SPECIAL REPORT 20 OCTOBER 2020

The effectiveness of the financial arrangements and management practices in four integrity agencies

NEW SOUTH WALES AUDITOR-GENERAL'S REPORT

audit office
OF NEW SOUTH WALES

THE ROLE OF THE AUDITOR-GENERAL

The roles and responsibilities of the Auditor-General, and hence the Audit Office, are set out in the *Public Finance and Audit Act 1983* and the *Local Government Act 1993.*

We conduct financial or 'attest' audits of State public sector and local government entities' financial statements. We also audit the Total State Sector Accounts, a consolidation of all agencies' accounts.

Financial audits are designed to add credibility to financial statements, enhancing their value to end-users. Also, the existence of such audits provides a constant stimulus to entities to ensure sound financial management.

Following a financial audit the Audit Office issues a variety of reports to entities and reports periodically to parliament. In combination these reports give opinions on the truth and fairness of financial statements, and comment on entity compliance with certain laws, regulations and government directives. They may comment on financial prudence, probity and waste, and recommend operational improvements.

We also conduct performance audits. These examine whether an entity is carrying out its activities effectively and doing so economically and efficiently and in compliance with relevant laws. Audits may cover all or parts of an entity's operations, or consider particular issues across a number of entities.

As well as financial and performance audits, the Auditor-General carries out special reviews and compliance engagements.

Performance audits are reported separately, with all other audits included in one of the regular volumes of the Auditor-General's Reports to Parliament – Financial Audits.

AUDITOR-GENERAL NEW SOUTH WALES

GPO Box 12
Sydney NSW 2001

The Legislative Assembly
Parliament House
Sydney NSW 2000

The Legislative Council
Parliament House
Sydney NSW 2000

In accordance with section 52B of the *Public Finance and Audit Act 1983,* I present a report titled **'The effectiveness of the financial arrangements and management practices in four integrity agencies'.**

Margaret Crawford
Auditor-General
20 October 2020

auditoffice
OF NEW SOUTH WALES

audit.nsw.gov.au

contents

The effectiveness of the financial arrangements and management practices in four integrity agencies

Auditor-General's foreword

This audit examined the effectiveness of the financial arrangements and management practices of four integrity agencies. It was conducted with reference to the legislative and Constitutional framework that is currently in place for financial management in New South Wales.

This report appropriately recognises that the government of the day is responsible for the prudent and responsible management of the state's finances. It identifies several areas of ambiguity in the way the current financial arrangements apply to the integrity agencies that are the subject of this audit. It also highlights threats to the independence of the integrity agencies that may arise from the involvement of the Executive Government in the decision making about funding. The report argues these risks are not mitigated sufficiently under the current financial arrangements.

The recommendations in this report outline the principles that should inform the financial arrangements for the integrity agencies. Consistent with the Audit Office of NSW's role in auditing NSW Government departments and agencies, the recommendations are directed to NSW Treasury and the Department of Premier and Cabinet. However, the report recognises that the current role of these entities in the funding arrangements for the integrity agencies poses a threat to their independence. Consequently, it is important to recognise the important role of the NSW Parliament in determining the appropriate funding model for the integrity agencies. The audited agencies should consult closely with the NSW Parliament when considering these recommendations to ensure the views of Parliament are reflected appropriately in any changes arising from the implementation of these recommendations. This recognises the appropriate role of the NSW Parliament in safeguarding the independence of its integrity agencies.

Section one

The effectiveness of the financial arrangements and management practices in four integrity agencies

Executive summary

On 4 November 2019, the Hon. Don Harwin MLC, Special Minister of State, requested this audit under section 27(B)(3)(c) of the *Public Finance and Audit Act 1983.*

Consistent with the Minister's request, this audit assessed the effectiveness of the financial arrangements and management practices of four integrity agencies - the Independent Commission Against Corruption (ICAC), the NSW Electoral Commission (NSWEC), the NSW Ombudsman (NSWO) and the Law Enforcement Conduct Commission (LECC). The audit also included NSW Treasury and the Department of Premier and Cabinet (DPC) because both departments are involved in the processes that lead to decisions about funding for the integrity agencies and managing access to this funding.

The NSW Government, through the Treasurer, is responsible to the citizens of New South Wales for the prudent and responsible management of the state's finances. The annual budget is the primary process that the NSW Government uses for financial management. Decisions about funding for the integrity agencies are made through this budget process. NSW Treasury provides guidance to all government departments and agencies, including the integrity agencies that are the focus of this audit, on the Government's priorities for the budget. NSW Treasury also reviews and provides advice to the Expenditure Review Committee of Cabinet on proposals for funding through the budget.

The integrity agencies are subject to the application of 'efficiency dividends' and 'budget savings and reform measures', which limit their access to the full funding that has been approved by Parliament. NSW Treasury and DPC manage the application of these limits to the integrity agencies. The integrity agencies are grouped within the DPC 'cluster', which is an administrative arrangement created by the NSW Government. Clusters do not have legal status but are used for administrative and financial management. DPC has provided additional funding during the financial year to some of the integrity agencies in the years covered in this audit. DPC also oversees the involvement of the integrity agencies in developing and reporting on their outcomes. This is a requirement of NSW Treasury's outcome budgeting reforms, which are currently being implemented.

Each of the integrity agencies is overseen by a parliamentary committee that includes members of both houses of the NSW Parliament. These committees are responsible for reviewing the performance of the integrity agencies that they oversee. They do not have a role in funding decisions. ICAC and LECC each have additional oversight from an Inspector. The Inspector of the ICAC's role is to oversee the operations and conduct of ICAC to ensure that it complies with the law. The Inspector of the LECC's role is to oversee the way LECC carries out its functions, with a focus on the legality of LECC's use of its powers. Neither of these Inspectors has a role in funding decisions.

The Audit Office of NSW is an independent integrity agency that receives some of its revenue through the NSW Government's budget process and sits within the DPC cluster. We have taken the following actions to preserve our independence and mitigate potential conflicts of interest that could arise in conducting this audit:

- not considering or commenting on the financial arrangements for our office
- requesting a deferral of our office's evidence to an inquiry by the NSW Legislative Council's Public Accountability Committee that is considering the budget process for integrity agencies. The inquiry includes the four integrity agencies that are the subject of this audit and our office
- seeking independent legal advice on the framework for the financial arrangements for the integrity agencies
- using additional internal review processes to provide quality assurance to audit conclusions.

Conclusion

The current approach to determining annual funding for the integrity agencies presents threats to their independent status. The approach is consistent with the legislative and Constitutional framework for financial management in New South Wales, but it does not sufficiently recognise that the roles and functions of the integrity agencies that are the focus of this audit are different to other departments and agencies.

The government of the day is responsible to the citizens of New South Wales for the prudent and responsible management of the state's finances. Accordingly, the government of the day has a central role in decisions about funding for departments and agencies and in determining the financial management processes to be applied. This is clearly established in the legislative framework and conventions for managing public funds in New South Wales. This system is primarily designed to determine the funding for departments and agencies that are responsible to ministers. It is less appropriate for integrity agencies because it does not provide additional protection against the risk that funding decisions could be influenced by previous or planned investigations by the integrity agencies. This risk has the potential to limit the ability of the integrity agencies to fulfil their legislative mandate. The extent and nature of this risk differs for each of the integrity agencies. This is outlined in the key findings section below and described in detail in Chapters 2–5 of this report.

Aspects of the financial management mechanisms used to administer funding for the integrity agencies create tensions with their independent status. These mechanisms include the means of applying efficiency dividends and budget savings and reform measures, the provision of additional funding from DPC to the integrity agencies, and requests for the integrity agencies to report to DPC on their activities and outcomes.

NSW Treasury and DPC have administered efficiency dividends and budget savings and reform measures to the integrity agencies. This results in the integrity agencies not being able to access the full funding approved by Parliament. There are two competing interpretations of appropriation legislation that lead to different conclusions about whether there is a clear legal basis for doing this. NSW Treasury and DPC focus on the fact that the Appropriation Act provides funding for the integrity agencies to a Premier, rather than the agency, and does not state that a Premier must provide the full amount of funding approved to the agency. This interpretation leads to the view that a Premier can restrict access to appropriation funding that was approved by Parliament. An alternative interpretation of the Appropriation Act would consider factors specific to the integrity agencies that differentiate them from other agencies subject to these measures. These factors include that the integrity agencies are independent of ministerial control, accountable to Parliament for performing specific legislated functions, and some may conduct investigations that involve a Premier, or DPC or NSW Treasury. If this alternative interpretation is used, then the reduction of the integrity agencies' access to appropriation funding approved by Parliament could diminish the independent status of the integrity agencies and limit their ability to fulfil their legislative mandate.

DPC has given additional funding to three of the integrity agencies in recent years in response to requests from the agencies. If the integrity agencies require additional funding during the year, the only mechanism available is to seek funding from DPC. This creates a potential threat to the independence of the integrity agencies. Asking DPC to make decisions about funding allocations between an integrity agency and another agency in the DPC cluster is inappropriate because DPC is not responsible for the functions or actions of an integrity agency. It is also possible that DPC could be the subject of an investigation conducted by an integrity agency. DPC has advised that it considers these risks more theoretical than real.

DPC's provision of $2.5 million in additional funding to ICAC in 2019–20 may not have been consistent with the *Appropriation Act 2019* (the Act), because of a change to the Act compared to previous appropriation legislation. The additional funding that was provided to ICAC in 2019–20 by DPC had been appropriated to DPC under Part 2 of the Act. The Act specified that funding appropriated under Part 2 could only be used for the purposes specified in that Part. ICAC receives its appropriation under Part 4 of the Act. It is contestable as to whether the purpose of an appropriation under Part 2 of the Act would include providing funding for an agency that receives an appropriation under another part of the Act.

The integrity agencies have been asked to report on activities and outcomes to DPC as part of the outcome budgeting reforms that are being implemented by NSW Treasury. This is inconsistent with their independent status because the integrity agencies are accountable to Parliament for their activities, not DPC or a Premier.

Our audit also assessed the integrity agencies' systems for planning, budgeting and monitoring the efficiency of their work. We did not find major deficiencies in the management practices of the integrity agencies. We did identify opportunities for improvement in each agency. These are specific to the circumstances of each agency and are outlined in the key findings section below and Chapters 2–5 of this report.

1. Key findings

The role of the Executive Government in deciding annual funding for the integrity agencies presents threats to their independence

The financial arrangements used to determine the funding for the integrity agencies are based on the legislative and Constitutional framework in New South Wales. These arrangements reflect the fact that the government of the day is responsible for managing the state's finances. Under this framework, the government of the day initiates funding legislation, funding is given to a minister for the services of the agencies, and the minister retains ultimate accountability to Parliament for the expenditure of the funding. Accordingly, the Executive Government – through Cabinet, NSW Treasury and DPC - is involved in the processes that determine the funding for the integrity agencies that are the focus of this audit. This system principally exists to enable funding decisions for NSW Government departments and agencies. These departments and agencies are created by the Executive Government and ministers oversee them directly.

The role of the integrity agencies includes providing independent scrutiny of the Executive Government. Work done by the integrity agencies can potentially have a negative impact on the NSW Government, or individual ministers or senior public servants. As a result, there is a risk that the previous or planned work of the integrity agencies could influence the decisions made about their funding.

The existing safeguards to this risk are not sufficient. Decisions about funding for integrity agencies are not transparent and there are no mechanisms for the agencies to question or challenge decisions made. The NSW Parliament reviews appropriation legislation but is not involved in the process of developing the annual NSW budget and does not see budget proposals that were made by the integrity agencies during the budget development process. Agencies can report to their parliamentary committees, but these committees do not have a role in decisions about their funding. The impact of potential threats to the independence of the integrity agencies, and their ability to fulfil their legislative mandates, is specific to each agency due to differences in their functions and jurisdiction. These are discussed separately for each agency in this report.

The legal basis for restricting the integrity agencies' access to appropriation funding is contestable

Limits on access to the full appropriations approved by Parliament have been applied to the integrity agencies in recent years. These have been set by the ERC and administered by NSW Treasury and DPC. There are two competing interpretations of appropriation legislation that lead to different conclusions about whether a Premier has a clear legal basis for restricting access to funding that has been appropriated for the integrity agencies.

NSW Treasury and DPC have interpreted the Appropriation Act in a way that concludes a Premier is able to restrict the integrity agencies' access to appropriation funding. This interpretation is based on the following key points:

- The Appropriation Act specifically appropriates funding to a Premier, rather than to the head of an integrity agency. This reflects the established Westminster convention that a minister is ultimately accountable to Parliament for the expenditure of public funds.
- The Appropriation Act specifies a maximum amount of funding that can be withdrawn for the services of each of the integrity agencies, but it does not specify that a Premier must provide the full amount of funding approved to the agencies.
- The *Government Sector Finance Act 2018* contemplates the existence of unused appropriations by making provision for the return of any funds that are not used within the financial year to the Consolidated Fund.

NSW Treasury and DPC's interpretation is consistent with relevant financial legislation and financial administration conventions in New South Wales, but it does not sit well alongside the legislated role and functions of the integrity agencies. An alternative approach to interpreting the Appropriation Act would consider the contextual factors and legislation specific to each integrity agency. These include:

- The appropriations for the integrity agencies are made under a discrete Part of the Appropriation Act. This indicates an intention to distinguish between appropriations for integrity agencies and appropriations for other government departments and agencies.
- The integrity agencies are established by separate Acts of Parliament which give them independence from ministers. This is different to the arrangements for other departments and agencies, which are established by Executive order and cannot act independently of their minister.
- The Appropriation Act provides for appropriations to a Premier for the services of the integrity agencies that are specified in legislation. The integrity agencies are accountable to Parliament for performing these functions.
- An integrity agency may undertake an investigation that involves a Premier or DPC or NSW Treasury.

If this alternative interpretation is used, then a Premier would require an express source of power to limit the availability of appropriation funding to the integrity agencies. If a Premier could reduce the integrity agencies' access to funding that was appropriated by Parliament, their independence could be compromised and their ability to fulfil their legislative mandate could be diminished.

The system for providing additional funding to the integrity agencies creates potential threats to their independence

ICAC, NSWEC and NSWO each received additional funding from DPC during the financial year in the period 2014–15 to 2018–19. To access this funding, the heads of the integrity agencies wrote to the DPC Secretary requesting additional funding and providing a brief description of the reason it was needed. Most of the requests for additional funding related to the cost of conducting work that was not anticipated at the time the annual appropriations for the integrity agencies were set.

If the integrity agencies require additional funding during the year, the only mechanism available is to seek funding from DPC. This creates a potential threat to their independence. Asking DPC to make decisions about funding allocations between an integrity agency and another agency in the DPC cluster is inappropriate because the integrity agencies are not accountable to DPC and DPC is not responsible for the functions or actions of the integrity agencies. In addition, it is possible that DPC could be the subject of an investigation conducted by an integrity agency. There are no criteria or guidelines for integrity agencies seeking additional funding from DPC. This means there is very little transparency to Parliament about the requests made and the reasons that they were granted.

DPC's provision of additional funding to ICAC in 2019–20 may not have been consistent with the *Appropriation Act 2019*

DPC provided an additional $2.5 million to ICAC in 2019–20 in response to ICAC's request for funding to cover the cost of a public inquiry that arose during the financial year. This was provided outside the annual budget process. DPC sourced the funding from within its appropriation funding from that year.

DPC received its appropriation funding under Part 2 of the *Appropriation Act 2019*. Section 25 of the Act stated that this funding could only be used for the purposes specified in Part 2 of the Act. The appropriation for ICAC was made under Part 4, a different part of the *Appropriation Act 2019*. It is contestable as to whether the purpose of the appropriation for DPC could extend to giving additional funding to ICAC, which was funded under a different part of the Act.

The Appropriation Acts in the years 2014–15 to 2018–19 did not include provisions stating that funding appropriated under Part 2 could only be paid out for the purposes specified in Part 2. This indicates that the additional funding provided from DPC to integrity agencies in those years would not necessarily have been inconsistent with the relevant Appropriation Acts.

Asking the integrity agencies to report to DPC on their activities and outcomes is inconsistent with the independence of the integrity agencies

Outcome budgeting was introduced as a management practice in New South Wales in 2017–18. Under this approach to budget development, agencies are required to link their budget submissions to a 'state outcome'. The state outcomes are assigned by NSW Treasury to the departments that have been designated as 'principal departments' for each cluster. These departments are then responsible for achieving the outcomes assigned to them.

The integrity agencies have been asked by DPC to develop plans and report to it against the state outcome of 'accountable and responsible government'. DPC is accountable to the Premier and the Cabinet for delivering this outcome. The outcome itself is broad enough to be consistent with the general role and functions of the integrity agencies. However, the integrity agencies are not subject to direction by a minister or department in their activities and report directly to Parliament on their functions. This makes it inappropriate for the integrity agencies to be asked to report against objectives and outcomes that are set by the NSW Government and administered by DPC.

Some comparable jurisdictions give parliament a more direct role in funding for integrity agencies

In several comparable jurisdictions, parliamentary committees provide advice on the budgets for integrity agencies. In some of these jurisdictions, the heads of integrity agencies are formally classified as Officers of Parliament to signify a more direct relationship with Parliament. The use of these mechanisms in other jurisdictions is intended to provide a clearer distinction between integrity agencies and other government departments and agencies. This aims to provide additional safeguards to the independence of integrity agencies, while also improving the transparency of the decision-making for integrity agency budgets and improving the transparency of integrity agency performance to Parliament and the public.

ICAC's financial arrangements and management practices

ICAC's legislation establishes it as an independent agency that is accountable to Parliament. Decisions about the annual appropriation for ICAC are made by Cabinet, with advice from NSW Treasury. Members of Cabinet or NSW Treasury could be the subject of, or more broadly affected by, an ICAC investigation. NSW Treasury advises that it provides ICAC's funding submissions directly to Cabinet without making changes. However, NSW Treasury does provide separate advice to Cabinet on these submissions. There is no independent advice on ICAC's funding requirements and there is no transparency to Parliament about the reasons for decisions made about ICAC's budget. The absence of these safeguards in the current financial arrangements creates a threat to ICAC's independence and has the potential to limit its ability to fulfil its legislative mandate.

ICAC submitted budget proposals seeking increases to its appropriation funding in several recent years. The budget proposals related to funding to expand its workforce to respond to increases in the volume and complexity of its work. Some of these proposals were rejected without reasons being provided. There are no formal mechanisms available to ICAC to question or challenge these decisions. The process available to ICAC to request additional funding outside the annual budget creates further risks to its independence, as described above.

ICAC's management practices are suitable for its needs. Its staff use structured processes for prioritising work against its legislative mandate and it has conducted recent reviews to assess its operational efficiency. ICAC's internal budgeting processes are adequate but could be improved with better documentation of the reasons for its budget decisions.

NSWEC's financial arrangements and management practices

NSWEC's legislation states that it should conduct elections and investigate potential breaches of electoral law independently and be accountable to Parliament. Decisions about the annual appropriation for NSWEC are made by Cabinet. It is possible that NSWEC's investigations of electoral integrity could include members of Cabinet or the political party that holds government. There is a risk that decisions about its funding could be influenced by the conduct of these investigations. If realised, this would be a threat to NSWEC's independence and ability to fulfil its legislative mandate. NSWEC has not received the full funding amount it has requested in recent years. There is inadequate transparency about how funding decisions were made and there are no formal mechanisms to question or challenge these decisions.

The conduct of elections is a key element of a democratic system and under-funding this function could have serious implications. NSWEC's requests for additional appropriation funding are assessed alongside the priorities of the government of the day. Its role transcends these immediate priorities and there is a risk that its funding requirements may not be prioritised.

NSWEC's management practices are suitable for its needs. Its internal budgeting processes and efficiency programs are clear and well documented. NSWEC has identified options to improve its operational and corporate efficiency but has not implemented all of these.

NSWO's financial arrangements and management practices

NSWO's legislation makes it clear that it should operate independently of the agencies it oversees and be accountable to Parliament. NSWO's investigations do not include members of Cabinet, except in relation to Public Interest Disclosures made about a minister, so the risk that decisions about its budget could be affected by its investigations is relatively lower. However, NSWO's investigations can comment on and make recommendations about government policies, which may have been endorsed by Cabinet or an individual minister, and its investigations cover systemic issues for which ministers and the heads of government departments are responsible. NSWO faces a further challenge in its ability to make compelling budget proposals under the current financial arrangements. Its funding requests are assessed alongside the government's priorities, but its work is unlikely to align directly with these priorities.

NSWO's management practices are suitable for its needs. NSWO has assessed its operational and corporate efficiency recently and has implemented major changes to its operating model in response to this. Its internal budgeting process is adequate but could be improved by being documented more thoroughly.

LECC's financial arrangements and management practices

LECC's legislation states it should operate independently of the agencies it oversees and be accountable to Parliament. LECC's jurisdiction does not include members of Cabinet, NSW Treasury or DPC. However, LECC's investigations have the potential to have an impact on a Minister for Police, who is a member of Cabinet, and the government of the day. There is a risk that decision makers for LECC's funding could be influenced by these considerations. While LECC has not sought increases to its appropriation funding in recent years, there are no formal mechanisms to question or challenge these decisions if it did have concerns about its funding in the future. Unlike the other integrity agencies in this audit, LECC is not classified as a separate GSF agency under the *Government Sector Finance Act 2018.* This difference means that LECC has less independence from the Executive Government, because LECC would have to comply with a Treasurer's Direction even if it believes it is not consistent with the independent exercise of its functions.

LECC's management practices are suitable for its needs. LECC's internal budgeting processes are clear and documented and it has identified and implemented operational and corporate efficiency savings in several areas. LECC published a new strategic plan in July 2020. Over the first three years of its operations from 2017, LECC had not conducted effective strategic planning, which made it difficult for LECC to demonstrate that it had a cohesive approach to its operations across the agency during this time.

2. Recommendations

Recommendations to NSW Treasury and the Department of Premier and Cabinet (DPC):

1. Acknowledging that the government of the day is responsible for the financial management of the state, NSW Treasury and DPC should implement a funding model for the integrity agencies that addresses potential threats to their independence while ensuring their accountability. This should be based on the following principles:

    - The integrity agencies are required to demonstrate their accountability as prudent managers of their financial resources.
    - Parliament's role in the budget process should be expanded to ensure Cabinet is provided with more independent advice on the funding requirements for the integrity agencies.
    - There should be transparency to Parliament and the relevant agency for decisions made about funding for the integrity agencies.
    - There should be structured oversight by Parliament of the performance and financial management of the integrity agencies.

2. NSW Treasury and DPC should reassess whether the process used to apply efficiency dividends to the integrity agencies is consistent with appropriation legislation and the independence of the integrity agencies.

