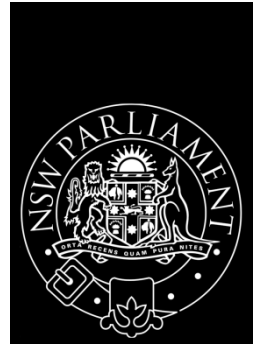


LEGISLATIVE ASSEMBLY



# Public Accounts Committee

## Issues Arising from the Premature Release of Draft Auditor-General's Reports

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## Membership and staff

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|                        | Mr Paul McLeay MP, Member for Heathcote (until November 2009)  |
| <b>Members</b>         | The Hon Grant McBride MP, Member for The Entrance  |
|                        | Mr Peter Draper MP, Member for Tamworth  |
|                        | Mr Ninos Khoshaba MP, Member for Smithfield  |
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|                        | Mr John Turner MP, Member for Myall Lakes  |
|                        | Mr Victor Dominello MP, Member for Ryde (from March 2010)  |
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## Terms of reference

### **Public Finance and Audit Act 1983**

#### **57 Functions of Committee**

(1) The functions of the Committee are:

...

- (c1) to examine any report of the Auditor-General laid before the Legislative Assembly,
- (d) to report to the Legislative Assembly from time to time upon any item in, or any circumstances connected with, those financial reports, reports or documents which the Committee considers ought to be brought to the notice of the Legislative Assembly...

## Chair's foreword

The leaking of confidential information from government agencies or ministerial offices to the media is problematic and is usually linked to political agendas. The Committee was concerned to see a draft report of the Auditor-General leaked in this fashion.

While the Committee did not inquire into the particulars of the leak, the Committee does not question the integrity or professionalism of the Auditor-General or his staff. I share the concerns of the Auditor-General that recipients of the draft report have breached a confidential process that is undertaken pursuant to the *Public Finance and Audit Act 1983* (the Act).

The Committee supports the Auditor-General in pursuing an amendment to the Act and has recommended that it be an offence for any recipient of a draft report to disclose or reproduce any part of a draft report prior to it being tabled in Parliament.

The media is not innocent in all this. Journalists will no doubt argue that they are acting in the public interest by disclosing information contained in draft reports. However, the premature disclosure by the press undermines the statutory requirements and natural justice principles which ensure agencies subject to an audit are able to check the facts and make a response to the findings and recommendations before the report is released. Accordingly, it is difficult to argue that the premature release was in the public interest.

Without specifically limiting the freedom of the press, I hope that an amendment to the *Public Finance and Audit Act 1983* will deter people from leaking information contained in draft reports of the Auditor-General and uphold the Parliament's right to have the Auditor-General report to it before the information is disclosed by the media.



Paul Gibson MP  
Chair

## List of recommendations

### **RECOMMENDATION 1**

That the Government require all public sector departments and agencies to review their current arrangements in relation to the storage, management and transmission of confidential documents in their control. Additionally, all departments and agencies should make necessary improvements to their document control systems to ensure complete safeguarding and security of all such documents. This can be achieved through a new Premier's Memorandum and the provisions of the Model Code of Conduct for NSW Public Agencies.

### **RECOMMENDATION 2**

That the *Public Finance and Audit Act 1983* be amended to make it an offence for recipients of draft audit reports to disclose or reproduce any part of the report prior to it being tabled in the Parliament of New South Wales. The penalty for this offence should be the same as that for offences under section 38 and the Committee recommends that the penalty for these offences should be 50 penalty units.





