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Oversight of Independent Statutory Roles – Is it time for more
comprehensive codification?

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Abstract

This paper presents an 'on reflection' practitioner's perspective, principally using the role of the Auditor-General as a case study.

Important context is that the Auditor-General's role is one of the original independent accountability roles established at the point of colonisation in Australia consistent with the established Westminster approach. Notably however it is only in the 'modern era', commencing in the last quarter of the twentieth century that statutory oversight was initiated.

Against the basic assumption that in common with all public sector functions, independent statutory roles should be transparently accountable, the means and intensity of oversight approaches being utilised is explored. Apparent conflicts and challenges arising in consequence of these approaches are identified and means of mitigating unintended consequences are explored.

In the context that there is clearly potential for conflict, an overriding premise is the need for mutual trust and respect to be achieved to enable meaningful oversight without compromising the ability of the independent statutory role to be discharged, consistent with legislative intent. The paper explores options to advance this objective with an emphasis on meaningful engagement.

Oversight of Independent Statutory Roles – Is it time for more comprehensive codification?

I welcome the opportunity to present this paper although it is a task I undertake with some hesitation given that I have only relatively recently retired from a 'subject role'. I should point out that as a practitioner Auditor-General, across two jurisdictions for over 21 years, I did not pay particular attention to the way oversight was practiced. My enduring focus was overwhelmingly to acquit the responsibilities of the role consistent with my oath of Office. My approach over my career has been generally to regard 'sound practice' as being quite adequate to acquit 'accountability obligations'. Nevertheless when approached to present this paper in the context of the bye line, 'too little or too much' I felt it worthwhile to assemble my thoughts and put them forward for consideration.

I am approaching this topic therefore with an 'on reflection', practitioner's perspective using the Auditor-General's role as the case study. I should also record at the outset that I experienced very constructive engagement with the relevant parliamentary committees and never experienced other than conscientious and well intentioned engagement from parliamentarians and committee staff. Notwithstanding there were experiences that with hindsight could have been mitigated or avoided by better consultation and more purposeful engagement.

In overview my reflection is influenced primarily by the traditional, complementary role of the 'Public Accounts Committee'. That is to follow up on audit reports. My strong personal view that this is the principal; and the crucially important role. When robustly undertaken this role presents the most effective 'applied' oversight of the effectiveness of the audit function in that it provides the ultimate 'test' of the relevance and effectiveness of the audit function in operation.

Interestingly the Auditor-General role is one of the longest standing independent statutory roles. A Colonial Auditor or Board of Audit was established at the point of foundation of each colony in Australia.¹ Further at the point of Federation, the Audit Act was the fourth piece of legislation enacted by the fledgling Commonwealth Parliament².

In the Commonwealth sphere, aside from the ongoing relationship with the Joint Committee of Public Accounts and Audit and its predecessor committees, my recollection is that there was not even an external financial audit of the then Commonwealth Audit Office until after the 1975 amendments to the Audit Act which empowered the Auditor-General to undertake 'efficiency audits'.³ Again my recollection is that this provision was promoted by Senator Wright as a 'check' or 'trade off' to the expansion of the audit mandate.

A further contextual point to be noted is that apart from a very limited number of incidents over Australian history, overall the discharge of the broad ranging audit function has occurred without notable concerns being raised about the approach to, or quality of audit. My proposition is that if substantive concerns existed, then the legislated remedy or other formal redress would have been utilised.

¹ Office of the Auditor General, Our History, www.audit.wa.gov.au/about-the-oag/our-history/, accessed 10 July 2013.

² Audit Act 1901 (No4), Commonwealth

³ Reference to Commonwealth Hansard

Another indicator is my understanding that the removal or resignation on conduct or behaviour grounds from the Office of Auditor-General across Australasia is minimal, being limited to three since colonisation, a South Australian⁴, and a Queensland⁵ Auditor-General in the pre federation era over an irregular warrant for expenses of an Assistant Auditor-General and where the Auditor-General was declared insolvent respectively; and the 1994 resignation of the then New Zealand Auditor-General over irregular expenses. The next closest 'incident' appears to have been the more recent review of the Victorian Auditor-General in the 1990's under the guise of National Competition Policy⁶.

