

Western Australian Auditor General's Report



Opinion on Ministerial Notification



Report 6: October 2018-19

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WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

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**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

OPINION ON MINISTERIAL NOTIFICATION

This report has been prepared for Parliament under the provisions of section 24 of the *Auditor General Act 2006*.

This report deals with a decision by the Attorney General, the Hon John Quigley MLA, not to provide information to Parliament about legal advice sought in relation to an ex gratia payment to Mr Gene Gibson.

A handwritten signature in black ink, appearing to read 'Caroline Spencer'.

CAROLINE SPENCER
AUDITOR GENERAL
31 October 2018

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Ministerial decision not to provide information to Parliament

Introduction

This report deals with a decision by the Attorney General, the Hon John Quigley MLA, not to provide information to Parliament about legal advice sought in relation to an ex gratia payment to Mr Gene Gibson.

Section 82 of the *Financial Management Act 2006* (the FM Act) requires a Minister who decides that it is reasonable and appropriate not to provide certain information to Parliament, to give written notice of the decision to both Houses of Parliament and the Auditor General within 14 days of the decision.

Section 24 of the *Auditor General Act 2006* (AG Act) requires the Auditor General to provide an opinion to Parliament as to whether the Minister's decision was reasonable and appropriate.

What did we do?

The Audit Practice Statement on our website (www.audit.wa.gov.au) sets out the process we follow to arrive at our section 82 opinions, including:

- a review of agency documents
- a review of any advice provided to the relevant Minister by agencies, the State Solicitor's Office (SSO) or other legal advisers
- interviews with key agency persons including discussions about our draft findings and the Auditor General's opinion.

Our procedures are designed to provide sufficient appropriate evidence to support an independent view to Parliament on the reasonableness and appropriateness of the Minister's decision.

We have not performed an audit, however, our procedures follow the key principles in the Australian Auditing and Assurance Standards.

Opinion

The decision by the Attorney General not to provide Parliament with information about legal advice sought in relation to an ex gratia payment to Mr Gene Gibson was reasonable and therefore appropriate.

Background

In Parliament on 28 June 2018, the Hon Michael Mischin MLC asked the Leader of the Government in the Legislative Council representing the Attorney General, for the following information in Question without Notice 534:

- (1) *Did the advice the Attorney General received from the State Solicitor's Office support or not support the making of a payment?*
- (2) *Did the advice he receive identify failings for which the state was responsible, with reference to the Court of Appeal judgement in Gibson v State of Western Australia [2017] WASCA 141; and, if so, precisely what were those failings?*
- (3) *To the extent that the miscarriage of justice resulted from Mr Gibson's blameless plea of guilty on the basis of legal advice, is the state proposing to recover any of the \$1.5 million from his legal representatives; and if not, why not?*
- (4) *Why will the government not pay compensation to other accused who are acquitted on appeal, having been convicted after pleas of not guilty, and so suffered a miscarriage of justice for which they are blameless?*

On 28 June 2018 the Hon Sue Ellery, on behalf of the Attorney General, answered part (4). However, the Attorney General declined to give the information in parts (1) to (3), replying:

(1)–(3) Answering this question would require disclosure of matter that is subject to legal professional privilege and, accordingly, I am unable to provide the requested information. I am cognisant of my obligations under section 82 of the Financial Management Act and will provide any notice required by that section to Parliament and to the Auditor General in accordance with the legislative requirements.

On 17 July 2018, the Attorney General notified the Auditor General of his decision not to provide the requested information in accordance with section 82 of the FM Act.

In considering the Attorney General's decision, we followed the approaches laid out in our previous Opinions on Ministerial Notifications dealing with legal professional privilege¹.

For legal professional privilege to apply, communications between the client and lawyer '...must be for the "dominant purpose of legal advice or in relation to actual or anticipated litigation ...'. If the dominant purpose test is met, then legal professional privilege extends to:

- notes, memoranda or other documents made by staff of the client, if those documents relate to information sought by the client's legal advisor to enable legal advice to be provided
- a record or summary of legal advice even if prepared by a non-lawyer but not to the client's opinions on or stemming from the legal advice

¹ Office of the Auditor General. 2016 Report 10: *Opinions on Ministerial Notifications*, p.6.

- drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer whether or not they are actually communicated to the lawyer
- the lawyer's revisions of the client's draft correspondence.

Key findings

The decision by the Attorney General not to provide the requested information was reasonable and therefore appropriate.

Parts (1) to (2) of the question asked for information about legal advice the Government received in relation to an ex gratia payment to Mr Gene Gibson. Part (3) asked for information about the State's intention to recover funds from Mr Gibson's legal representatives. The Attorney General, through the Leader of the Government in the Legislative Council, informed Parliament that he was unable to provide the information in parts (1) to (3) as it was subject to legal professional privilege.

The Attorney General declined our request to examine the legal advice. In his and the SSO's view releasing the information to the Auditor General could waive the State's claim of legal professional privilege.

However, we received other evidence from the Attorney General and the SSO confirming that the information in parts (1) and (2) formed part of legal advice, and that part (3) has been referred to the SSO for consideration. We are satisfied that the requested information is subject to legal professional privilege.

Appendix 1: Auditor General's view on legal professional privilege and access to information

The matter of whether providing copies of legal advice to me, under statutory provisions in order to form an independent opinion on behalf of the Parliament, would waive legal professional privilege has been the subject of ongoing consideration for successive governments, legal advisers and the Parliament over recent years.²

During this particular section 82 inquiry, the Attorney General rightly considered the potential exposure to the State arising from providing me with the relevant legal opinion. In doing so, he also had to consider the desire of his Office to respect concerns of the SSO against my requirement to form an independent opinion on behalf of the Parliament under the *Auditor General Act 2006* (AG Act).

The time, effort and resources involved for my Office, the Attorney General's Office and for the SSO to conclude this inquiry has again highlighted the need for amendment to the AG Act. My Office must be able to examine legal advice as a source of primary evidence in the discharge of my duties, while at the same time protecting the State's legal professional privilege.

Government has supported an amendment to the AG Act, following recommendations in the Parliamentary Joint Audit Committee's 2016 review of the effectiveness of the AG Act, and other reviews. During the course of this section 82 inquiry, the Attorney General re-affirmed this support.

The Department of Treasury is currently reviewing legislation key to the operations of my Office, including the AG Act and the FM Act. My Office is working with Treasury as appropriate to see information restrictions addressed³. I am confident this matter has the support across Government and the Parliament to finally progress to a real and sensible resolution.

² See for example: Joint Standing Committee on Audit. 2016 *Review of the operation and effectiveness of the Auditor General Act 2006*; Office of the Auditor General. 2015 *Opinions on Ministerial Notifications*, Appendix 2; Standing Committee on Estimates and Financial Operations. 2016 *Report 62: Provision of Information to the Parliament*; and McGowan State Government. February 2018 *McGowan Government Response to the Special Inquiry*.

³ See Office of the Auditor General. 2018 *Annual Report 2017-18*, p16.

Auditor General's reports

Report number	2018-19 reports	Date tabled
5	Local Government Procurement	11 October 2018
4	Opinions on Ministerial Notifications	30 August 2018
3	Implementation of the GovNext-ICT Program	30 August 2018
2	Young People Leaving Care	22 August 2018
1	Information Systems Audit Report 2018	21 August 2018
Report number	2018 reports	Date tabled
13	Management of Crown Land Site Contamination	27 June 2018
12	Timely Payment of Suppliers	13 June 2018
11	WA Schools Public Private Partnership Project	13 June 2018
10	Opinions on Ministerial Notifications	24 May 2018
9	Management of the State Art Collection	17 May 2018
8	Management of Salinity	16 May 2018
7	Controls Over Corporate Credit Cards	8 May 2018
6	Audit Results Report – Annual 2017 Financial Audits and Management of Contract Extensions and Variations	8 May 2018
5	Confiscation of the Proceeds of Crime	3 May 2018
4	Opinions on Ministerial Notifications	11 April 2018
3	Opinion on Ministerial Notification	21 March 2018
2	Agency Gift Registers	15 March 2018
1	Opinions on Ministerial Notifications	22 February 2018

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