# Chapter One - Background to the Inquiry

## INTRODUCTION

- 1.1 On 29 May 2010, excerpts from a draft performance audit report of the Auditor-General were published in *The Sydney Morning Herald*. The premature release of a draft report is of concern to the Committee and to the Auditor-General. It is rare for a draft report of the Auditor-General to be leaked. The leak of the draft performance audit report on the V8 Supercars is the first under the current Auditor-General's tenure.
- 1.2 The Committee held a private meeting with the Auditor-General to discuss the leaked report and internal security measures in place to protect the integrity of information in draft reports. Discussion also focused on the safeguards, if any, in place to ensure draft reports provided to third parties are treated with discretion.
- 1.3 The Committee resolved to conduct an inquiry to examine issues arising from the premature release of draft Auditor-General's reports, with particular reference to whether the provisions of the *Public Finance and Audit Act 1983* (the Act) and safeguards currently in place are sufficient to ensure the integrity of draft reports.
- 1.4 The Committee undertook this inquiry in accordance with Section 57(1)(d) of the *Public Finance and Audit Act 1983*, which provides that the functions of the Committee extend to reporting to the Legislative Assembly on any circumstances connected with reports tabled by the Auditor-General which the Committee considers should be brought to the notice of the Legislative Assembly.
- 1.5 The Committee has not conducted an inquiry into the particulars of the leaked report. It has focused its attention on the adequacy of measures in place to prevent the leaking of draft reports of the Auditor-General in the future, with particular reference to the provisions of the *Public Finance and Audit Act 1983*.

## DISTRIBUTION OF DRAFT REPORTS OF THE AUDITOR-GENERAL

- 1.6 The Auditor-General has statutory, professional and natural justice obligations to distribute and discuss audit reports prior to finalisation and tabling in Parliament. The Audit Office consults with the organisations audited in order to verify the accuracy and completeness of facts presented in its audits as well as to give departments and agencies an opportunity to prepare responses to recommendations. The agency's response is included as part of the tabled report.
- 1.7 The relevant statutory provisions within the *Public Finance and Audit Act 1983* are:
  - Section 38C – performance audits – requiring the Auditor-General to distribute the proposed report to the Heads of agencies, responsible Ministers and the Treasurer; and wait for up to 28 days for a response for inclusion in the report.
  - Sections 52(3) and (4) – financial audits and related reports – requiring the Auditor-General to report on the Total State Sector Accounts, the financial reports of individual authorities, and any matters arising from audits or the exercise of other functions; and allowing the Auditor-General to provide the proposed report to the Head of each authority for comment that may be included in the report.

Background to the Inquiry

Section 52E – protected disclosures or complaints – allowing the Auditor-General to report on investigations to authorities and Ministers, and include their comments in reports to Parliament.<sup>1</sup>

- 1.8 The Auditor-General has also advised that there is a professional obligation to comply with Australian auditing and assurance standards, with respect to communicating with agencies being audited. These professional requirements are:

For financial engagements, communication is required with those charged with the governance of entities. Reference to this is made in Auditing Standards ASA 260 and ASA 265.

For performance audits, communication is required with the responsible party (agency) before reporting to the intended user (Parliament). See Assurance Standard ASAE 3500 paragraphs 28, 66 and 70.<sup>2</sup>

## **CIRCUMSTANCES SURROUNDING THE PREMATURE RELEASE OF THE DRAFT PERFORMANCE AUDIT REPORT IN THE MEDIA**

- 1.9 The Auditor-General tabled the Performance Audit Report on Government Investment in V8 Supercar Races at Sydney Olympic Park on 23 June 2010. Excerpts from the draft report were published a month earlier in *The Sydney Morning Herald* on 29 May 2010.

- 1.10 The Auditor-General advised the Committee that the Deputy Auditor-General had undertaken an internal investigation following the leak:

It found no irregularities with the distribution of the V8 draft reports by Audit Office staff. The reports were hand delivered to Ministers' and heads' of agency office addresses, and emailed to the heads of the key agencies and liaison officers within those agencies.<sup>3</sup>

- 1.11 The Committee does not question the professionalism of the Auditor-General or his staff and notes the unavoidable security risks associated with the statutory obligations, which require the Auditor-General to provide the Head of the authority subject to the audit, the responsible Minister and the Treasurer a summary of the findings and proposed recommendations.

- 1.12 The Auditor-General noted in the report:

All my reports are distributed for comment and clearly marked confidential. This is Audit Office practice and meets the requirements of natural justice. Unfortunately, there was a breach of this confidential government process by persons unknown. I intend to pursue an amendment to the *Public Finance and Audit Act* to make this an offence.<sup>4</sup>

- 1.13 The Committee is of the view that consideration should be given to the Auditor-General's request for an amendment to the *Public Finance and Audit Act 1983*. This is discussed further in Chapter Two.

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<sup>1</sup> Submission from the Auditor-General, p. 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> Submission of the Auditor-General, p. 3.