On the other hand there is an evident adoption of oversight across Australian jurisdictions however the approach varies considerably in terms of methodology and intensity. Further this appears to have evolved broadly across the period from the mid 1970's through to the current time where the audit legislation of a number of jurisdictions has recently been reviewed or is currently is under review.

In an interesting aside this situation contrasts with the Canadian situation where with a comparable Westminster based approach operates. The first full review of the audit practices of the Canadian National Audit Office was undertaken at their own request by an international team led by the Australian National Audit Office (ANAO) in 2009.⁷ Interestingly, the Canadians also appear to 'tolerate' an overall far more robust audit and reporting approach without formal oversight arrangements.⁸

My overriding assumption however remains that consistent with the generally stated approach to public sector accountability, viz not only to 'do the right thing but to be seen to do the right thing', independent statutory roles have the obligation to be exemplars in acquitting their accountability obligations. The debate is however around how this is done and whether there is a contradiction between the 'statutory independence' provisions and the nature and intensity of oversight arrangements.

It is critically important that independent statutory office holders should be allowed to undertake their roles without undue interference as they are 'personally' responsible for the role and 'individually' accountable in the normal sense through budgetary and annual reporting processes. In the accountability stakes, 'the buck stops' with the individual office holder. Oversight provisions are therefore additional to routine accountability provisions, and arguably should therefore be used purposefully and sparingly, in the absence of 'cause'.

Again drawing on the Canadian situation, they have taken a stronger line than practiced in Australia where with the exception of NSW, audit offices are staffed by public servants. In another respects my understanding is that in Australia audit offices are subject to the operational policies and accountability regimes (ie government administrative policies) applicable to the broader public sector. The Canadians have recorded that in the previous application of central government administrative policies, the need for managerial autonomy to protect their

⁴ A Matter of Independence-A History of the South Australian Auditor-General's Department, Government Printer, South Australia, 1990, P32-38

⁵ The Plain Truth, A History of the Queensland Audit Office, Robert Longhurst. Queensland Audit Office 1995, P25

⁶ In the Public Interest, 150 years of the Victorian Auditor-General's Office, Peter Yule, 2002, P 243

⁷ Serving Parliament Through a Decade of Change, Office of the Auditor General of Canada, 2011 P16

⁸ Waste Watchers – the Auditors General who won't let governments binge on our taxpayers dollars, John Lorinc, CA Magazine, May 2012, Canadian Institute of Chartered Accountants

independence is essential to their effectiveness and that they need to be independent of government and be perceived as such.⁹

Also in Canada, as in the United Kingdom, the practice is for Public Accounts Committees to be chaired by an opposition member. I therefore also speculate whether this has had an impact on the attitude to oversight of the Auditor-General.

The challenge therefore is how to decide what the appropriate level of oversight is.

My starting point is that decisions in this regard should consider three critical aspects, viz the legislative provisions relevant to the role, the maturity of the approach to the exercise of the role and the nature and significance of any concerns with the performance of the role.

Legislative provisions

In Victoria the *Constitution Act 1975* provides specifically for the Independence of the Auditor-General. Express identification as an independent officer of the Parliament is provided by section 94B (1) and further at subsection (6) the Auditor-General is afforded complete discretion in the performance or exercise of his or her functions or powers and, in particular is not subject to direction from anyone in relation to-

- (a) Whether or not a particular audit is to be conducted;
- (b) The way in which a particular audit is to be conducted;
- (c) The priority to be given to any particular matter.

Either by statute or convention these attributes are generally accepted across all Australian jurisdictions, and in Westminster based systems.

Complementing these 'positioning' provisions the *Audit Act 1994* provides that in undertaking audits, the standards made by the Australian Auditing and Assurance Standards Board 'must be applied'¹⁰. This act proceeds to prescribe consultative and procedural fairness steps that are to be followed.

