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Hon Peter Collier MLC
Chair
Standing Committee on Estimates and Financial Operations

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Dear Chair

PRELIMINARY THOUGHTS ON AUDITOR GENERAL AMENDMENT BILL 2022

Thank you for your letter dated 27 October 2022 seeking a written summary of my preliminary thoughts on the Auditor General Amendment Bill 2022 (the Bill), including my understanding of how it will affect the functions and operations of the Office. I also thank the Committee for providing several weeks grace to prepare this response, as my Executive team and I are still in the early stages of considering the potential operational implications of the Bill, which broadly contains provisions relating to the Auditor General's information access powers and reporting functions.

Access powers

As you are aware, full and timely access to audit information has been a long-standing concern and an increasingly acute operational impediment for this Office. My predecessor and I have commented publicly on this issue throughout our respective periods in the role of Auditor General. A major factor impeding full and timely access has been ongoing confusion in parts of the State sector around the scope of the Auditor General's powers. I have also witnessed, on occasions, this confusion within some Government Trading Enterprises and local government entities.

The Bill contains a range of provisions based on several key principles including the Auditor General's express right to access materials that are subject to Cabinet confidentiality, other public interest immunity claims and legal professional privilege for the purposes of performing statutory audit functions. Rights of access to such materials will no longer require Cabinet or Ministerial endorsement, as has been the custom in Western Australia. Nor will the provision of sensitive materials waive any privileges or immunities attached to them, which allays a common concern across the State sector.

The recognition of these issues, as proposed in the Bill, all appear to be very positive developments that should provide clarity to the sector and thereby give effect to the original intent of the *Auditor General Act 2006* to entitle the Auditor General to full and free access at all reasonable times to information relating to an audit.¹ I trust these provisions will have a positive impact on our audit efficiency, and particularly where it relates to legal advice, our audit effectiveness. A smooth transition during implementation is critical to avoiding any undue impact on our ongoing annual program of financial and performance audits. Therefore, it is important that our Office—and the more than 300 entities we audit—promptly acquire an agreed understanding of the OAG's rights of access.

¹ These proposed changes explicitly reflect the "auditor sees everything" principle for private sector auditing as enshrined in the *Corporations Act 2001* (Cwth), Volume 2, sections 310 and 312; the Australian Auditing Standards; and Principle 4 (unrestricted access to information) of the International Organisation of Supreme Audit Institutions' (INTOSAI) *Mexico Declaration*, 2019.

In this respect, I have received, and welcome, offers from the Department of the Premier and Cabinet (DPC) and the State Solicitor's Office (SSO) to work together to establish protocols to put the new and amended access provisions into effect. This work has commenced, and we are currently trialling access to some requested items of Cabinet material through a proposed secure digital platform managed by DPC. While the Bill provides for the making of regulations in key areas (e.g. the new section 36B(3) relating to audit requests), I will seek a greater reliance on protocols as an alternative that allows us to retain flexibility while optimal and mutually agreed business processes are developed. This may indeed limit the need for regulations in many instances, which will help reduce the risk of future impasses over the interpretation of legislative rights of both the Auditor General and audited entities.

Disclosure and reporting

Notably, there are provisions in the Bill, especially those around the Auditor General's disclosure and reporting obligations (e.g. the new sections 36D and 36E relating to 'confidential material') that have not been tested in any Australian audit jurisdiction. Consequently, it is difficult to know how these will operate in practice at this time, although it appears reasonably clear that the new section 36D(2) removes the full discretion on reporting afforded the Auditor General under section 7(6) of the current *Auditor General Act 2006* (AG Act). Other jurisdictions carry similar clauses stipulating matters the Auditor General must not disclose, but in these jurisdictions the Auditor General explicitly retains the discretion to make that determination.² I will welcome the opportunity to engage wherever possible with DPC and SSO to clarify the implementation approach for these new disclosure and reporting provisions.

Other considerations relating to access, disclosure and reporting

At this stage, I will likely seek clarity, guidance or advice from DPC or SSO on several other aspects of the Bill's access and disclosure provisions to help ascertain any potential impact on the conduct of our audits and reporting, and to minimise the risk of me and my successors inadvertently breaching the amended Act. These aspects include:

- what is the scope and application of the new section 4A given its explicit override of any 'power, right or function conferred' under the AG Act? In particular, to what extent, and in what form, will the new section 4A influence the operation of the 'good faith' reasonable excuse provisions under the new 36A? For example, could items commonly examined in public sector auditing (such as ministerial briefing notes) now claim to be subject to these privileges, thereby preventing or delaying our access?
 - Guidance agreeing broad categories of 'parliamentary privileged material' will, therefore be important in this respect for audit efficiency.
- what is meant by the phrase 'consult regarding the terms of the report' as it relates to the amended procedural fairness processes under the new section 25? It is not yet clear whether this will require more or less detail and more engagement than what we currently provide audited entities in our summary of findings, which is our proposed report.
- what is the scope and application of the Auditor General's access powers for audits that form part of our financial and information systems audit results reports I currently table under section 24? Are these access powers limited in any way by the wording of the new section 35, which appears to limit them to requests made for the purpose of providing an opinion on a section 82 *Financial Management Act 2006* notification?
- how will we determine a 'specified person' for the purposes of the new section 36B 'audit requests'? Can a group of standing specified persons be established to ensure efficient access across all audits (e.g. accountable authorities and local government chief executive officer)?

² See, *Audit Act 2008* (TAS) section 30A; *Audit Act 1994* (VIC) section 64; *Auditor General Act 2009* (QLD) section 66; *Auditor General Act 1997* (CWTH) section 37(1).

- what is meant by the term 'substance of confidential material as it relates to my obligations under the disclosure provisions of the new section 36D? This is not a term used in any Australian public audit legislation and it seems more encompassing than the detailed reporting restrictions applied in the Australian jurisdictions listed in Footnote 2.

In summary, I acknowledge the priority and efforts the Government is giving to address the prolonged impediments the OAG has experienced around consistent timely access to all information relevant to our statutory auditing functions and responsibilities. While the Bill confirms an unprecedented level of audit access to information in this State, it is quite prescriptive, and is seeking to codify in detail a range of matters that have been subject to principles requiring sound judgement by Auditors General based on long traditions of public audit practice.

Therefore, I will keep Parliament informed of any issues arising from implementation of the Bill that impact the purposes of the AG Act³, the independence provisions of the Auditor General⁴, or the operations of the OAG. I will do this primarily through my reports and my consultations with all relevant parliamentary committees, including the Joint Audit Committee given its standing function to consider the operation and effectiveness of the AG Act.

Please contact me at ag@audit.wa.gov.au, or through my Principal Adviser, Tim Hughes on 6557 7565 if you require any further information or if you wish to meet with me to discuss this matter.

Yours faithfully



CAROLINE SPENCER
AUDITOR GENERAL
22 November 2022

³ Listed under section 3 of the *Auditor General Act 2006* as (a) to ensure the State has an Auditor General with the necessary functions, immunities and independence; and (b) to provide for the independent external audit of the public sector and related entities.

⁴ As currently listed under section 7 of the *Auditor General Act 2006*, and as reported by the Australasian Council of Auditors General (ACAG) in its periodic surveys of Auditors General independence across Australian and New Zealand jurisdictions. The last survey was undertaken in 2020. Report available on the [ACAG website](#).