3. NSW Treasury and DPC should ensure that the use of cluster-based financial management arrangements does not diminish the independence of the integrity agencies and is consistent with the requirements of appropriation acts and other relevant legislation. This includes ensuring that:

    - the provision of additional funding to the integrity agencies outside the budget process is consistent with appropriation legislation and includes sufficient safeguards to protect the independence of the integrity agencies
    - any request for the integrity agencies to report on activities and outcomes as a part of outcome budgeting reforms is consistent with their independence.

Note: These recommendations should be read in conjunction with the Auditor-General's foreword to this report, which provides necessary context for their implementation.

1. Introduction

On 4 November 2019, the Hon. Don Harwin MLC, Special Minister of State, requested this audit under section 27(B)(3)(c) of the *Public Finance and Audit Act 1983.*

Consistent with the Minister's request, this audit assessed the effectiveness of the financial arrangements and management practices of four integrity agencies - the Independent Commission Against Corruption (ICAC), the NSW Electoral Commission (NSWEC), the NSW Ombudsman (NSWO) and the Law Enforcement Conduct Commission (LECC). The audit also included NSW Treasury and the Department of Premier and Cabinet (DPC) because both departments have a role in the financial arrangements for the integrity agencies. NSW Treasury manages the budget process that determines the annual funding for the integrity agencies. DPC has a role in managing access to this funding because the integrity agencies are placed within the DPC 'cluster'.

The Audit Office of NSW is an independent integrity agency that receives some of its revenue through the NSW Government's budget process and sits within the DPC cluster. We have taken the following actions to preserve our independence and mitigate potential conflicts of interest that could arise in conducting this audit:

- not considering or commenting on the financial arrangements for our office
- requesting a deferral of our office's evidence to an inquiry by the NSW Legislative Council's Public Accountability Committee that is considering the budget process for integrity agencies and the NSW Parliament, including the four integrity agencies in this audit and our office
- seeking independent legal advice on the framework for the financial arrangements of the four integrity agencies in this audit
- using additional internal review processes to provide quality assurance to audit conclusions.

1.1 Financial arrangements for the integrity agencies

NSW Government budget process

The integrity agencies are classified as a part of the general government sector, which means they are grouped with other departments and agencies for budget purposes. The budgets for the integrity agencies are set out in the budget papers each year. The agencies are also given an indication of their likely budgets for the following three years, which are described as forward estimates. If an integrity agency wants an increase to its appropriation funding from the amount previously advised in the forward estimates, it must prepare a budget proposal using a format specified by NSW Treasury.

NSW Treasury's role as manager of the budget process includes deciding on the timelines, providing advice to agencies on their budget proposals, and reviewing integrity agency budget proposals. NSW Treasury prepares annual budget guidelines that set out the government's priorities and include any limitations on proposals for increases to appropriation funding. For example, NSW Treasury placed a cap on the number of budget proposals that agencies could make for the 2019–20 budget.

The integrity agencies are classified as 'independent entities' in NSW Treasury's budget guidelines. This means their budget proposals can be made directly to NSW Treasury, rather than being prioritised within the DPC cluster as are proposals by other DPC cluster agencies. However, once submitted to NSW Treasury, the integrity agencies' budget proposals are subject to the same processes and considerations as proposals from other government departments and agencies. For example, NSW Treasury may request changes to integrity agency budget proposals and may choose to not progress a proposal to the Cabinet Expenditure Review Committee (ERC) if it judges that the proposal does not meet the budget guidelines.

After the integrity agencies submit their budget proposals, NSW Treasury provides briefings to the ERC on the proposals that have been progressed for consideration. The ERC makes the final decisions about the budgets for the integrity agencies. Discussions held in ERC meetings are considered 'Cabinet-in-Confidence', so the reasons for decisions made by the ERC are not made public or provided to the integrity agencies. Briefings that NSW Treasury provides to the ERC during the budget development process are also considered Cabinet-in-Confidence and are not made public or shared with the integrity agencies.

Appropriation framework

The *Constitution Act 1902* states that appropriations from the Consolidated Fund can only be made under an Act that specifies the purposes of the appropriation. The decisions made during the budget development process are reflected in an annual Appropriation Bill that specifies the amount that can be withdrawn from the Consolidated Fund and describes the purposes for which the funding can be used. An Appropriation Bill is introduced in the Legislative Assembly by the Treasurer. Under the *Constitution Act 1902*, all Bills relating to the appropriation of funding must originate in the Legislative Assembly and a Bill relating to appropriations can become law without the approval of the Legislative Council. This reflects the principle that it is the role of the government of the day to initiate appropriation legislation.

Members of Parliament are provided with the Bill and the budget papers. The budget papers provide further information about the funding amounts specified in the Appropriation Bill, but do not form a part of the legislation itself. Parliament is not involved in the process of developing the annual NSW budget and does not see budget proposals that were made by the integrity agencies during the budget development process.

An annual Appropriation Act appropriates funding for the integrity agencies to a Premier, rather than directly to the heads of the integrity agencies. This means that an Appropriation Act itself does not give the integrity agencies the authority to withdraw or spend this funding. This reflects the principle that ministers are ultimately accountable to Parliament for the expenditure of public funds. In practice, a Premier will delegate the authority for the expenditure of funding that was appropriated under an Appropriation Act to the head of each integrity agency. This delegation is made under the *Government Sector Finance Act 2018* and allows the integrity agencies to make decisions about the expenditure of appropriated funding.

Financial management mechanisms applied to the integrity agencies

As a part of the budget development process, the ERC makes decisions about any limits it wishes to apply to government agencies' access to the appropriations approved by Parliament. These are described as 'efficiency dividends' and 'budget savings and reform measures'. The integrity agencies are subject to these limits.

Until 2018–19, NSW Treasury oversaw the implementation of efficiency dividends across all government agencies, including the integrity agencies. NSW Treasury applied the efficiency dividends by directing the agencies to submit a revised budget proposal that was lower than the amount approved by Parliament in the Appropriation Act. In 2019–20, DPC oversaw the budget savings and reform measures for the integrity agencies. There were no limits imposed on funding appropriated for the integrity agencies in 2019–20. However, DPC informed the integrity agencies of estimated limits on appropriation funding for each of the next nine years.

The integrity agencies are grouped within the DPC cluster for administrative and financial management purposes. Clusters are an administrative arrangement created by the NSW Government that do not have any formal legal status. According to the NSW Government, cluster management aims to assist with pursuing common objectives across agencies, integrating services, and allocating resources between agencies. The use of clusters for the management of the integrity agencies has the potential to create tensions with their independent status. This is discussed in detail in Chapter 6 of this report.

Some of the integrity agencies have requested and received additional funding from DPC during the financial year. This was not a part of the annual budget process and involved the reallocation of funding that had been appropriated for the services of DPC.

The requests from the integrity agencies were made when the agencies required additional funding to conduct work required to fulfil their legislative functions. To access this funding, the heads of the integrity agencies wrote to the DPC Secretary requesting additional funding and providing a brief description of the reason it was needed. In some cases, the integrity agencies also wrote directly to the Premier.

DPC oversees the involvement of the integrity agencies in developing and reporting on their activities and outcomes. This is a part of NSW Treasury's outcome budgeting reforms, which are currently being implemented. The integrity agencies are asked to report to DPC because they have been placed within the DPC cluster. As noted above, clusters do not have a legal basis, so the requests are a result of management decisions by NSW Treasury and DPC.

The application of these financial management mechanisms to the integrity agencies is analysed in Chapter 6 of this report. Where relevant, these processes are also discussed for individual agencies in Chapters 2–5 of this report.

The integrity agencies are subject to the *Government Sector Finance Act 2018* (GSF Act), which sets the framework and principles for financial management in NSW Government agencies. The objects of the GSF Act include:

- promoting and supporting sound financial management, budgeting, performance, financial risk management, transparency and accountability in the government sector
- requiring the efficient, effective and economical use and management of government resources in accordance with the principles of sound financial management
- promoting appropriate stewardship of government resources and related money.

Three of the integrity agencies – ICAC, NSWEC and NSWO – are classified as 'separate GSF agencies'. This means that they are not required to comply with whole of government financial management directions if they consider these are inconsistent with the independent exercise of their functions. If one of the agencies chooses to exercise this, it must provide a written document stating the reasons for non-compliance to the Treasurer and include this information in its annual report. LECC is not a separate GSF agency, so it does not have this exemption.

Each of the integrity agencies is overseen by a parliamentary committee that includes members of both houses of the NSW Parliament. These committees are responsible for reviewing the performance and the Annual Reports of the agencies that they oversee. They do not have a role in relation to funding for the agencies. ICAC and LECC each have additional oversight from an Inspector. The Inspector of the ICAC's role is to oversee the operations and conduct of ICAC to ensure that it complies with the law. The Inspector of the LECC's role is to oversee the way LECC carries out its functions, with a focus on the legality of LECC's use of its powers. Neither of these Inspectors has a role in funding for the agencies.

1.2 Arrangements for integrity agencies in comparable jurisdictions

In several comparable jurisdictions, parliamentary committees provide advice on the budgets for integrity agencies. In Victoria, the Independent Broad-based Anti-corruption Commission (IBAC) and the Ombudsman are overseen by the Parliamentary Committee on Integrity and Oversight. This Committee oversees the agencies by reviewing their performance and proposed annual work programs. Draft budgets are determined in consultation with this Committee. IBAC makes a distinction between 'core work' that must be covered by the budget, and additional projects or hearings that are evaluated on a case-by-case basis before proceeding. A business case must be provided to the Committee for consideration if IBAC believes it requires more funding for additional work during the year.

The ACT Electoral Commission receives ongoing recurrent funding that is determined in consultation with the Parliamentary Committee for the Electoral Commission. The Treasurer can veto the sum agreed upon but must table a document in Parliament that explains the reasons for the decision.

In New Zealand, the Officers of Parliament Committee oversees several integrity agencies. These integrity agencies submit their budget proposals to the Committee in a process that takes place before the New Zealand Government's full budget process. The Committee takes evidence from the heads of the agencies and seeks advice from the New Zealand Treasury on the budget proposals. The Committee then makes its recommendation on the budget proposals to the Parliament. The Committee also assesses financial and performance matters of the Offices, including: recommending appointments of the heads of the Offices; appointing external auditors; and developing or reviewing codes of conduct.

In five comparable jurisdictions – Victoria, Queensland, Western Australia, the Australian Capital Territory, and New Zealand – the heads of selected integrity agencies are formally designated as Officers of Parliament. Several of these are the equivalents of the integrity agencies in this audit, including Ombudsmen, Electoral Commissioners and Anti-corruption Commissioners. In these jurisdictions, the term Officer of Parliament aims to provide a clearer relationship to Parliament and greater separation from the Executive Government. However, it does not give agencies any additional functions, powers, or rights.

There are four other jurisdictions in Australia that do not use an equivalent classification to Officers of Parliament for their integrity agencies, as shown in Exhibit 1.

Exhibit 1: Use of the Officers of Parliament classification in comparable jurisdictions

	Ombudsman	Electoral Commissioner	Anti-corruption Commissioner
Commonwealth	⊖	⊖	N/A
Victoria	✓	✓	✓
Queensland	✓	⊖	✓
Western Australia	✓	⊖	⊖
South Australia	⊖	⊖	⊖
Tasmania	⊖	⊖	⊖
ACT	✓	✓	⊖
Northern Territory	⊖	⊖	⊖
New Zealand	✓	⊖	N/A

Key

✓ Equivalent agency is classified as an 'Officer of Parliament'.

⊖ Equivalent agency is not classified as an 'Officer of Parliament'.

N/A Equivalent agency does not exist in this jurisdiction.

Source: Audit Office research.

1.3 About the audit

This audit assessed the effectiveness of the financial arrangements and management practices at four integrity agencies – the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the NSW Electoral Commission, and the NSW Ombudsman. In making this assessment, this audit considered the following questions:

1. Do funding models effectively support integrity agencies to fulfil their legislative mandate?
2. Have integrity agencies assessed the requirements for fulfilling their legislative mandate?
3. Are the internal budgeting processes at integrity agencies effective?
4. Do integrity agencies monitor how efficiently they use their funding?

More information about the audit scope, criteria, and approach can be found in Appendix Two.

2. Independent Commission Against Corruption - financial arrangements and management practices

Conclusion

Financial arrangements for ICAC

ICAC's main functions are to investigate and prevent corruption in the public sector. Its legislation establishes it as an independent agency that is accountable to Parliament.

Decisions about the annual appropriation for ICAC are made by the Cabinet, with advice from NSW Treasury. Members of Cabinet or NSW Treasury could be involved in or affected by an ICAC investigation. There is no independent advice to Cabinet on ICAC's funding requirements and there is no transparency to Parliament about the reasons for decisions made about ICAC's budget. The absence of these safeguards in the current financial arrangements creates a threat to ICAC's independence and have the potential to limit its ability to fulfil its legislative mandate.

ICAC submitted budget proposals seeking increases to its appropriation funding in several recent years. The budget proposals related to funding to expand its workforce to respond to increases in the volume and complexity of its work. Some of these proposals were rejected without reasons being provided. There are no formal mechanisms available to ICAC to question or challenge these decisions. The process available to ICAC to request additional funding outside the annual budget creates further risks to its independence.

ICAC's management practices

ICAC's staff use structured processes for prioritising work against its legislative mandate and it has conducted recent reviews to assess its operational efficiency. ICAC's internal budgeting processes are adequate but could be improved with better documentation of the reasons for its budget decisions.

2.1 Overview of the Independent Commission Against Corruption (ICAC)

ICAC's main roles are investigating allegations of corruption in the public sector and providing advice and education on preventing corruption. ICAC's jurisdiction covers all NSW public sector agencies except for the NSW Police Force and the NSW Crime Commission, which are overseen by the Law Enforcement Conduct Commission. ICAC's jurisdiction also includes staff and elected representatives of local councils, ministers and other Members of Parliament, the judiciary, and the Governor. ICAC has extensive investigation powers, which include using covert evidence collection techniques, holding public hearings, and compelling witnesses to provide evidence.

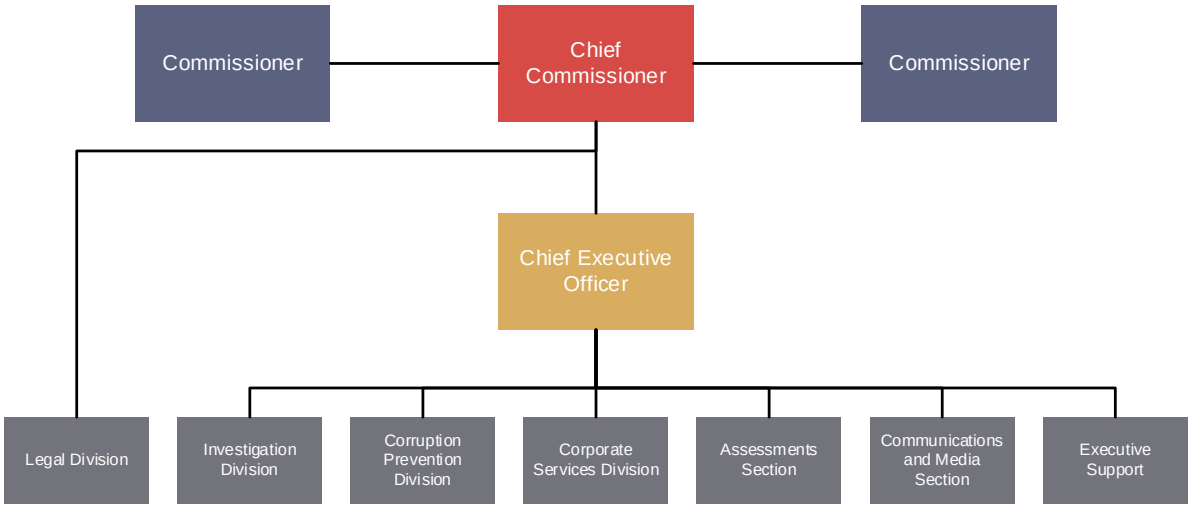
ICAC's legislation establishes it as an independent agency that is accountable to Parliament. The objects of the *Independent Commission Against Corruption Act 1988* (ICAC Act) include a statement that ICAC is an 'independent and accountable body.' ICAC is treated as an independent entity under financial and management legislation. Funding for ICAC is appropriated under a discrete part of the Appropriation Act, as one of nine special offices. This is different to the way other government departments and agencies receive appropriation funding. ICAC is subject to the *Government Sector Finance Act 2018* but is classified as a separate GSF agency. This means that it is not required to comply with whole of government financial management directions if it considers these are inconsistent with the independent exercise of its functions. If ICAC chooses to exercise this, it must provide a written document stating the reasons for non-compliance to the Treasurer and include this information in its annual report.

ICAC is accountable to Parliament in several ways, including:

- The Parliamentary Committee on the Independent Commission Against Corruption (ICAC Committee) considers ICAC's annual reports and can conduct ad hoc hearings and inquiries relating to ICAC's operations. ICAC can present reports directly to the Parliament.
- ICAC's activities are overseen by the Inspector of the Independent Commission Against Corruption, who reports directly to Parliament.
- ICAC Commissioners have fixed tenure and can only be removed by the Governor after a vote in both Houses of Parliament. The ICAC Act has a provision for a standing appropriation for the remuneration of Commissioners and Assistant Commissioners, although this has not been used to provide funding for ICAC.

ICAC is led by a Chief Commissioner who is supported by two Commissioners. The Commissioners make final decisions about which matters to investigate and how to conduct those investigations after receiving advice from staff. The day-to-day management of ICAC is overseen by a CEO who is responsible for leading the executive management team. The CEO's role also includes assisting the Commissioners in their decision-making, resource allocation and strategic planning. ICAC's organisational structure is summarised in Exhibit 2.

Exhibit 2: Independent Commission Against Corruption organisation structure



Source: ICAC Annual Report, 2018–19.

Under the ICAC Act, the ICAC Commissioners have the discretion to decide which matters to investigate and how to conduct investigations. ICAC's standard process begins with staff conducting an initial assessment of every matter received. These initial assessments consider whether the matter meets the standard of potentially 'serious and systemic' corruption required to justify further action. ICAC also considers whether it would be appropriate to refer the matter to another NSW Government agency. ICAC Commissioners then decide whether a matter warrants further investigation after taking advice from relevant staff. Options for further investigation include a preliminary investigation, a full investigation, and a public inquiry. ICAC's main corruption investigation and prevention activities are summarised in Exhibit 3.

A decision to commence a public inquiry must be approved by the Chief Commissioner and at least one other Commissioner. These decisions were previously made at the discretion of the Chief Commissioner alone. The NSW Government made these changes through amendments to the ICAC Act in 2016 that were intended to strengthen the governance of ICAC's decision making.

Exhibit 3: ICAC's corruption investigation and prevention activity, 2014–15 to 2018–19

Activity	2014–15	2015–16	2016–17	2017–18	2018–19
Corruption investigation					
Matters received and assessed	3,146	2,436	2,489	2,751	2,743
Preliminary investigations commenced	42	41	27	41	18
Full investigations commenced	14	10	10	12	12
Number of public inquiries	7	6	2	4	4
Number of days on public inquiries	64	48	31	47	133
Corruption prevention					
Requests for corruption prevention advice	134	94	105	139	180
Corruption prevention training sessions	85	107	74	126	111

Source: ICAC Annual Reports.

The number of matters referred to ICAC for assessment ranged from 2,400 to 3,100 over the five years between 2014–15 and 2018–19, as shown in Exhibit 3. This is influenced by factors including the incidence and awareness of corruption in the NSW public sector.

In 2018–19, ICAC commenced 18 preliminary investigations in response to matters that were referred to it. The number of matters proceeding to a full investigation remained consistent over the five years between 2014–15 and 2018–19, ranging from ten to 14 in each year. ICAC conducted four public inquiries in 2018–19, which required a total of 133 hearing days. This was a large increase in the number of hearing days compared to the previous four years, when hearings totalled between 31 and 64 days per year.

The changes in the type and duration of investigations conducted by ICAC are influenced by factors including the nature of matters referred to ICAC for assessment, the decisions made by the ICAC Commissioners about how to investigate matters, and the complexity of investigating the matters. The variation in the volume and nature of matters referred to ICAC makes it difficult to predict ICAC's workload with precision and creates a need for flexibility in ICAC's funding arrangements to ensure it can fulfil its legislative role. This is especially the case for matters that lead to full investigations and public inquiries, which can arise unexpectedly and require significant resources due to their complexity.

There were some fluctuations in the volume of ICAC's corruption prevention work during the period 2014–15 to 2018–19. The number of requests received for corruption prevention advice ranged from 94 in 2015–16 to 180 in 2018–19. The number of training sessions on corruption prevention that ICAC delivered was between 74 and 126 per year. ICAC has more discretion over the volume and nature of its corruption prevention work compared to its investigation work. However, there are some external factors that influence the demand for ICAC's corruption prevention activities, including changing awareness of corruption in the public sector and changes in the number of requests for advice and training.

2.2 Funding for ICAC

ICAC receives most of its revenue from appropriation funding. This is determined annually through the NSW Government's budget process. It has also received a significant amount of additional funding from DPC during the financial year in most recent years, as shown in Exhibit 4.

Exhibit 4: ICAC's revenue (actuals), 2014–15 to 2018–19

	2014–15	2015–16	2016–17	2017–18	2018–19
	$m	$m	$m	$m	$m
Appropriation revenue*	27.1	20.2	21.1	21.1	25.4
Additional funding from DPC**	1.6	1.3	0.1	1.7	1.7
Other revenue***	0.9	2.6	(0.6)	1.1	1.5
Total revenue	**29.6**	**24.1**	**20.6**	**23.9**	**28.6**

Notes:

* Appropriation revenue is the amount received by ICAC. This may be lower than the amount approved in the Appropriation Act for reasons including: the application of 'efficiency dividends'; staffing changes leading to lower employee expenditure requirements; changes to project timelines leading to lower capital expenditure requirements.

** Funding was provided from the funds that were appropriated to DPC under Part 2 of the Appropriation Act in each year.

*** ICAC's other revenue includes: acceptance by the Crown Entity of employee benefits and other liabilities; sales of goods and services; and investment revenue.