<sup>4</sup> New South Wales Auditor-General's Report Performance Audit, *Government Investment in V8 Supercar races at Sydney Olympic Park*, June 2010, p ??

## Chapter Two - Mechanisms to maintain the confidentiality of draft reports

### STATUTORY AND PROFESSIONAL REQUIREMENTS FOR AUDIT OFFICE STAFF

- 2.1 There are statutory, professional and administrative requirements relating to maintaining the secrecy or confidentiality of information arising from audits undertaken. Section 38 of the *Public Finance and Audit Act 1983* provides:
- (1) The Auditor-General, an auditor and an authorised person shall preserve and aid in preserving secrecy with respect to all matters and things that come to the knowledge of the Auditor-General, auditor or authorised person in the exercise of the functions of the Auditor-General, auditor or prescribed person under this Act and the prescribed requirements and shall not communicate to any person any such matter or thing.
  - (2) Nothing in subsection (1) applies to or in respect of:
    - (a) the conduct of any matter necessary for the proper administration of this Act or the prescribed requirements, or
    - (b) proceedings for an offence relating to public money, other money, public property or other property or for the recovery of public money, other money, public property or other property, or
    - (c) disciplinary proceedings brought against an officer of an authority, or
    - (d) a report or communication authorised or required to be made by or under this Act or the prescribed requirements, or
    - (e) a report or communication that the Treasurer authorises the Auditor-General to make to a person for the purposes of a due diligence or similar process relating to the sale of any government undertaking.
- 2.2 Section 62 of the Act makes it an offence to contravene or fail to comply with any provision of the *Public Finance and Audit Act 1983*. The penalty for a contravention or failure to comply shall not exceed 20 penalty units or \$2,200.
- 2.3 The Auditor-General also advised that professional requirements demand ethical practices based on the standard APES 110 – Code of Conduct for Professional Accountants. He notes:
- The code includes confidentiality as a fundamental principle. The ethical requirements are referenced in the quality control requirement of standards ASQC 1/APES 320, and ASAs 102, 200 and 220, and ASAE 3500.<sup>5</sup>

### INTERNAL SECURITY MEASURES

- 2.4 To give effect to the statutory and professional requirements noted above, there are a number of internal security measures in place at the NSW Audit Office to protect the integrity of information contained in draft reports.

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<sup>5</sup> Submission from the Auditor-General, p. 2.

Mechanisms to maintain the confidentiality of draft reports

- 2.5 The Auditor-General has advised that the office accommodation is secure with staff gaining entry to the two floors via the use of electronic security cards. Access to individual computers and the computer network is password protected.
- 2.6 The Code of Conduct for Audit Office staff requires them to manage all information owned and held by the Office in a professional manner. It stipulates that staff:  
...must comply with the *Public Finance and Audit Act 1983* which requires that I do not divulge or communicate to any person outside the Audit Office any information obtained during the course of an audit other than is necessary to meet the requirements of the Act. Official information must remain confidential and is not to be used to gain personal advantage. This continues to apply after leaving the Audit Office.<sup>6</sup>
- 2.7 New staff are required to sign the Code of Conduct and the induction program for staff includes instruction on the secrecy and confidentiality provisions of the Act. In addition, a Statement of Independence, which reinforces these statutory and professional obligations is signed annually by all staff.<sup>7</sup>
- 2.8 Breaches of the Code of Conduct are dealt with under the Office's Disciplinary Policy. The Auditor-General has advised that this policy applies the Premier's *Guidelines for Managing Conduct and Performance*, which are derived from the provisions of the *Public Sector Employment and Management Act 2002*. Disciplinary actions that can be taken include a reprimand, a fine, a direction to the officer to resign, or dismissal.<sup>8</sup>
- 2.9 The Auditor-General advised the Committee that to his knowledge there has not been any disciplinary action taken by the Office in relation to the mishandling of confidential information.