These provisions are both unequivocal and the adoption of the auditing standards which are subordinate legislation to Australian Corporations Law, provide significantly more prescriptive parameters of operation than applicable to most other areas of public administration, other than the justice system.

Maturity of approach to the function

In terms of the independent external audit function there is a mature and well developed suite of Australian Auditing and Assurance Standards which Section 13 of the *Audit Act 1994* requires 'must be applied, as appropriate, in the performance of functions and exercise of powers in relation to audits or performance audits'. Consistent with these standards and practices developed by auditing practitioners a range of complementary procedures and controls have been established and are practiced by audit offices to assure the objectivity and quality of audit conclusions.

⁹ Serving Parliament Through a Decade of Change, P6

¹⁰ *Audit Act 1994* (Victoria), Section 13

These range from the professional need to adopt a methodology and approach to audit to assure consistency in the application of auditing standards, well developed evidentiary standards to be observed, the identification of an 'engagement leader' professionally responsible for each audit, an 'engagement quality control reviewer' for each audit, both with roles specified in the auditing standards, a strong system of peer reviewed quality assurance guided by the auditing standards. This on a sample basis, cyclically reviews the office approach and methodology, and the professional practice of engagement leaders, using professionals from other audit offices operating within a framework established by the Australasian Council of Auditors-General and which aligns with broader professional practice.

Arguably the auditing profession has one of the most developed approaches to standard setting and assurance of professional standards, with Australia being internationally acknowledged as being at the forefront professionally.

Nature and significance of any concerns with the performance of the role

Again using the Victorian legislation for illustrative purposes, there are a range of consultative provisions established including;

- (a) Requirement to consult with the Parliamentary Committee on a draft of each year's Annual Plan which is required to be tabled prior to the beginning of the financial year to which it relates¹¹
- (b) That in determining audit priorities the Auditor-General must confer with and have regard to any priorities determined by the Parliamentary Committee¹²,
- (c) The budget for each financial year is to be determined in consultation with the Parliamentary Committee concurrently with the Annual Plan¹³
- (d) In the case of Victoria only, there is also a requirement to consult with the Parliamentary Committee on each individual audit specification which sets out the objectives of the audit and any particular issues to be addressed for each individual performance audit¹⁴

In addition to these legislative based interactions there is the traditional 'Public Accounts Committee' interaction with the Auditor-General of following up audit reports. This is typically undertaken via a mix of correspondence and formal inquiry. Aside from the primary objective of holding accountable officers to account, this activity provides a very effective means of assessing the relevance and quality of the audit findings.

While follow up practice varies across jurisdictions, the Victorian example in the last Parliament (2006-2010), the Public Accounts and Expenditure Review Committee followed up approximately fifty per cent of audit reports by correspondence or inquiry. In the absence of adverse issues regarding the audit process or findings it seems reasonable to assume the test of relevance and quality of audit findings was met.

Express oversight

¹¹ *Audit Act 1994 (Vic)*, Section 7A

¹² *Ibid* Section 7D (1)

¹³ *Ibid* Section 7D (2)

¹⁴ *Ibid*, Section 15 (2)

Again using the Victorian example, audit legislation across Australia now generally provides, in addition to an annual financial audit of audit offices, for the Parliamentary Committee to be involved in arranging for a periodic performance audit of the Auditor-General and his or her office. There are two notable areas of interest in this regard.

First is the difference in approach to and focus of such performance audits when compared with the private sector approach undertaken by the Australian Securities and Investment Commission (ASIC)¹⁵ when it is assumed the overriding objective of such reviews is to provide assurance as to the quality (effectiveness) of the audit process.

The obvious difference in approach when the terms of reference and reports on respective sectors are examined is the obvious ASIC focus on applied aspects of audit quality with particular focus on the application of Australian Auditing and Assurance Standards. Perusal of the ASIC report shows a clear 'outcomes' focus with the report dealing with specifics of the audit task such as consideration of 'impairment testing and fair value measurement', evidence of the exercise of 'professional scepticism', 'appropriateness of audit evidence', etc.