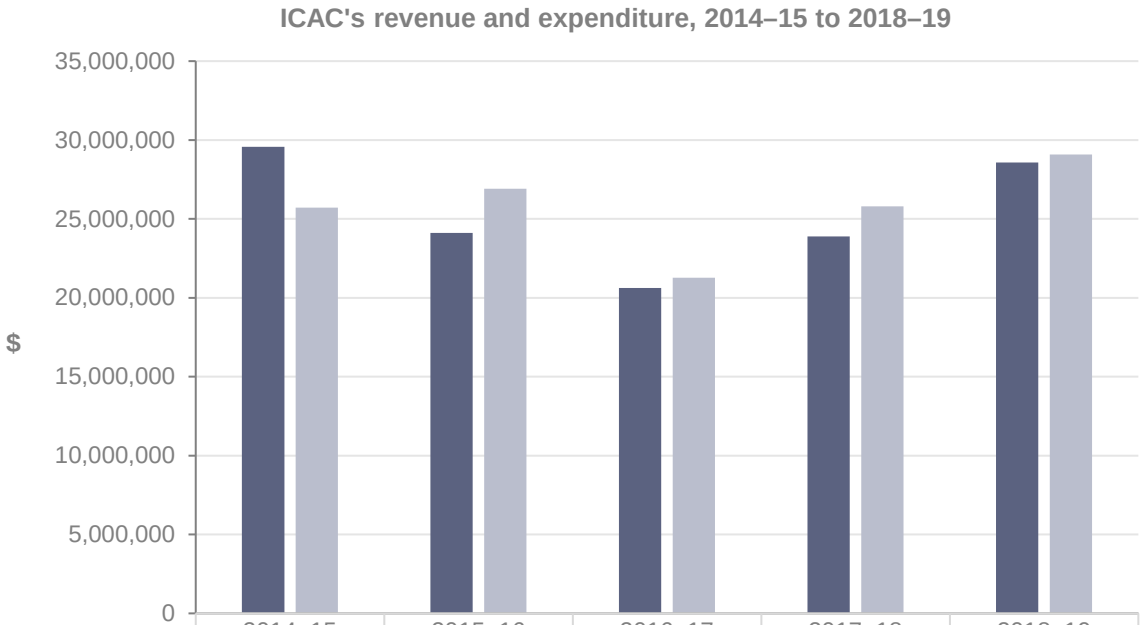
Source: ICAC financial statements 2014–15 to 2018–19.

ICAC's total revenue reduced by $9.0 million between 2014–15 to 2016–17. This was largely due to a reduction of almost $7.0 million, or 25 per cent, in the amount of appropriation funding from 2014–15 to 2015–16. After remaining around that level for the following two years, ICAC's appropriation revenue increased to $25.4 million in 2018–19.

ICAC's expenditure has been higher than its revenue in most recent years

ICAC's expenditure exceeded the amount of funding it received in four of the five years between 2014–15 and 2018–19, as shown in Exhibit 5. This indicates that the reduction in the amount of funding appropriated for ICAC in 2015–16 made it difficult for ICAC to operate within its budget. While ICAC's funding was reduced significantly, demand for assessments of potential corrupt conduct remained steady and ICAC's investigation activities increased, as shown in Exhibit 3 above.

Exhibit 5: ICAC's revenue and expenditure, 2014–15 to 2018–19



	2014–15	2015–16	2016–17	2017–18	2018–19
Revenue	29,575,000	24,104,000	20,629,000	23,899,000	28,581,000
Expenditure	25,709,000	26,906,000	21,280,000	25,799,000	29,088,000

Source: ICAC financial statements 2014–15 to 2018–19.

ICAC made proposals to increase its appropriation funding by $1.9 million through the annual budget process in both 2015–16 and in 2016–17. ICAC had prepared budget proposals in line with the requirements of NSW Treasury's budget guidelines to support these budget proposals. Neither of the proposals were approved and ICAC was not provided with reasons for this. ICAC's proposal for an increase to its appropriation funding of $3.6 million in 2018–19 was approved. This restored ICAC's funding to a similar level to its funding in 2014–15.

ICAC made a single proposal for increased appropriation funding in 2019–20 in which it sought $4.1 million. The request was to pay for additional staff, which ICAC argued was required to support the larger number of public hearings it was holding. An ICAC-commissioned report that analysed its workforce requirements was provided to support this proposal. This request was not approved and ICAC was not provided with reasons for the rejection of this budget proposal.

The process for determining the annual appropriation funding for ICAC does not recognise ICAC's status as an independent agency

The Cabinet Expenditure Review Committee (ERC) makes the decisions about the budget proposals that are presented to it from ICAC. Members of Cabinet could potentially be investigated directly by ICAC and ICAC's investigations have the potential to damage the reputation of government more broadly. There is a risk that these factors could influence the ERC's decision-making about funding for ICAC. Cabinet conventions mean that all discussions held at ERC are considered Cabinet-in-Confidence and are not made public or shared with agencies or Parliament. The limited transparency about why decisions about ICAC's funding were made means that it is not possible for Parliament to understand the basis for decisions about ICAC's funding.

In the absence of additional safeguards, the involvement of NSW Treasury in deciding whether to progress ICAC's proposals for increases to its appropriation funding is a potential threat to ICAC's independence. NSW Treasury advises that it provides ICAC's funding submissions directly to Cabinet without making changes. However, NSW Treasury does provide separate advice to Cabinet on these submissions. For the 2019–20 budget, NSW Treasury put a cap on the number of proposals agencies could make and limited the criteria to 'urgent and unavoidable' requests. NSW Treasury's budget guidelines said this was necessary because it was an election year and there would be limited funding available for new budget proposals once government election commitments had been funded. NSW Treasury's guidance stated that any proposals must have the prior approval of the NSW Treasury Secretary, or they would not be progressed for consideration by the ERC.

ICAC is classified as an independent entity in NSW Treasury's budget guidelines. However, ICAC was still limited to making a single budget proposal in 2019–20 and its budget proposals still required the approval of the NSW Treasury Secretary to be progressed. This is not consistent with ICAC's accountability arrangements, in which it is accountable to Parliament, rather than a minister or the secretary of a department. There are currently no additional safeguards to this risk, such as independent advice and greater transparency to Parliament.

The Executive's involvement in the funding decisions for ICAC can create tensions which could limit the effectiveness of the current financial arrangements. Good governance principles suggest that an effective decision-making process should ensure that those who could be investigated do not determine the funding of the investigating body. In the case of ICAC, this is very difficult to achieve because of its broad remit. However, including additional safeguards in the process for determining appropriation funding would provide better protection against risks to ICAC's independence and its ability to fulfil its legislative mandate.

The safeguards to threats to ICAC's independence are not sufficient

There are several safeguards to the risk that funding decisions about ICAC could be compromised, but each of these has some limitations. The appropriation for ICAC must be approved by the NSW Parliament, via the passage of the annual Appropriation Act, as described in Chapter 1 of this report. However, Members of Parliament do not receive the initial budget proposals that were made by ICAC. Nor do they see the advice that was provided by NSW Treasury on ICAC's budget proposals. This means that Members of Parliament are not aware of funding proposals that were rejected or only partially granted after NSW Treasury or ERC decisions.

There are several avenues that ICAC can use to communicate directly with Parliament about its funding requirements. These include:

- ICAC can make a special report to Parliament on administrative or policy matters relating to its functions. ICAC did this in May 2020 when it tabled a special report on its funding process. This was the first time ICAC has tabled this type of report.
- ICAC and the ICAC Inspector raised concerns about ICAC's budget at hearings of the ICAC Committee in 2019. This committee subsequently published a report recommending that the funding model for ICAC should be reconsidered to ensure ICAC's independence is maintained and it is sufficiently funded. The NSW Government response to this report did not respond directly to this recommendation but noted that it had asked the Auditor-General to examine the matter in this audit.
- Budget Estimates Hearings are conducted annually by NSW Parliament Portfolio Committees. At these hearings, members of the Committee can question ministers and senior NSW Government officials about their budget allocations and spending decisions. Appearances at the Committee hearings are by invitation from the Committee and in 2019, ICAC was not invited to appear.

These mechanisms allow ICAC to raise concerns about funding decisions. However, they do not allow the funding amounts to be reconsidered or changed because Parliament does not have any formal role in ICAC's budget development process.

ICAC does not have an appropriate mechanism to seek additional funding

The number of matters referred to ICAC have remained broadly consistent, as shown in Exhibit 3 above. However, ICAC cannot always predict which matters will require more comprehensive investigations or which will lead to public inquiries at the time when its annual budget is set. This means that ICAC needs a mechanism to access additional funding to ensure it can fulfil its legislative role.

ICAC has requested and received additional funding from DPC during the financial year in each of the five years examined for this audit. To access this funding, ICAC wrote to the DPC Secretary requesting additional funding and providing a brief description of the reason it was needed. In some cases, ICAC also wrote directly to the Premier due to concerns about the timeliness of responses to its requests. ICAC made these requests to DPC because it is grouped within the DPC cluster, as described in Chapter 1.

Additional funding was paid from DPC's appropriation funding to ICAC after consultation between the Secretaries of DPC and NSW Treasury and approval by the Premier. Each of ICAC's requests for additional funding during this period were approved. This funding made up more than ten per cent of ICAC's total revenue in 2015–16 and was more than five per cent of its revenue in four of the five years, as shown in Exhibit 6.

Exhibit 6: Additional funding from DPC to ICAC, 2014–15 to 2018–19

	2014–15	2015–16	2016–17	2017–18	2018–19
Additional funding provided	$1.6m	$2.6m	$0.1m	$1.7m	$1.7m
Additional funding as % of total revenue	5.4%	10.9%	0.6%	7.0%	6.0%

Source: ICAC financial statements, 2014–15 to 2018–19.

The role of DPC and NSW Treasury in making decisions about additional funding for ICAC creates risks to ICAC's independence. Asking a DPC Secretary to make decisions between funding for ICAC and another agency in the DPC cluster is inappropriate because neither a DPC Secretary nor a Premier is responsible for ICAC's functions or actions. Further, ICAC's jurisdiction means it could be seeking additional funding to investigate a senior government official. If funding requests were not granted, this could create a perception that decisions about ICAC's funding were compromised. The DPC Secretary stated in evidence to Parliament that he did not scrutinise requests from ICAC in any detail because of concerns that this could be perceived as inappropriate.

However, DPC has engaged in some financial management discussions with ICAC. For example, in July 2019, DPC wrote to ICAC stating that ICAC should participate in a NSW Treasury-led review of its budget management process. DPC also requested that ICAC provide DPC and NSW Treasury with detailed financial information on a quarterly basis so ICAC's expenditure against its budget could be monitored. In previous years, DPC maintained a greater distance from the financial management of ICAC. For example, a letter from the then-DPC Secretary to ICAC in 2012 specified that ICAC should deal directly with NSW Treasury on budget matters.

ICAC raised a separate issue relating to the lawfulness of DPC and NSW Treasury's involvement in its funding arrangements in a Special Report to Parliament in May 2020. ICAC's report drew on legal advice it commissioned and states that 'because aspects of the current funding arrangements, namely the involvement of Executive Government in those arrangements, are incompatible with the Commission's independence, they are unlawful'. In our view, the Executive's involvement in making decisions on appropriations for the integrity agencies is in accordance with the legislative framework for appropriations and Westminster conventions, in which decisions about appropriations are initiated by the government of the day and ministers are accountable for the expenditure of public money. However, the involvement of DPC, NSW Treasury and Cabinet in funding decisions for ICAC creates threats to ICAC's independence that are not mitigated adequately under the current financial arrangements, as described above.

2.3 ICAC's management practices

ICAC has structured processes for prioritising work against its legislative mandate

ICAC has systems for assessing and prioritising its work in line with its legislative role and functions. Staff are provided with established processes for assessing matters referred to it and detailed guidance on how to apply these. Briefs that analyse whether matters referred to ICAC should be progressed for further investigation are prepared for consideration by an assessment panel. This panel meets regularly and includes ICAC's Commissioners and senior executives.

ICAC's approach to conducting investigations and corruption prevention projects is guided by policy frameworks and processes and is overseen by an executive committee. The examples of briefings that we viewed mostly followed ICAC's established processes and frameworks and presented clear information against ICAC's decision-making criteria. We identified some examples that varied from documented procedures. Briefs did not include detailed analysis of the likely costs or timeframes for the work being proposed. ICAC's policy stated that this should be included.

ICAC has conducted recent reviews to assess its operational efficiency

ICAC monitors its overall productivity through reporting on activities including the volume and timeliness of its assessment of matters referred to it and the number of investigations it conducts. Some of ICAC's investigation work is unpredictable. As a result, it is not always possible to estimate the time or cost of individual investigations or inquiries meaningfully. ICAC's quality standards for its investigations are informed by a range of external sources, including legislation, common law principles, policies of the Office of the DPP and the Attorney-General for NSW, and relevant professional standards.

ICAC commissioned an external review in October 2018 that included an assessment of ICAC's workforce and processes since the implementation of the new organisational structure comprising three Commissioners and a CEO. This review made several observations on the efficiency of ICAC's routine operational processes, including:

- ICAC could improve the way it prioritises its work to understand where effort should be applied to get the most benefit and manage demand efficiently.
- There may be opportunities to achieve corruption prevention outcomes using less formal approaches than those used by ICAC.
- ICAC's frontline investigation staff spent considerable time on manual processes that reduce the time they can spend on their primary investigation duties.

ICAC used this review to support a budget proposal for an increase to its appropriation funding. This was not approved, as discussed above. During this audit, ICAC advised that it is considering ways to control its legal costs, but this approach has not been formalised and is not reflected in ICAC's current procurement policy. ICAC's expenditure on external legal fees was around $1 million in 2017–18 and almost $1.8 million in 2018–19.

ICAC has identified some corporate efficiency savings but has not reviewed its overall corporate structure recently

ICAC has done some work to assess the efficiency of its corporate functions. It commissioned a review of its ICT strategy in 2017 which identified potential savings of around $1.3 million over ten years if it changed its approach to purchasing IT equipment. ICAC previously made bulk orders using appropriation funding provided once every five years. ICAC made a successful budget proposal in 2018–19 to receive annual appropriation funding for IT equipment which allowed it to make smaller, more regular IT purchases at lower overall cost.

ICAC commissioned a review that included a comparison to the corporate costs of three similar agencies in 2018. It has not conducted a comprehensive review of its corporate services division to determine whether its current size and structure best meet the organisation's needs. As a result, there have been no major changes to the structure of the Corporate Services Division since the introduction of the organisational structure comprising three Commissioner and a CEO in 2016. Without this analysis, it is difficult for ICAC to demonstrate that its corporate functions are being delivered in the most efficient way possible.

ICAC's internal budgeting processes are suitable for its needs but could be better documented

Our previous financial audits included an assessment of ICAC's key financial controls. Audits in the last five years did not identify any high-risk deficiencies in ICAC's financial systems and unqualified audit opinions with respect to ICAC’s financial statements were issued in each year. Budget documentation that is prepared for executives includes draft annual budgets and monthly financial reporting that includes variance analysis.

ICAC advised that its annual budget is developed by its senior executives and involves considering operational needs and options for reprioritisation of expenditure where required. ICAC does not document its approach in an overall budget policy or strategy and does not record minutes of its meetings or document decisions made. ICAC advised that it does not think it needs to document this because it is a small organisation and most of its costs are fixed.

Given the wide discretion ICAC Commissioners have, it is important that ICAC accounts for the way it uses its funding in as much detail as possible, without disclosing sensitive details of its operations. ICAC could improve its internal budgeting process by:

- documenting its budget policy or strategy
- incorporating budget responsibilities in the relevant staff position descriptions
- analysing the reasons for variances between budgeted and actual expenditure in more detail.

3. NSW Electoral Commission - financial arrangements and management practices

Conclusion

Financial arrangements for NSWEC

NSWEC conducts elections and is responsible for maintaining the integrity of the electoral system in New South Wales. NSWEC's legislation states that it should conduct elections and investigate potential breaches of electoral law independently and be accountable to Parliament. Decisions about the annual appropriation for NSWEC are made by the Cabinet. It is possible that NSWEC's investigations of electoral integrity could include members of Cabinet or the political party that holds government. There is a risk that decisions about its funding could be influenced by the conduct of these investigations. If realised, this would be a threat to NSWEC's independence and ability to fulfil its legislative mandate. NSWEC has not received the full funding amount it has requested in recent years. There is inadequate transparency about how funding decisions were made and there are no formal mechanisms to question or challenge these decisions.

The conduct of elections is a key element of a democratic system and under-funding this function could have serious implications. NSWEC's requests for additional appropriation funding are assessed alongside the priorities of the government of the day. Its role transcends these immediate priorities and there is a risk that its funding requirements may not be prioritised.

NSWEC's management practices

NSWEC's internal budgeting processes and efficiency programs are clear and well documented. NSWEC has identified options to improve its operational and corporate efficiency but has not implemented all of these.

3.1 Overview of the NSW Electoral Commission (NSWEC)

NSWEC's main roles are to conduct elections and maintain the integrity of the electoral system in New South Wales. NSWEC's integrity functions include investigating potential breaches of electoral and political funding laws. Its jurisdiction for these matters includes ministers and other Members of Parliament, local councillors, political party officials, and private citizens including people who make donations to political candidates or parties.

NSWEC's legislation makes it clear that it should conduct elections and investigate potential breaches of electoral law independently and be accountable to Parliament. The *Electoral Act 2017* (Electoral Act) makes it clear that NSWEC should operate as an independent agency. The objects of the Electoral Act include constituting 'an independent Electoral Commission with an independent Electoral Commissioner'. The Electoral Act also states that NSWEC is not subject to the control or direction of a minister in the exercise of its functions and that NSWEC must undertake its work in a way that is not unfairly biased against or in favour of any individuals or organisations.

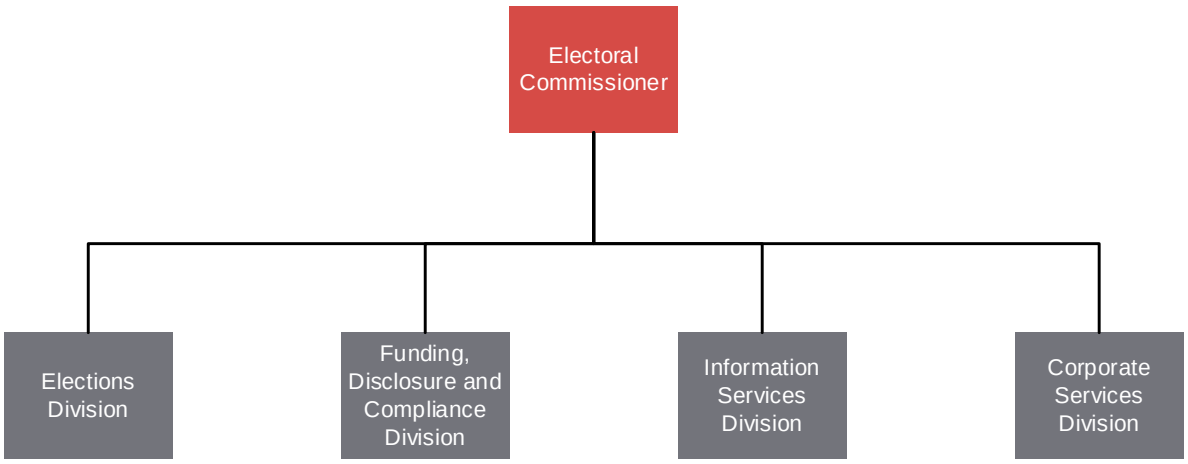
NSWEC is treated as an independent entity under financial and management legislation. Funding for NSWEC is appropriated under a discrete part of the Appropriation Act, as one of nine special offices. This is different to the way other government departments and agencies receive appropriation funding. NSWEC is classified as a separate agency under the *Government Sector Finance Act 2018*. This means that it is not required to comply with whole of government financial management directions if it considers these are inconsistent with the independent exercise of its functions. If NSWEC chooses to exercise this, it must provide a written document stating the reasons for non-compliance to the Treasurer and include this information in its annual report.

NSWEC is accountable to Parliament in several ways, including:

- The Joint Standing Committee on Electoral Matters considers NSWEC's annual reports and can conduct hearings to examine its operations.
- The NSWEC reports directly to Parliament on electoral donations and the administration of elections. However, the NSWEC's post-election review is given to the Premier, who must present it in Parliament within one month.
- Electoral Commissioners are appointed for a period of up to ten years. The Electoral Commissioner is appointed by the Governor and can only be removed by the Governor with the approval of both Houses of Parliament.

The NSW Electoral Commissioner leads the NSWEC. There are four divisions within the current structure of NSWEC that cover the areas of Elections Funding, Disclosure and Compliance, Information Services, and Corporate Services. NSWEC's organisational structure is summarised in Exhibit 7.

Exhibit 7: Office of the NSW Electoral Commissioner organisation structure



Source: NSWEC website.

NSWEC's main role is conducting state government elections, which take place every four years. NSWEC can be engaged by local governments and non-government organisations to organise their elections. NSWEC aims to provide these services on a cost-recovery basis.

In addition to delivering elections, NSWEC has several functions that require ongoing maintenance or monitoring. This includes maintaining the NSW electoral roll and NSW's electronic voting technology and providing public education about the electoral system. The *Electoral Act 2017* and the *Electoral Funding Act 2018* gave NSWEC additional functions relating to the integrity of the electoral system. These include investigating possible breaches of electoral funding and political lobbying laws and administering public funding for political parties.

In 2018–19, NSWEC conducted 192 investigations relating to potential breaches of state electoral laws and 128 matters relating to third-party lobbying laws. NSWEC also recorded and published almost 5,000 disclosures of political donations.

3.2 Funding for NSWEC

NSWEC receives most of its revenue from appropriation funding. This is determined annually through the NSW Government's budget process. The annual budget is approved by the Cabinet Expenditure Review Committee (ERC), as described in Chapter 1 of this report. NSWEC's funding changes significantly from year to year according to the stage in the electoral cycle, as shown in Exhibit 8. For example, NSWEC's revenue from appropriation funding was $143.3 million in 2018–19, which was an election year, compared to $68.8 million in 2017–18.

The Electoral Act includes provision for a standing appropriation for election expenses. This does not provide a mechanism for direct access to funding because it requires the approval of the Governor, which can only be given on the advice of the government of the day.

Exhibit 8: NSWEC's revenue (actuals), 2014–15 to 2018–19

	2014–15	2015–16	2016–17	2017–18	2018–19
	$m	$m	$m	$m	$m
Appropriation revenue*	96.3	57.2	68.4	68.8	143.3
Additional funding from DPC**	1.4	--	--	2.4	--
Other revenue***	1.7	5.1	3.2	0.3	2.3
Total revenue	**99.4**	**62.3**	**71.6**	**71.5**	**145.5**

Notes:

* Appropriation revenue is the amount received by NSWEC. This may be lower than the amount approved in the Appropriation Act for reasons including: the application of 'efficiency dividends'; staffing changes leading to lower employee expenditure requirements; changes to project timelines leading to lower capital expenditure requirements.

