

COMMISSIONED BY THE VICTORIAN AUDITOR GENERALS OFFICE

# Independence of Auditors General

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A survey of Australian and New Zealand Legislation

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# **Independence of Auditors-General: A survey of Australian and New Zealand legislation**

## **Government Integrity Systems**

Despite its periodic difficulties, Australia is generally regarded as one of the stronger nations in terms of the integrity systems applicable to government.

The US-based organisation Global Integrity ranked Australia third in its 2004 Public Integrity Index<sup>1</sup>, an investigative report that tracked corruption, openness and accountability in 25 countries.

Although Australia was ranked highly in these areas, the legislature's ability to hold the Executive and the public sector to account in this country is still perceived as having some weaknesses. Moreover the changing relationship between government and the public sector has profoundly affected the traditional accountability of Ministers to the legislature.

Among the factors considered by Global Integrity, and contributing to the overall conclusion, were Australia's very strong oversight and regular two mechanisms (ranking third) and the strong electoral and political processes (ranking eighth) in their assessment. The presence of an independent Auditor General who is generally beyond the reach of partisan politics and who perform their tasks independently is seen as a significant contributor to the overall integrity of the system.

Global Integrity also sees it to be important that in both law and in practice, the independent oversight officers are:

- appointed in a way that supports independence;
- protected from removal without relevant justification;
- protected from political interference;
- have a professional, full-time staff and receive regular funding; and
- make regular reports to the legislature.

The Organisation for Economic Corporation and Development (OECD) noted in a 2005 Policy Brief<sup>2</sup>, that new forms of public sector management, privatisation and new technologies have not only changed the way the public sector operates, but have also created a need for new ways of making both agencies and governments accountable for what they do.

The OECD noted that some of the most significant amongst recent changes to accountability mechanisms have been to secure the independence of auditors as well is to reinforce the links between the audit office and the legislature. If there is a constitutional or statutory level, most Supreme Audit Institutions (SAI) are now independent of the Executive. In a number of countries, the audit officers have been made independent Officers of the Parliament.

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<sup>1</sup> *Global Integrity Country Report: Australia*. Center for Public Integrity, 2004

<sup>2</sup> *Public Sector Modernisation: Modernising Accountability and Control*. Organisation for Economic Cooperation and Development, April 2005.

The need for more direct reporting by public auditors to the Parliament and for arrangements that better ensured their independence from government was recognised in the middle of the last century but it was not until 1983, when the *National Audit Act 1983* was passed<sup>3</sup>, that the Comptroller and Auditor General (C&AG) of the United Kingdom was given the express power to report to Parliament at his or her own discretion.

It is perhaps significant that the bill that became the *National Audit Act* was not introduced by the Government of the day. It was originally a private member's bill, although it commanded wide all-party support.

Under the *National Audit Act*, the C&AG formally became an Officer of the House of Commons, to be appointed by the Crown, but in consultation with the Chairman of the Public Accounts Committee (PAC). The C&AG holds office during good behaviour and can only be dismissed following resolutions of both Houses. The *National Audit Act* also established the National Audit Office (NAO), a statutory independent body, separate to the civil service, with staff employed directly by the C&AG.

The *National Audit Act* gave the C&AG complete discretion over discharge of functions, but in determining to carry out an audit examination, he or she must take into account any proposals made by the PAC. The legislation also cemented the C&AG's accountability relationship with the Parliament by creating a statutory Public Accounts Commission to oversee the budget of the NAO and to appoint its auditor. It consists of the Chairman of the PAC, the Leader of the House (a Cabinet Minister) and seven other MPs (none of whom can be Ministers).

The model developed to ensure the accountability and independence of the C&AG in the United Kingdom has been widely recognised as having the essential characteristics of an independent Officer of the Parliament. These are:

- Parliamentary involvement in appointment and dismissal;
- a statutory committee which is responsible for budget oversight and approval;
- a specific select committee to which the Officer is bound to; and
- staffing independent of the civil service.

These characteristics are now seen as the benchmark for independent oversight officers and have been widely adopted (with some significant variations) for use in many other jurisdictions and for a range of oversight officers.

The independence of Auditors General continues to be the subject of considerable attention in many jurisdictions. The factors affecting their independence have also been the subject of comprehensive comparative studies.

## **International Organization of Supreme Audit Institutions**

In 2001, the International Organization of Supreme Audit Institutions (INTOSAI) published the Task Force report on results of an extensive survey of the Supreme Audit Institutions (SAIs) in 113 of its

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<sup>3</sup> *History of the National Audit Office*, National Audit Office (UK), 2006.

non-European member States<sup>4</sup>. In 2004, the National Audit Office in the United Kingdom published the results of a more recent survey of all 25 State Audit Institutions in the European Union and the European Court of Auditors<sup>5</sup>.

These surveys noted the following groups of safeguards as being important to the independence of SAIs:

- Constitutional/statutory guarantees of independence;
- Functional/operational independence;
- Freedom of reporting;
- Financial autonomy; and
- Managerial/administrative autonomy.

## **Mexico Declaration on SAI Independence**

The XIX Congress of the International Organization of Supreme Audit Institutions (INTOSAI) meeting in Mexico recognised eight core principles in the *Mexico Declaration on SAI Independence*<sup>6</sup> as being essential requirements for proper public sector auditing. These are:

1. The existence of an appropriate and effective constitutional/statutory/legal framework and of de facto application provisions of this framework
2. The independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties
3. A sufficiently broad mandate and full discretion, in the discharge of SAI functions
4. Unrestricted access to information
5. The right and obligation to report on their work
6. The freedom to decide the content and timing of audit reports and to publish and disseminate them
7. The existence of effective follow-up mechanisms on SAI recommendations
8. Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources.

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<sup>4</sup> *The Independence of SAIs – Final Task Force Report*. International Organization of Supreme Audit Institutions, 2001.

<sup>5</sup> *State Audit in the European Union*. National Audit Office (UK), 2004.

<sup>6</sup> *International Standards of Supreme Audit Institutions ISSAI 10 Mexico Declaration on SAI Independence*, International Organization of Supreme Audit Institutions [www.issai.org](http://www.issai.org)

## Independence Safeguards in Australian and New Zealand legislation

As noted in INTOSAI's first Principle of independence, the existence of an appropriate and effective constitutional/statutory/legal framework and of de facto application provisions of this framework is fundamental to establishing and preserving the independence of an Auditor General.

In most jurisdictions, the legislative framework typically includes various independence safeguards designed to protect an Auditor General from undue Executive influence.

A recent study<sup>7</sup> of the independence of the Australian Auditor General found that, notwithstanding formal regulation designed to assure independence, there remain many avenues by which the Executive could influence an Auditor General.

However, jurisdictions vary greatly in the types of safeguards they have adopted. The present study aimed to identify and compare the range of independence safeguards that exist for Auditors General in the legislation<sup>8</sup> governing Auditors General for the Australian Commonwealth, States and Territories, and for New Zealand.

## Ranking of Independence Factors

Sixty key 'independence factors' or legislative components were identified that were relevant to the Independence Principles outlined in the INTOSAI Declaration.

Because of the differences in the construction of legislation between jurisdictions it was necessary to make an assessment of how or whether the factor was addressed in the legislation.

No attempt was made to weight the factors in terms of their relative importance to independence but each factor was ranked on the extent to which it is removed from the control of Executive Government according to the following scale:

0. **Silent or Executive decides** -- the legislation is either silent about the factor or the factor is under the direct control of the Executive or of the Governor.
1. **Parliament consulted** -- the Executive is required to consult Committee of Parliament and/or with the leader of each political party within the Parliament before making a decision about the factor. This improves transparency, but does not shift decision making power and the decision still rests with the Executive.
2. **Parliament veto** -- the Parliament or a Committee of Parliament is able to veto a proposal from the Executive about the factor. This introduces some level of Parliamentary control, although any decision about what to propose rests with the Executive.
3. **Parliament recommends** -- the Parliament or a Committee of Parliament makes recommendations to the Executive about the factor. This enables Parliament to take the initiative but the final decision rests with Executive, which may reject the recommendation.