By contrast perusal of public sector terms of reference and reports shows a focus on process and inputs with an emphasis on 'governance and planning', 'monitoring and managing performance', 'human resources management', etc in addition to higher level review of the 'conduct and management of audits' aspects¹⁶.

The second area of interest is the divergent approaches which have evolved across Australia in the approach to these performance audits of audit offices.

The differences are in approach with the Commonwealth taking an ongoing 'audit' approach by appointing the one person to undertake both the annual financial attest audit and an ongoing performance audit. The Act¹⁷ affords the Independent Auditor equivalent powers, responsibilities and indemnities to those of the Auditor-General, including the Section 43 provision that the Independent Auditor must, in performing or exercising his or her functions or powers, have regard to the audit priorities of the Parliament as determined by the Joint Committee of Public Accounts and Audit.

By contrast most states provide for a periodic and separate performance audit of the Auditor-General and the Auditor-General's Office.

Here however the approach and incidence varies markedly with for instance Queensland and the Northern Territory referring to a Strategic Review of the Audit Office¹⁸ to be undertaken by a person appointed by the Governor in Council after consultation with the Parliamentary Committee. Further such reviews are to be undertaken at least every five years in Queensland while the Northern Territory provides for the review is to be undertaken at least every three years¹⁹.

¹⁵ Audit inspection report for 2011-12, December 2012, Report 317, Australian Securities and Investment Commission, Australian Government

¹⁶ 117th Report to Parliament, Report on the Appointment of a Person to Conduct the Performance Audit of the Victorian Auditor-General and the Victorian Auditor-General's office Under section 19 of the Audit Act 1994, June 2013, No 239, Session 2010-13, Government Printer for the State of Victoria

¹⁷ Auditor-General Act 1997 (Commonwealth), Part 7, Sections 41-49

¹⁸ Auditor-General Act 2009 (Queensland), Part 4, Section 68-

¹⁹ Audit Act (Northern Territory), Part 5, Sections 26-28

Another variation is the approach provided for in NSW²⁰ and Victoria²¹ where the respective parliamentary committees are to appoint a reviewer/performance auditor. In NSW the review is to be conducted at least once every four years whereas in Victoria the review is to be at least once every three years. In NSW the Act sets the review objective as ‘to examine the auditing practices and standards of the Auditor-General and to determine whether the Auditor-General is complying with those practices and standards in the carrying out of the Auditor-General’s functions under this Act’.

In Victoria the Audit Act in addition to defining the purpose of the audit as ‘to determine whether the Auditor-General and the Victorian Auditor-General’s Office are achieving their objectives effectively and doing so economically and efficiently and in compliance with this Act’, provides that the auditor ‘in conducting the audit, must comply with directions as to the audit given by the Committee.’²²

A further variation in approach is evident in Western Australia with the approach appearing more holistic. While appointing an independent auditor to undertake the annual financial and performance reporting attest audit, the ‘performance review’ of the audit office is provided for as part of a broader ‘review’ of the Act.²³ This ‘review of the operation and effectiveness of this Act’ is to be undertaken as soon as practicable after the fifth anniversary of its commencement. The provisions relate to a ‘performance and legislative review’. While ‘the performance of the Auditor General’s functions by the Auditor General and the OAG’ is included it is as part of a wider review. Interestingly also this legislation explicitly provides for the Joint Standing Committee on Audit to consult with the Auditor General before appointing the reviewer and determining the terms of reference to be given to the reviewer. This is a practice notably absent from most other audit legislation.

What does all this mean?

Essentially there has been a relatively rapid ‘evolution’ of the oversight arrangement across Australian jurisdictions since the 1980s. Opinion will undoubtedly vary on ‘why’ this has occurred however drivers appear to range across external factors and perceptions by the Executive ‘of the day’ as to the ‘appropriateness’ of audit findings and ‘nature’ of reporting. I am not aware of any particular actual shortcomings in the audit processes having been identified. Further I note that audit opinions that were subject to concern and criticism in the past, most notably the audit view regarding recognition of lease arrangements, have effectively been vindicated by subsequently promulgated accounting standards. Tentatively therefore it can be concluded that there have been a range of influencing factors ranging from ‘executive’ perceptions regarding audit findings and the ‘flow on’ effect of the establishment of further independent accountability roles such as Ombudsmen and corruption commissions, the latter certainly driving the escalation of oversight mechanisms notwithstanding the very different focus. Ie audit relating to resource management and administrative systems whereas corruption commissions focus on individuals and criminality.

