

CASE NOTES

Is the Auditor General a Deemed Departmental Head?

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Introduction

The *Constitution* of Papua New Guinea (PNG) establishes key constitutional offices and assigns each of them important roles and responsibilities. Indeed, the nature of each function demonstrates how critical the roles are to ensuring there is check and balance on the exercise of power, authority and jurisdiction by the government. The Office of Auditor General is one of these constitutional bodies that plays a critical role in assessing and reporting on the expenditure of public funds.

The paper will examine the role of the Auditor General and the position of the Auditor General under the legislative framework, particularly the *Public Services (Management) Act* 1995 (PSMA). The position and the role of the Auditor General was recently considered by the Supreme Court in *Special Reference By the Public Solicitor Re Jurisdiction of the Public Service Commission and the Powers and Functions of the Auditor General* (2022) SC2299. The paper begins with a review of the legal framework relating to the Office of the Auditor General and his powers and functions and his unique position as a “deemed departmental head” or “deemed department” under the PSMA. The paper then focuses on the decision of the Supreme Court in SC2299.

Office of Auditor General

The *Constitution* creates the Office of Auditor-General under Section 213, and designates the Auditor General as the duly authorised office holder. This is affirmed by Section 221 of the *Constitution* which makes the Auditor-General a constitutional office-holder (CoH). The appointing authority of the Auditor-General is the Head of State, acting on the advice of the National Executive Council (which decides who the Auditor General will be). Section 213 provides that:

213. Establishment of the office of Auditor-General.
- (1) An office of Auditor-General is hereby established.
 - (2) The Auditor-General shall be appointed by the Head of State, acting with, and in accordance with, the advice of the National Executive Council given after receiving reports from the Public Services Commission and the Public Accounts Committee.
 - (3) In the performance of his functions under this *Constitution*, the Auditor-General is not subject to the control or direction of any person or authority.

The functions of the Auditor-General concerns inspection and audit of public accounts and public monies in PNG.¹ It is indeed an important role that ensures accountability, integrity and transparency in the use of public monies. Section 214 which provides the functions of the Auditor General is set out below.

214. Functions of the Auditor-General.
- (1) The primary functions of the Auditor-General are to inspect and audit, and to report at least once in every fiscal year (as provided by an Act of the Parliament) to the Parliament on the public

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¹ The reports of the Auditor General are usually presented to the Parliament for public scrutiny.

accounts of Papua New Guinea, and on the control of and on transactions with or concerning the public moneys and property of Papua New Guinea, and such other functions as are prescribed by or under a Constitutional Law.

- (2) Unless other provision is made by law in respect of the inspection and audit of them, Subsection (1) extends to the accounts, finances and property of-
 - (a) all arms, departments, agencies and instrumentalities of the National Government; and
 - (b) all bodies set up by an Act of the Parliament, or by executive or administrative act of the National Executive, for governmental or official purposes.
- (3) Notwithstanding that other provision for inspection or audit is made as provided for by Subsection (2), the Auditor-General may, if he thinks it proper to do so, inspect and audit, and report to the Parliament on, any accounts, finances or property of an institution referred to in that Subsection, insofar as they relate to, or consist of or are derived from, public moneys or property of Papua New Guinea.
- (4) An Act of the Parliament may expand, and may provide in more detail for, the functions of the Auditor-General under Subsections (1), (2) and (3), and may confer on the Auditor-General additional functions and duties not inconsistent with the performance of the functions and duties conferred and imposed by those subsections.

Apart from establishing an office and prescribing its functions, the *Constitution* authorises Parliament to enact legislation to provide the needed machinery to facilitate for the operation of the office. The enabling law that governs the Office of Auditor-General is the *Audit Act* 1989, which expands on the audit function under Section 3. This provision states that the “primary functions of the Auditor-General are to inspect and audit, and to report at least once in every fiscal year to the Parliament on the public accounts of Papua New Guinea, and on the control of and on transactions with or concerning the public moneys and property of Papua New Guinea, and such other functions as are prescribed by or under a law of Papua New Guinea.”

The scope of this function extends to the accounts, finances and property of all public service departments, government agencies, provincial governments, statutory authorities, constitutional offices, constitutional institutions, government associations, government-owned companies, provincial government associations and public projects.