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<sup>7</sup> Lawson, Charles (2009), *Can the Executive influence the independence of the Auditor-General*, AJ Admin L90

<sup>8</sup> Australian Capital Territory, *Auditor-General Act 1996* Republication No 7 Effective: 26 August 2008;  
Australia, *Auditor General Act 1997*, Act No. 151 of 1997 as amended 27 June 2008;  
New South Wales, *Public Finance and Audit Act 1983* Reprint No 13 29 May 2007;  
Northern Territory of Australia, *Audit Act*, As in force at 30 October 2002;  
New Zealand, *Public Audit Act 2001* Reprint as at 1 April 2008;  
Queensland, *Auditor-General Act 2009*, Act No. 8 of 2009;  
South Australia, *Public Finance and Audit Act 1987*, Version 21.12.2007;  
Tasmania, *Audit Act 2008*, (No. 49 of 2008);  
Victoria, *Audit Act 1994*, Version No. 051;  
Western Australia, *Auditor General Act 2006*, Version 00-b0-05

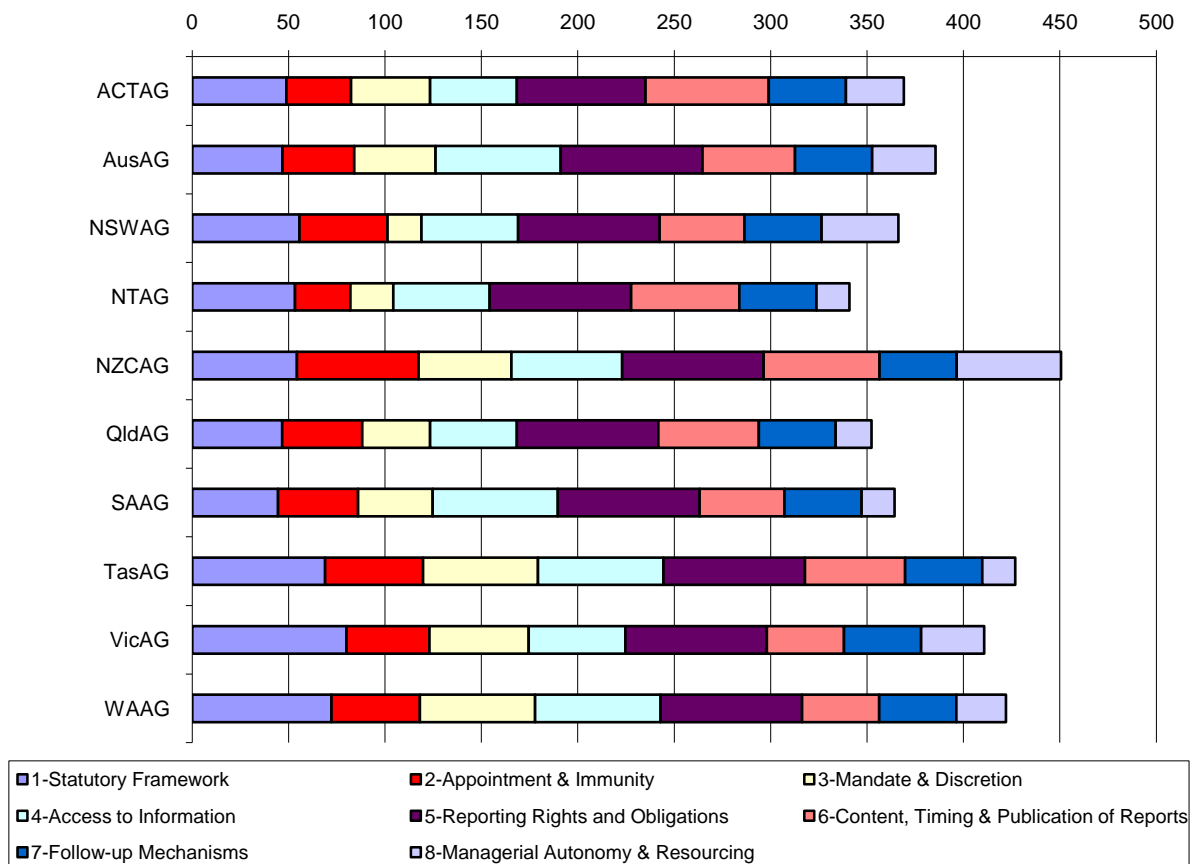
4. **Parliament decides** -- any decision about the factor is made by the Parliament or a Committee of Parliament. This places control within the Parliament itself where it is transparent and more difficult for Executive to influence.
5. **Independent body decides** -- any decision about the factor is made by another independent body, outside of the control of the Executive. This should remove partisan politics, although the independent body itself may or may not be subject to Executive influence.
6. **Auditor General decides** -- any decision about the factor is made by the Auditor General, free from Executive influence.
8. **Legislation mandates** -- the factor is explicitly addressed in the legislation. Any variation would require legislative amendment and Parliamentary debate and is therefore protected from Executive influence.
10. **Constitution mandates** -- the factor is embedded in the Constitution. An amendment to the Constitution would require a large Parliamentary majority and/or referendum. This gives the highest possible protection from Executive influence.

It should be noted that the full range of ranking was not applicable to all of the factors examined.

To produce a total score, the ranking for each of the factors examined for each INTOSAI Principle was aggregated for each jurisdiction. To enable some comparison of relative strengths and weaknesses in the jurisdiction's legislative framework, the aggregated ranking from individual factors was adjusted to reflect the number of factors grouped under each Principle.

## Results of Analysis

**Aggregated Factors Contributing to INTOSAI Principles of Independence  
by Jurisdiction**



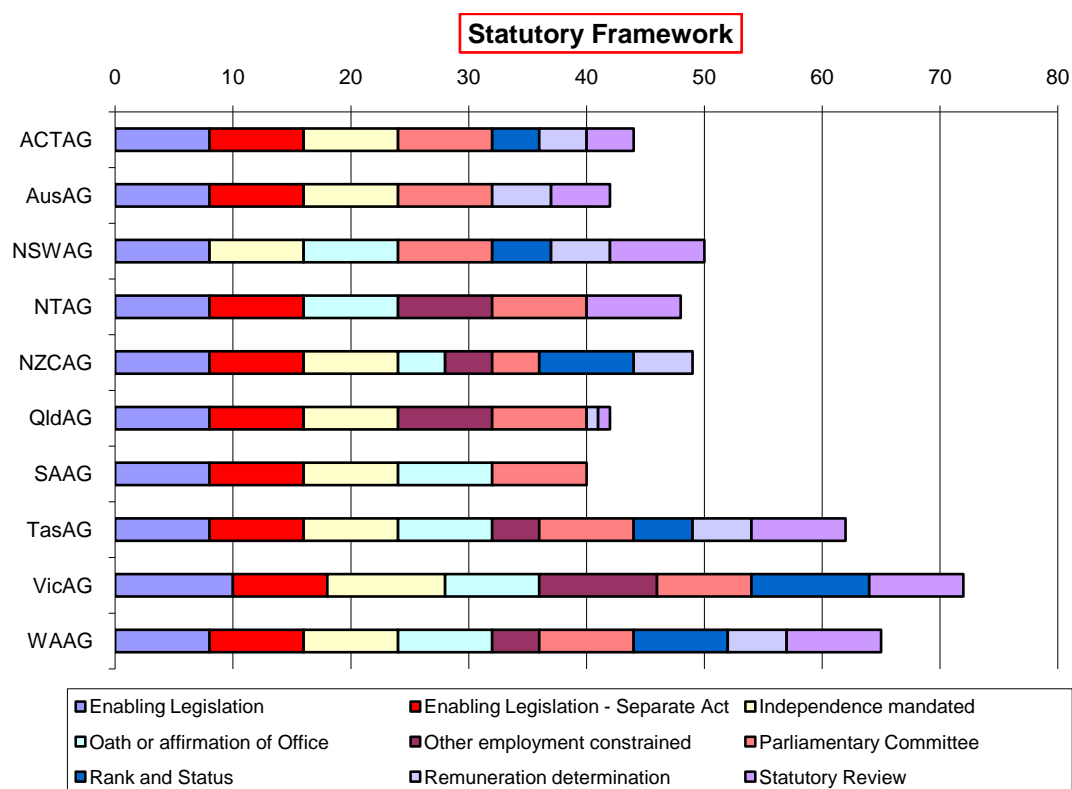
Overall, New Zealand had the strongest independence safeguards in its legislative framework, followed closely by the Australian States of Tasmania, Western Australia and Victoria. Independence safeguards were less well developed in some other Australian jurisdictions.

## Factors Contributing to Individual Principles of Independence

The factors contributing to each of the INTOSAI Principles of Independence are shown in more detail below.