The end result however is that notwithstanding a common legislative and generally accepted convention and precedent for the independent Auditor-General role; and the overwhelmingly reliable use of the very comprehensive and well developed auditing and assurance standards by

²⁰ Public Finance and Audit Act 1983 (NSW), Section 48A

²¹ Audit Act 1994 (Victoria), Section 19

²² Audit Act 1994 (Victoria), Section 19 (3) (b)

²³ Auditor General Act 2006 (Western Australia) Section 48

Auditors-General, a fairly 'close' system of oversight has developed, particularly across the larger state jurisdictions in Australia.

Equally once provisions are included in legislation historical experience indicates it is unlikely they will be removed or reduced. Therefore the most productive way forward appears to be to focus on how to make these respective audit and oversight functions operate in a complementary, constructive and cost effective manner so the primary role is achieved and in the most cost effective way for the taxpayer. In this way the shared overriding objective of auditors and Public Accounts Committees of facilitating the Parliament in being able to 'hold the executive to account' can be purposefully achieved.

Better practice oversight

In terms of an appropriate level and intensity of oversight, the Commonwealth approach would seem to represent better practice. The subjecting of the audit function to the same level of independent external financial and performance audit at the discretion of an appointed professional, though specifically oversighted by a parliamentary committee, as that to which the rest of the public sector receives seems logical. This audit is informed of the audit priorities of the Parliament in the same way as the Auditor-General is informed in relation to his or her audit of the broader public sector. Similarly any report of the independent auditor could be followed up by the parliamentary committee in the same way as occurs in relation to reports by the Auditor-General in relation to the wider public sector.

This on top of the contextual situation of an audit office operating as an audit practice applying Australian Auditing and Assurance Standards which provide a far more objective basis of assessing performance than available for the public sector more generally should serve to assure the Parliament whether an audit office is achieving its objectives effectively and doing so economically and efficiently.

In this context, and by comparison, the periodic review approach appears more of an 'inquiry' approach which is normally adopted on an exception basis after a problem or 'exception' issue has arisen.

Accordingly in a strategic sense there would be merit in at least raising this consideration when audit legislation is reviewed.

A further consideration in a strategic sense is that across Australia the practice is generally for the 'Public Accounts committee' to both oversight the Auditor-General and to follow up the reports of the Auditor-General. Given the evolution of the oversight role and current day standards regarding conflicts of interest, consideration might also be warranted of the Westminster approach of separating these roles with separate committees. The UK approach is to have a Public Accounts Commission for the appointment and oversight role and a Public Accounts Committee for the follow up role.

Given the number of 'independent accountability' roles now in place, it may also be time for Parliaments to review their approach to 'oversight' and 'follow up' functions and introduce more discrete functional approaches.

Enhancing oversight

Acknowledging the current situation however, what can be done to achieve respective objectives while facilitating more effective oversight?

Here I believe greater attention to the now well established generally accepted practice in relation to 'performance assessment' and more engaging consultation warrants attention. Essentially this would involve working even harder at achieving a 'mature and meaningful' engagement and 'open' communication between the Auditor-General and the parliamentary committee.

Applying these principles to the oversight task, particularly in the environment of periodic reviews and audits, could productively involve establishing in advance, and in practical application detail, the objectives against which performance is to be assessed and the criteria which are to be applied. The reference to 'achieving objectives' generally mentioned in legislation is quite broad and subject to considerable interpretation. Achieving clarity on the attributes of the objectives and the nature of the criteria to be applied at the outset would be beneficial to both parties and likely lead to more effective operations of the audit function, and of the oversight.

