds of sensitive materials, including those which are subject to cabinet confidentiality, legal professional privilege and other kinds of privileges and immunities which operate to protect the public interest.

The Bill achieves this by:

- defining protected materials and restricted materials;
- creating a clear right of access to those materials by expressly providing that the fact that materials are protected materials or restricted materials is not a reasonable excuse for failing to provide the Auditor General with access to those materials;
- providing for the making of regulations dealing with the form of requests, including requiring requests for protected or restricted materials to be directed to a specified person, which could include, for example, the official custodian of the Cabinet record;
- regulating the disclosure of protected information and restricted information; and
- protecting the operation of privileges and immunities in other contexts, including legal proceedings.

### Clause 1. Short title

This clause provides that the short title of the Act is the *Auditor General Amendment Act 2022*.

### Clause 2. Commencement

This clause provides that sections 1 and 2 will come into operation on Royal Assent, and the rest of the Act will come into operation on a day fixed by proclamation. This clause provides that different days may be fixed for different provisions within the Act.

### Clause 3. Act amended

This clause provides that the Act amends the *Auditor General Act 2006*.

### Clause 4. Section 4 amended

This clause amends section 4 of the Act by moving the definition of Parliament from Part 2 of the Act and including in the appropriate alphabetical order in section 4 – Terms used in this Act, which is the principal interpretation clause of the Act.

The definition of Parliament remains the same as that which was previously included in Part 2, but the definition will now apply throughout the *Auditor General Act 2006* unless the contrary intention appears.

**Clause 5. Section 4A inserted**

This clause inserts s 4A after section 4 in the Act, which confirms that:

- the scope of Parliamentary privileges under the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891* is unaffected by the *Auditor General Act 2006*;
- unless authorised by Parliament, any powers, rights or functions exercised under the *Auditor General Act 2006* must not be exercised to the extent that the exercise would relate to a matter determinable by Parliament.

The clause reflects section 4(2) of the *Corruption, Crime and Misconduct Act 2003*.

**Clause 6. Section 7 amended**

This clause removes the definition of Parliament, which now appears in section 4 – Terms used in this Act.

**Clause 7. Section 25 amended**

This clause removes existing section 25(2)(a) and (b) and replaces those provisions with a new section 25(2)(a) and (b) which provide that the Auditor General must consult with the Treasurer, the agency or audited local subsidiary as the case may be, any person who is taken to have a special interest in the report under section 36B(5) and any person who, in the Auditor General's opinion, has a special interest in the report.

In addition, the Auditor General must, by written notice, invite each person listed above to make submissions or comments on the terms of the report before a specified day, being not more than 14 days after the person is consulted, before the report is submitted to Parliament.

The effect of this clause is to ensure that in addition to the persons with whom the Auditor General is required by existing section 25(2)(a) and 2(b) to consult regarding the terms of a report, and to invite submissions and comments from about the report, the Auditor General is required to also consult and invite submissions from a person who has provided protected or restricted material to the Auditor General for the purpose of the audit.

## **Clause 8. Part 4 Division 2 replaced**

This clause removes the existing Part 4 Division 2 of the *Auditor General Act 2006* and replaces it with a new Part 4 Division 2. The following sets out the details of the sections which form part of Part 4 Division 2.

## **Division 2 – Information gathering powers and duties**

### **Subdivision 1 – Preliminary**

Subdivision 1 deals with preliminary matters relating to Division 2, including terms used, the power of the Auditor General to authorise a person to perform functions and delegation.

### **Section 32A inserted**

This section defines terms relevant to this Part. Of note are the proposed definitions of:

- *parliamentary privileged material*, which includes any information, the disclosure of which would, apart from any immunity of the Crown, infringe the privileges of Parliament;
- *protected material*, which includes, materials that relate to proceedings, deliberations or decisions of Cabinet or any committee of Cabinet (including proposed or contemplated proceedings, deliberations or decisions), and/or materials relating to state or national security where they have been communicated in confidence or their disclosure could damage the security or defence of the Commonwealth or the security of the State; and
- *restricted material*, which includes, for example, documents subject to legal professional privilege and documents which would otherwise attract public interest immunity, including materials the disclosure of which could:
  - prejudice the investigation of a contravention or possible contravention of the law;
  - prejudice the fair trial of a person;
  - damage relations between the Government of the State and a government of the Commonwealth or another State or Territory; or
  - reasonably be expected to unfairly prejudice the commercial interests of a person or body.

### **Section 33 inserted**

This section provides for the Auditor General to give written authorisation for a person to perform any of the Auditor General's functions in Division 2. This provision reflects the existing section 33 of the *Auditor General Act 2006*.

### **Section 33A inserted**

This new section authorises a specified person to delegate the functions conferred on that person under the amendments to the Act, and sets out the limitations of those delegations.

“Specified person” is defined in section 36B(1) as meaning a person specified in the regulations or, if no person is specified in the regulations, a person in possession or control of the material,

### **Subdivision 2 – Information gathering powers**

Subdivision 2 sets out the information gathering powers of the Auditor General, including the power to access information, records, systems, money and property and the power to direct a person to provide information.

### **Section 33B inserted**

This section is broadly reflective of existing section 35, and provides for the Auditor General to have access to information, records, systems, money and property relevant to an audit upon written notice to a relevant person without paying any fee. This access also extends to entry onto premises as required at all reasonable times, provided written authority is presented upon request. The section establishes that a relevant person must not, without reasonable excuse, fail to provide all reasonable facilities for the effective exercise of the power. A person who does fail to do so commits an offence which carries a criminal penalty.

The provision will have effect subject to Subdivision 3, which contains specific provisions dealing with requests for protected materials and restricted materials. Those specific provisions will continue to operate and section 33B must be read as subject to them.