### Statutory Framework:

***Principle 1. The existence of an appropriate and effective constitutional/statutory/legal framework and of de facto application provisions of this framework.***



Nine key legislative factors affecting independence were identified within the statutory frameworks of the jurisdictions reviewed:

1. whether constitutional provisions and/or enabling legislation exists which specifically address the establishment, status, mandate and powers of the Auditor General, as opposed to establishment by Executive action.
2. whether there is separate Audit legislation to ensure that Parliamentary debate is focused on the Auditor General’s role, functions and independence rather than being diluted by broader debate on wider financial legislation;
3. whether there is an oath or affirmation of office that reinforces the independence of the Auditor General and his or her relationship with the Parliament and before whom the oath is sworn or the affirmation is made;

4. whether the independence of the Auditor General is explicitly mandated and/or stated as a requirement or obligation;
5. whether the status and/or rank of the Auditor General is established to ensure that the independence and authority of the role is recognised and respected by other parts of government;
6. whether the mechanism for determining the remuneration (a key determinant of status and/or rank) of the Auditor General is established and protected from Executive influence;
7. whether the Auditor General is constrained from holding other positions or gaining remuneration from other forms of employment or, where this is permitted, whether the Executive is involved in giving permission;
8. whether there is oversight of the Auditor General's role by a Parliamentary Committee to ensure that the role is seen to be accountable to the Parliament;
9. whether there is a statutory requirement for a periodic review of the performance of the Auditor General's role and the extent of Executive influence in determining the terms of reference or in receiving the report of the review.

In the overall assessment of statutory frameworks, Victoria has the strongest independence safeguards, followed by Western Australia and Tasmania. Other jurisdictions provided less protection of the Auditor General from Executive influence.

### **Enabling Legislation / Separate Legislation**

In all of the jurisdictions examined, the Auditor General is created by statute, not by administrative action.

In Victoria the Auditor General is embedded in the Constitution as one of three 'independent officers of the Parliament', clearly establishing his or her independence and giving the office a high status. Separate enabling legislation details the roles, functions and powers of the Auditor General. Since the Constitution can only be amended through a motion passed by a large majority in both Houses and by a majority of voters at a referendum, including the Auditor General in the Constitution also gives the office strong protection from the Executive. Although relatively rare in Westminster-style governments, constitutional provision is used much more widely internationally. The INTOSAI survey mentioned previously found that 79 of 113 Supreme Audit Institutions are established and have the mandates enshrined in the Constitution of the countries.

The enabling legislation in all of the jurisdictions examined clearly specified the functions and powers of the Auditor General, although these vary considerably between jurisdictions. The legislation also specifies the manner of appointment and usually provides for the circumstances under which an appointee can be removed.

Eight of the jurisdictions have separate Legislation ensuring that the audit role of Auditor General has been the primary focus of Parliamentary debate.

### **Independence Mandated, Oath or Affirmation of Office**

The capacity to execute the role independently and free from influence is fundamental to the effective functioning of an independent Auditor General.

In a number of jurisdictions, independence is explicitly stated as a requirement or obligation on the Auditor General.

Although the meaning of the term is not defined, in Victoria, the Auditor General has been embedded in the Constitution Act as an 'independent officer of Parliament'. Similar provisions as 'independent officer of the Parliament' are made in the enabling legislation of other Auditors General. Some jurisdictions also include a 'duty to act independently' and/or explicitly state that the Auditor General 'is not subject to the direction of anyone' with respect to the exercise of his or her functions.

An oath or affirmation of office is used in some jurisdictions to reinforce the Auditor General's independence and impartiality and in some cases to symbolically mark the special relationship with an



allegiance to the Parliament. In a number of jurisdictions the oath is sworn before the Speaker or the Clerk of the Parliament, symbolically strengthening the relationship between the Auditor General and the Parliament. In other jurisdictions it is sworn before the Governor. In several jurisdictions the legislation is silent regarding an oath.

### **Rank and Status**

The status or rank of the Auditor General relative to other parts of the government or public sector is of considerable importance in determining his or her authority and the extent to which the role is acknowledged, accepted and supported by all of the parties involved (government, public servants, legislators and the public at large). If status and rank can be degraded by the Executive, the effectiveness of the Auditor General could be seriously undermined. Some jurisdictions explicitly mandate status or rank (for example 'independent officer of the Parliament'); others do so indirectly by mandating salary relativities, whilst in others the legislation is silent.

### **Other Employment Constrained**

Constraints on the Auditor General holding other positions or gaining remuneration from other forms of employment is commonly included in legislation to ensure that the incumbent devotes his or her full attention to the statutory role and to reduce the opportunity for a conflict of interest.

In some jurisdictions, any other occupation for reward is prohibited and may be grounds for removal from Office, whilst in others it may be permitted subject to approval. Where such approval can only be given by Parliament it could be expected to be relatively difficult to obtain and transparency of approval is ensured. However, where approval must be sought from Executive, it could enable covert pressure to be applied to the Auditor General.

### **Remuneration Determination**

Remuneration determination is considered among the statutory safeguards because it is a key determinant of status and rank, and also has a major impact on the calibre of persons who might be attracted to the role. Reducing remuneration could be used to effectively downgrade status of the Auditor General. The capacity of Executives to influence remuneration is therefore of importance, as is the transparency of the process by which remuneration is determined. In some jurisdictions remuneration is determined by a statutory tie to other officers such as to the judiciary, or to other jurisdictions, whilst in others it is determined by an independent tribunal. However, in some jurisdictions the Executive has direct control over remuneration.

### **Parliamentary Committee**

The relationship between the Auditor General and the Parliament he or she supports is of considerable importance. An effective relationship will permit the Auditor General to operate more effectively.

The relationship with a Parliamentary Committee can also provide a way for distancing the Auditor General from Executive influence. As noted previously, the United Kingdom was the first to establish a statutory relationship between its Comptroller and Auditor General and the House of Commons Public Accounts Committee. Other jurisdictions have followed and Parliamentary Committee oversight is now quite common with some having an active role in scrutinising audit plans, budgets, and appointments.

In all of the jurisdictions examined the Auditor General has a functional relationship with a Parliamentary Committee(s) which considers their reports. To ensure that the Committee is proactively engaged in its oversight role, this may be mandated in legislation rather than in Standing Orders.

Parliamentary Committees can also enhance the accountability of the Auditor General himself/herself. Accountability is needed to ensure that the Auditor General continues to operate as intended and makes effective and efficient use of his or her resources. Accountability for their actions and use of public funds is possibly more important for Auditors General than for any other part of the public sector, because of their independence.

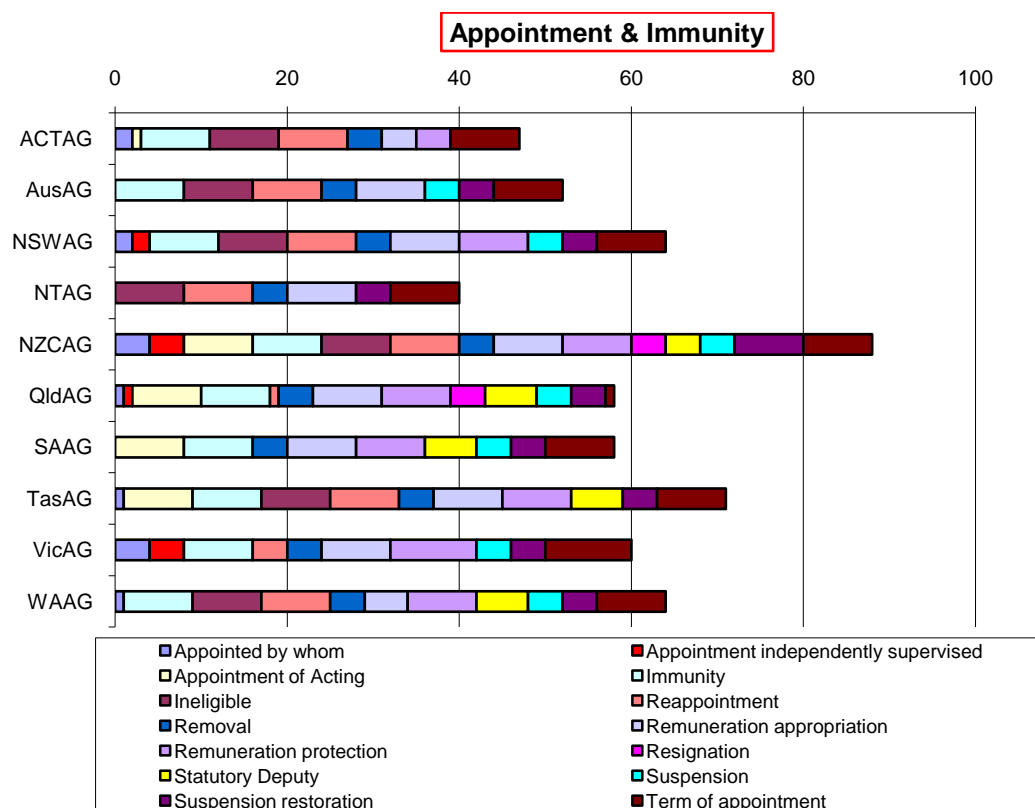
## Statutory Review

A periodic statutory review is a key control over the continuing effectiveness of the Auditor General's function. A number of jurisdictions have introduced a requirement for a statutory review of the Auditor and/or their Office, some on a fixed term periodic basis (such as the Victorian Auditor General and the Queensland Auditor General) whilst others enable performance audits of the Office by the Auditor General's external auditor. However, *ad hoc* performance audits do not match the accountability imposed by a scheduled, comprehensive review of the Auditor General's function.