** Funding was provided from the funds that were appropriated to DPC under Part 2 of the Appropriation Act in each year.

*** NSWEC's other revenue includes: sales of goods and services (including provision of election services to local government); acceptance by the Crown Entity of employee benefits and other liabilities; and investment revenue.

Source: NSWEC financial statements 2014–15 to 2018–19.

NSWEC had multiple requests for increases to its appropriation funding rejected in recent years

In 2019–20, NSWEC made 13 separate proposals for increases to its appropriation funding totalling $33.8 million. NSWEC commissioned external reviews and developed business cases to support these proposals. The ERC approved an increase of $8.4 million to NSWEC's appropriation funding, which was about 25 per cent of the total funding amount requested. The requests for appropriation funding increases related to the implementation of its workforce strategy and several IT projects to improve data and cyber security.

For the 2019–20 budget, NSW Treasury put a cap on the number of proposals agencies could make and limited the criteria to 'urgent and unavoidable' requests. NSW Treasury's budget guidelines said this was necessary because it was an election year and there would be limited funding available for new budget proposals once government election commitments had been funded. NSW Treasury's budget guidelines stated that any proposals for increases to appropriation funding must have the prior approval of the NSW Treasury Secretary, or they would not be progressed for consideration by the ERC.

NSWEC is described as independent agency in NSW Treasury's budget guidelines. This meant that NSWEC did not have to submit its budget proposals via DPC. However, NSWEC was still limited to making a single budget proposal in 2019–20 and its budget proposals required the approval of the NSW Treasury Secretary to be progressed to the ERC. NSWEC was not informed which, if any, of its budget proposals for 2019–20 were considered by the ERC because NSW Treasury considers this information Cabinet-in-Confidence.

The process for determining the annual appropriation for NSWEC considers electoral funding alongside the NSW Government's policy commitments

The ERC makes the decisions about budget proposals that are presented to it from NSWEC. These decisions are made with reference to the priorities and commitments of the government of the day. For the 2019–20 budget, the five stated priorities were:

1. A strong economy, quality jobs and job security
2. High quality education
3. Well-connected communities with quality local environments
4. Putting the customer at the centre of government services
5. Breaking the cycle of intergenerational disadvantage.

NSWEC's funding requirements may not be appropriately prioritised if they are being considered against requests for funding to fulfil government election commitments or other high-profile policies or projects. NSWEC's functions do not make a direct contribution to the achievement of any of the government policy priorities listed above. The integrity of elections and the broader electoral system is a fundamental element of the democratic system in New South Wales, but the consequences of inadequately funding the NSWEC may not have a direct impact on the government of the day.

NSWEC's main accountability is to the NSW Parliament, but Members of Parliament have limited opportunities to engage in the details of funding decisions about the NSWEC. Members of Parliament do not receive the initial budget proposals that were made or see the advice that NSW Treasury and DPC provided to the ERC. This means that Members of Parliament are not aware of funding proposals from NSWEC that were rejected or only partially granted following NSW Treasury's consideration and ERC deliberations. The Electoral Commissioner can communicate directly with Parliament by tabling reports and appearing at Parliamentary Committees including the Joint Standing Committee on Electoral Matters or at Budget Estimates hearings. However, these mechanisms do not allow funding decisions to be reconsidered because none of these have any role in the budget development process.

NSWEC does not have an appropriate mechanism to request additional funding outside the appropriation process

NSWEC received additional funding from DPC twice in last five years. In 2014–15, NSWEC received $1.4 million for costs associated with delivering the state government election. In 2017–18, NSWEC received $2.4 million from DPC for work required to implement the *Electoral Act 2017*. NSWEC made these requests to DPC because it is grouped within the DPC cluster, as described in Chapter 1. Both of NSWEC's requests for additional funding during this period were approved. This additional funding was paid from DPC's appropriation funding to NSWEC after approval by the Premier.

Asking a DPC Secretary to make decisions between funding for NSWEC and another agency in the DPC cluster is inappropriate because neither a DPC Secretary nor a Premier is responsible for the functions or actions of NSWEC. Further, if the only mechanism available for NSWEC to seek additional funding is via a DPC Secretary, this could lead to a situation in which NSWEC is seeking funding from the potential subject of an investigation.

3.3 NSWEC's management practices

NSWEC has proposed changes to improve the efficiency of its operations

NSWEC commissioned an assessment of its workforce structure in 2019. The review found that almost half of its staff, including Director-level staff, were in temporary positions. Weaknesses of this model which have impacted NSWEC in recent years include paying higher rates to contractors and losing organisational knowledge due to high staff turnover. NSWEC argues that reclassifying positions from temporary to ongoing is justified by its expanded legislative mandate, which now includes investigating possible breaches of electoral funding and political lobbying laws, and an increasing requirement for ongoing maintenance of electronic voting and cybersecurity systems.

To implement these changes, NSW Treasury would need to authorise an adjustment to NSWEC's labour expense cap, which sets the maximum amount that an agency can spend on employees in ongoing roles. NSWEC submitted a request to NSW Treasury to increase its labour expense cap to allow it to implement the recommendations of its workforce review, which included a formal business case. This proposal was not approved and NSWEC was not given a reason for this.

NSWEC conducted a review of its organisational structure in 2018. Some recommended changes have been implemented, while others are still being considered by the NSWEC executive. NSWEC advised the key reasons for this are that some recommendations require increases to its appropriation funding to implement and the delivery of the 2019 state election took precedence over broader strategic work. NSWEC's program of internal audits over the last three years has included several reviews that considered its operational efficiency. Areas examined included project management for the 2019 state government election and processes used for managing investigations. Several of these reviews have noted recent improvements in its efficiency in areas including project management and governance.

NSWEC has some discretion to manage its election costs by changing service levels in areas such as security of ballots, waiting times for voters, and vote counting times. NSWEC's service levels are detailed in project planning documents and approved by an escalation process through its governance committees. Decisions about election service levels are complex and have implications for cost and the risk to successful delivery of elections. The conduct of an election is a high-risk project because the consequences of parts of the process failing are significant. NSWEC must also consider the expectations of stakeholders including voters, political parties, individual candidates, and the media.

NSWEC has identified options to improve its corporate efficiency but has not implemented all of these

NSWEC has applied its own 'efficiency program' annually since 2016–17. This has involved reviewing costs across the organisation with the aim of finding efficiency improvements. This program has included the review of cross-organisation spending in areas including procurement, consultants and travel, 'line by line' analysis of costs in each division, and review of staff positions to identify duplication of roles. This program is governed by an internal steering committee that reviews recommended changes. This program has identified that NSWEC's corporate support systems including records management and IT systems are out of date and need upgrading.

NSWEC's IT costs have risen recently due to cyber security requirements and online voting systems. However, the Electoral Commissioner stated in NSWEC's 2018–19 Annual Report that it is not compliant with NSW Government cyber security policy. Gaps included: the absence of a formal information security strategy and processes; weaknesses in the way access to systems was controlled; and a lack of a formal process to detect and respond to cybersecurity incidents. The Electoral Commissioner noted that NSWEC was attempting to address these issues but was constrained because its request for increased appropriation funding to implement recommendations of a review it commissioned in 2017 was not approved. In previous years, our financial audit reports have noted weaknesses in NSWEC's IT security, including the absence of monitoring of information systems privileged user activities.

NSWEC’s internal budgeting processes are suitable for its needs

Our previous financial audits included an assessment of NSWEC's key financial controls. Audits in the last five years did not identify any high-risk deficiencies in NSWEC's financial systems and unqualified audit opinions with respect to NSWEC’s financial statements were issued in each year.

NSWEC has a Strategy, Performance and Budget Committee that oversees its budget process and broader financial strategy. The Committee's membership includes the Electoral Commissioner and senior executives from each business unit. Organisational objectives and identified organisational risks are considered in financial decision making at this Committee. NSWEC projects and initiatives are assessed against consistent criteria that test how they align with the NSWEC’s strategic plan.

There are clear and documented financial delegations, and budget responsibilities are included in the performance plans of senior executives. Business units are involved in the budget setting process, as Directors are responsible for setting budgets for their respective units. All Divisions provide monthly financial reporting on actual expenditure against the budget, including variance analysis. NSWEC monitors project costs through financial reporting to Portfolio and Project Steering Committees. This includes month to month tracking of expenditure associated with each project.

4. NSW Ombudsman - financial arrangements and management practices

Conclusion

Financial arrangements for NSWO

NSWO oversees government agencies and some government-funded private sector bodies that provide services to the community or exercise administrative functions. NSWO's legislation makes it clear that it should operate independently of the agencies it oversees and be accountable to Parliament.

NSWO's investigations do not include members of Cabinet, except in relation to Public Interest Disclosures made about a minister, so the risk that decisions about its budget could be affected by its investigations is relatively lower. However, NSWO's investigations can comment on and make recommendations about government policies, which may have been endorsed by Cabinet or an individual minister, and its investigations cover systemic issues for which ministers and the heads of government departments are responsible. NSWO faces a further challenge in its ability to make compelling budget proposals under the current financial arrangements. Its funding requests are assessed alongside the government's priorities, but its work is unlikely to align directly with these priorities.

NSWO's management practices

NSWO has assessed its operational and corporate efficiency recently and has implemented major changes to its operating model in response to this. Its internal budgeting process is adequate but could be improved by being documented more thoroughly.

4.1 Overview of the NSW Ombudsman (NSWO)

NSWO's main role is providing independent oversight of government agencies and some government-funded organisations that provide services to the community or exercise administrative functions. NSWO's jurisdiction includes NSW Government departments and agencies, local government councillors and staff, public universities in NSW, and some non-government organisations that provide services on behalf of the NSW Government, including corrections and community services. NSWO does not have jurisdiction over Members of Parliament, ministers, the judiciary, the NSW Police Force or the NSW Crime Commission.

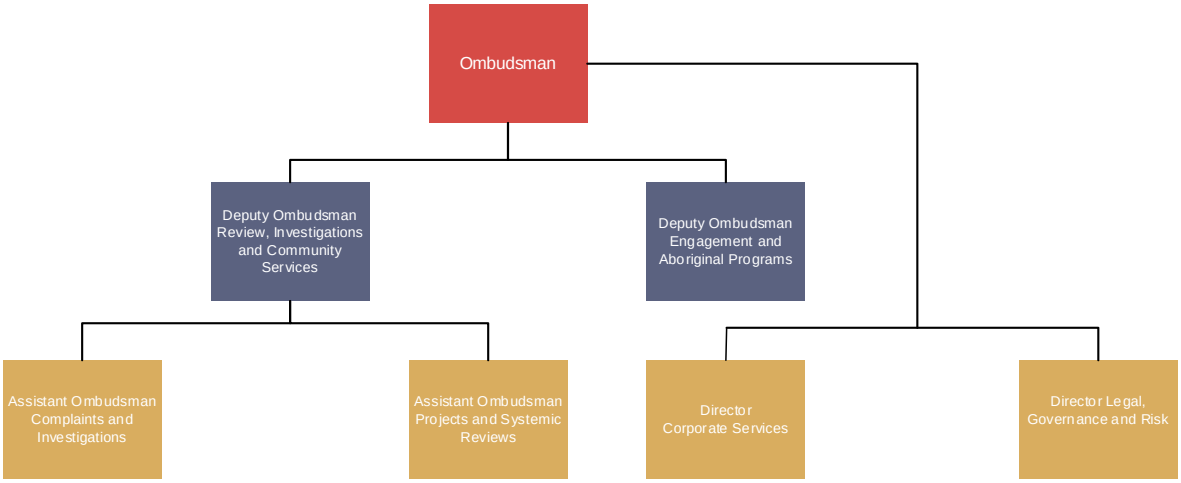
NSWO's legislation makes it clear that it should operate independently of the agencies it oversees and be accountable to Parliament. When conducting investigations or reviews, NSWO has free access to NSW Government staff and information required to conduct its work. NSWO is treated as an independent entity under financial and management legislation. Funding for NSWO is appropriated under a discrete part of the Appropriation Act, as one of nine special offices. This is different to the way other government departments and agencies receive appropriation funding. NSWO is classified as a separate agency under the *Government Sector Finance Act 2018*. This means that it is not required to comply with whole of government financial management directions if it considers these are inconsistent with the independent exercise of its functions. If NSWO chooses to exercise this, it must provide a written document stating the reasons for non-compliance to the Treasurer and include this information in its annual report.

NSWO is directly accountable to Parliament in several ways, including:

- NSWO is overseen by the Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission.
- NSWO presents reports directly to the President of the Legislative Council and the Speaker of the Legislative Assembly.
- The Ombudsman can only be removed following a vote in both Houses of Parliament.

NSWO is headed by the NSW Ombudsman, with a Deputy Ombudsman for Reviews, Investigations and Community Services and a Deputy Ombudsman for Engagement and Aboriginal Programs, as shown in Exhibit 9.

Exhibit 9: NSW Ombudsman organisation structure



Source: NSWO internal documents.

NSWO's main functions are specified in the *Ombudsman Act 1974*. NSWO also has functions under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, and the *Public Interest Disclosures Act 1994*. NSWO's main areas of work are:

- responding to complaints about government agencies and service providers, which can come from members of the public and staff at the agencies
- providing regular oversight and review of government systems and processes, including correctional facilities, the child protection system, and the public interest disclosures system
- monitoring and assessing state government aboriginal programs
- Reviewing 'reviewable' deaths (people with disability in supported group accommodation, children in care, and children whose deaths occur in circumstances of abuse or neglect) and convening the NSW Child Death Review Team
- providing education and training to NSW Government agencies.

Most of NSWO's workload comes from responding to matters referred to it from members of the public or staff at government agencies. NSWO describes these as 'contacts'. In 2018–19, NSWO received approximately 40,000 contacts, as shown in Exhibit 10. Of these, around 19,000, or 48 per cent, were assessed by NSWO as complaints that were within its jurisdiction. One third of the contacts related to matters that were out of NSWO's jurisdiction, with the remainder requests for advice (11 per cent) and notifications required under legislation (eight per cent), such as deaths of people in state government care. These figures have remained stable over the past five years, which indicates that NSWO's overall operational workload is relatively predictable.

Exhibit 10: Contacts to NSWO by type, 2018–19

Contact type		
Complaints	19,463	48%
Requests for advice	4,555	11%
Notifications	3,338	8%
Out of jurisdiction	13,298	33%
Total	**40,654**	**100%**

Source: NSWO Annual Report 2018–19, p.12.

A large amount of NSWO's work involves ensuring accountability for government services that are provided to vulnerable people. Among the contacts to NSWO classified as complaints, 26 per cent concerned custodial services, eight per cent were about community services, and eight per cent were about Housing NSW (formerly FACS Housing).

NSWO initiated seven formal investigations in 2018–19, which arose from a combination of complaints and NSWO's own research and intelligence. NSWO also conducts a large number of less formal reviews. These involve investigatory work but are not classified as formal investigations requiring the use of NSWO's full investigatory powers. While NSWO conducts a small number of formal investigations, they take up significant time and resources, with some running over several years. Recent investigations by the NSW Ombudsman include a report on compliance and enforcement of water regulations and sharing of information on vulnerable children between NSW Government agencies. NSWO has also conducted reviews of the operations of broader government systems on topics including complaint handling processes in NSW Government agencies and abuse and neglect of people with disabilities.

4.2 Funding for NSWO

NSWO received almost all its revenue from appropriation funding in 2018–19, as shown in Exhibit 11. In previous years, NSWO received up to 20 per cent of its revenue through grants for the provision of services to other agencies, including monitoring disability services, child protection, and aboriginal programs. The transfer of functions from NSWO to other agencies or jurisdictions led to a reduction in its revenue of almost $8 million between 2017–18 and 2018–19. NSWO received additional funding from DPC of around $2 million in 2014–15 and 2015–16. This funding was for the costs of an investigation relating to the NSW Police Force. NSWO has not sought additional funding from DPC since this investigation concluded.

Exhibit 11: NSWO's revenue (actuals), 2014–15 to 2018–19

	2014–15	2015–16	2016–17	2017–18	2018–19
	$m	$m	$m	$m	$m
Appropriation revenue*	24.7	24.3	28.9	29.7	26.6
Additional funding from DPC**	2.1	2.1	0.3	--	--
Other revenue***	5.1	7.0	5.2	7.8	2.9
Total revenue	**31.9**	**33.5**	**34.4**	**37.4**	**29.5**

Notes:

* Appropriation revenue is the amount received by NSWO. This may be lower than the amount approved in the Appropriation Act for reasons including: the application of 'efficiency dividends'; staffing changes leading to lower employee expenditure requirements; changes to project timelines leading to lower capital expenditure requirements.

** Funding was provided from the funds that were appropriated to DPC under Part 2 of the Appropriation Act in each year.

*** NSWO's other revenue is mostly grants from other agencies to provide services on their behalf, e.g. oversight of Aboriginal programs.

Source: NSWO financial statements 2014–15 to 2018–19.

Several functions that were provided by NSWO have been transferred to other agencies or jurisdictions in recent years. This has reduced NSWO's size and revenue. Responsibility for the oversight of the NSW Police Force's handing of complaints was transferred to LECC in 2016–17. Most of NSWO's responsibilities for monitoring disability services were transferred to the Commonwealth Government in 2018–19 after the introduction of the National Disability Insurance Scheme. Some NSWO staff were transferred to the Office of the Children's Guardian, another independent statutory office, during 2019–20 as a part of reforms in child protection. NSWO has considered options to share resources or consolidate functions with other oversight agencies, with the goal of finding efficiency and effectiveness improvements.

The process for determining the annual appropriation funding for NSWO does not fully recognise its independence

The Cabinet Expenditure Review Committee (ERC) makes the decisions about the annual appropriation for NSWO. NSWO's jurisdiction does not include ministers, except in relation to Public Interest Disclosures made about a minister. Its investigations typically make findings about government departments, rather than individual senior officials. However, NSWO's reviews can comment on and make recommendations about government policies, which may have been endorsed by Cabinet or an individual minister. In addition, ministers are ultimately responsible for all of the actions of their departments and agencies.

While the risk that decisions about NSWO's funding could be influenced by these factors is relatively lower, the existing safeguards are not comprehensive. If realised, this risk would reduce NSWO's ability to fulfil its legislative functions independently of the Executive Government.

NSWO's priorities are not directly linked to government priorities

The decisions about NSWO's appropriation funding are made with reference to the priorities and commitments of the government of the day. For the 2019–20 budget, the five stated priorities were:

1. A strong economy, quality jobs and job security
2. High quality education
3. Well-connected communities with quality local environments
4. Putting the customer at the centre of government services
5. Breaking the cycle of intergenerational disadvantage.

Some of NSWO's work could make an indirect contribution to some of these priorities. For example, NSWO's complaint handling and investigation functions cover areas including education and services for vulnerable people. However, NSWO's work is less likely to align with government priorities compared to projects and programs run by government departments and agencies. This may make it difficult for NSWO to make a compelling case for increases to its appropriation funding if these are required deliver its statutory functions. NSWO's statutory secrecy requirements for formal investigations may also limit its ability to provide complete information to NSW Treasury to support proposals for additional funding.

4.3 NSWO's management practices

NSWO has done recent work to clarify its core roles and functions

NSWO commissioned a major strategic review in 2018. This led to an organisational restructure that aimed to improve the alignment of its resources to the delivery of its legislative mandate and enable more consistent approaches to delivering its main functions. Work conducted since the review has focused on developing more consistent approaches to prioritisation of quality and service standards. Recent improvements to these processes include establishing an executive committee that has scheduled meetings every two months. The committee considers and decides on proposals for new investigations and major projects, maintains a watching brief over emerging complaints and systemic issues that may warrant future investigations and projects, has developed templates for proposals, plans and post-project reviews, and tracks the progress of investigations and projects against their plans.

NSWO has considerable discretion in fulfilling its legislative functions, particularly in the number and scope of larger investigations it conducts. There are several areas where the extent of work required to fulfil its mandate remains ambiguous. For example, some of NSWO's legislative functions include mandated minimum standards while others do not.

Areas of work that could be clarified further include:

- the number of audits of the operation of the public interest disclosure (PID) system it should do. NSWO has responsibility for oversight of more than 400 public authorities and 130 local councils that are required to use the PID system, but only conducted one audit for 2018–19
- the amount of support it should provide to people who contact them with issues that are not within its jurisdiction.

NSWO's internal budgeting process is suitable for its needs

Our previous financial audits included an assessment of NSWO's key financial controls. Audits in the last five years did not identify any high-risk deficiencies in NSWO's financial systems and unqualified audit opinions with respect to NSWO's financial statements were issued in each year.

NSWO does not have a documented budget policy that sets out processes such as roles and responsibilities, reporting, and risk escalation. NSWO has made recent changes to improve its internal budget process, including improving the documentation of its processes. Senior executives were engaged with the budget process in 2019–20, including considering the alignment of spending decisions with organisational objectives. Senior executives were given accountability for cost centres and regular reporting including variance analysis was provided to executives.

NSWO has assessed its operational efficiency recently and has made changes

Around 80 per cent of NSWO's expenditure was on staff-related costs in each of the last five years. NSWO has begun trialling options to improve its project management and costing information. NSWO's case management system gives it some information on the timeliness of complaint resolution and staff utilisation but it does not allow it to track the costs of its major investigations and projects.

Work conducted since its strategic review in 2018 has identified several further efficiency opportunities. These include encouraging the use of its online complaints function and developing an automated call system to improve the efficiency of its telephone complaints service.

NSWO has identified and begun implementing several corporate efficiency savings

NSWO recently reviewed its corporate structure and has developed a plan that aims to modernise and better support the organisation. NSWO has identified the need for upgrades in systems to support corporate and operational efficiency, including IT, project management and costing, and records management. NSWO has not identified options for funding this. It has recently completed analysis of the funding required and the risks associated with not making the improvements for the 2020–21 budget process.

NSWO has conducted preliminary analysis of options to share resources or merge functions with other organisations that have comparable or complementary roles, as noted earlier in this chapter. NSWO has identified potential agencies with which it could share resources, including office space and corporate services functions. These considerations are in the early stages and have not yet been developed or costed by NSWO. Further work in this area may help NSWO to mitigate the effects of the reduction in its mandate and staff headcount in recent years. In the case of proposals to share resources, this must be balanced with the need for NSWO and any other agencies involved to protect their independence.

