



**STATE OF VERMONT
OFFICE OF THE STATE AUDITOR**

To: Summer Government Accountability Committee
From: Tim Ashe, Deputy State Auditor
Date: October 18, 2023

Thank you for the opportunity to offer some observations and suggestions concerning the Legislature's work to better hold State government accountable. We commend this effort.

At the most general level, the existence of this joint committee is a reflection that a single committee like the former Government Accountability Committee is not sufficient to address government accountability. Nor can the Legislature rely on the Administration for this work – they are neither independent or nonpartisan no matter how sincere and good-faith their presentations may be.

The key takeaway of this memo is that enhancing the Legislature's government accountability efforts should be systematized as much as possible, and not reliant upon individual legislators or individual committees to be exemplary in this regard.

The memo addresses each of the themes below and for each we offer strategies for you to consider.

NCSL Report Comments on Legislative Performance Auditing and Program Evaluation
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FULL DISCUSSION

NCSL Report Comments on Legislative Performance Auditing and Program Evaluation

In March 2019 NCSL completed a [report](#) for the Legislature related to legislative staffing and organizational structure. While the report was largely focused around issues of compensation and oversight, NCSL included the passage below concerning performance auditing and program evaluation.

"Performance Auditing and Program Evaluation. Over 80 percent of all state legislatures employ staff who specialize in conducting performance-based audits, or reviews, of state agencies and

programs. Unlike financial audits, these studies and reports focus on executive agency compliance and effectiveness in delivering programs and services that are responsive to legislative intent, public need and to generally accepted standards of efficiency and effectiveness. The Vermont General Assembly is one of only a few state legislatures that does not have this kind of executive oversight capacity. Maine offers a good example of a legislature that recently added a program evaluation staff function, along with a legislative committee dedicated to directing and reviewing its performance audits.

NCSL is not specifically recommending the creation of a program evaluation unit in this report. However, we are compelled to raise awareness about the trend in state legislatures to invest in this important oversight capacity. Vermont leaders should review examples of program evaluation offices in other legislatures to determine the value of this concept for the General Assembly. Good examples exist in Arizona, Maine, Mississippi, North Carolina, Utah and many other states.”

Our office is the only State entity that currently performs performance audits conducted to *generally accepted government auditing standards*. Our staff who perform this work are highly and specially trained, and nationally this workforce is scarce. We have been extremely fortunate to be able to recruit some extremely talented auditors the last few years (all have come from outside Vermont). The Legislature has several options it could consider to enhance program evaluation: build its own audit function, add resources to the State Auditor’s Office, and/or bolster a JFO program evaluation function that doesn’t rise to the level of *generally accepted government auditing standards*.

Making Sure Audit Findings Are Addressed

Our office issues approximately five audit reports each year. The reports are conducted by our team of auditors according to *generally accepted government auditing standards*. These nonpartisan, objective auditors dive deeply into a particular state government activity and then, based solely upon facts and not opinions, issue recommendations to the auditee.

Once the audits with their recommendations are completed, we send them to the audited agency and to the Governor and House and Senate leadership as required by statute. We then issue follow-up reports one and three years after the audit releases to determine whether our recommendations have been addressed.

Notably, though, there is no legislative committee explicitly tasked with ensuring that Executive branch agencies address our findings and recommendations. Our office frequently requests the opportunity to present our work before committees of jurisdiction, which is often (but not always) honored. Those committee hearings seem, from our perspective, educational and helpful to legislators. However, we suspect that many legislators do not appreciate that the Auditor’s Office does not have the ability to compel Executive branch agencies to fix the problems we identify or improve their practices as we recommend. If the Executive branch agency will not make changes, the Legislature is the only entity with the power to do something about it. A few examples illustrate this:

- In February 2022 we issued an audit of the Dam Safety Program at the Dept. of Environmental Conservation. Among the key findings was that new rules, **required by the Legislature**, intended to increase dam owner responsibilities to fix dangerous dams, had not been initiated by DEC. The dam safety rules were required to be in place by July 2022. They have still not been filed for review, meaning they are not likely to be adopted before the summer of 2024, nearly two years later than the Legislature demanded in its omnibus dam safety legislation several years ago. This July's flooding should be a warning siren – dams held up this time, but are we confident that will be the case with future weather events? Failure to adopt the new rules literally makes loss of life and property more likely in future events. While we have alerted legislators several times to this concern, we do not believe any committee has taken ownership of this Executive branch failure to act as your colleagues had the vision to require of them.
- In March 2023, we issued an audit of DAIL's inspections of assisted living facilities and residential care homes. A key finding was that despite the law requiring **annual** safety inspections, DAIL has made it a policy to attempt to inspect facilities every two years. Vulnerable older Vermonters' life safety is at issue, and the Legislature mandated annual inspection. Having alerted legislators to DAIL's contrary approach, we do not believe any committee has taken ownership of the issue. The consequences of DAIL's noncompliance with statute could be serious – problems that are undetected in such settings could lead to tragic outcomes, and the failure of the State to follow the law could put taxpayers at risk in legal proceedings.

These examples are not meant to scold, but rather to highlight that the lack of a designated legislative committee tasked with addressing audit findings and recommendations leads to a classic dilemma of diffuse responsibility. Many legislators agree that something needs to be done but assume someone else will do it. The joint study committee should consider a statutory change explicitly requiring legislative committees to receive in-person presentations of our audits, and to create an annual process by which the Legislature is informed of which audit recommendations requiring legislation action have been addressed and which have not. To be clear, the Legislature may not agree with all of the Auditor's recommendations, but failure to take action should be a deliberate choice, not a result of the diffuse responsibility described above.

Outcomes Report and Performance Measures More Generally

As our 2022 analysis of the Annual Outcomes Report demonstrated, the Report is of little to no use when it comes to determining whether state government is doing a good job. The September 2023 release of the report, unfortunately, exhibits nearly all the weaknesses we identified in earlier versions. For example:

- After pointing out that the 2020 report depicted the percent of Vermont covered by state-of-the-art telecommunications infrastructure at a clearly implausible 96.2% (it is based upon antiquated 4/1 download/upload speeds), the 2023 report shows 96.8%. Fixing the graphic would take a matter of minutes – instead, taxpayers must

be bemused or confused that their State government presented a graph so at odds with reality.

- The 2023 report continues to present subtle changes in certain measures as meaningful when they are within the margin of error (e.g. fluctuations in the percent of adults who smoke cigarettes), meaning that there has not clearly been any change.

In our report, we offered a framework to improve the Annual Outcomes Report which is applicable to all performance reporting. We drew on best practices identified by the Government Accountability Standards Board, the National State Auditors Association, and Washington State's Performance Measure Guide to develop the following criteria:

1. INFLUENCE: Does the entity have the ability to influence performance in a meaningful way?
2. CLEAR GOALS AND OBJECTIVES: Are there specific, measurable, and well-defined goals and objectives?
3. SIGNIFICANT AND RELEVANT: Does the measure capture significant and relevant information that helps us understand whether the objective is achieved?
4. COMPARABLE: Can the data be put in context (e.g., compared to a target or to another jurisdiction)?
5. DISAGGREGATED: When appropriate, is data disaggregated to show how different groups are impacted?
6. UNDERSTANDABLE: Is the measure easy to understand? Is the data presented clearly?
7. WELL-DEFINED: Are the measures specific and defined?
8. VALID: Is the data valid? Is information about the data source and methodology provided?
9. TIMELY: Are the data and indicators updated regularly?

An instance in our recent work highlights the importance of applying such a framework to your legislative work.

We recently performed an analysis of the state's 2021 Telecommunications Plan. One of the shortcomings we identified was that there are no performance measures in the Plan. As a result, legislators and the public are left without any measurable basis for determining whether the Public Service Department is doing a good job or not meeting the State's telecommunications goals. The response from the Commissioner of Public Service was that they didn't include performance measures because the statute doesn't require them to. As disappointing as that response may be (nothing stops PSD from including measures whether it's required by statute or not), it highlights the importance of the very conversations you're having in this committee. Failure to include performance measures in the original legislation requiring the Plan has resulted in a hundreds of pages long document that lacks accountability features.

We believe that Legislative Counsel and JFO, together, can help provide ongoing analysis on your behalf. They can be asking accountability-focused questions on your behalf in a non-partisan way and systemize asking the right questions, especially when presented with data like the examples above. While this unquestionably occurs, it is not systematic and it is not the result of purposeful direction from the Legislature. Legislative Counsel and JFO could

collaborate on a joint data-reporting evaluation framework (like the one in our report) that the staff of each entity will apply on your behalf when you are presented with information by the Executive branch or outside entities.