Where there is a capability for statutory reviews to be undertaken, the selection of, terms of reference for, and/or reporting line for the review outcome may become important. Alternatives range from appointment by a Parliamentary Committee to appointment by the Executive, either with or without consulting the Parliament. These latter arrangements could allow an Executive to apply inappropriate pressure through a review mechanism.

## Appointment and Immunity

***Principle 2. The independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties.***



The key legislative components that affected these aspects of independence in the legislation reviewed were as follows:

1. who makes the appointment decision and the extent of Parliamentary involvement;
2. whether the appointment process was independently supervised to increase transparency and reduce the risk of political patronage and partisan appointments;
3. whether the Auditor General is eligible for reappointment;
4. how and by whom the term of appointment is determined;

5. whether reappointment is possible and if so how and by whom is the decision to reappoint made;
6. whether the Auditor General's remuneration is protected from being reduced during his or her term of office;
7. whether remuneration is automatically appropriated to preclude Executive or bureaucratic interference;
8. whether there is a statutory Deputy Auditor General;
9. how and by whom decisions are made about the appointment of an acting Auditor General, to reduce the risk of untoward Executive influence when there is a vacancy in the office;
10. how an Auditor General may resign and to whom the resignation is submitted to reduce the risk of Executive influencing the resignation or the timing thereof;
11. how and by whom an Auditor General can be suspended
12. how and by whom a suspended Auditor General can be restored to office;
13. how and by whom an Auditor General can be removed from office; and
14. whether the Auditor General is provided with legal immunity in the normal discharge of the role.

In the overall assessment of appointment and immunity factors, New Zealand had the strongest independence safeguards, followed by Tasmania, Western Australia and New South Wales. Other jurisdictions provided less protection from Executive influence of the factors involved in appointment and immunity of the Auditor General.

#### **Appointment by Whom, External Supervision, Ineligibility**

The Auditor General's independence is compromised from the beginning if the selection and appointment is by the Executive itself.

In many jurisdictions it is still customary for the Governor or Governor-General to make appointments to public offices. Because the 'Governor' is usually interpreted to mean the Governor acting on advice of the Executive Council, appointment by the Governor enables the Executive to determine who will be appointed, opening the way for political patronage or appointment of a partisan government-friendly Auditor General.

Some form of consultation with leaders of political parties or Committees of the Parliament and/or the Speaker and the President during the appointment process encourages bipartisan/multi-partisan support for the appointees and reduces the risk of partisan appointments and in many jurisdiction such consultation may have been undertaken through convention in the past.

More recently there has been a clear trend to introduce stronger, statutory mechanisms to ensure some form of Parliamentary involvement in the appointment process. Alternatives include:

- a requirement for the *Executive to consult* with leaders of political parties and/or a Committee of Parliament and/or a Committee of Parliament as well as the Speaker and President; or
- capacity for Parliament or a Committee of Parliament *to veto an appointment* proposed by the Executive;
- capacity for Parliament or a Committee of Parliament *to recommend an appointment to the Executive*;
- appointment *directly* by the Parliament or a Committee of Parliament;
- the appointment is made from *candidates recommended by an independent external body*. (Not used in Australian or New Zealand jurisdictions but becoming more prevalent overseas).

If the appointment is made on the recommendation by the Parliament or a Committee of Parliament, it ensures that the appointee has the confidence of the Parliament, and also enhances the transparency of the appointment process. In 18 of the 25 States in the European Union at the time of the survey mentioned previously, the legislature makes the appointment. Outside the European Union, according to the INTOSAI survey, the Auditor General is appointed by the Head of State in 77 jurisdictions, by

the legislature in 34 jurisdictions and by joint action of both the Head of State and the legislature in eight jurisdictions.

Among the jurisdictions examined only New Zealand and Victoria ensure that the appointment is made directly by the legislature. Two Australian jurisdictions enable a Parliamentary veto of an appointment proposed by Executive and two mandate Parliamentary consultation before a decision is made by Executive.

External supervision of the appointment process by an independent body can help to ensure that prospective appointees are widely canvassed, that due process is followed and that a short list of suitable candidates is presented for final selection. In some of the jurisdictions examined, the legislation explicitly removes the office of the Auditor General from this form of supervision (which may be applied in other parts of the public sector). However, in several jurisdictions the appointment process is supervised by a Parliamentary Committee and in Queensland, the Executive is required to consult with a Parliamentary Committee about the process to be used in making the appointment.

### **Acting Appointment, Statutory Deputy**

Appointing an individual to act as Auditor General during the temporary absence or following the death, removal or suspension of an incumbent can provide an opportunity for the Executive to influence the position. The Acting appointment could be for an extended period if there are significant delays in filling the permanent role.

The adverse impact that Executive appointment can have on the independence of the acting appointee has been recognised in some jurisdictions by providing for a Statutory Deputy to automatically act as Auditor General during such periods. However, in many jurisdictions the Executive still determines who will be appointed to act as Auditor General.

### **Term of Appointment, Eligibility for Reappointment**

Security of tenure and duration of appointment are both important to independence. Internationally, the term of office of the Heads of Supreme Audit Institutions is fixed by law in 72 cases and by other means in 19 cases.

All of the legislation examined specifies the term of appointment of the Auditor General. There has also been a trend away from an earlier practice of appointing the Auditor General for life, and in most jurisdictions the term of appointment is for a fixed term. Victoria has mandated the fixed term of seven years in its constitution.

The length of fixed term appointments is of some importance. The term needs to be long enough to enable the development of independence and to enable the incumbent to effectively 'steer' the Audit Office. There is also a case to be argued for keeping the term short enough to avoid the incumbent becoming complacent or 'stale' in the role and to enable the introduction of contemporary thinking. Another consideration is the length of the term in relation to the Parliamentary electoral cycle. In most jurisdictions the term has been set to exceed at least one, if not two electoral periods.

Eligibility for reappointment has been recognised as an undesirable practice by INTOSAI because it might compromise independence. Where an incumbent is eligible for reappointment, as the time for reappointment approaches, the incumbent could become reluctant to criticise, or seek prominence by being overly critical. An option for reappointment could also enable the Executive to exert pressure on an incumbent. This is more likely if the Executive makes the appointment, and less so where the appointment is made through a more public Parliamentary appointment process.

There has been a clear trend against the eligibility for reappointment of an incumbent, and in all of the jurisdictions examined except Victoria and Queensland the Auditors General are now ineligible to be reappointed after the expiration of their term

### **Removal, Suspension, Restoration, Resignation**

Protection from removal from office at the whim of the Executive is paramount to security of tenure and independence. This has been recognised and in all of the jurisdictions examined the legislation mandates some form of Parliamentary involvement. Most jurisdictions also prescribe the grounds for removal.

Similarly, a number of jurisdictions have legislation that prescribes the circumstances under which the Auditor General can be suspended from office. In some jurisdictions power to suspend has been left in the hands of the Executive, leaving open the opportunity for Executive to suspend or threaten to suspend an Auditor General it finds troublesome. But a number of jurisdictions further prescribe that the Auditor General will be automatically restored to office unless the Parliament either confirms the suspension or requires the removal of the Auditor General. In New Zealand the legislation mandates that if the Governor General suspends the Auditor General, he or she is restored to office two months after the next session of Parliament commences.

All of the jurisdictions examined provide for the resignation of the Auditor General, but most require the resignation to be directed to the Governor, leaving open the possibility of Executive interference with the resignation process or delay informing Parliament. Only New Zealand and Queensland ensure that the Auditor General's resignation is directed to the Parliament.

### **Remuneration Protection and Appropriation**

The security and independence of the Auditor General is enhanced if his or her remuneration is protected from any possible influence or control by the Executive, or by the Treasury and other parts of the bureaucracy. Most jurisdictions provide this protection by appropriating the remuneration in either the enabling legislation or in the determining Tribunal legislation.