5. Law Enforcement Conduct Commission - financial arrangements and management practices

Conclusion

Financial arrangements for LECC

LECC's main functions are to investigate allegations of misconduct by law enforcement and oversee police handing of complaints. LECC's legislation states it should operate independently of the agencies it oversees and be accountable to Parliament. LECC's jurisdiction does not include members of Cabinet, NSW Treasury or DPC. However, LECC's investigations have the potential to have a negative impact on a Minister for Police, who is a member of Cabinet, and the government of the day. There is a risk that decision makers for LECC's funding could be influenced by these considerations. While LECC has not sought increases to its appropriation funding in recent years, there are no formal mechanisms to question or challenge these decisions if it did have concerns about its funding in the future.

Unlike the other integrity agencies in this audit, LECC is not classified as a separate GSF agency under the *Government Sector Finance Act 2018.* This difference means that LECC has less independence from the Executive Government, because LECC would have to comply with a Treasurer's Direction even if it believes it is not consistent with the independent exercise of its functions.

LECC's management practices

LECC's internal budgeting processes are clear and documented and it has identified and implemented operational and corporate efficiency savings in several areas. LECC published a new strategic plan in July 2020. Over the first three years of its operations since 2017, LECC had not conducted effective strategic planning which made it difficult for LECC to demonstrate that it had a cohesive approach to its operations across the agency during this time.

5.1 Overview of the Law Enforcement Conduct Commission (LECC)

LECC's main roles are to investigate allegations of misconduct by law enforcement officers and to oversee the way law enforcement agencies handle complaints from the public. Its jurisdiction covers the NSW Police Force and the NSW Crime Commission. LECC does not have jurisdiction over Members of Parliament, ministers, or the judiciary.

The objects of the *Law Enforcement Conduct Commission Act 2016* (LECC Act) include providing independent oversight and review of investigations. The LECC Act states that LECC and its Commissioners are not subject to the control or direction of the minister in the exercise of their functions. LECC Commissioners have fixed tenure and can only be removed by the Governor.

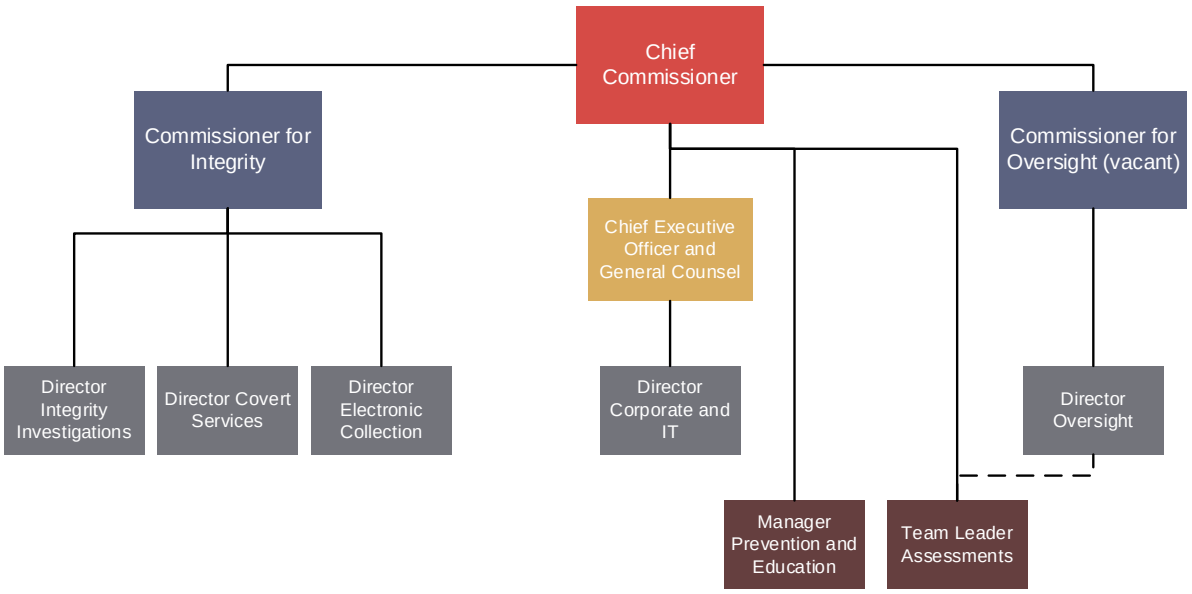
Funding for LECC is appropriated under a discrete part of the Appropriation Act, as one of nine special offices. This is different to the way other government departments and agencies receive appropriation funding. LECC is not classified as a separate GSF agency under the *Government Sector Finance Act 2018*, as the other three integrity agencies in this audit are. LECC is accountable to Parliament in several ways, including:

- LECC is overseen by the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission.
- LECC is also overseen by the Inspector of the Law Enforcement Conduct Commission, who reports directly to Parliament.
- LECC presents its reports to the President of the Legislative Council and the Speaker of the Legislative Assembly.

LECC commenced operations in July 2017. This followed a review of the police oversight system that recommended the establishment of the single agency to oversee the conduct of law enforcement agencies in NSW. The review provided detailed advice on the structure, operations and funding of the new agency. This included specifying that the new agency should have separate divisions for its two main functions of investigating misconduct and overseeing complaints handling. The establishment of the LECC drew together functions previously undertaken by the Police Integrity Commission, the NSW Ombudsman and the Inspector of the Crime Commission. These agencies and divisions were abolished when LECC commenced operations.

LECC's organisation structure currently includes three commissioners - a Chief Commissioner, a Commissioner for Integrity and a Commissioner for Oversight, as shown in Exhibit 12. The Chief Commissioner is the head of the organisation and oversees initial assessments of matters referred to LECC and LECC's prevention and education work. The Commissioner for Integrity oversees LECC's investigation work, and the Commissioner for Oversight is responsible for LECC's oversight of the internal complaint handling processes of the NSW Police Force and the NSW Crime Commission. The position of Commissioner for Oversight became vacant in early 2020 and the ongoing status of this position is currently under review. LECC also has a CEO who is responsible for the management of corporate functions. LECC's current CEO is also the General Counsel for the agency.

Exhibit 12: Law Enforcement Conduct Commission organisation structure



Source: LECC internal documents.

LECC's functions are set out in the LECC Act. These include:

- investigating matters that could amount to serious misconduct or serious maladministration by members of the NSW Police Force and NSW Crime Commission
- making recommendations on education and prevention programs concerning misconduct or maladministration in law enforcement
- overseeing the NSW Police Force's handling of complaints against police officers and the NSWCC's handling of complaints against its officers.

Almost all LECC's investigation and oversight work relates to the NSW Police Force, because the NSW Crime Commission is a small agency whose officers have limited contact with the public. LECC assessed around 2,500 complaints about the NSW Police Force in both 2017–18 and 2018–19, as shown in Exhibit 13. LECC staff make an initial assessment of complaints to determine whether they are examples of serious misconduct or maladministration. A committee of senior executives including the Commissioners then make the decisions about which matters should be investigated further by LECC.

In both 2017–18 and 2018–19, LECC conducted around 150 preliminary enquiries or preliminary investigations of complaints. In 2017–18, 28 of these were progressed to full investigations, while in 2018–19 this number grew to 49. LECC advised that the larger number of full investigations undertaken was due to filling vacant positions, which lifted its capacity to conduct full investigations.

LECC's legislative powers include the ability to hold public hearings into matters it is investigating. Four of LECC's investigations over the last two years have involved public hearings. These hearings took between one and four days to complete. LECC's prevention and education team conducted three major projects in 2018–19 relating to systemic issues identified at the NSW Police Force.

Through its role overseeing the NSW Police Force's complaints handing system, LECC monitored over 1,200 internal investigations in each of the years 2017–18 and 2018–19 as part of its oversight function.

Exhibit 13: LECC's main police integrity activities, 2017–18 and 2018–19

Activity	2017–18	2018–19
Complaints assessed	2549	2547
Preliminary enquiries and investigations*	151	158
Full investigations commenced	28	49
Number of compulsory appearances before the Commission	44	78
Number of police investigations overseen	1261	1254

* Figures combined from LECC Annual Report categories of 'preliminary enquiries' and 'preliminary investigations'.

Source: LECC Annual Reports, 2017–18 and 2018–19.

5.2 Funding for LECC

LECC has received almost all its revenue from appropriation funding, as shown in Exhibit 14. LECC received around $20.0 million in both 2017–18 and 2018–19, its first two full years of operation.

Exhibit 14: LECC's revenue (actuals), 2017–18 and 2018–19*

	2017–18	2018–19
	$m	$m
Appropriation revenue**	20.2	20.8
Additional funding from DPC	--	--
Other revenue***	0.7	1.2
Total revenue	**20.9**	**22.0**

Notes:

* LECC commenced operations in July 2017, so funding data is only shown from 2017–18 onward.

** Appropriation revenue is the amount actually received by LECC. This may be lower than the amount approved in the Appropriation Act for reasons including: the application of 'efficiency dividends'; staffing changes leading to lower employee expenditure requirements; changes to project timelines leading to lower capital expenditure requirements.

*** LECC's other revenue includes: acceptance by the Crown Entity of employee benefits and other liabilities; sales of goods and services; and investment revenue.

Source: LECC financial statements 2017–18 to 2018–19.

LECC has been operating for a relatively short time and did not reach its full staff complement in 2017–18 or 2018–19. As a result, it is difficult to provide meaningful analysis on trends in its funding or expenditure. LECC operated within its budget in its first two years of operation. LECC did not make any proposals for increases to its annual appropriation funding in these years and did not seek any additional funding from DPC during the financial year.

The process for determining the annual appropriation funding for LECC does not fully recognise its independence

The Cabinet Expenditure Review Committee (ERC) makes the decisions about LECC's annual appropriation funding. LECC's jurisdiction does not include ministers. However, LECC's investigations have the potential to impact the reputation of a Minister for Police and the government more broadly. While ERC members are unlikely to have a direct personal interest in LECC's work, there is a risk that decisions about LECC's funding could be influenced by these broader concerns.

LECC could raise concerns about its funding or the budget process with the Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission. It could also potentially raise concerns with the Inspector of the LECC. However, these bodies do not have any formal role in the budget process.

LECC has less independence than the other integrity agencies because of its status under the *Government Sector Finance Act 2018*

LECC is not classified as a separate GSF agency under the *Government Sector Finance Act 2018*, as the other integrity agencies in this audit are. There are no specific reasons for LECC's omission from the group of separate GSF agencies in extrinsic materials such as the explanatory memoranda or second reading speech. NSW Treasury advised during this audit that Cabinet decided which agencies were classified as separate GSF agencies.

This difference means that LECC has less independence from the Executive Government, because LECC would have to comply with a Treasurer's Direction even if it believes it is not consistent with the independent exercise of its functions. While LECC has not needed to exercise this, there is a risk that LECC's independence could be reduced by directions from the Executive.

5.3 LECC's management practices

Some of LECC's management practices have not been consistent across the organisation but recent improvements have been made

LECC has systems and standard procedures for assessing and prioritising its work and providing guidance to staff. However, guidance documents we examined during the audit varied in form and quality across the organisation, and the status of some of these documents was unclear.

LECC did not conduct effective strategic planning in its initial years of operation. It did not report against the outcomes set out in its 2017–2020 Strategic Plan or update or revise the plan during that time. Individual divisions developed their own business plans in 2019–20, but most made little reference to the priorities or outcomes articulated in the overall plan. LECC's 2018–19 annual report did not provide clear summaries of its activities across the organisation or compare activity and performance between the current year and previous year.

When LECC was established in 2017, it brought together several existing agencies with different organisational cultures and management practices. This created a significant challenge in establishing consistent management and operational practices across the organisation. The former Chief Commissioner decided in mid-2018 not to continue the full-time CEO position. In June 2019, the CEO position was reclassified as a part-time role. This may have reduced the attention given to addressing these challenges. LECC began streamlining some operational processes in early 2020 to reduce backlogs and improve consistency, and LECC published a new strategic plan in July 2020.

LECC has identified and implemented some operational and corporate efficiency savings

LECC has conducted several minor restructures within divisions over the past two years. These were cost-neutral and aimed to improve the structure of teams in relation to operational needs. LECC does not have any organisation-wide project management systems to monitor the time and cost of its major investigations. LECC has conducted some individual initiatives to assess its corporate efficiency, including:

- replacing its case management system, with the aim of improving data quality and management reporting capability
- completing a rent review against NSW Government policy and market conditions before extending its lease.

LECC's internal budgeting processes are suitable for its needs

Our previous financial audits included an assessment of LECC's key financial controls. Audits in the last two years did not identify any high-risk deficiencies in LECC's financial systems and unqualified audit opinions with respect to LECC's financial statements were issued in each year.

LECC documents its approach to budgeting in its accounting manual. This sets out the overall budget strategy, process and timing, and roles and responsibilities. It includes the broad criteria to decide whether to seek increases to its appropriation funding. The Directors of Divisions stated that they are accountable for their budgets, but this is not documented. LECC's budget reporting includes variance analysis and commentary. Monthly finance reports are prepared by the Finance Manager and provided to Commissioners and senior executives.

The LECC executive team decides the annual budget allocations for each division. For the 2019–20 budget process, LECC Commissioners held a dedicated meeting early in the financial year. However, spending decisions were not clearly linked to organisational objectives. For example, descriptions of the operational needs for capital bids were provided, but the contribution the capital item would make to achieving business unit or organisational objectives was not described. LECC stated that it does not need to document the way its spending decisions are made because the Commissioners understand the links between spending and organisational objectives.

6. Financial management mechanisms used by NSW Treasury and DPC

Conclusion

Aspects of the financial management mechanisms used by NSW Treasury and DPC to administer funding for the integrity agencies create tensions with their independent status.

NSW Treasury and DPC have administered efficiency dividends and budget savings and reform measures which results in the integrity agencies not being able to access the full funding approved by Parliament. There are two competing interpretations of appropriation legislation that lead to different conclusions about whether there is a clear legal basis for doing this. NSW Treasury and DPC take the view that the Appropriation Act provides funding for the integrity agencies to a Premier and does not state that a Premier must provide the full amount of funding to the agencies. This interpretation leads to the view that a Premier can restrict access to appropriation funding that was approved by Parliament. An alternative approach to interpreting the Appropriation Act would consider the contextual factors specific to the integrity agencies. These factors include: the integrity agencies are independent of ministerial control, the integrity agencies are accountable to Parliament for performing specific legislated functions, and the integrity agencies may conduct investigations that involve a Premier, or DPC or NSW Treasury. If this alternative interpretation is accepted, then the reduction of the integrity agencies' access to appropriation funding could diminish the independent status of the integrity agencies.

DPC has given additional funding to three of the integrity agencies in recent years in response to requests from the agencies. If the integrity agencies require additional funding during the year, the only mechanism available is to seek funding from DPC. This creates a potential threat to the independence of the integrity agencies. Asking DPC to make decisions about funding allocations between an integrity agency and another agency in the DPC cluster is inappropriate because DPC is not responsible for the functions or actions of an integrity agency. It is also possible that DPC could be the subject of an investigation conducted by an integrity agency. Separately, DPC's provision of $2.5 million in additional funding to ICAC in 2019–20 may not have been consistent with the *Appropriation Act 2019*. The appropriations for DPC and ICAC were made under different parts of the Act. Appropriation funding can only be paid out for the purpose specified in each part of the Act. It is not clear whether it is permissible to transfer funding between agencies that receive appropriations from different Parts of the Act.

The integrity agencies have recently been asked to report activity and outcome measures to DPC, as the principal department for the cluster that they have been placed in, under the outcome budgeting reforms that are being implemented by NSW Treasury. This is inconsistent with their independent status because the integrity agencies are accountable to Parliament for their activities, not DPC or a Premier. DPC has advised that it considers the risks to the independence of the integrity agencies described above to be more theoretical than real.

6.1 Restricting the integrity agencies' access to appropriation funding approved by Parliament

NSW Treasury and DPC have restricted the integrity agencies' access to the full appropriation funding that was approved by Parliament

As a part of the budget development process, in some years the Cabinet Expenditure Review Committee (ERC) has specified a limit on government agencies' access to the appropriations approved by Parliament. In those years, the ERC decided the size of the limit and which agencies, if any, were exempted. These have been described as efficiency dividends or budget savings and reform measures and they have been applied to the integrity agencies in recent years.

In 2018–19, NSW Treasury oversaw the implementation of efficiency dividends across all government agencies, including the integrity agencies. After the *Appropriation Act 2018* passed, NSW Treasury wrote to the integrity agencies about the application of an efficiency dividend of three per cent to the amount of funding approved by Parliament. NSW Treasury directed the agencies to resubmit a final budget proposal for a total amount of funding that was lower than the amount approved in the *Appropriation Act 2018*. The impact of the efficiency dividends on the integrity agencies' access to the funding approved by Parliament is shown in Exhibit 15.

Exhibit 15: Appropriation approved for integrity agencies and limits imposed by NSW Treasury through efficiency dividends, 2018–19

Agency	Amount approved by NSW Parliament in *Appropriation Act 2018*	Efficiency dividend applied by NSW Treasury	Maximum funding accessible to the agency
ICAC	$25,617,000	$210,000	$25,407,000
NSWEC	$158,699,000*	$1,183,000	$157,516,000
NSWO	$27,113,000	$277,000	$26,836,000
LECC	$23,554,000	$308,000	$23,246,000

* The appropriation amount approved for NSWEC included approximately $70m in funding that was exempt from the efficiency dividend.

Source: Integrity agency internal financial reporting documents.

The NSW Government budget for 2019–20 included savings and reform measures totalling around $3.2 billion across the NSW Government. DPC oversaw the budget savings and reform measures for the integrity agencies in 2019–20. There were no limits imposed on funding appropriated for the integrity agencies in 2019–20. However, DPC informed the integrity agencies of the estimated limits that would be placed on their appropriations in each of the next nine years. The integrity agencies' access to approved appropriations will be reduced by around $10 million each over this period.

The legal basis for restricting the integrity agencies' access to appropriation funding is contestable

The efficiency dividends and budget savings and reform measures described above have been administered by either NSW Treasury or DPC in recent years. While these departments have managed the practical application of these financial management mechanisms, the legal authority for managing the appropriations for the integrity agencies lies with a Premier. There are two competing interpretations of appropriation legislation that lead to different conclusions about whether a Premier has a clear legal basis for restricting access to funding that has been appropriated for the integrity agencies.

NSW Treasury and DPC have interpreted the Appropriation Act in a way that concludes a Premier is able to restrict the integrity agencies' access to appropriation funding. Its interpretation is based on the following key points:

- The Appropriation Act specifically appropriates funding to a Premier, rather than the head of the integrity agency. This reflects the established Westminster convention that a minister is ultimately accountable to Parliament for the expenditure of public funds.
- The Appropriation Act specifies a maximum amount of funding that can be withdrawn for the services of each of the integrity agencies. It does not specify that a Premier must provide the full amount of funding approved to the agencies.
- The *Government Sector Finance Act 2018* contemplates the existence of unused appropriations by making provision for the return of any funds that are not used within the financial year to the Consolidated Fund.

NSW Treasury and DPC's interpretation appears to be consistent with relevant financial legislation and financial administration conventions in New South Wales, but it does not sit well alongside the legislative role and functions of the integrity agencies. An alternative approach to interpreting the Appropriation Act would consider the context in which the Appropriation Act operates and the outcome that would flow from NSW Treasury and DPC's interpretation. This alternative interpretation would emphasise the importance of contextual factors specific to the integrity agencies, which include:

- The appropriations for the integrity agencies and for other government departments and agencies are made under discrete Parts of the Appropriation Act. This indicates an intention to distinguish between appropriations for integrity agencies and appropriations for government departments.
- The integrity agencies are established by separate Acts of Parliament which give them independence from ministers. This is different to the arrangements for other departments and agencies, which are established by Executive order and cannot act independently of their minister.
- The Appropriation Act expresses the appropriations to a Premier as 'for the services of' the integrity agencies. The integrity agencies have functions that are specified in legislation and are accountable to Parliament for performing these functions.
- An integrity agency may be obliged to undertake an investigation that involves a Premier or a senior government official.

These factors point to the need for an integrity agency to be properly funded to fulfil its functions and for that funding to be free from intervention by a Premier or the Executive Government. Under this alternative interpretation, a Premier would require an express source of power to limit the availability of appropriation funding to the integrity agencies. If a Premier could reduce the integrity agencies' access to funding that was appropriated by Parliament, the independent status of the integrity agencies could be diminished.

Ministers can retain control of certain types of expenditure by integrity agencies through decisions about delegations

There are some circumstances in which a minister can maintain control of the expenditure of an integrity agency. Under the current framework, funding is appropriated to a minister, not a department or agency, so a department or agency must have a delegation from the minister before it can incur expenditure. This applies to the integrity agencies as well as other departments and agencies. A minister can impose terms and conditions on these delegations, but these must not be inconsistent with the purposes for which the appropriation was given. This means that for the integrity agencies, a Premier could not impose a term or condition on a delegation that prevented expenditure on a specific investigation but could impose a term or condition that did not interfere with the integrity agencies' ability to exercise its functions.

In February 2019, we tabled a report that found LECC did not comply with the current framework for expenditure delegations because the minister had not delegated approval for expenditure by LECC on overseas travel, and the former LECC Chief Commissioner incurred this expenditure on overseas travel without the minister's approval. The report also noted that ministers should take care not to unduly interfere with the functions of independent agencies in the way they use this control over the expenditure of integrity agencies.

6.2 Use of clusters for the financial management of the integrity agencies

DPC has given additional funding to three of the integrity agencies in recent years following requests from the integrity agencies

ICAC, NSWEC and NSWO each received additional funding from DPC during the financial year in the period 2014–15 to 2018–19. ICAC's requests for additional funding mostly related to covering the cost of large inquiries and public hearings that had not been anticipated. ICAC cannot predict which matters will require more comprehensive investigations or which will lead to public inquiries at the time when its annual budget is set. NSWEC's requests for additional funding related to delivering the state government election (2014–15) and implementing new legislation (2017–18). NSWO's requests for additional funding covered costs associated with a major inquiry that was significantly more complex and lengthier than most matters it investigates. LECC did not make any requests to DPC for additional funding during this period, as shown in Exhibit 16.

Exhibit 16: Additional funding from DPC to integrity agencies, 2014–15 to 2018–19

	2014–15	2015–16	2016–17	2017–18	2018–19
	$m	$m	$m	$m	$m
ICAC	1.6	1.3*	0.1	1.7	1.7
NSWEC	1.4	--	--	2.4	--
NSWO	2.1	2.2	0.3*	--	--
LECC	--	--	--	--	--

* Excludes grant from DPC for redundancies.

Source: Integrity agency financial statements 2014–15 to 2018–19.

To access this funding, the heads of the integrity agencies wrote to the DPC Secretary requesting additional funding and providing a brief description of the reason it was needed. In some cases, the integrity agencies also wrote directly to the Premier. The integrity agencies made these requests to DPC because they are grouped within the DPC cluster for financial management and administrative purposes. The NSW Government's cluster arrangements do not have legal status, as described in Chapter 1 of this report. However, if the integrity agencies require additional funding during the year, the only mechanism available is to seek funding from DPC.