## **REQUIREMENTS OF THIRD PARTIES WHO RECEIVE DRAFT AUDIT REPORTS AND OTHER SAFEGUARDS IN PLACE**

- 2.10 All public sector employees in New South Wales have an administrative responsibility to comply with staff codes of conduct. Premier's Memorandum 1997-10 *Model Code of Conduct for NSW Public Agencies* instructs the heads of agencies to implement codes of conduct consistent with the model. The model contains a section on protecting confidential information.
- 2.11 Accordingly, staff within government agencies that are in receipt of draft audit reports are subject to confidentiality provisions within their respective codes of conduct and are subject to disciplinary measures for breaches of the code.
- 2.12 The Committee accepts that there are requirements on third parties who receive draft audit reports to ensure the information contained in those reports remains confidential. However, it is concerned that it is often difficult to ascertain the source of leaks of confidential information. Accordingly, it is often difficult to take disciplinary action. The Committee considers that Government has a responsibility to ensure that departments and agencies have appropriate controls and processes in place to ensure the confidentiality of draft reports. Such controls would include having a

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid*, p 3.

central point to manage documents, measures to control the transmission of these documents, and procedures to store documents.<sup>9</sup>

## RECOMMENDATION 1

That the Government require all public sector departments and agencies to review their current arrangements in relation to the storage, management and transmission of confidential documents in their control. Additionally, all departments and agencies should make necessary improvements to their document control systems to ensure complete safeguarding and security of all such documents. This can be achieved through a new Premier's Memorandum and the provisions of the Model Code of Conduct for NSW Public Agencies.

- 2.13 In addition to administrative requirements, the Auditor-General has a number of safeguards in place when distributing draft reports. He has advised the Committee that all draft reports specify that they are confidential and that the responses provided are part of the process leading to the tabling of the report in Parliament.<sup>10</sup>
- 2.14 Following the leaking of the draft report on the *V8 Supercars* the Audit Office is "looking at improving the clarity of statements accompanying draft reports and increasing the visibility of the confidential markings on draft reports."<sup>11</sup>
- 2.15 The Committee considers that in reviewing its current practices for distributing draft reports that the Auditor-General consider the practices in other jurisdictions. For example, in Canada the accompanying letter sent by the Auditor-General with draft reports outlines a number of safeguards:
- ...that the report be treated with appropriate discretion until it is tabled in the House of Commons, that the report should not be copied, and that all copies should be returned to the [Office of the Auditor-General] OAG or destroyed. Each copy is numbered to facilitate tracking and retrieval.<sup>12</sup>
- 2.16 While strengthening the safeguards in place to ensure third parties maintain the confidentiality of draft reports will assist in ensuring draft reports are not prematurely disclosed, the Committee believes that more should be done.
- 2.17 The Auditor-General notes that currently the secrecy provisions of the *Public Finance and Audit Act 1983* apply only to the Auditor-General and his staff. He argues that the application of these secrecy provisions should be expanded to include recipients of draft reports.<sup>13</sup>
- 2.18 The majority of jurisdictions across Australia have specific statutory provisions that make it an offence for third parties to disclose information provided to them on a

<sup>9</sup> See the House of Commons, Canada, Report of the Standing Committee on Public Accounts, *The Premature Release or Leaking of Reports of the Auditor-General to the Media before their presentation in the House of Commons*, May 2007, p 3.

<sup>10</sup> Submission from the Auditor-General, p. 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> See the House of Commons, Canada, Report of the Standing Committee on Public Accounts, *The Premature Release or Leaking of Reports of the Auditor-General to the Media before their presentation in the House of Commons*, May 2007, p 2.

<sup>13</sup> Submission of the Auditor-General, p. 3.

Mechanisms to maintain the confidentiality of draft reports

confidential basis in relation to audits conducted. For example, Section 20A(2) of the *Audit Act 1994* (Vic.) provides:

(2) A person who receives a proposed report, or part of a proposed report, of the Auditor-General under this Act must not disclose any information contained in it except—

(a) in the course of performing the person's official duties; or

(b) after the information has been made public in a report of the Auditor-General.

Penalty: 50 penalty units, in the case of a natural persons, 250 penalty units, in the case of a body corporate.

2.19 Section 46(4) of the *Auditor-General Act 2006* (WA) similarly makes it an offence to communicate information in a draft report or copy or reproduce any part of a draft report. It provides that any person that is given a summary of a report of the Auditor-General prior to its release must not:

(a) communicate any information as to those matters to any person; or

(b) copy or reproduce any part of the summary of findings, except as may be necessary in connection with making submissions or comments to the Auditor-General... or obtaining legal advice as to those matters.