Section 3(6) of the *Audit Act* authorises the Auditor-General to appoint a person to assist him in the discharge of his two important functions (which require the Auditor-General to be satisfied that):

1. The functions performed by, and the operations carried out by the relevant body, are being carried out in an economical, efficient and effective manner, and
2. The procedures that are followed by the relevant body for reviewing operations carried on by the body are adequate to assess the extent to which those procedures are being carried on in an economical, efficient and effective manner.

The person referred to in Section 3(6) is required to act under the directions of and on terms and conditions determined by the Auditor-General. The authorized person is to conduct the necessary inspection and audit of any accounts and records and to report the findings to the Auditor-General. This overarching power is provided under Section 4 of the Act. The Auditor-General also has powers under Section 4 of the Act to summon relevant individuals to appear before him with records of subject accounts and to examine them.

The Auditor-General is a prosecuting authority under Section 5 of the Act for offences of misappropriation, misuse or fraud of public monies, stores or property within the ambit of constitutional laws and the *Audit Act*. This prosecution powers becomes available after 60 days where the Public Prosecutor fails to proceed with a referral from the Auditor-General. The rationale in assigning prosecution powers to the Auditor-General is to compliment the resources, time, money and work put into inspection and audit of public accounts and records.

Apart from the annual reports that the Auditor-General submits to Parliament, he also reports to the responsible Minister and Speaker of Parliament under Section 7 of the *Audit Act*. The report that goes to the Minister covers issues concerning the collection, receipt, expenditure or public moneys or the receipt, custody, disposal, use of stores and other property of the State, or to the accounting for such moneys, stores or property, as well as any irregularities revealed by any inspection or audit. This report may also include the identity of a person who has failed to comply with the *Audit Act* and details of failure.

The report to Parliament covers the audit and inspection conducted of an agency and the recommendations made. The report must contain reasons for an opinion expressed in the report. Copies of the report to Parliament is sent to the responsible Minister and head of the subject agency. There is an additional special report that Section 7(4) allows the Auditor-General to submit to the Speaker for presentation to the Parliament on any matter that is of such importance or urgency that it should not be deferred until the presentation of his annual report to Parliament.

Under Section 19 of the *Organic Law on Certain Constitutional Office-holders*, the Auditor-General is required to furnish a report to the Head of State (Governor General) for presentation to Parliament on an annual basis, covering the operation of his office and recommendations for improvement.

National Public Service

The National Public Service is one of the State Services established to assist the National Government administer and govern the country. The *Constitution* provides a list of four services under Section 188. These are:

1. The National Public Service.
2. The Police Force.
3. The Papua New Guinea Defence Force.
4. The Parliamentary Service.

Other State Services may be provided by Acts of Parliament. These services are established to assist the government implement policies and enforce laws. An example of such a service is the Correctional Service. Section 5 of the *Correctional Service Act 1995* declares that the Correctional Service is a State Service.

In relation to each of the State Services, Section 195 of the *Constitution* states that subject to this Part, Acts of the Parliament may make provision for or in respect of the State Services, and in particular for and in respect of:

- (a) the structures and organizations of the State Services;
- (b) the employment of persons in the State Services; and
- (c) the terms and conditions of appointment to, and of employment in, the State Services.

The National Public Service is regulated by the PSMA; the Police Force is regulated by the *Police Act 1998*; the PNG Defence Force is regulated by the *Defence Act 1974*; and the Parliamentary Service is regulated by the *Parliamentary Service Act 1997*.

The National Public Service comprises departments established by the PSMA. It is a distinct category of bodies that do not include constitutional offices, Police, Defence, Correctional Service, the Parliamentary Service and statutory authorities. According to Section 20(1) of the PSMA, there are only two departments that are expressly established, whilst the rest are established by a process defined under Section 20(2). The provision is set out in full below:

20. DEPARTMENTS OF THE PUBLIC SERVICE AND OFFICES DEEMED AS DEPARTMENTS.
- (1) There shall be–
 - (a) a Department of the Prime Minister and National Executive Council established under Section 16 of the *Prime Minister Act* 2002; and
 - (b) a Department of Personnel Management; and
 - (c) such other Departments as are established under Subsection (2).
 - (2) The Head of State, acting on advice, may, by notice in the National Gazette–
 - (a) establish a Department or an Office deemed as a Department; or
 - (b) abolish a Department or deemed Department; or
 - (c) alter the name of a Department or deemed Department other than the Department of Prime Minister and National Executive Council and the Department of Personnel Management.
 - (3) In this Act, "Department" includes deemed Department for all purposes.
 - (4) For purposes of this Act–
 - (a) the Commissioner General of Internal Revenue; and
 - (b) the Auditor-General; and
 - (c) a Provincial Administrator; and
 - (d) such other officers as specified by the Head of State, acting on advice, shall, in relation to the officers and employees of, and offices in the organisations of which they are respectively in charge, be deemed to be the Departmental Heads.