All requests for additional funding made by the integrity agencies in the years shown in Exhibit 16 above were approved. Additional funding was paid from DPC to the integrity agencies after discussions between the Secretaries of DPC and NSW Treasury and approval by the Premier.

The system for providing additional funding to the integrity agencies creates potential threats to their independence

The practice of the integrity agencies seeking additional funding from DPC creates a potential threat to their independence. Asking DPC to make decisions about funding allocations between an integrity agency and another agency in the DPC cluster is inappropriate because DPC is not responsible for the functions or actions of an integrity agency. In addition, it is possible that DPC could be the subject of an investigation conducted by an integrity agency.

There are no criteria or guidelines for integrity agencies seeking additional funding from DPC and integrity agencies are not required to provide any specific information in support of their requests. There is very little transparency to Parliament about the requests made and granted. DPC does not record any details about the reasons for granting the funding requests and the additional funding provided is only recorded in the disaggregated section of the financial statements of the integrity agencies in annual reports published the following year. Accounting standards do not require departments to publish this information in a detailed manner in their financial statements.

The NSW Public Sector Governance Framework, which was published in 2013, stated that while integrity agencies were placed within a cluster, they would not generally receive grant funding from the principal department in that cluster. Further, requiring the integrity agencies to apply to DPC for additional funding could lead to a situation in which one of the integrity agencies is seeking funding from a potential subject of the investigation. This would not be consistent with good practice approaches to governance.

DPC's provision of additional funding to ICAC in 2019–20 may not have been consistent with the *Appropriation Act 2019*

DPC provided $2.5 million to ICAC in 2019–20 in response to ICAC's request for additional funding to cover the cost of a public inquiry. DPC consulted with NSW Treasury on this decision and provided this funding in its capacity as the principal department for the cluster. DPC sourced this funding from within its appropriation funding for that year. DPC's provision of additional funding to ICAC using its appropriation funding may not have been consistent with the legislative purpose for which the appropriation was made.

Part 2 of the *Appropriation Act 2019* (the Act) provided funding for the services of DPC. The Act specified that funding could be reallocated in some circumstances, but funding appropriated under Part 2 of the Act could only be paid out for the purposes specified in that Part. An appropriation for the services of DPC would ordinarily extend to making grants to agencies which have been administratively grouped within the DPC cluster and the integrity agencies are grouped within the DPC cluster. However, the appropriations for the services of the integrity agencies were made under Part 4 of the *Appropriation Act 2019*. It is contestable as to whether it was within the purpose of the appropriation for DPC to provide this additional funding to an agency which received its appropriation from another part of the Act.

In the years 2014–15 to 2018–19, the Appropriation Acts did not include a provision stating that funding appropriated under Part 2 may only be paid out for any of the purposes specified in Part 2. This indicates that additional funding provided from DPC to integrity agencies in those years would not have been inconsistent with the relevant Appropriation Acts.

Asking the integrity agencies to report to DPC on their activities and outcomes is inconsistent with the independent status of the integrity agencies

Outcome budgeting was introduced as a management practice in New South Wales in 2017–18. Under this approach to budget development, agencies are required to link their budget submissions to a state outcome. The state outcomes are assigned by NSW Treasury to the relevant cluster principal department, which is then responsible for delivering its assigned outcomes.

The integrity agencies have been asked by DPC to develop plans to report to it against the state outcome of 'accountable and responsible government'. DPC is accountable to the Premier and Cabinet for delivering this outcome. The outcome itself is broad enough to be consistent with the general role and functions of the integrity agencies. However, the integrity agencies are not subject to direction by a minister or department in their activities and report directly to Parliament on their functions. This makes it inappropriate for the integrity agencies to be asked to report against objectives and outcomes that are set by the NSW Government and administered by DPC.

Section two

Appendices

Appendix one – Responses from agencies

Response from Independent Commission Against Corruption

I·C·A·C
INDEPENDENT COMMISSION AGAINST CORRUPTION
NEW SOUTH WALES

Ms Margaret Crawford
Auditor-General for New South Wales
Level 19, Darling Park Tower 2
201 Sussex Street
SYDNEY NSW 2000

Your ref: D2022818

Dear Ms Crawford

Audit – the effectiveness of financial arrangements and management practices of four integrity agencies

I refer to your letter of 12 October 2020 and thank you for giving the Commission the opportunity to provide a formal response to be incorporated into the published report.

This letter and the attached Supplementary Opinion of Bret Walker SC dated 15 October 2020 constitute the Commission's formal response.

The report, with respect, correctly identifies that the current funding model applicable to the Commission does not recognise the Commission's status as an independent agency, that existing safeguards to the threats to the Commission's independence are not sufficient and that the Commission does not have an appropriate mechanism to seek additional funding.

While a new funding model for the Commission is clearly required, the Commission does not consider that the Department of Premier and Cabinet or NSW Treasury should be involved in implementing such a funding model for the Commission as proposed by Recommendation 1 in the report.

The Commission's position is that, because the involvement of Executive Government in funding arrangements for the Commission is incompatible with its independence, such involvement is unlawful.

In his Supplementary Opinion, Mr Walker has reiterated that the law as to the independence of the Commission does not permit the Department of Premier and Cabinet or NSW Treasury to exercise control or influence over the conduct of the Commission through decisions concerning funding (see paragraph 7 of the Supplementary Opinion). Rather, as noted by Mr Walker, "…the Houses (of Parliament) are the best suited of all available centres of political power in New South Wales to devise and promulgate a better ICAC funding model" (see paragraph 12 of the Supplementary Opinion). This opinion is consistent with the statement in the foreword to the report that, in determining an appropriate funding model, it is important to recognise the important role of NSW Parliament.

I also provide the following information with respect to certain observations made in the report.

Sensitive

Level 7, 255 Elizabeth Street Sydney NSW 2000 GPO Box 500 Sydney NSW 2001 ABN 17 934 402 440
T 02 8281 5999 F 02 9264 5364 E icac@icac.nsw.gov.au www.icac.nsw.gov.au

At page 23 it is stated that the Commission has not conducted a comprehensive review of its corporate services division to determine whether its current size and structure best meet the Commission's needs.

I note that the Commission's corporate services division was subject to comparative analysis by KPMG in its 8 October 2018 report. In that report, KPMG compared the Commission's "back-office" with those of LECC, the Queensland Crime and Corruption Commission and the Victorian IBAC. The conclusion reached by KPMG was that the Commission's "back-office" function comprised 22% of its workforce making it "one of the smallest proportions of the comparators" and that compared to other similar organisations the Commission had "a relatively lean back-office function".

In light of the observation in the report, the Commission has undertaken to conduct a comprehensive review of its corporate services division to determine whether its current structure best meets the Commission's needs.

At page 22 of the report it is noted that the Commission could improve its internal budgeting process by:

- documenting its budget policy or strategy
- incorporating budget responsibilities in the relevant staff position descriptions
- analysing the reasons for variances between budgeted and actual expenditure in more detail.

I note that reasons for variances between budgeted and actual expenditure are currently provided on a monthly basis to the Commission's Executive Management Group.

The Commission will, however, take steps to address the issues noted above including considering what further detail should be provided for variances between budgeted and actual expenditure.

Yours sincerely

The Hon Peter Hall QC
Chief Commissioner

16 October 2020

Sensitive

THE INDEPENDENCE OF ICAC, AND ITS BUDGET PROCESS

SUPPLEMENTARY OPINION

I am asked to advise further on matters arising since my Opinion dated 16th April 2020. That Opinion was disclosed in the Special Report of May 2020 delivered under sec 75 of the *Independent Commission Against Corruption Act 1988* (NSW) to the Presiding Officers of the Houses of Parliament. It has also been shared with the office of the New South Wales Auditor-General in the course of ICAC commenting on the draft Report of the Auditor-General upon a performance audit which is in train concerning the effectiveness of the financial arrangements and management practices of the four so-called integrity agencies, including ICAC.

2 The focus of this Supplementary Opinion is on the possible rôle of the senior bureaucrats of the Department of Premier and Cabinet and NSW Treasury in the implementation of a funding model for ICAC that addresses the potential threats to its statutory independence (as to which. see my earlier Opinion) while ensuring its proper accountability.

3 In my opinion, the law discussed in my earlier Opinion does not permit any substantive rôle to be performed by these senior public servants in decision-making concerning the funding of ICAC. This is true both for core funding and for flexible funding.

4 The very reason ICAC exists, as explained in my earlier Opinion, renders the integrity of public administration, for which ultimately the government of the day is politically responsible to the Houses and electorally to the people, central to its operations. Corruption in any part of public administration reflects adversely on the whole, to greater or lesser degree according to circumstances. There is therefore a constant potential for the operations of ICAC to embarrass the Government, to criticize the leadership of the bureaucracy and to affect the political fortunes of Ministers (including the Premier) to whose directions those senior public servants are subject.

5 These are not considerations that may properly be disregarded as merely theoretical. They do not arise only when concrete and acute conflicts of duties affect those senior public servants.

6 Significantly, decisions concerning the funding of ICAC are made prospectively, looking ahead to budgeted (ie forecast) expenditures. Decisions that have the effect of reducing the resources available to ICAC in the forthcoming funding period obviously constitute material impediments to ICAC maintaining a current or recent extent of work, let alone accommodating an otherwise necessary expansion of work. Funding decisions thus bear upon the capacity of ICAC, through its Commissioners, making and acting on decisions to enquire into matters within its statutory remit.

7 As explained in my earlier Opinion, the law as to the independence of ICAC does not permit DPC and Treasury to exercise this kind of control or influence over the conduct of ICAC.

8 It is certainly not the place of DPC and Treasury (ie the senior public servants leading those departments) to determine for themselves the permissible scope for them to control or influence the conduct of ICAC by means of funding decisions. Neither, of course, is it for their responsible Ministers to do so. The political and bureaucratic elements of the Government, meaning the Executive, cannot do so, because they do not declare or enforce the law. More pointedly, doing so would directly contradict the independence of ICAC required by the law.

9 It follows that no implementation of an appropriate funding model for ICAC could involve any continuing rôle by way of substantive decision-making (including advice to Ministers) on the part of those senior public servants.

10 It also follows that it would be, at the least, unwise for those public servants to be involved in the devising of an appropriate funding model for ICAC, even if that model were not to involve them in the continuing implementation of the chosen model. That is, a most undesirable tension or conflict could be introduced at the inception of such a new funding model for ICAC if the very officials whose removal from the ongoing process is necessary were themselves to construct the supposed new alternative.

11 In my opinion, the constitutional responsibility of the Houses of Parliament in relation to appropriations provides the obvious cue for a better funding model for ICAC. Hence my comments in my earlier Opinion at para 45.

12 Apart from the indispensable formal rôle of the Executive in proposing legislation, particularly for an appropriation, it follows that the Houses are the best

suited of all available centres of political power in New South Wales to devise and promulgate a better ICAC funding model. Respectfully, I agree with the Auditor-General that the Houses have an important rôle – although, for the reasons discussed in my earlier Opinion and above, I would stress that the importance of their rôle partly comes from the inappropriateness of the Executive, including senior public servants in DPC and Treasury, having any substantive rôle in devising let alone implementing a proper ICAC funding model.

13 Desirably, the Executive (meaning the Ministers) and the Houses would fix upon the combination of legislation (perhaps) and procedures (such as a focussed Standing Order) by which the requisite independence can best be assured. In my experience, respectfully, there is every reason to suppose that with goodwill these technicalities will present no real difficulties.

Fifth Floor St James' Hall

15th October 2020

Bret Walker

Response from NSW Electoral Commission

NSW Electoral Commission

16 October 2020

Ms Margaret Crawford
Auditor-General for New South Wales
GPO Box 12
SYDNEY NSW 2001

Dear Ms Crawford

Thank you for the opportunity to consider your Performance Audit Report on '*The effectiveness of financial arrangements and management practices of four integrity agencies*.'

The NSW Electoral Commission welcomes the report and believes it will provide a strong basis for developing positive reforms to the annual budget process for NSW integrity agencies. The findings in this report recognise contemporary expectations regarding the independence and transparency of statutory authorities, particularly those that exercise integrity and regulatory responsibilities in relation to government officials.

The NSW Electoral Commission looks forward to working with the NSW Parliament and the Government to develop new budget processes that are fit for purpose, efficient, balanced and designed to strengthen the integrity of public administration, specifically through enhancing transparency.

Thank you once again for the opportunity to comment on your report.

Yours sincerely

John Schmidt

John Schmidt
Electoral Commissioner

Level 25, 201 Kent Street SYDNEY NSW 2000 | GPO Box 832 SYDNEY NSW 2001
P 1300 135 736 | F 02 9290 5991 | elections.nsw.gov.au

Response from NSW Ombudsman

6 325 886 267
el 24, 580 George Street, Sydney NSW 2000
2 9286 1000 | F 02 9283 2911
free 1800 451 524
w.ombo.nsw.gov.au

Ombudsm
New South W

For Official Use Only

16 October 2020

Ms Margaret Crawford
Auditor-General for New South Wales
GPO Box 12
SYDNEY NSW 2001

Dear Ms Crawford

Performance Audit – The effectiveness of financial arrangements and management practices of four integrity agencies

Thank you for informing me of the pending finalisation of your performance audit examining the effectiveness of financial arrangements and management practices of four integrity agencies.

Your consideration of integrity agencies' systems for planning, budgeting and monitoring the efficiency of work has produced valuable insights.

I note your comment that the NSW Ombudsman's *'internal budgeting process is adequate but could be improved by being documented more thoroughly'*. I am pleased to inform you that since this audit was conducted, our office has developed improved documentation that more fully describes our internal budget processes. This documentation outlines our defined budget approach, timeframes, roles and responsibilities, budget approvals and financial performance reporting.

As you aware the NSW Ombudsman considers the current process for setting budgets of the independent integrity bodies to be misaligned with their status as statutory offices of Parliament. We therefore support your recommendation to implement a funding model that enhances the independence of this process.

Yours sincerely

Paul Miller
Acting NSW Ombudsman

For Official Use Only

Response from Department of Premier and Cabinet and NSW Treasury

NSW GOVERNMENT | Premier & Cabinet

NSW GOVERNMENT | Treasury

Reference: A3972944

Ms Margaret Crawford
Auditor-General
Level 19, Darling Park Tower 2
201 Sussex Street
SYDNEY NSW 2000

Dear Auditor-General

Thank you for your letter dated 12 October 2020 enclosing your final report on the effectiveness of the financial arrangements and management practices of four integrity agencies (the **Report**).

The Department of Premier and Cabinet (**DPC**) and Treasury confirm receipt of the Report and will carefully consider its recommendations.

We acknowledge the theoretical risk to the independence of the integrity agencies relating to the provision of additional funding from DPC. We raised similar points in our submission to the Public Accountability Committee's inquiry into the Budget process for independent oversight bodies and the Parliament of New South Wales, a copy of which is attached. However, we consider it important to note that in our experience, this theoretical risk has never materialised or eventuated in practice. The Independent Commission Against Corruption (**ICAC**), for example, has received supplementary funding from the Government on every occasion that the ICAC has requested it for at least the last ten years.

We also note the matter raised in the Report regarding the consistency of DPC's provision of additional funding to the ICAC in 2019-20 with the *Appropriation Act 2019*. DPC maintains that it is satisfied that the past practice of DPC providing grants to integrity agencies, including the ICAC, is lawful. This is consistent with the Crown Solicitor's advice, at Appendix 3 to the Report, that an appropriation for the services of a principal department would ordinarily extend to making grants or otherwise distributing funds to other government departments or agencies which have been administratively grouped within the cluster headed by that principal department. We note that the Crown Solicitor has observed (at para 45 of its advice dated 13 March 2020) that it is less clear whether it would be within the purposes of an appropriation 'for the services of' a principal department if those funds were used to provide supplementary funding to assist an agency in the same cluster for which an appropriation had been made in another part of the Appropriation Act. The Crown Solicitor notes, however, that it is not possible to answer this question in the abstract.

Thank you for the opportunity to respond to the Report.

Yours sincerely

Tim Reardon
Secretary
Department of Premier and Cabinet
19 October 2020

Michael Pratt
Secretary
NSW Treasury
19 October 2020

52 Martin Place Sydney ▪ GPO Box 5341 Sydney NSW 2001 ▪ P: (02) 9228 5555 ▪ F: (02) 9228 3935 ▪ dpc.nsw.gov.au

Submission No 56

INQUIRY INTO BUDGET PROCESS FOR INDEPENDENT OVERSIGHT BODIES AND THE PARLIAMENT OF NEW SOUTH WALES

Organisation: NSW Government

Date Received: 10 December 2019

Submission to the Public Accountability Committee's Inquiry into the Budget process for independent oversight bodies and the Parliament of NSW

Department of Premier and Cabinet
NSW Treasury

DECEMBER 2019

NSW GOVERNMENT | Premier & Cabinet

Introduction

The Inquiry's terms of reference include inquiring into and reporting on options for enhancing the process for determining the quantum of funding of the:

- Independent Commission Against Corruption (**ICAC**),
- Law Enforcement Conduct Commission (**LECC**),
- Audit Office of New South Wales,
- NSW Electoral Commission,
- NSW Ombudsman, and
- NSW Parliament (Legislative Council and the Department of Parliamentary Services),

including the transparency of this process, and any other related matter.

The bodies listed above, excluding NSW Parliament, are collectively referred to as 'independent oversight bodies' in this submission. While their functions vary, they share two important features: they are directly accountable to the Parliament and operate with some degree of statutory independence from the Executive government.

This submission seeks to assist the Committee by providing factual information about:

- the role of NSW Treasury,
- the role of the Department of Premier and Cabinet (**DPC**),
- the role of the NSW Parliament, and
- key principles for the Committee to consider,

in relation to the budget process for independent oversight bodies and NSW Parliament.

The role of NSW Treasury

Outcome Budgeting

'Outcome Budgeting' is a way of allocating resources based on the outcome to be achieved from a citizen's perspective, first announced in Budget 2017-18.

This approach puts the needs of the people at the centre of investment decision making.

The entire State spending has been mapped to the State Outcomes that the NSW Government wants to achieve for its citizens. Outcome Indicators have been assigned to every State Outcome to track results against spending.

As announced in Budget 2017-18:

> The NSW Outcome Budgeting model builds on Treasury's experience in commissioning outcomes, international evidence and experience in moving towards performance budgeting. We've also looked at best practice examples from countries such as Canada, UK, New Zealand, USA and the Commonwealth Government. Outcome Budgeting will not only change policy and processes in the NSW Government but will also transform the practices of the public sector to deliver more tangible and meaningful results to the public.
>
> **This budgeting approach will encourage public sector agencies and service providers to coordinate and collaborate … so that resources are optimally pooled and programs appropriately targeted to inclusively service the needs of everyone across NSW's communities** (emphasis added).[1]

Further information on Outcomes Budgeting can be found in the NSW Treasury Policy and Guidelines Paper TPP18-09 'Outcomes Budgeting' available on the NSW Treasury website.

[1] NSW Treasury, *Outcome Budgeting* (10 July 2018) <https://www.treasury.nsw.gov.au/budget-financial-management/reform/outcome-budgeting>.

NSW Budget process

The budget process is managed by NSW Treasury to support the achievement of the objects of the *Fiscal Responsibility Act 2012* (NSW), including to maintain the AAA credit rating of the State of NSW (section 3). It is a consistent process across all government agencies including the independent oversight bodies and the NSW Parliament.

Generally, an agency's base budget is confirmed on the basis of ongoing operational requirements over the medium term (four years) and adjusted for indexation each year.

An entity is required to make a submission to Government for any new or incremental funding required or other adjustments to these four-year budget estimates.

All new and incremental adjustments (policy or parameter changes) supporting the Government's resource allocation decisions are subject to a rigorous process to ensure the responsible expenditure of taxpayer funds.

Agency proposals are classified in line with Circular *TC14/28 Parameter and Technical Adjustments and Measures (New Policy).* This Circular outlines agency requirements and provides a distinction between Parameter and Technical Adjustments (**PTAs**) and New Policy Proposals (**NPPs**). In addition to looking at the detailed financial and cost information, Treasury looks at how the proposal is going to impact positively on performance measure targets, whole-of-government objectives including State Outcomes, as well as improving key performance indicators and various outcomes of service delivery.

Budget Guidelines are sent out in advance of the budget process to inform agencies of the process context, criteria and key dates.

Every agency's funding needs are assessed having regard to the role and functions of that agency, with consideration to all other Government priorities and service delivery requirements.

Submissions are considered by the Expenditure Review Committee of Cabinet as part of the Budget process. The deliberations of the Committee are kept confidential in accordance with Cabinet conventions and consistent with the principle of collective Ministerial responsibility. The outcome of these deliberations is reflected in the annual Appropriation Bill which is presented to the Parliament for scrutiny, debate and approval.

In an election year, the usual Budget process is varied to accommodate the election and the possibility of a change in government.

In 2019:

- NSW Treasury wrote to all Clusters and independent oversight bodies outlining the preparation work required for the possibility of a June budget, while stating the final process and date was ultimately a decision for the Government formed after the election.
- In addition to election commitments and PTAs, clusters and independent oversight bodies were given an opportunity to submit genuinely urgent and unavoidable matters (budget proposals) for an incoming Government to consider as part of its budget preparation.
- Independent oversight bodies in the DPC cluster were able to submit a proposal, separate from proposals submitted by the cluster.
- Clusters and independent oversight bodies provided submissions to Treasury on budget enhancements. Independent oversight bodies provided their proposals, and PTAs, directly to NSW Treasury.
- Following the election, elected Ministers who wished to submit additional bids following briefings from their agencies, had an avenue to raise these with the Treasurer or the Premier. Given the fiscal context, Treasury did not open a formal second round for all agencies.

The role of the Department of Premier and Cabinet

DPC leads the NSW public sector to deliver on the NSW Government's commitments and priorities. It provides strategic coordination across clusters, and partners with NSW Government agencies to ensure that services are delivered on time, within budget and to the community's expectations.

DPC is the lead agency of the Premier and Cabinet cluster. Consistent with their statutory independence from the Executive Government, DPC is not responsible for determining the amount that is appropriated to independent oversight bodies, nor does the DPC Secretary have a direct role in relation to their governance or financial management.

The independent oversight bodies are, however, currently treated as part of the DPC cluster for budget reporting purposes.[2] DPC provides guidance for its cluster agencies, including the independent oversight bodies, during the Budget process. Their statutory functions are embedded in the Outcome Budgeting framework through the State Outcome 'Accountable and responsible government'.