Penalty: a fine of \$50,000.<sup>14</sup>

2.20 The Commonwealth legislation applies a penalty of imprisonment for two years for breaches of the confidentiality provisions.<sup>15</sup>

2.21 The Committee is concerned that New South Wales is one of only a few Australian jurisdictions that do not have specific statutory provisions that make it an offence for third parties to disclose a copy or summary of a draft Auditor-General report provided to them in accordance with legislation. The Committee agrees with the Auditor-General that the *Public Finance and Audit Act 1983* should be amended to make it an offence for recipients of draft audit reports to disclose the information contained in them.

2.22 The Committee considers that the penalty for the proposed offence of disclosing a copy or summary of a draft report should be the same as that for the offence of the Auditor-General, auditor or authorised officer disclosing information under section 38. The penalty for this offence is 20 penalty units, which is currently \$2,200. The Committee considers that 50 penalty units, as applied in Victoria, is a more appropriate penalty level

## RECOMMENDATION 2

That the *Public Finance and Audit Act 1983* be amended to make it an offence for recipients of draft audit reports to disclose or reproduce any part of the report prior to it being tabled in the Parliament of New South Wales. The penalty for this offence should be the same as that for offences under section 38 and the Committee recommends that the penalty for these offences should be 50 penalty units.

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<sup>14</sup> See also Section 53 of the *Auditor-General Act 2009* (Qld); and Section 46(4) of the *Audit Act 2008* (Tas).

<sup>15</sup> See Section 36 of the *Auditor-General Act 1997* (Cth).

## OTHER COMMENTS

- 2.23 The Committee also considered what action could be taken to deter the media from prematurely releasing information contained in draft reports. There are secrecy provisions in many pieces of legislation across Australian jurisdictions that require persons who have access to that information to ensure that it is kept confidential. However, very few make it an offence for the media to publish any confidential material that is leaked to them and these tend to be related to the security and defence of the nation. For example, under the *Crimes Act, 1914* (Cth) a Commonwealth officer is guilty of an offence if he or she communicates information (which that person has a duty to treat as secret) to someone who is not authorised to receive it (Section 79). A journalist who receives such information and publishes it is guilty of an offence if he or she had reason to believe it was communicated in contravention of this provision.
- 2.24 The Committee appreciates that the leaking of a draft audit report should not be treated with the same gravity as the leaking of official secrets. However, it is concerned about the general disregard the media has for confidential material. While the freedom of the press is an important part of any democracy, this freedom should not be used irresponsibly.
- 2.25 The Committee is of the view that an amendment to the *Public Finance and Audit Act 1983*, which makes it an offence for any person, including journalists, who have been given a copy of the summary or findings of an audit prior to its release to disclose the information, will be an important measure in deterring leaked reports.

## CONCLUSION

- 2.26 The Auditor-General is obliged under the *Public Finance and Audit Act 1983* to report to Parliament. The leaking of information contained in draft audit reports disregards the Parliament's primacy in relation to the receipt of Auditor-General's reports and undermines parliamentary sovereignty.
- 2.27 It is accepted that in accordance with statutory, professional and natural justice principles the Auditor-General is required to provide those agencies that have been audited with an opportunity to comment on the draft report prior to it being tabled. This is to allow those agencies to verify the accuracy of information contained in draft reports and to provide a response to the audit's finding and recommendations.
- 2.28 There are unavoidable security risks associated with this process. The Committee is of the view that adequate procedures should be in place to ensure that draft reports remain confidential and that specific offences should apply to the disclosure of the information contained in those reports. The Committee has recommended that the Government require all agencies to have in place appropriate controls and processes to ensure the confidentiality of information held by them. It was furthermore recommended that the *Public Finance and Audit Act 1983* be amended to make it an offence for all recipients of draft reports to disclose or reproduce any part of the report prior to it being tabled in Parliament. It is hoped that this amendment will deter persons from leaking draft reports of the Auditor-General in the future.

# Appendix One – Submissions

NSW Audit Office – 5<sup>th</sup> July 2010.