In *Reference by the Public Solicitor Pursuant to the Constitution Section 19 (1) Re Jurisdiction of the Public Services Commission*², the Supreme Court was asked for an opinion on whether the Office of Public Solicitor, created under Section 176 of the *Constitution*, is part of the National Public Service. The Supreme Court considered Section 20 of the PSMA and said:

Therefore, the National Public Service consists of (a) the Department of the Prime Minister and National Executive Council; (b) the Department of Personnel Management; and (c) such other Departments and Offices deemed as Departments as are established under Section 20(2). The Office of Public Solicitor is neither a department nor a deemed Department. Therefore, it is not part of the National Public Service.

This case makes it abundantly clear that the National Public Service is made up of departments that are established under and pursuant to Section 20 of the PSMA.³ In *James Kepson v Stanis Hulahau & PNG Migration & Citizenship Authority*⁴, when refusing to grant leave to apply for judicial review, the National Court relied on *Reference by the Public Solicitor Re Jurisdiction of the Public Services Commission* and *Special Reference By the Public Solicitor Re Jurisdiction of the Public Service Commission and the Powers and Functions of the Auditor General*⁵ and remarked that:

Both decisions seal that the National Public Service consists of the Department of the Prime Minister and the National Executive Council, and the Department of Personal Management, and such other Departments and Offices deemed as Departments as are established under Section 20(2) of the *Public Service (Management) Act* 1995. In the case of the second defendant, it is neither a department nor is it deemed a department and is therefore not part of the National Public Service. Therefore, the decision of the Public Services Commission is not binding on it in favour of the plaintiff here.

The Scheme of Deemed Department(al) Head

The PSMA introduces the scheme where an agency can be deemed to be a department or the head of the agency is deemed a departmental head. Section 20(2) of the PSMA stipulates:

20. DEPARTMENTS OF THE PUBLIC SERVICE AND OFFICES DEEMED AS DEPARTMENTS.
- (2) The Head of State, acting on advice, may, by notice in the National Gazette–
 - (a) establish a Department or an Office deemed as a Department; or

² (2019) SC1871.

³ See Mamu, Leslie B, "The Constitutionality of the Police Force and the Commissioner of Police" (2021) 3 *Attorney General's Law Journal* 29.

⁴ (2023) N10448.

⁵ (2022) SC2299.

- (b) abolish a Department or deemed Department; or
- (3) In this Act, “Department” includes deemed Department for all purposes.

Essentially, when deeming an office or agency as a department by the Head of State, it simply means that the subject office or agency will be regarded and treated as a department. Similarly, with a head of the office or agency; where the head is deemed a departmental head, it simply means, the head is to be regarded and treated as a departmental head. This provision becomes handy in implementing the government’s intention to expand the application of a regulation or policy to a non-department.

Under Section 20(4) of the PSMA, the Commissioner General of the Internal Revenue Commission (IRC), the Auditor-General and the Provincial Administrators are deemed departmental heads. Section 75 of the PSMA further provides that:

75. POWERS OF COMMISSIONER GENERAL OF INTERNAL REVENUE AND AUDITOR-GENERAL AND PROVINCIAL ADMINISTRATORS.

For the purposes of this Act–

- (a) the Commissioner General of Internal Revenue; and
- (b) the Auditor-General; and
- (c) a Provincial Administrator; and
- (d) such other officers or employees as are so specified by the Head of State, acting on advice, shall, in relation to the officers and employees of, and offices in, the branches or sections of which they are respectively in charge, be deemed to be the Departmental Heads.

The inclusion of the IRC and the Auditor-General under the ambit of the Department of Personnel Management was challenged by both the Internal Revenue Commission and the Auditor-General’s Office.