Similarly, to prevent the Executive from 'punishing' the Auditor General, his or her remuneration is protected from being diminished during his or her term of office by legislation in most of the jurisdictions examined.

However, as mentioned previously, where the remuneration is determined by, or is subject to, the influence of the Executive, this form of protection leaves open the possibility that the Executive could affect the overall status of the Auditor General, whilst not, except in periods of high inflation, directly affecting the incumbent.

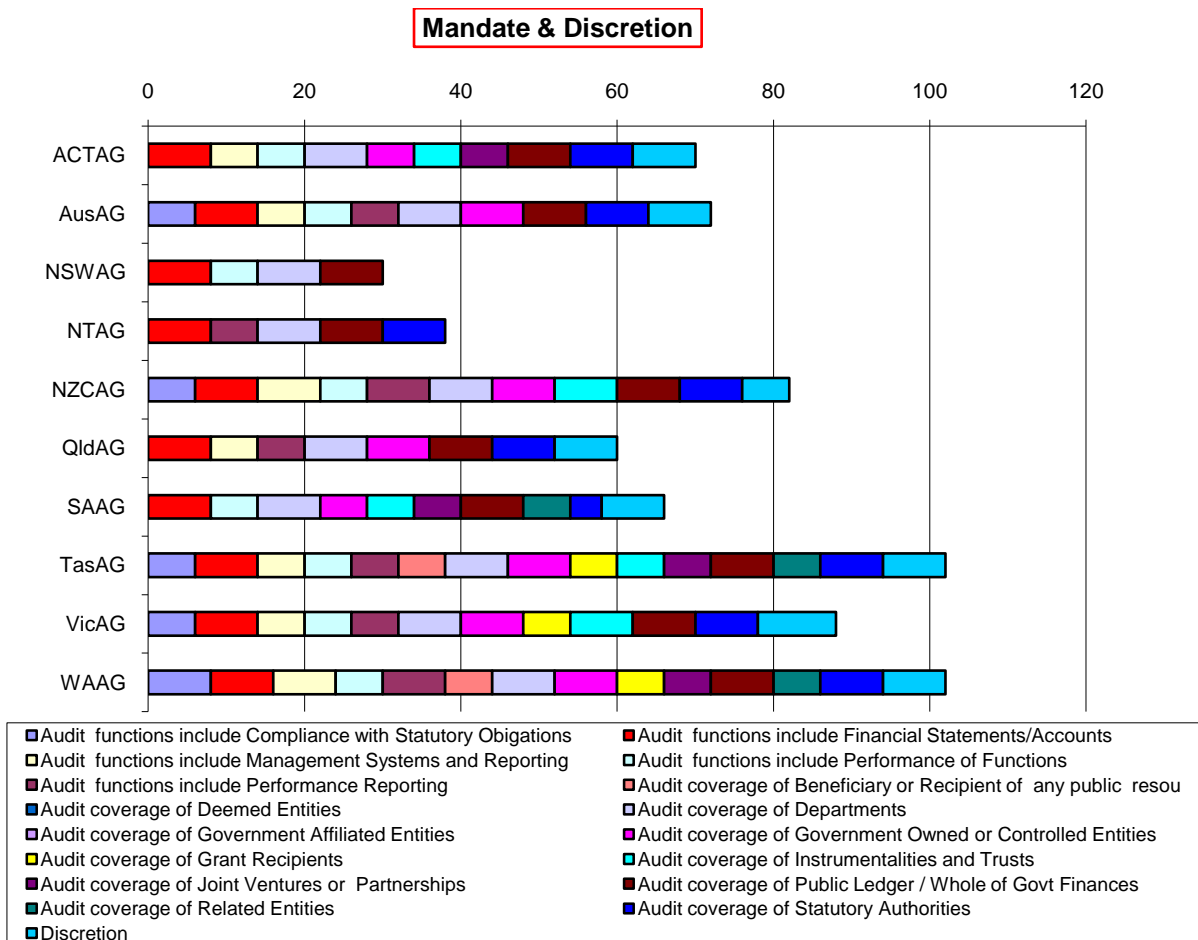
### **Immunity**

The threat of litigation could weaken the independence of the Auditor General. Similarly, litigation could be used to divert attention from the Auditor General's function.

In all of the jurisdictions examined, the Auditor General is afforded either immunity or indemnity for both acts of commission and omission.

## Mandate and Discretion

### *Principle 3. A sufficiently broad mandate and full discretion, in the discharge of SAI functions*



The key legislative components identified that relate to mandate and discretion included the functional mandate, the coverage mandate and the extent to which the discretion the Auditor General is afforded in performance of his or her role can be affected by direction to undertake specific tasks. Overall, the strongest mandate is provided by the recent legislation in Tasmania and Western Australia.

### Functional Mandate

The independence of the Auditor General is significantly influenced by the type of audit work his legislation enables him to undertake. There has been strong international trend to broaden the powers of Auditors General so that they can audit the use of public monies, resources, or assets.

To have a full and effective audit mandate, the Auditor General should have the ability to undertake audit work that includes:

1. financial statements/accounts;
2. management systems;
3. compliance with statutory obligations; and
4. performance indicators and/or performance reporting;
5. the economy, efficiency, and effectiveness of performance of functions.

A number of Australian jurisdictions have now empowered their Auditor General to undertake the full range of audit functions. The ACT has gone further in empowering the Auditor General to assess environmental issues and economically sustainable development (not shown in this assessment).

However, some jurisdictions have so far refrained from empowering their Auditor General to undertake wider compliance and performance audit functions. This seriously compromises the role of the Auditor General in assisting the Parliament of those jurisdictions to hold the Executive to account.

### **Coverage Mandate**

There is little point in providing wide functional powers to an Auditor General if these powers can be circumvented by the types of entities he is empowered to audit, or if the Executive is able to exempt certain entities from the Auditor General's coverage.

Ideally, the Auditor General should, *de facto*, be empowered to audit the use of public moneys, resources, or assets by any recipient or beneficiary regardless of its legal nature. This has become increasingly important as new forms of public sector management, privatisation, joint ventures, outsourcing, and so on, have changed the way the public sector operates, creating a need for new ways of making both agencies and governments accountable for what they do.

The following aspects of coverage were examined in the review of legislation:

6. public ledger/whole of government finances (audit of whole of government public ledger and/or budgets);
7. government departments (audit of the use of public money, resources or assets by government departments);
8. statutory authorities (audit of the use of public money, resources or assets by government statutory authorities);
9. instrumentalities and trusts (audit of the use of public money resources or assets by other instrumentalities or trusts);
10. government owned or controlled entities (audit of the use of public money, resources or assets by government owned business enterprises corporations and subsidiaries);
11. deemed entities (audit of entities deemed by government to be public entities because of the use of public resources whatever the extent of control);
12. joint-venture or partnerships (audit of public-private partnerships or joint endeavours that used significant public resources, or gain significant benefit there from);
13. related entities (audit of bodies or entities that are financially dependent upon public resources and subject to operational public control);
14. government affiliated entities (audit of entities financially dependent upon public resources but independently controlled);
15. grant recipients (audit of recipient of grants of public resources to determine if they have been used for the intended purposes);
16. beneficiaries or recipients of any public resources (audit of the use of public money, resources or assets by a recipient or beneficiary regardless of its legal nature).

The extent of the coverage mandate is a vexed area and one that can be quite difficult to unravel. It is also the area where there is greatest variation between jurisdictions, and the area that enables Executive to influence to what extent they are held accountable in their use of public resources.

Some legislation deliberately excludes certain types of government entities from the scrutiny of the Auditor General, whilst in others the Executive has the capacity to either exclude or include entities or parts of entities at its whim.

Recent legislation in two Australian jurisdictions is close to the ideal expressed in INTOSAI Principle 3 of empowering the Auditor General to 'follow the public dollar' wherever it has been spent. These jurisdictions have drawn a distinction between the Auditor General's traditional role of the as 'auditor of the entity' and his or her broader role in holding the government to account by including a provision that enables the Auditor General to 'examine' or 'investigate' any matter relating to the use of public resources of any kind by any recipient or beneficiary regardless of its legal nature. It is important to note that these investigative provisions do not depend on the Auditor General becoming

the 'auditor of the entity' in the traditional sense. However, they take account of the changes in the way significant quantities of public resources are being deployed by governments and address some of the more recently developed service delivery mechanisms and structures to which governments either commit public resources or forego other public benefits.

Other jurisdictions have lagged behind, constraining their Auditor General to entity-focussed audit of government departments, statutory authorities and/or other predetermined types of entities.