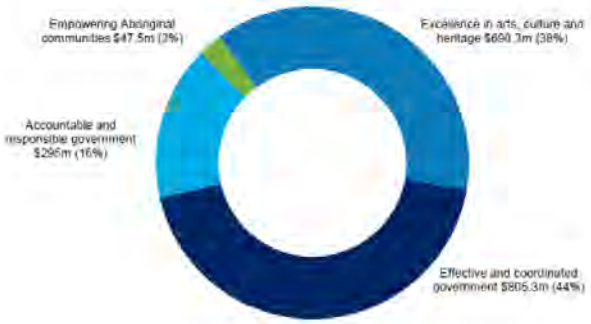
Table 1: State outcomes delivered by the Premier and Cabinet cluster

State Outcome	Description
Effective and Coordinated Government	Coordinating government policy initiatives, overseeing infrastructure investment and facilitating the delivery of key urban renewal precincts.
Accountable and responsible government	Ensuring a robust democracy, upholding the integrity of Government, fighting corruption, enhancing public sector capability and improving service delivery.
Empowering Aboriginal communities	Transforming the relationship between Aboriginal people and the NSW Government through the delivery of Opportunity, Choice, Healing, Responsibility and Empowerment (OCHRE).
Excellence in arts, culture and heritage	Developing and supporting arts and culture, increasing attendance at cultural events, and sustaining cultural precincts and infrastructure. Protecting, preserving and enabling public access to our State's heritage

[2] The Legislature, or the NSW Parliament, is not treated as part of any cluster for budget reporting purposes but is subject to the same Budget process as all other agencies.

A summary of DPC cluster expenses by State Outcome is set out in Chart 5.1 below:

Chart 5.1 Recurrent expenses by outcome 2019-20 (dollars and %)



Note: The sum of percentages does not equal one hundred due to rounding.

The 2019-20 Budget for DPC and all cluster agencies including independent oversight bodies is set out in Budget Paper No. 3.[3]

In the 2019-20 Budget process, independent oversight bodies provided their NPPs and PTAs to Treasury. DPC did not make any amendments or alterations to the submissions made by independent oversight bodies.

Treasury analysts were available to directly assist independent oversight bodies with their Budget submissions.

DPC was informed by both NSW Treasury and independent oversight bodies about the content of their NPPs and PTAs. DPC also had visibility in Prime (an electronic system for managing the State finances) of those matters. DPC does not have access in Prime to make any amendments or changes to the submissions of independent entities.

Prime is intentionally designed to allow independent oversight bodies to submit proposals directly to Treasury.

Supplementary funding

In recent years, DPC has provided supplementary funding to certain independent oversight bodies in addition to their annual appropriation.

For example, in FY2018-19 DPC provided $1.7 million as supplementary funding to the ICAC.

In FY2019-20, DPC is providing an additional $3.5 million as supplementary funding to the ICAC ($1 million of which was approved in FY2018-19). Details of the supplementary funding provided by DPC to the independent oversight bodies between FY2009-10 and FY2018-19 are set out in **Annexure A**.

The additional funds are not a special appropriation. As such, the funds require reallocation from other areas within the DPC cluster.

Budget Savings

Several whole of government Budget savings and reform measures were included in the 2019-20 Budget.

[3] Available at https://www.budget.nsw.gov.au/sites/default/files/budget-2019-06/Budget_Paper_3-Budget_Estimates-Budget_201920.pdf.

These savings are apportioned by DPC amongst the cluster, calculated on a pro rata basis according to the operational expenses of each entity and adjusted for any protected items. Further information about protected items can be found in *Treasury Circular NSWTC12-10*.

To allow the independent oversight bodies additional time to prepare for the forward year impacts of these reductions, DPC is absorbing all of the required savings for independent oversight bodies within the Premier and Cabinet cluster in FY2019-20.

If certain entities in the Premier and Cabinet cluster were exempt from these savings, and no adjustment to the requisite savings was made, the remaining cluster entities would be required to absorb those savings. Apart from the independent oversight bodies, the Premier and Cabinet cluster currently includes entities such as the Public Service Commission, the Art Gallery of NSW Trust, the Australian Museum Trust, the Library Council of NSW, the Sydney Opera House Trust, the Trustees of the Museum of Applied Arts and Sciences, Infrastructure NSW, the Greater Sydney Commission and Parliamentary Counsel's Office.

Parliament's Role

Budget Process

In New South Wales, the appropriation of money from the Consolidated Fund may only be done by an Act of the State Parliament.[4]

Each year an Appropriation Bill is prepared and tabled in Parliament alongside the Budget, currently known as Budget Paper 4.

The practice of separating the Appropriation (Parliament) Bill from the main Appropriation Bill is to ensure that if the main Appropriation Bill does not pass before the commencement of the financial year, the Appropriation (Parliament) Bill may be separately passed to ensure the continuity of Parliament.

The objective of the Appropriation Bill is to appropriate from the Consolidated Fund those funds required during the financial year for the services of the Government, including Departments of the Public Service and various special offices.

Special offices, including the ICAC, the LECC, the NSW Electoral Commission and the Ombudsman's Office, among others, have a single and separate sum appropriated to the Premier out of the Consolidated Fund for the services of that particular office. In the *Appropriation Act 2019*, these appropriations are set out in Part 4 – Appropriation (Special Offices).

The amount that each of these special offices receives represents a maximum amount that each of these offices can expend. Unlike grant amounts that are passed through from DPC to other agencies in the Premier and Cabinet cluster, funds provided to special offices are provided directly to those offices.

The annual Appropriation Bill is introduced in the Legislative Assembly and once passed in the Legislative Assembly is sent to the Legislative Council. It is subject to Parliamentary scrutiny and debate.

Oversight and Accountability

Each of the independent integrity bodies is subject to some form of oversight by a Parliamentary Committee. There is the Joint Standing Committee on Electoral Matters; the Committee on the ICAC; the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission; and the Public Accounts Committee.

[4] *Constitution Act 1902* (NSW), s 45.

The functions of the ICAC Committee include, for example, monitoring and reviewing the exercise by the ICAC of the ICAC's functions, and reporting to both Houses of Parliament, on any matter appertaining to the ICAC connected with the exercise of its functions to which, in the opinion of the Committee, the attention of Parliament should be directed.[5]

It may be assumed that any inadequacies in the performance of integrity agencies' functions, and the reasons for those deficiencies, would be examined and reported on by the Committee through its inquiry process.

The LECC, the Ombudsman and the ICAC are also required to prepare and submit annual reports detailing the operations of each body directly to the Parliament in accordance with relevant legislative obligations.[6] The Auditor-General presents the annual report of the Audit Office of NSW to the Legislative Assembly, pursuant to section 12A of the *Annual Reports (Statutory Bodies) Act 1984*. The NSW Electoral Commission must also prepare and submit an annual report to the Premier which is laid before both Houses of Parliament pursuant to the *Annual Reports (Statutory Bodies) Act 1984*.

Key issues for the Committee's consideration

Special funding arrangements for independent oversight bodies

It has been suggested to the Inquiry that funding for oversight bodies should not be determined as part of a normal Budget process that treats that level of funding as optional or subject to prioritisation against internal Government-of-the-day spending priorities.

It is well-established that the functions of independent oversight bodies are essential to the health of our democracy.

However, independent oversight bodies are funded from the Consolidated Fund, a finite resource from which all other essential government services are funded.

It is critical that the government of the day is able to assess the funding needs of all agencies in the context of the State's broader financial position and the need to ensure that all essential services are provided to a standard that meets public expectations. This is fundamental to Outcome Budgeting and any proposed funding model for independent oversight bodies should be carefully considered in this context.

The constitutional principles of representative and responsible government require that the body that is directly and immediately representative of the people has responsibility for financial measures. In other words, the Legislative Assembly must remain publicly and electorally accountable for the financial management of the State.[7]

Although this principle is usually raised in the context of the powers of the Legislative Council with respect to Money Bills, it is also relevant when considering funding models that would directly or indirectly limit the financial prerogative of the Legislative Assembly.

Transparency in the Budget process

The Committee may wish to consider whether the Budget process is sufficiently transparent or whether there is scope for increased transparency.

[5] *Independent Commission Against Corruption Act 1988*, s 64.
[6] *Law Enforcement Conduct Commission Act 2016*, s 139; *Independent Commission Against Corruption Act 1988*, s 76; *Ombudsman Act 1974*, s 30.
[7] Anne Twomey, *The Constitution of NSW* (Federation Press, 2004) 534.

Any proposals for greater transparency must take into account the need for confidentiality of Cabinet deliberations in relation to the NSW Budget, which has been recognised by the courts as 'an application of the principle of collective responsibility'.[8]

The Committee may wish to consider whether additional transparency is in fact necessary given that existing Parliamentary processes, including the annual Appropriations Bill, the Budget Estimates process and the Committee system, already ensure that the resourcing of independent oversight bodies is subject to a very high degree of public and Parliamentary scrutiny.

Accountability for financial management

There is also the consideration of whether appropriate accountability measures are in place regarding the use of public resources by independent oversight bodies.

Every statutory body is responsible for delivering outcomes for the people of NSW within its budget. It is important that the financial management practices and capabilities of independent oversight bodies are sound, and that they are accountable for the use of public resources and the way in which those finances are managed.

It is acknowledged that there may be unforeseeable matters that arise during any given financial year.

However, repeated requests for supplementary funding may indicate a problem with an entity's financial management practices. All agencies are expected to assess and prioritise all expenditure to ensure that services are delivered within the budget available.

Independence

It is important that independent statutory bodies are, and are perceived to be, independent from the government agencies that are subject to their jurisdiction.

At a practical level, it is also difficult for the Premier and Cabinet cluster budget to be managed where ad hoc funding is sought by agencies within the cluster during the year, after the annual appropriation. The Premier and Cabinet cluster budget is finite, and any provision of supplementary funding must be sourced from within that budget.

DPC does not consider ad hoc supplementary funding requests as a sustainable funding approach, nor does it promote transparency or accountability for financial management.

The Auditor-General's Review

The NSW Government has asked the Auditor-General of NSW to undertake an independent review of the effectiveness of the financial arrangements and management practices of the ICAC, the LECC, the Ombudsman's Office and the NSW Electoral Commission. This review will help to ensure that the Government can respond to any funding and financial management issues affecting those integrity bodies and ensure that they are able to fulfil their important statutory functions.

[8] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [56].

Annexure A

	Supplementary funding provided by the Department of Premier & Cabinet (DPC)										
	By Financial Year										
Integrity Agency	2009-10 $000s	2010-11 $000s	2011-12 $000s	2012-13 $000s	2013-14 $000s	2014-15 $000s	2015-16 $000s	2016-17 $000s	2017-18 $000s	2018-19 $000s	Total over 10 Years $000s
Audit Office of NSW	-	-	-	-	-	-	-	-	-	-	-
NSW Electoral Commission	-	-	-	-	-	1,370	-	-	2,444	-	**3,814**
Independent Commission Against Corruption	-	-	-	3,210	2,625	1,600	2,621**	129	1,683	1,716	**13,584**
Ombudsman's Office	-	-	-	1,842	2,203	2,070	2,157	1,768	-	-	**10,040**
Law Enforcement Conduct Commission*	-	-	-	-	-	-	-	-	-	-	-
	0	0	0	5,052	4,828	5,040	4,778	1,897	4,127	1,716	**27,438**

* The LECC was part of the Justice Cluster prior to 2018-19
** $1,281,000 allocated by Treasury for voluntary redundancies

Source: Published Annual Reports

Appendix two – About the audit

Audit objective

This audit assessed the effectiveness of the financial arrangements and management practices at four integrity agencies – the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the NSW Electoral Commission, and the NSW Ombudsman.

Audit criteria

We addressed the audit objective by considering the following questions for each agency:

1. Do funding models effectively support integrity agencies to fulfil their legislative mandate?
2. Have integrity agencies assessed the requirements for fulfilling their legislative mandate?
3. Are the internal budgeting processes at integrity agencies effective?
4. Do integrity agencies monitor how efficiently they use their funding?

Audit scope and focus

In assessing the criteria, we checked the following aspects:

1. Do funding models effectively support integrity agencies to fulfil their legislative mandate?
   a) Funding arrangements reflect Parliament's intent for the agency's role.
   b) Transparency in the decision-making process.
   c) Challenge process for discussion of agency assessments of their core funding requirements.
   d) Flexibility to respond to unforeseen increases in expenditure required to deliver their core services.

2. Have integrity agencies assessed the requirements for fulfilling their legislative mandate?
   a) Processes for determining core and discretionary functions and services.
   b) Systems for prioritising resources to the areas of greatest need.
   c) Clear rationale for chosen service levels and quality standards.
   d) Performance metrics to track achievement of organisational objectives.

3. Are the internal budgeting processes at integrity agencies effective?
   a) Agency budgets based on a clear understanding of the costs of fulfilling their legislative mandate.
   b) Clear links between spending decisions and organisational strategy.
   c) Clear ownership and accountability for budget holders and executives.

4. Do integrity agencies monitor how efficiently they use their funding?
   a) Systems for capturing and monitoring the cost of delivering their functions / services.
   b) Evidence of work to assess the efficiency of operational and 'back office' services and improve where necessary.

Audit exclusions

The audit did not:

- question the merits of government policy objectives
- assess the overall NSW Budget process as it applies to other departments and agencies.

Audit approach

Our procedures included:

1. Interviewing NSW Government staff including:
    - heads of integrity agencies
    - finance and operational managers at agencies
    - senior staff at DPC and NSW Treasury who work with the agencies
    - senior staff at equivalent integrity agencies in other jurisdictions.
2. Examining documents including:
    - NSW Government legislation and guidelines relating to financial arrangements for integrity agencies
    - agency policies and procedures for prioritisation, budgeting, and efficiency monitoring
    - academic and practitioner literature on the role and functions of integrity agencies in comparable.
3. Analysing financial data including:
    - agency revenue sources
    - agency expenditure.

The audit approach was complemented by quality assurance processes within the Audit Office to ensure compliance with professional standards.

Audit methodology

Our performance audit methodology is designed to satisfy Australian Audit Standard ASAE 3500 Performance Engagements and other professional standards. The standards require the audit team to comply with relevant ethical requirements and plan and perform the audit to obtain reasonable assurance and draw a conclusion on the audit objective. Our processes have also been designed to comply with requirements specified in the *Public Finance and Audit Act 1983* and the *Local Government Act 1993*.

Acknowledgements

We gratefully acknowledge the co-operation and assistance provided by staff at the audited agencies.

Audit cost

The estimated cost of this audit, including staff costs and overheads, was approximately $750,000.

Appendix three – Opinion from the Crown Solicitor's Office

Sensitive: Legal

ADVICE

Crown Solicitor's Office

FINANCIAL ARRANGEMENTS & MANAGEMENT PRACTICES IN INTEGRITY AGENCIES

Executive summary

1. You seek advice on three questions relating to the funding and expenditure arrangements of four "integrity agencies": the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the Ombudsman's Office, and the NSW Electoral Commission.

Question 1 – the appropriation framework

2. Part 4 of the *Appropriation Act 2019* makes a separate appropriation, to the Premier, "for the services of" each of these agencies.

3. In my advice I review the nature of an appropriation and the relevant provisions of the *Constitution Act 1902* (at [13]-[28]); identify provisions in the *Appropriation Act 2019* and the *Government Sector Finance Act 2018* ("*GSF Act*") which permit variation or supplementation of appropriations (at [36]-[45]); and examine aspects of the appropriations given to these agencies (at [29]-[35]).

Question 2 – ministerial discretion and expenditure

4. I consider the operation of the provisions in the *GSF Act* relating to the delegation of appropriation functions (at [48]-[69]); and whether it would be open to a minister to "reduce" the appropriated funds available to an agency (at [70]-[73]).

5. I also consider whether there are other provisions in the *GSF Act*, or other Acts, which confer power on the Premier or another minister to exercise control over the expenditure of funds by these agencies (at [47] and at [74]-[88]).

Question 3 – legislative intention if an agency considers it is insufficiently funded

6. Finally, I consider how the relevant legislation anticipates the resolution of a situation where an integrity agency considers it is not sufficiently funded (at [89]-[93]).

Background

7. The Auditor-General, in response to a request under s 27B(3)(c) of *the Public Finance and Audit Act 1983* from the Hon. Mr Don Harwin MLC, Special Minister of State and Minister for the Public Service and Employee Relations, Aboriginal Affairs and the Arts, is conducting an audit of the effectiveness of the financial arrangements and management practices of four "integrity agencies". These agencies are the Independent Commission Against Corruption ("ICAC"), the

Prepared for: AUD018 Audit Office
Client ref: Liz Basey D2003154
Author: Tom Chisholm

Date: 13 March 2020

Sensitive: Legal

202000630 D2020/183308

Crown Solicitor's Office

Law Enforcement Conduct Commission ("LECC"), the Ombudsman's Office, and the NSW Electoral Commission.

8. I also note that the Public Accountability Committee of the Legislative Council is currently conducting an inquiry into "the budget process for independent oversight bodies" and the Parliament, which includes these four agencies. I have read the written submissions made to that inquiry by the NSW Government and the four agencies.

9. In your letter of 26 February 2020 you have asked me three questions relating to the appropriation and funding arrangements for these agencies. I note that the first question, in particular, is of wide scope: it is only possible in this advice to outline what I understand to be the principal aspects of the appropriation framework as they apply, in practice, to the four agencies. I would of course be pleased to answer any more specific questions in a later advice.

10. I also note that your letter asks three further questions relating to the independence of these agencies. I will, as agreed, answer these questions separately.

Analysis

Question 1 – application of the appropriation framework to these agencies

11. Your first question asks how the appropriation framework enabled by the *Constitution Act*, the annual Appropriation Acts and the *GSF Act* applies to integrity agencies. In answering this question, I will focus primarily on the legal arrangements by which funds are appropriated for use by the agencies.

12. I will consider in my answer to Question 2 the extent to which the Appropriation Acts and the *GSF Act* confer discretions on the Treasurer and other ministers in relation to funds appropriated to these agencies.

Authority to withdraw money from the Consolidated Fund

13. The legal rule that "no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself" has been described as a "foundational principle of representative and responsible government"[1].

14. This principle is reflected, in this State, in provisions in the *Constitution Act* and the *GSF Act*, and in the Annual Appropriation Acts.

15. Section 39(1) of the *Constitution Act* establishes the Consolidated Fund: except as otherwise provided by or in accordance with any Act, "all public moneys collected, received or held by any person for or on behalf of the State shall form one Consolidated Fund".

[1] *Wilkie v Commonwealth* (2017) 263 CLR 467; [2017] HCA 40; at 15 [61]; (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also the authorities cited in note 80 in support of that proposition.

16. Section 45 of the *Constitution Act* provides that the Consolidated Fund "shall be subject to be appropriated to such specific purposes as may be prescribed by any Act in that behalf."

17. Section 4.6(1) of the *GSF Act* provides that money must not be paid out of the Consolidated Fund "except under the authority of an Act". This section confirms that the "distinct authorization from Parliament" (see at [13] above) must occur under an Act of the Legislature[2]. The "Legislature" is defined in s. 3 of the *Constitution Act* as meaning the Sovereign ("His Majesty the King") "with the advice and consent of the Legislative Council and Legislative Assembly". This definition reflects the fact that for a Bill to become an Act it must ordinarily be passed by both Houses and assented to by the Governor: s. 8A, *Constitution Act*.

18. Section 5A of the *Constitution Act*, however, establishes an important exception to the general rule that for a Bill to become law it must be passed by both Houses before being assented to by the Governor. Section 5A applies to "any Bill *appropriating* revenue or moneys for the *ordinary annual services of the Government*". If the Legislative Council rejects or fails to pass such a Bill (or returns it "with a message suggesting any amendment to which the Legislative Assembly does not agree"), the Bill may be presented to the Governor and will become an act on royal assent "notwithstanding that the Legislative Council has not consented to the Bill".

19. The *Constitution Act* also provides that "all Bills *for appropriating any part of the public revenue* or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly": s. 5. Section 46 of the *Constitution Act* requires in general terms, that any money bills (including a Bill for the appropriation of the Consolidated Fund) be recommended by the Governor[3]. These provisions reflect the general principle that it is the Government of the day that initiates or moves to increase parliamentary appropriations and taxation. This constitutional and parliamentary principle has been described as embodying "the financial initiative of the Crown"[4].

Nature of an appropriation

20. In a frequently cited passage, Mason J said that:[5]

> "An Appropriation Act has a twofold purpose. It has a negative as well as a positive effect. Not only does it authorise the Crown to withdraw money from the Treasury, it 'restrict(s) the expenditure to the particular purpose'".

21. In *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23, Hayne and Kiefel JJ stated that: (238 CLR 1 at [296] 105; original emphasis)

[2] See also *Wilkie* at at 15 [61], noting that the effect of ss. 81 and 83 of the Commonwealth *Constitution* is to prescribe that the form of the requisite parliamentary appropriation must by "law".

[3] Section 46(1) provides that it shall not be lawful for the Legislative Assembly "to originate or pass any vote, resolution, or Bill for the appropriation of any part of the Consolidated Fund, or of any other tax or impost to any purpose which has not been first recommended by a message of the Governor to the said Assembly during the Session in which such vote, resolution, or Bill shall be passed". Section 46(2), however, provides that a Governor's message is not required for a Bill introduced by, or a vote or resolution proposed by, a Minister of the Crown.

[4] See generally *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23; at 105 [294] (Hayne and Kiefel JJ).

[5] *Victoria v Commonwealth* (1975) 134 CLR 338 Mason J, at 392–393; quoting Isaacs and Rich JJ in *Commonwealth v Colonial Ammunition Co. Ltd* (1924) 34 CLR 198 at 224. This description by Mason J has been cited subsequently by the High Court, including in *Wilkie v Commonwealth* (2017) 263 CLR 467; [2017] HCA 40; at 525-526 [70].

> "Parliamentary appropriation is the process which *permits* application of the Consolidated Revenue Fund to identified purposes... The appropriation of funds, standing alone, does not and never has required application of the amounts appropriated. Any *obligation* to apply the funds to the permitted purpose must be found elsewhere than in the appropriation."

22. It appears clear that - whilst an appropriation provides authority, or permission, to withdraw money from the Consolidated Fund - it does not also provide legal authority for the actual expenditure of the appropriated funds[6]. Legal authority for that expenditure needs to be found elsewhere, either under authority provided by another Act; or under the non-statutory executive, or prerogative, powers of the Crown in right of New South Wales.