In 2014, the Parliament enacted the *Internal Revenue Commission Act* which created the Office of the IRC. Section 7 of the Act declared that the Internal Revenue Commission is not a department. The effect of this law is that the provisions of Sections 20 and 75 of the PSMA do not apply to the IRC. By this provision, the Commissioner General of IRC is effectively excluded from being deemed a departmental head.

As for the Auditor-General, the challenge was mounted by way of a special reference through the Office of the Public Solicitor. The next section of this paper sets out the background to the court challenge and the outcome of the case.

Special Reference by Public Solicitor re Auditor General’s Office

The special reference filed by the Public Solicitor sought an opinion from the Supreme Court on whether the Auditor-General’s Office is part of the National Public Service which can enable it to be deemed a department and the Auditor-General, a departmental head. The Supreme Court provided its opinion in *Reference by the Public Solicitor re Jurisdiction of the Public Services Commission and the Powers and Functions of the Auditor-General*.⁶

Toward the end of 2020, the Auditor-General approached the Public Solicitor complaining that the *Public Services (Management) (Amendment) Act 2020*⁷ (2020 Amendment) brought the Office of the Auditor-General under the PMSA and deemed it as a department and the Auditor-General as a deemed departmental head. The effect of this amendment was that the Auditor-General is:

- Required to report to the departmental head of the Department of Personnel Management on a wide range of matters.

⁶ (2022) SC2299.

⁷ Act No 5 of 2020.

- Required to implement government policies and decisions and comply with directions issued by the departmental head of the Department of Prime Minister and National Executive Council.
- Subjected to a regime of performance appraisal and review established for departmental heads.
- Obligated to comply with staff and personnel emolument ceilings set by the departmental heads of the Departments of Personnel Management and Treasury.
- Subjected to the same appointment and termination procedures that apply to departmental heads.

The Public Solicitor agreed to file a Supreme Court reference pursuant to Section 19 of the *Constitution* to challenge the constitutionality of the 2020 Amendment. The Supreme Court proceedings was initiated in 2021 (titled SC Ref 3 of 2021). The following five questions were presented to the Supreme Court for its opinion:

Question 1: Does the Public Services Commission have jurisdiction under Section 191 of the *Constitution* to review any decision of the Auditor-General or an officer or employee of the Auditor-General's Office?

Question 2: Is Section 3 of the *Public Services (Management) (Amendment) Act 2020* constitutional to the extent that it alters the status of a constitutional office-holder (the Auditor-General) to a departmental head under Section 22 of the *Public Services (Management) Act*?

Question 3: Is Section 3 of the *Public Services (Management) (Amendment) Act 2020* constitutional in that it effectively subjects a constitutional office-holder (the Auditor-General) to the dictates of the *Public Services (Management) Act* and the Public Service General Orders?

Question 4: Does Section 3 of the *Public Services (Management) (Amendment) Act 2020* comply with the constitutional requirements of Section 12 of the *Constitution* in so far as it attempts to alter an Organic Law, specifically the *Organic Law on the Rights and Independence of Constitutional Office-holders*?

Question 5: Does Section 3 of the *Public Services (Management) (Amendment) Act 2020* comply with the constitutional requirements of Sections 13 and 14 of the *Constitution* in so far as it effectively alters the *Constitution* by:

- (a) altering the constitutional status of the Auditor-General under Section 221 of the *Constitution*, to being a departmental head under Section 22 of the *Public Services (Management) Act 1995*?
- (b) altering the guaranteed independence of the Auditor-General by making the Auditor-General's administrative decisions subject to the review jurisdiction of the Public Services Commission?

The application⁸, came before the Supreme Court comprising five judges (Kandakasi DCJ, Batari J, Cannings J, Hartshorn J and Makail J). The answers given by the court in relation to the five questions are set out below.

1. Does the Public Services Commission have jurisdiction under Section 191 of the *Constitution* to review any decision of the Auditor-General or an officer or employee of the Auditor-General's Office?

In answering Question 1, the court referred to its earlier decision in *Reference by the Public Solicitor re Jurisdiction of the Public Services Commission* which concerned a similar constitutional office. In that case, the court ruled that the Public Solicitor's Office was created by the *Constitution* and is not part of the National Public Service, and decisions made by the Public Solicitor concerning personnel matters are not subject to the review jurisdiction of the Public Service Commission (PSC). It was noted that a primary function of the PSC under Section 191 of the *Constitution* is the review of personnel matters connected with the National

⁸ (2022) SC2299.