The absence of these investigative provisions in legislation seriously constrains the Auditor General's ability to inquire into many of the 'newer' forms of public sector management, including contracting out and public private partnerships. It also enables the cloak of 'commercial in confidence' to be used to prevent proper accountability to the public in these circumstances.

### **Discretion**

17. The key factor examined for discretion whether the Auditor General is subject to direction, and if so by whom.

To be fully independent, an Auditor General requires complete discretion in exercising his or her powers and in the manner in which his or her functions are carried out. Importantly, the Auditor General should not be subject to direction from anyone as to whether or not an audit is to be conducted, how audits are conducted, or the priority any audit work is given.

Whilst all of the jurisdictions examined impose obligations on Auditors General to undertake certain audits, the discretion he or she is afforded to exercise functions as he or she sees fit is an important component of independence.

In some circumstances, it may be appropriate that the scrutiny of the Auditor General can be brought to bear on matters of public concern by providing the capacity to either direct or request that they examine the matter and report their findings to the Parliament. However, there is wide variation among jurisdictions about whether the Auditor General can be directed or requested to undertake tasks, and if so by whom.

Some jurisdictions enable the Governor, or the Minister to refer matters to the Auditor General, and a few allow the Minister to direct the Auditor General to undertake such tasks. Such provisions can lead to the perception that the Auditor General is simply another part of Executive government. A direction could also be used to divert attention and/or resources from the exercise of other independent audit functions. Moreover, where the legislation does provide for directions or requests it is usually silent with respect to the resources need to undertake these tasks.

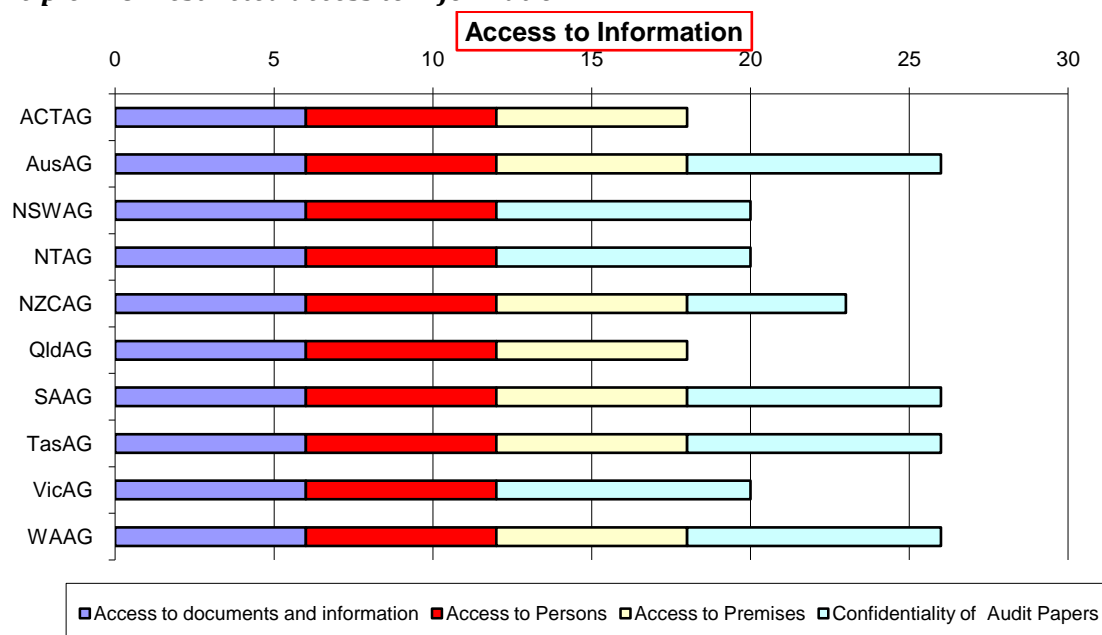
Some protection from inappropriate use of direction is provided where matters can be referred only by Parliamentary or Committees of Parliament and independence is further enhanced where the Auditor General is only required to "have regard to priorities" of Parliament.

The highest level of protection is provided where the legislation explicitly states that the Auditor General is not subject to direction from anyone with respect to the performance of his or her functional role.



## Access to Information and Confidentiality

### Principle 4. Unrestricted access to information.



Auditors General should have adequate powers to obtain timely, unfettered, direct, and free access to all the necessary documents and information for the proper discharge of their statutory responsibilities. The information they obtain using their information gathering powers should be protected from inappropriate disclosure.

### Access to Documents, Persons and Premises

The key legislative components identified in the legislation reviewed with respect to access to information were:

1. the ability to access documents or information in any form that is relevant to an audit;
2. the ability to call persons to produce documents, give evidence orally, in writing or under oath;
3. the ability to access premises and to examine, make copies of or extracts from documents or other records; and, additionally,
4. protection of the confidentiality of information obtained by the auditor general from inappropriate disclosure.

All jurisdictions have empowered their Auditor General to have access to documents and persons who may have information of value to their enquiries. Some also enable the Auditor General access to premises under the control of government entities.

However, as with the coverage mandate mentioned above, some jurisdictions have lagged behind and have yet to adapt the powers of their Auditor General to recent developments in the way the public sector operates. In a number of jurisdictions the Auditor General only has access to information held by government agencies or to persons employed within the public sector.

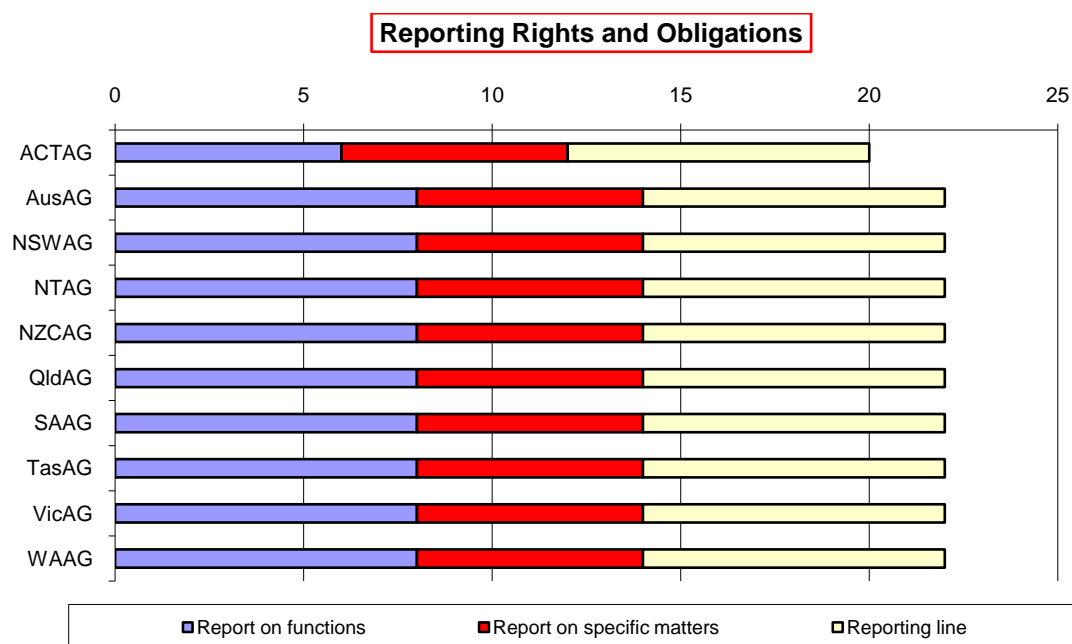
Only the most recent legislation in some jurisdictions is explicit in giving the Auditor General access to any information, any person, or any premises, land or place that is relevant to an audit, examination or investigation. Such powers are necessary where the coverage mandate of the Auditor General encompasses examination or investigation of any use of public resources, which may extend beyond the traditional confines of the public sector.

## Confidentiality

Most jurisdictions provide for the information gathered by their Auditor General to be kept confidential. This is important for protecting the working papers that are involved in the development of the view ultimately taken by the Auditor General, and to ensure that the Auditor General's information gathering powers are not used to provide a 'back door' to sensitive information. A number of jurisdictions have exempted the Auditor General from Freedom of Information legislation for this reason. However, in some jurisdictions the Executive can release information held by the Auditor General if it chooses to do so.

## Reporting Rights and Obligations

*Principle 5. The right and obligation to report on their work.*



Openness and transparency in reporting are fundamental to the independence of the Auditors General and to their role in the overall integrity system. Auditors General should not be restricted from reporting the results of their audit work.