Further, audit offices, with their legislated role performed in accordance with authoritative standards and methodologies, lend themselves to the development of meaningful performance reports which could largely be subjected to an attest audit. This offers a fruitful area for development and offers the opportunity for the development of more comprehensive and transparent reporting on performance.

Legislation relating to performance reviews/audits varies in whether consultation with the Auditor-General is required. Where there is not a requirement mandated it would be better practice if this occurred regardless as this reflects contemporary generally accepted practice and should lead to reducing avoidable conflicts. A better understanding of the operating environment and priorities of the auditor should also lead to more focussed terms of reference and more relevant assurance being obtained from the investment being made in the performance audit. At worst it would bring to attention up front any differences of view for more objective consideration.

Conclusion

To return to the 'remit' for this presentation, is it time for more comprehensive codification for the oversight of independent statutory roles. In this paper I have sought to both articulate the reason for the oversight and to relate this to the context as a means of establishing an appropriate level of oversight; commensurate with the role, and the risk.

Clearly independent statutory roles need to be accountable and subject to Parliament's scrutiny. This is an undisputed given.

The case study of the Auditor-General role however shows significant variability in approach in relation to a core function. Further there generally does not appear to be an evident rationale for the intensity of the approach being used nor in some respects does there seem an adequate 'guard' against intrusion into the incumbent's exercise of their statutory role.

Therefore the challenge is more one of establishing a clear understanding of the rationale for the oversight, establishing an appropriate approach and then applying that consistently, rather than per se more codification. From a 'subject practitioner' perspective there certainly appears scope

for more 'measure' in the focus and incidence of oversight so the level of oversight reflects the circumstance.

Important roles, central to the integrity of our system of government, are being dealt with and therefore it is critically important that an appropriate balance be achieved. The framework needs to be robust yet also allow the office holder to acquit his or her responsibilities without undue interference with their legislative remit or management prerogative.

My view is that the current situation within each jurisdiction will individually have a 'legitimate' rationale however with hindsight invariably the approach could be improved upon by both legislative and administrative initiatives. Every opportunity to achieve this should be used.

At the principle level I believe there would be merit in Parliaments at least re-visiting their approach to oversight. The alternative of a more co-ordinated and functional approach to oversight of Independent Statutory Roles should provide for a more rigorous, focussed and consistent approach while also recognising differences in respective independent statutory officer roles. There is now a range of Independent Statutory Bodies indicating a 'base load' now exists for considering the merits of a single oversight parliamentary committee to 'free up' the current 'related' committees to primarily focus on the operational deliverables of the respective independent statutory roles. This would better assure the necessary level of parliamentary attention to, and follow up of the work and reports of these independent statutory roles.

Functional familiarity in the context of oversight could be maintained via overlapping membership of the oversight committee and the respective functional committees. An obvious benefit of this approach would be that a more informed and focussed approach to oversight would be achieved. It is also more likely the fundamentally important functional relationship with the respective parliamentary committee, the Public Accounts Committee in the case of the Auditor-General, would be easier to achieve and at the same time reduce scope for conflicts and unintended impacts on the Independent Statutory Role.

A further consideration, at least in the case of Auditors-General, where there are well established internationally based standards of professional practice and where all completed work is actually tabled in Parliament, is whether a more relevant oversight approach would be a more routine, less intrusive approach. This could entail more comprehensive performance reporting which in turn could be subject to attest audit in a manner similar to annual financial reporting, with in depth performance audits and inquiries being used on an exception basis rather than on a time cycle basis as currently generally applies.

In current circumstances and without the need for formal action, there also appears clear opportunity regardless for more open and purposeful consultation in undertaking the oversight role. This would undoubtedly lead to a better understanding of respective contexts, considerations and objectives. Mature and engaged consultation does not diminish objectivity, such an approach offers greater prospect of less resource intensive yet more informed oversight and less chance of oversight activities impacting on audit operations and management initiatives.

In closing, I thank the Australian Study of Parliament Group for this opportunity to canvas my perspective and views. I hope this contributes to advancing the relevance, appropriateness and quality of oversight activities.