### **Section 34 inserted**

This section is broadly consistent with the existing section 34, and provides for the Auditor General to direct a person to provide information relevant to an audit, including records, explanations and answers to specific questions, and to do so in writing, orally, by attendance and/or under oath or affirmation. The section establishes that failure to comply, without a reasonable excuse, is an offence which carries a penalty.

Amendments to this section include the requirement for a specified timeframe for compliance being no less than 10 business days, and clarification that the power to direct can be used in relation to 33B.

This section also provides that the powers conferred under this section, and the obligations of people in receipt of directions under this section, have effect subject to

Subdivision 3 and requests made under this provision will need to be consistent with the requirements set out in Subdivision 3.

### **Section 35 inserted**

This new section provides that the Auditor General may use the powers to access information conferred in Sections 33B and 34 for the purpose of reporting to Parliament under section 24(2)(c). That section concerns reporting by the Auditor General to Parliament following receipt of a notice under section 82 of the *Financial Management Act 2006* on whether a decision by a Minister not to provide information to Parliament concerning and conduct or operation of an agency was reasonable and appropriate.

### **Section 36 inserted**

This section is broadly consistent with the existing section 36, and establishes that a person is required to comply with a request under section 34 even if doing so may incriminate the person, or if any other duty of confidentiality or secrecy would otherwise apply, and that complying with the request is not a breach of any such duty. The section also provides that, if a person complies with a request under section 34, any information obtained is not admissible as evidence against the person, except in relation to:

- offences under this subdivision; or
- offences under the *Criminal Code*, Chapter XX: Miscellaneous offences against public authority, which includes offences such as obstructing a public officer.

The section strengthens the existing section 36 good faith protections for individuals who comply with audit requests.

### **Subdivision 3 – Information gathering powers in relation to certain material**

Subdivision 3 sets out some specific requirements in relation audit requests relating to information that is subject to parliamentary privilege or is protected material or restricted material. It includes a power to make regulations.

### **Section 36A inserted**

This section provides that a person is not required to comply with a direction, or facilitate access to information, in accordance with Section 33B or 34 if the information requested is subject to Parliamentary privilege and Parliament has not authorised its release to the Auditor General.

This is a new provision, and provides clarity around the obligations of public servants on the handling of parliamentary privilege information, being the purview of Parliament.

### **Section 36B inserted**

This new section establishes requirements, obligations and rights in relation to requests from the Auditor General to access protected material or restricted material, including a head of power for regulations to be made which:

- require requests to be made to a specified person, such as the custodian of the Cabinet record, rather than the person holding the relevant records;
- provide for the form of audit requests, including how these requests are made, and how audit requests are to be responded to; and
- set out the rights and obligations of a specified person and a person holding the relevant records.

The section makes clear that a specified person cannot refuse to comply with a request because it relates to protected materials or restricted materials. The effect of this is that the Act will not enable privileges and immunities to be asserted as a reason not to provide access to protected materials or restricted materials.

This section further establishes that where a request is required to be directed to a specified person who is not the person in possession or control of the material, the specified person is required to respond to a request relating to protected material, and that any other person is not required to respond to a request where they believe it relates to protected material.

A specified person who responds to a request under this section is taken to have a special interest in the report and therefore must receive a draft of any relevant report to be submitted to Parliament and be given the opportunity to provide comment under section 25(2)(a) and (b) prior to its submission.

### **Section 36C inserted**

This new section establishes that the Auditor General must not copy or take extracts from protected or restricted material without the written approval of the specified person as prescribed in the regulations, as relevant to the request. Any copies or extracts of protected or restricted material taken with approval must also be returned or destroyed on completion of the audit.

### **Subdivision 4 – Confidentiality of certain material**

Subdivision 4 sets out matters relating to the disclosure of confidential material, including protected material and restricted material and provides for the preservation of privileges and immunities in other contexts.

### **Section 36D inserted**

This new section introduces a definition of *confidential material*, which includes parliamentary privileged, protected and restricted material as previously defined, in addition to other material that should not be disclosed on the basis of possible judicial proceedings or public interest grounds. The section provides that the Auditor General or other relevant person must not disclose, communicate or give access to confidential material, or disclose the substance of confidential material, to any person (other than a person who is assisting in the performance of the audit). The section allows for the Auditor General to identify in reports to Parliament that confidential material has been omitted from those reports and also 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*.

### **Section 36E inserted**

This new section provides that, where the Auditor General decides not to make a report to Parliament due to the obligation not to disclose confidential material (or omits confidential 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, in accordance with the regulations. The regulations 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 respected.

The section does not compel the Auditor General to prepare such a report.

### **Section 37 inserted**

This section provides that where the Auditor General is considering a notice under section 82 of the *Financial Management Act 2006*, the Auditor General must not disclose information to Parliament if the Minister decides that it would not be in the public interest for material that is the subject of a notice under section 82(1) of the *Financial Management Act 2006* to be disclosed to Parliament. This section applies in addition to Section 36D, which relates to confidential material, and is broadly consistent with the existing section 37 in the Act.

### **Section 37A inserted**

This new section establishes that the provision of material to the Auditor General does not waive or impair any privileges, confidentiality, or public interest immunity relating to the material.

## **Subdivision 5 – Transitional provisions**

Subdivision 5 contains transitional provisions.

### **Section 37B inserted**

This new section establishes the necessary transitional provisions for the Act, including clarifying that the new powers will apply to materials even if they were created prior to enactment. The provisions also clarify how the new powers operate in relation to audits that are already on foot but not yet completed.

### **Clause 9. Section 46 amended**

This clause updates the terminology relating to the confidentiality of draft reports and summary reports provided to Parliament contained in section 46 to ensure that the confidentiality obligations are extended to any person who has obtained a copy of a draft report or summary of findings under section 25.