Auditors General should be required to report on the outcome of their work and should also be able to report significant findings at any time. The reports should be presented directly to the Parliament and should be published. The transparency this brings to accountability forms a vital part of the overall integrity of the system of government.

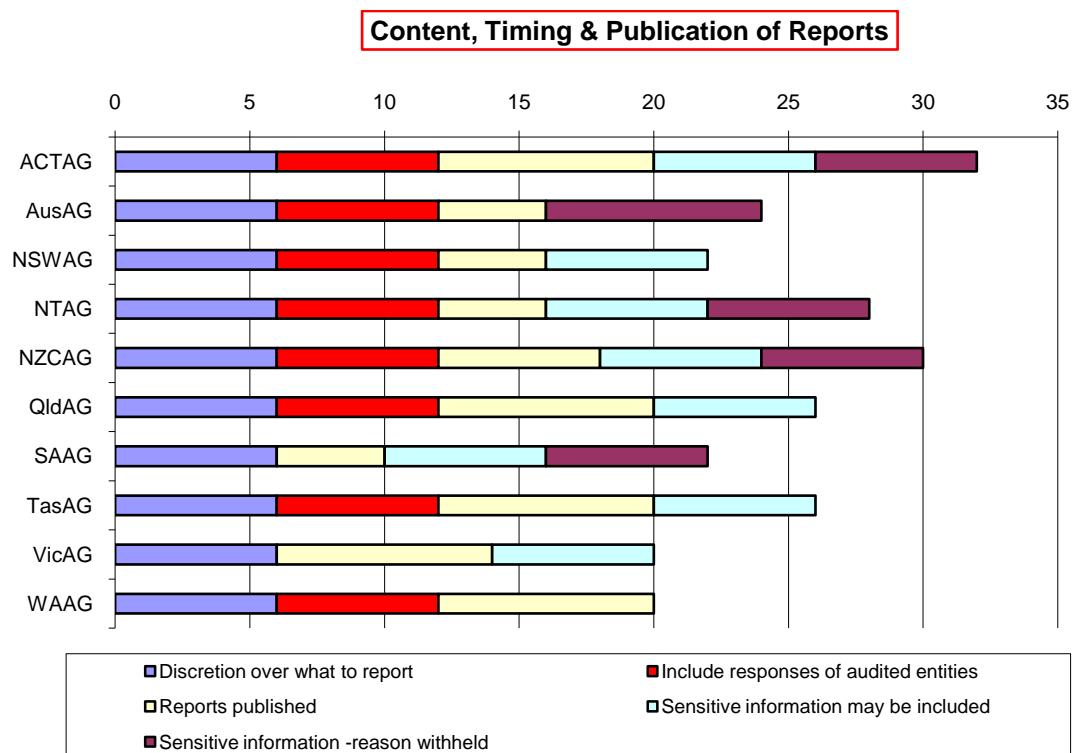
The key legislative components identified in the legislation reviewed with respect to reporting rights and obligations were:

1. the obligation to report to Parliament on the discharge of functions generally;
2. the ability to produce separate reports on any matter the Auditor General considers warranting such a report; and
3. the ability or requirement to report directly to the Parliament.

All of the jurisdictions have these reporting rights and obligations. However, in some jurisdictions the Auditor General may also have the discretion to report only to a Committee of Parliament, to a Minister, to an entity or to some other person. Such reporting lines appear to run contrary to the principle of transparency that is usual with an Auditor General's report.

## Content, Timing and Publication of Reports

**Principle 6. The freedom to decide the content and timing of audit reports and to publish and disseminate them.**



The ability to decide the content and timing of their reports is an important aspect of the independence of Auditor General. Publication of these reports is a fundamental element of transparency.

The key legislative components identified in the legislation reviewed that related to Principle 6 were:

1. whether the Auditor General has complete discretion over when to report and what to include in, or exclude from, a report;
2. the requirement for Auditor General to consider responses of audited entities and whether they have discretion about what to include or exclude from the response so that the response cannot be used to subvert or divert attention from audit findings;
3. whether 'sensitive' information may be included in the Auditor General's report;
4. whether the reason for withholding 'sensitive' information may be disclosed; and
5. whether the Auditor General's reports are published for general distribution to the public.

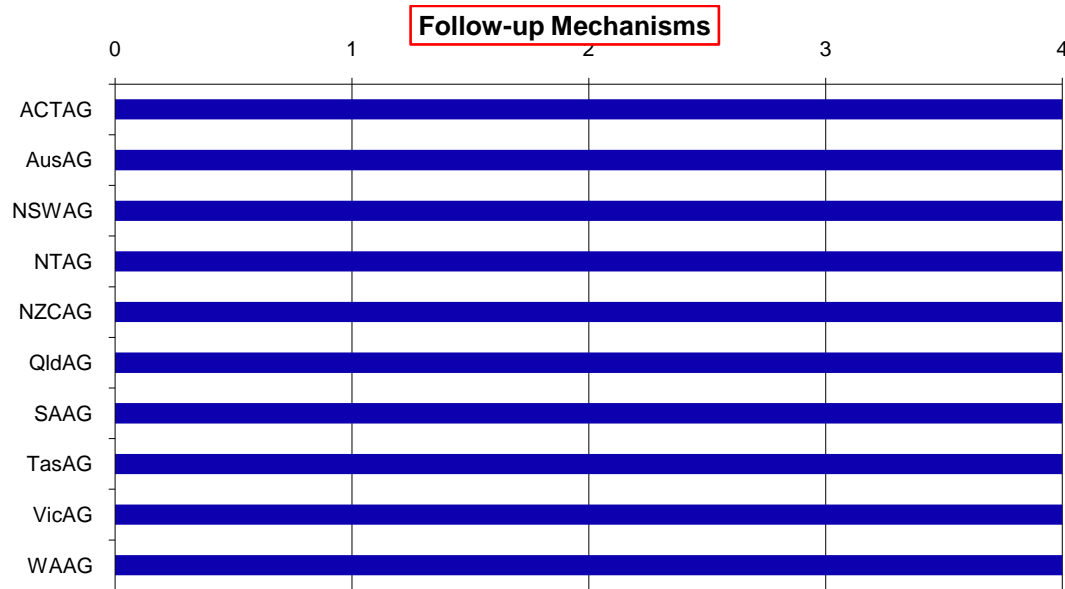
All Australian jurisdictions provide discretion to their Auditor General to decide the content of their reports. However, in some jurisdictions the Executive can impose constraints on the publication of 'sensitive' information.

In preparing a report, it is a natural justice requirement that Auditors General should take into consideration the views of the audited entity. This is the case in all jurisdictions and most require the publication of any response from an audited entity or a fair summary thereof. However, because the responses from entities are under Executive control, this mechanism could be used to reduce the independence of the Auditor General in deciding what is to be reported. Only two jurisdictions empower the Auditor General to decide what to include from a response from agencies. The Victorian requirement to for the Auditor General to reach agreement with the audited entity on the

form of the response to be included in a report is particularly vulnerable to this form of Executive manipulation.

## Follow-Up Mechanisms

### *Principle 7. The existence of effective follow-up mechanisms on SAI recommendations*



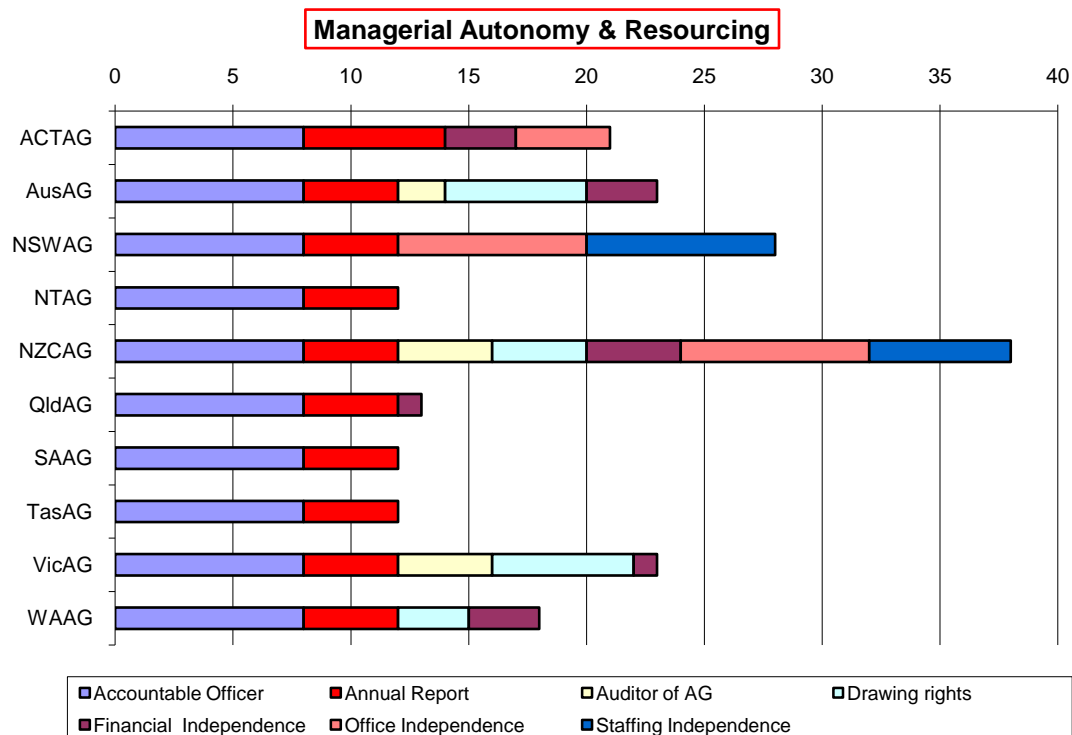
The key legislative component identified in this area is whether the Parliament has some mechanism for considering the Auditor General’s findings, for holding the government to account and for following up on recommendations.