Note: The observations in this section apply to the Administration's annual Programmatic and Performance Measure Budget Report as well. The Legislature should consider revising 32 V.S.A. § 307 (c)(2) to provide better and clearer direction to the Administration for performance-related budget preparation.

Timing of Programmatic and Performance Measure Budget Report

The Administration's Programmatic and Performance Measure Budget Report is not presented to the Legislature until mid-February to early March. This is clearly too late for JFO or the Legislature to review, absorb, and utilize such material. The Joint Fiscal Committee could instruct all agencies to submit their latest performance data prior to the session so JFO can review it (at a high level) for the committees of jurisdiction before the session begins. Otherwise the timing of the information is not aligned with legislative activity and is of little use to you.

Increasing Consistency and Accountability in Rulemaking

A year and a half or so ago, our office spent some time reviewing recently passed rulemaking provisions. We found 125 new rulemaking provisions in legislation that passed between 2017 and 2021. While some of those provisions merely *authorized* rulemaking, in many instances it was *required*. Sometimes agencies were told they "shall" promulgate rules, but no date by which the rulemaking was to be completed was included. In other instances, dates to file or adopt rules were included in the legislation – adherence to those dates has been hit or miss. In some instances, the legislation required the rulemaking agency to provide an interim status report – here, too, we found instances when such progress reports were not actually provided. We also found instances in which legislative committees, and even one administrative agency, simply forgot about time-sensitive rulemaking provisions.

We have two straightforward recommendations that would help the Legislature keep better tabs on rulemaking provisions and to make the provisions more consistent.

1. Formally task Legislative Counsel at the end of each legislative session with producing an inventory of all new rulemaking provisions that have been enacted, including the responsible agency and any deadlines. At present, no single office is responsible for this. As a result, some rulemaking requirements fall through the cracks, some deadlines are not met, and legislators do not have a one-stop location to monitor agency compliance with rulemaking provisions. For what it's worth, it took one staff person in our office two days to inventory all rules provisions in legislation that passed between 2017 and 2021. This level of effort, especially for just one year at a time, would not pose a burden on Legislative Counsel. If you direct Legislative Counsel to perform this task, no legislation would be required to complete the annual inventory, and it could be requested immediately for the recently-completed 2023 session. The inventory could be posted to the LCAR committee page and updated each year.

2. In terms of consistency and accountability, Legislative Counsel should adopt the practice that any time rulemaking is being contemplated in a committee, **the Legislative Counsel attorney** will ask four basic questions of the committee:
 - Do you want to require that these rules be written, or merely allow them to be written?
 - If you want to require them, do you care when they are completed by? If so, add a deadline.
 - If you want to require they be written, do you want an interim status report from the relevant agency to flag any issues with meeting the deadline in a timely manner?
 - If you want a status report, who do you want to receive it and when?

Additional recommendations: Whenever possible, when rulemaking is being *required* (“shall”), include a deadline for either the proposed rule to be filed or to be adopted. The very presence of a deadline appears to have the effect of increasing the likelihood that rules will be promulgated as envisioned. Also, when rules are being required, include a requirement that the responsible agency provide a brief progress report to the relevant committees. There are often good reasons for delays in rulemaking, and the sooner the committees of jurisdiction are aware of those reasons the better for all involved. This doesn’t need to be a time-consuming report – even a brief email to the committees would be useful.

The advantage of these rulemaking recommendations is that they rely upon the consistency that staff bring to the process, and they don’t rely on the mindfulness of individual legislators or committees. We affectionately note that legislators often resist being told precisely how to perform their duties, while Legislative Counsel can be directed to consistently apply these concepts.

General Oversight Function

At your first meeting, Senator Brock remarked about the need for a more targeted general oversight function in the Legislature. We agree. The political process will always result in ad hoc oversight actions (e.g. Judiciary may hold hearings if a prison contractor is alleged to have failed to perform its duties responsibly), but there is no dedicated accountability committee of the Legislature that both dives into systemic issues and then remains responsible for seeing them addressed. The GAC could have been, but never proved to be, that type of committee. EB-5 remains a useful example. One structural issue generally viewed as enabling that failure to occur was the combined promotion and regulation of EB-5 participants by ACCD. Has that lesson led to the identification of other instances of a similar structural issue in other programs? Has anything been done about them *before there’s another problem like EB-5*? That’s the kind of work a general oversight committee could perform.

We look forward to following your continued accountability work and are here to help.