In all of the jurisdictions examined, a Parliamentary Committee has an active involvement in receiving and considering recommendations contained within reports from their Auditor General.

None of the jurisdictions examined contained explicit legislative requirements for recommendations to be followed up, this being decided by the Parliament and/or its Committees.

## Managerial Autonomy and Resourcing

**Principle 8. Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources.**



The importance of managerial autonomy and independent resourcing for preserving the independence of Auditors General was first recognised in legislation passed in the United Kingdom more than 25 years ago when the *National Audit Act 1983* was established. The model developed in the United Kingdom included mechanisms designed to ensure both financial independence from the Treasury and staffing independence from the civil service.

The key legislative components identified in the legislation reviewed that contribute to managerial and resourcing independence are:

1. staffing autonomy or the independence from the Executive control of the public service;
2. financial autonomy or the independence of the process for of establishing the budget for the Auditor General from the Executive;
3. drawing rights on appropriated resources and to whom resources are appropriated and its independence from the Executive;
4. office autonomy or the independence of the structure supporting the Auditor General from Executive control;
5. whether the Auditor General is the Chief Executive or Accountable Officer for his or her office;
6. whether the Auditor General is required to produce an annual report covering his or her office's operations and financial statements; and
7. whether the appointment, terms of reference, and reporting line of the auditor of the Auditor General's office is subject to Executive control.

New Zealand was a clear leader among the jurisdictions examined in terms of the managerial and autonomy and independence in resourcing of its Auditor General. In a number of Australian jurisdictions the Auditor General remains vulnerable to decisions of the Executive.

### **Accountable Officer, Annual Administrative Report**

Although a great deal of attention has been paid to assuring the independence of the Auditors General themselves, less attention has been paid to their financial independence and their capacity to manage independently.

In all of the jurisdictions examined, the Auditor General is both the chief executive and the accountable officer for his or her Office, and is required to report annually on the administration of his or her office.

### **Financial Autonomy**

The usual Westminster appropriation process requires the Government to be held accountable for the budget and that it therefore should determine the budget's overall make-up and composition. However, leaving the budget for the Auditor General in the hands of the Executive could enable the Executive to starve the Auditor General of financial resources, thereby rendering him ineffectual.

In the United Kingdom, as part of the reforms introduced in 1983, the Comptroller and Auditor General presents the National Audit Office budget to the Public Accounts Commission. The Treasury is able to make submissions to the Commission about the budget but it is the Commission that makes a recommendation to the House of Commons about whether to accept the budget.

None of the Australian jurisdictions have adopted this level of separation of the budget from the control of the Executive. In a number of jurisdictions, the financial resources available to the Auditor General are entirely controlled by the Executive, but some more recent legislation has introduced requirements that the Parliament or a Committee of Parliament can have some input into the budget process, either being consulted about or empowered to recommend on the Audit Office budget.

Similarly, most jurisdictions do not protect the Auditor General's drawing rights on his or her budget appropriation. Only the ANAO has legislative guarantees on availability of parliamentary appropriations to the Auditor General, whilst in Victoria, the Auditor General is empowered to incur any expenditure obligations necessary for the performance of the function of his or her office, subject to the annual appropriation.

In contrast, in New Zealand, the Parliament decides on the level of funding for the Auditor-General, who submits his annual budget through the Speaker to Parliament directly. As in the United Kingdom, this approach reverses the decision making process, with the Parliament making the decision after considering submissions from the Executive. Further, under the New Zealand approach, the Speaker is the "Vote Minister" responsible for the Auditor General's appropriation, ensuring that the Executive is not in a position to constrain the use of the appropriation. The New Zealand model provides much stronger protection to the financial independence of the Auditor General.

### **Office Autonomy**

Departments, staffed by public servants, have traditionally been created to support the Auditor General and these remain the most common form of administrative unit within the Australian jurisdictions. Two jurisdictions have established the Audit Office as a statutory office, whilst others specify that a department must be created.

A disadvantage of the departmental structure is that it is usually subject to overarching legislation developed for the public service at large. Typically this legislation includes mechanisms to govern the classification of the staff, the flexibility of staff deployment, and the method of recruitment, selection and appointment of staff. It may also bring into play whole-of-government policy directives which may enable either the Executive or the public service bureaucracy to exert more subtle control over the Auditor General. Such bureaucratic intervention into managerial or administrative matters has the potential to be misused to constrain and/or frustrate the activities of the Auditor General.

The importance of freeing the Auditor General from potential managerial or administrative interference was recognised in the United Kingdom when the National Audit Office was established. It was seen to be important to free the NAO from the influence of the civil service (particularly the Treasury) that it was required to scrutinise. The NAO is not part of the civil service and civil servants must resign from the service before taking up employment with the NAO.

New Zealand has ensured a similar structural independence for its Auditor General, whose office is established as a corporation to which that New Zealand's State Sector Act does not apply.

New South Wales is the only Australian jurisdiction to have removed its Audit Office from the public service and created it as a statutory body. Victoria enables the Parliamentary Committee to, by resolution, free the Auditor General of certain requirements of that State's Public Administration Act and Financial Management Act.

### **Staffing Autonomy**

The capacity to employ staff is fundamental to the resources available to the Auditor General. Most legislation makes provision for staff and the Auditor General is usually the employing authority. Many jurisdictions also enable the Auditor General to use contracted professional services and some enable secondment of staff from other public sector organisations (often requiring approval from the Minister).

In many jurisdictions, the Executive and/or the public service bureaucracy can influence or indeed control the number, classification and remuneration and other conditions of the Auditor General's staff. However, New South Wales has removed all employees of the Audit Office, including its senior executives, from the public service. This is more closely aligned to the models adopted by the United Kingdom and New Zealand.

### **Auditor of the Auditor General**

In all jurisdictions a separate, independent auditor is appointed to audit the annual financial statements of the office of the Auditor General. The independent auditor may be confined to financial statement auditing, may have a wider performance audit role or a separate appointment may be made to audit or review the performance of the Auditor General. Where the latter is the case, the mechanisms of the auditor's appointment (by whom) as well as the reporting line of the auditor are of importance in assuring independence, not only of the auditor, but also of the Auditor General, especially when performance audits may be conducted.

In some jurisdictions, the Parliament or a Committee thereof makes the appointment of this auditor and accepts the audit reports. In other jurisdictions, the Executive makes the appointment and establishes the independent auditor's terms of reference.

### **Summary and Conclusions**

There is wide variation in the independence safeguards embedded in the legislation reviewed from the various Australian and New Zealand jurisdictions. Whilst all have a legislative framework, there are significant areas where jurisdictions could learn from one another by adopting best practice solutions .

A number of jurisdictions continue to exhibit weaknesses in the overall statutory framework governing their Auditor General and in aspects of his or her appointment and immunity.

Weaknesses in the functional mandate of the Auditor General in some jurisdictions significantly constrain the role their Auditors General can perform.

More significantly, only a few jurisdictions have adapted the coverage mandate of their Auditors General to take account of the changing way the public sector is operating. Those that have lagged behind run a significant risk that the Executive will not be adequately held to account for the use of public resources.

As yet only a few jurisdictions have responded to the financial and managerial vulnerability of their Auditors General that was recognised in the United Kingdom almost a quarter of a century ago, by providing adequate protection from Executive influence to these important aspects of independence.