23. The "negative" effect of an appropriation – restricting the expenditure to the particular purpose – is reflected in s. 45 of the *Constitution Act*, which (as outlined above) provides that the Consolidated Fund shall be subject to be appropriated "to such specific purposes as may be prescribed by any Act".

24. It is not possible for there to be an appropriation "in blank", without any reference to purpose. On the other hand, it is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified.[7]

25. A distinction is often drawn between an **annual** appropriation, made in the annual Appropriation Acts which comprise the budget, and a **standing** appropriation made in other Acts. A standing appropriation is "permanent", in that it will (unless amended) continue to appropriate funds from time to time in the circumstances where it applies.[8]

26. The effect of s. 21A of the *Public Finance and Audit Act* ("*PFA Act*") was that a standing appropriation provision, which appropriated money from the Consolidated Fund for a specified purpose shown in the Estimates of the Consolidated Fund, operated only to the extent necessary to meet any shortfall in the costs of meeting that purpose "after the appropriation of money for that purpose under an Appropriation Act".

27. Section 21A of the *PFA Act* was repealed by the *Government Sector Finance Legislation (Repeal and Amendment) Act 2018*, on and from 1 July 2019, which is prior to the commencement of the *Appropriation Act 2019* on 25 June 2019. Part 4 Div. 2 of the *GSF Act* contains provisions relating to appropriations (as discussed further below). There is, however, no provision in the *GSF Act* in similar terms to the repealed s. 21A of the *PFA Act*, nor are there any provisions in the *GSF Act* which have an equivalent effect to s. 21A of the *PFA Act*.

---

[6] See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23; especially at 55 [111] (French CJ); 73 [178] (Gummow, Crennan and Bell JJ); 113 [320] (Hayne and Kiefel JJ); 210-211 [601]-[602] (Heydon J). See also *Williams v Commonwealth [No. 1]* (2012) 248 CLR 156; [2012] HCA 23; at 179 [2] (French CJ), and 354 [531] (Crennan J).

[7] See *Wilkie v Commonwealth* (2017) 263 CLR 467; [2017] HCA 40; at 526 [71].

[8] See the description of annual and special (or standing) appropriations by French CJ in *Pape v Commissioner of Taxation* (2009) 238 CLR 1;[2009] HCA 23; at 40 [64].

28. It is possible that the same provision might operate *both* as a standing appropriation (authorising withdrawal of the funds from the Consolidated Fund for the permitted purpose), and as a provision which authorises the actual expenditure of those funds[9].

Appropriations to the agencies

29. I note that there are some standing appropriation provisions which may be relevant to funding of expenses relating to these agencies. These provisions are:

    (a) *Electoral Act 2017*: s. 265 ("Payment of expenses");

    (b) *Electoral Funding Act 2018*: s. 134 ("Appropriation of Consolidated Fund for electoral funding"); and

    (c) *Independent Commission Against Corruption Act 1988*: Sch. 1, cl. 6 (Remuneration of Commissioner or Assistant Commissioner).

30. Amounts appropriated under standing appropriation provisions can only be applied for the purposes specified in those provisions.

31. The amounts appropriated under these standing appropriation provisions would, *prima facie*, be in addition to amounts appropriated to the agencies under the annual Appropriation Acts – although it would be possible for future annual Appropriation Acts (or another Act) to overcome this by including a provision equivalent to the repealed s. 21A of the *PFA Act*.

32. I also note that s. 4.7 of the *GSF Act*, relating to "deemed appropriations", is also a standing appropriation. That provision applies to "deemed appropriation money", which is government money that a GSF agency receives or recovers of a kind prescribed by the regulations[10], that forms part of the Consolidated Fund *and* is not appropriated under the authority of an Act. The responsible Minister for a GSF agency is "taken to have been given an appropriation out of the Consolidated Fund" at the time the agency receives or recovers any deemed appropriation money: s. 4.7(1). An appropriation under s. 4.7 is taken to have been given only for the services of the GSF agency that receives or recovers the deemed appropriation money.

33. Every unused appropriation for an "annual reporting period" for the NSW Government lapses and ceases to have effect for any purpose at the end of that period: s. 4.8(1), *GSF Act*. An unused "deemed appropriation" does not, however, lapse at the end of the annual reporting period unless the regulations provide differently: s. 4.8(3).

34. Appropriations to each of the four agencies were provided for in Part 4 (Special Offices) of the *Appropriation Act 2019*. The appropriation provisions are in similar form, and I will use s. 18, relating to the ICAC, as an example. Section 18 provides that: (emphasis added)

[9] See eg *Williams v Commonwealth [No. 1]* (2012) 248 CLR 156; [2012] HCA 23; at 354 [531] (Crennan J).

[10] See cl. 13 of the Government Sector Finance Regulation 2018, which prescribes the various kinds of "deemed appropriation money".

Crown Solicitor's Office

"**18 Independent Commission Against Corruption**

This Act appropriates the sum of $24,899,000 **to the Premier** out of the Consolidated Fund **for the services of** the Independent Commission Against Corruption for the year 2019–20.

Note: The appropriation will fund services for the following State outcome:

		Expenses $,000	Capital expenditure $,000
01	Accountable and responsible government	25,765	800"

35. The Note to s. 18 is "budget related information" within the meaning of s. 29 of the *Appropriation Act 2019*, as are the Budget Papers tabled in Parliament in connection with the Bill for the *Appropriation 2019*[11]. Section 29(2) of the *Appropriation Act 2019* provides that budget related information "does not form part of this Act", and "does not affect the application of any amount appropriated by this Act". Budget related information may, however, be taken into account, to some extent, if it is capable of assisting in ascertaining the meaning of the Act, in accordance with the ordinary principles which apply to the use of extrinsic materials in the interpretation of Acts[12]. (Appropriation Acts are also interpreted having regard to the constitutional and parliamentary principles and practice relating to appropriation legislation[13].)

Variation or supplementation of appropriated sums

36. There are several mechanisms by which funds appropriated under the *Appropriation Act 2019* may be supplemented or varied.

37. **First**, s. 25(1) of the *Appropriation Act* provides that payment of a sum appropriated by the Act for a purpose "may not be made in excess of the sum specified for the purpose", except as provided by that section or Pt 4 of the *GSF Act*.

38. Subsection (2) of s. 25 provides that: (emphasis added)

"(2) If the **exigencies of government so require**, the Treasurer may authorise the payment of a sum appropriated for a purpose in excess of the sum specified for the purpose but only if an equivalent sum is not paid out for another purpose, whether the other purpose is specified in relation to the same or a different Minister."

39. Subsection (3) of s. 25 provides that: (emphasis added)

"(3) If the Treasurer is satisfied that a sum appropriated for a purpose is insufficient to enable the purpose to be effectively and efficiently carried out, the Treasurer may authorise the payment of a sum in excess of the sum specified for the purpose, **but only if**:

[11] See also s. 4.1(3) of the *GSF Act*, which is to the same effect (unless an Annual Appropriation Act provides differently).

[12] See s. 34 of the *Interpretation Act 1987*.

[13] See, for example, *Combet v Commonwealth* (2005) 224 CLR 494; [2005] HCA 61; and *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23.

(a) an equivalent sum is identified as surplus to another purpose by the Minister in relation to whom the other purpose is specified, whether the other purpose is specified in relation to the same or a different Minister, and

(b) the equivalent sum is not paid out for the other purpose."

40. Subsections (2) and (3) are each subject to subsections (5)-(8), which provide that the sums appropriated under Parts 2, 3 and 4, may only be paid out for any of the purposes specified in that Part. Most relevantly, s. 25(7) provides that the sums appropriated under Part 4 "may only be paid out for any of the purposes specified in Part 4".

41. It follows that, if not all of the money appropriated to a "special office" under Part 4 had been "paid out" to that special office during a financial year, s. 25 would permit the Treasurer[14] to authorise the payment of that unpaid sum for the services of a *different* special office under Part 4. Section 25(7) would, however, prevent that unpaid sum from being paid out for purposes other than those specified in Part 4.

42. **Secondly**, although it does not strictly involve a variation of an appropriation[15], I note that s. 13 of the *Appropriation Act 2019* appropriates a sum of $120 million to the Treasurer "for State contingencies for the year 2019-20". This appropriation was previously described as the Advance to the Treasurer (see eg s. 15 of the *Appropriation Act 2018*). The Treasurer must cause details of the payments of sums from the Treasurer's State contingencies appropriation to be included in the Budge Papers for the next annual reporting year for the NSW Government: s. 4.12, *GSF Act*.

43. **Thirdly**, s. 4.13 of the *GSF Act* authorises the Treasurer, with the approval of the Governor, to determine that additional money is to be paid out of the Consolidated Fund during the annual reporting period[16] for the NSW Government "in anticipation of appropriation by Parliament" if it is "required to meet any exigencies of Government" during the current annual reporting period. Any money determined under s. 4.13 for an exigency must be no more than is necessary in the public interest to fund expenditure to meet the exigency: s. 4.13(3). The Treasurer must cause details of the payments of money under this section to be included in the Budget Papers for the next annual reporting year for the NSW Government: s. 4.13(4). Such "budget variations" are also included in the next year's Annual Appropriation Act, in order (in general terms) to vary retrospectively the previous year's appropriation so as to validate the expenditure[17].

44. There is also a question whether it might be possible for the agencies (or other "Special Offices") to receive a portion of funds appropriated to the services of a Department, in addition to the funds appropriated for the services of the agencies under Part 4 of the *Appropriation Act 2019*. The note to the appropriation for the Department of Premier and Cabinet in s. 8 of the *Appropriation Act 2019* includes "Cluster grants", and the 2019-2020 Budget Paper No. 3 lists

[14] The Treasurer would of course need to be satisfied that the necessary circumstances in s. 25 applied.

[15] See *Wilkie v Commonwealth* (2017) 263 CLR 467; [2017] HCA 40 for consideration of a somewhat equivalent provision in an annual appropriation Act of the Commonwealth.

[16] See ss. 2.10 (annual reporting period for a GSF agency), and 2.11 (annual reporting period for the NSW Government), *GSF Act*.

[17] See, for example, ss. 31-32, and Sch. 1, of the *Appropriation Act 2019*.

each of the four agencies as being within the Department of Premier and Cabinet "cluster". Whilst the notes in the *Appropriation Act 2019* do not form part of the Act or affect the application of any amount appropriated by this Act, they may be taken into account as extrinsic materials where they are capable of assisting in the construction of the Act (see above at [35]). In my view an appropriation for "the services of" a principal department would ordinarily extend to making "grants" or otherwise distributing funds to other government departments or agencies which have been administratively grouped within the "cluster" headed by that principal department.

45. It is less clear, however, whether it would be within the purposes of an appropriation "for the services of" a principal department if those funds were applied to provide supplementary funding to assist an agency in the same "cluster" for which an appropriation had been made *in another part* of the Appropriation Act. (Appropriations for the services of Departments are made in Part 2 of the Appropriation Act, whilst appropriations for the services of the "Special Offices" are made in Part 4[18].) It is not possible to answer this question in the abstract, because it would be likely to require consideration of the purposes of specific instances of proposed expenditure.

Question 2 – ministerial discretion and expenditure

46. Question 2 is in two parts. I have reversed the order for convenience:

    (a) Does a Minister (including the Premier) have the legal authority to apply an "efficiency dividend", or similar mechanism, to reduce the availability of funds appropriated to integrity agencies after the annual Appropriation Act has been passed by Parliament?

    (b) Once funding has been appropriated in a way that complies with the *Constitution Act*, to what extent does a Minister (including the Premier) have the legal authority/discretion to exercise control over the expenditure of integrity agencies?

Other possible sources of power to direct agencies

47. In answering Question 2 I will primarily focus on the potential effect of the *GSF Act*. I note that Questions 5 and 6 (which I will address in the subsequent advice) ask whether these agencies are required to comply with government policy, including administrative requirements imposed by the cluster arrangements.

Delegation of appropriations under GSF Act

48. Because the *Appropriation Act 2019* appropriates funds for the services of each agency to the Premier, the agency has no authority to withdraw any of those funds from the Consolidated Fund. The *GSF Act*, however, permits a minister to delegate the authority granted by the Appropriation Act. The Premier is the minister who has (as outlined above) received the

[18] Section 25 of the Appropriation Act 2019 may form part of the legislative context within which this question would need to be considered.

appropriations for each of these agencies[19], and who may therefore delegate the authority granted by the appropriations for the services of these agencies.

49. In order to understand these delegation provisions, it is necessary to outline first some of the contextual provisions of the *GSF Act*.

GSF agencies, separate GSF agencies, and accountable authorities

50. The *GSF Act* imposes a range of obligations and functions on "GSF agencies" (an expression that includes a "separate GSF agency"[20]), and on the "accountable authorities" of those agencies.

51. The **LECC** is a "*GSF agency*" for the purposes of the *GSF Act*. The Chief Executive Officer of the LECC is the accountable authority. See ss. 2.4(1)(e), 2.7(2)(g), *GSF Act*.

52. The **ICAC,** the **Electoral Commission** and the **Ombudsman's Office** are each "*separate GSF agencies*": s. 2.5(1)(b), (d) and (e), *GSF Act*.

53. The accountable authority for the **ICAC** is the Chief Executive Officer of the ICAC: s. 2.7(2)(b), *GSF Act*.

54. The accountable authority for the **Ombudsman's Office** is the Ombudsman: s. 2.7(2)(c), *GSF Act*.

55. The accountable authority for the **Electoral Commission** is the "governing body", if the Commission has one: s. 2.7(2)(j)(i), *GSF Act*. The expression "governing body" is relevantly defined to mean a "board, council or other body comprised of individuals that are collectively responsible for managing the affairs of the agency" but not "any board, council or other body with merely advisory functions": s. 1.4, *GSF Ac*). If the agency does not have a governing body, the "head of the agency"[21] is the accountable authority: s. 2.7(2)(j)(ii), *GSF Act*. In my view, the Electoral Commission (not the Electoral Commissioner), consisting of the members specified in s. 9(1) of the *Electoral Act 2017*, is the "governing body" of the Commission for *GSF Act* purposes and is therefore the accountable authority for the Electoral Commission (see, especially, s. 9(3), Sch. 1 cl. 16, *Electoral Act*).

56. Section 5.5 of the *GSF Act* relevantly provides that:

> "(2) A government officer must ensure that the officer's expenditure of money for the State or a GSF agency is in a way that is authorised.
>
> (3) Expenditure of money is in a way that is authorised if it is done:
>
> (a) in accordance with a delegation or subdelegation from a person with power regarding the expenditure of the money, or
>
> (b) under the authority of this Act or any other law."

[19] Different ministers also receive appropriations for other "Special Offices" under Part 4 of the *Appropriation Act 2019*.

[20] Section 2.4(1)(a), *GSF Act*.

[21] Relevantly defined to mean the person who is the chief executive officer (however described) of the agency or otherwise responsible for the agency's day to day management, but not its governing body (if any) s. 1.4, *GSF Act*.

57. The expression "government officer" is defined broadly, and includes the head of a GSF agency; a person employed in or by a GSF agency; a person who is a statutory officer and not a Public Service employee under the *Government Sector Employment Act 2013* but who is the head of, or exercises functions in relation to, a Public Service agency; and a person working for a GSF agency by way of secondment from another GSF agency: s. 2.9(1), paras (a)-(d). A government officer who has any of these relationships with a GSF agency (or who is prescribed by the regulations) is a "government officer for a GSF agency": s. 2.9(3).

58. A "government officer" is not, relevantly, either a Minister or Parliamentary Secretary, or a person who is a member of the governing body of a GSF agency but not employed in or by the agency or any other GSF agency: s. 2.9(2), paras (b) and (h).

Delegation of appropriation functions

59. Part 9 Div. 2 of the *GSF Act* relates to delegations. A "**delegable function**" includes "a function that is conferred or imposed on a person or other entity by or under this Act or any other legislation (including an annual Appropriation Act) regarding the expenditure of money (including out of the Consolidated Fund)": s. 9.7(1)(b), *GSF Act*. The note to s. 9.7(1) indicates that, for example, the authority given to a Minister by an Annual Appropriation Act to expend money forming part of the Consolidated Fund is a delegable function covered by paragraph (b).

60. A "**separate GSF agency delegable function**" of a Minister in relation to a separate GSF agency, similarly, includes a "function that is conferred or imposed on the Minister by or under this Act or any legislation (including an *Annual Appropriation Act*) regarding the expenditure of money (including out of the Consolidated Fund) for or in respect of the services of the agency": s. 9.7(2)(a), *GSF Act*. The note to s. 9.7(2) indicates that, for example, paragraph (a) covers both appropriations given to a Minister for the services of a specific separate GSF agency or appropriations given for the services of a cluster or other grouping of agencies to which a separate GSF agency belongs.

61. The list of persons to whom a Minister may delegate a "delegable function" (in relation to a GSF agency which is *not* a separate GSF agency) is longer than the list of persons to whom a Minister may delegate a "separate GSF agency delegable function" (in relation to a *separate GSF agency*).

62. As outlined above, the ICAC, the Electoral Commission and the Ombudsman's Office are each "separate GSF agencies". A Minister may delegate any of the Minister's *separate GSF agency delegable functions* in relation to a separate GSF agency to: (s. 9.9(3), *GSF Act;* emphasis added)

> "(a) the accountable authority for the agency or
>
> (b) a government officer (or government officer of a kind) **of the agency**."

63. The LECC is, as outlined above, a GSF agency, not a separate GSF agency. A Minister may delegate any of the Minister's delegable functions[22] to:

[22] Except separate GSF agency delegable functions, or information sharing functions under Div. 9.1.

"(a) another Minister, or

(b) the accountable authority for a GSF agency for which the Minister is the responsible Minister, or

(c) a government officer (or a government officer of a kind) of a GSF agency for which the Minister is the responsible Minister, or

(d) the Secretary of a Department, or

(e) a GSF agency for which the Minister is the responsible Minister that is a person, or

(f) any other entity (or an entity of a kind) prescribed by the regulations."[23]

Terms and conditions on a delegated appropriation function

64. Where a Minister delegates a function regarding the expenditure of money out of the Consolidated Fund under the authority of an annual Appropriation Act, the Minister "may impose terms and conditions on the delegation", and also on any subdelegation, "so as to limit the amounts and purposes for which expenditures of money are permitted under the delegation" or subdelegation: ss. 5.2(1), (2), *GSF Act*.

65. Any such delegation must be in writing: see s. 49 of the *Interpretation Act 1987*, which includes a number of important provisions relating to the form of delegations.

66. Section 5.2(3) provides that: (emphasis added)

> "The Minister must ensure that the terms and conditions imposed are **not inconsistent** with the **purposes for which the appropriation was given**."

67. Section 5.2(4) provides that, to avoid doubt, the delegate or subdelegate is authorised to make expenditures of money, but only in accordance with the terms and conditions (if any) that the Minister has imposed.

68. Section 5.2 does not limit "any *other kinds* of terms or conditions" that can be imposed on the delegation or subdelegation[24] of appropriation expenditure functions under Div. 9.2 (including under s. 49 of the *Interpretation Act* in its application to delegations or subdelegations under Div. 9.2[25]): s. 5.2(5). The restriction imposed by s. 5.2(3) would however, in my view, apply to terms and conditions on any delegation which have an effect "so as to limit the amounts and purposes for which expenditures" of the appropriated money are permitted under the delegation.

69. I also note that the fact that s. 5.2(3) requires the Minister to ensure that the terms and conditions imposed are "not inconsistent with the purposes for which the appropriation was given" aligns with the fact that s. 5.2 is not a "paramount" provision within the meaning of s. 1.8 of the *GSF Act*. As a result, s. 5.2 is to be construed on the basis that it is a provision which is "not intended to limit or exclude the operation of any other legislation": s. 1.8(1), *GSF Act*.

[23] None of the regulations made for the purposes of this provision are presently relevant.

[24] I will, for convenience, refer only to delegations at this point, but (unless indicated) the situation in relation to subdelegations would be the same.

[25] Section 49 of the *Interpretation Act* relates to delegation powers in any Act or instrument, and includes various facilitative provisions.

Question 2(a) – whether the Minister may reduce the funds available to an agency

70. I am asked whether it would be open for a minister (including the Premier) to apply an "efficiency dividend", or similar mechanism, to *reduce* the availability of funds appropriated to the minister for the services of these Part 4 agencies under the annual Appropriation Acts.

71. In my view a minister to whom such funds had been appropriated would not ordinarily have any power to reduce the total sum of the appropriated sums available to the agency. The total sums have been appropriated by the Legislature in an Appropriation Act, and an express source of power would be required in order to reduce the amounts of those appropriated sums. (I have discussed the operation of s. 25 of the *Appropriation Act 2019* above which, in the circumstances in which it applies, enables money that has been "identified as surplus" to one purpose to be paid for another purpose. Sums appropriated for the purposes of Part 4, however, "may only be paid out for any of the purposes specified in Part 4": s. 25(7).)

72. The minister could, however, impose terms and conditions on a delegation under s. 5.2 of the *GSF Act* which could, for example, limit the ability of certain officers to expend funds, and limit the circumstances in which those funds may be expended, on behalf of the agency. I have outlined above (at [62]-[63]) the persons to whom such a delegation may be made, which differ depending on whether the GSF agency is a "separate GSF agency".

73. I discuss the potential limits on the scope of these terms and conditions in my answer to Question 2(b) below.

Question 2(b) – whether any other sources of control over expenditure of agencies

74. The second part of your question asks whether, after funding has been appropriated in a way that complies with the *Constitution Act*, a minister (including the Premier) has legal authority/discretion to exercise control over the expenditure of integrity agencies.

Section 5.2(3), GSF Act – terms and conditions of a delegation limiting expenditure

75. Section 5.3 of the *GSF Act* requires that the minister to whom funds have been appropriated ensures that any terms and conditions of a delegation, which may have the effect of limiting the amounts and purposes for which expenditures of moneys are permitted, "are not inconsistent with the purposes for which the appropriation was given".

76. The "purposes for which the appropriation was given" would in my view (as outlined above) be assessed by reference to the substantive statutory functions of the agencies. The principal functions of the Ombudsman, the ICAC and the LECC, could, in very broad terms, be described as involving scrutiny of the activities of the Executive Government.

77. The principal functions of the Electoral Commission and the Electoral Commissioner involve, in equally broad terms, administering the electoral process and the funding of political parties (and other participants) under the *Electoral Funding Act*. The High Court has recognised that the contemporary operation of a system of responsible government in this State reflects the

significant role of modern political parties, one of which (or a coalition of which) ordinarily "controls" the Legislative Assembly: see *Egan v Willis* (1998) 195 CLR 424 at 449; [1998] HCA 71 at [38]. The Court also recognised the "conventional requirement" that Ministers are chosen from amongst the Members of either House (195 CLR 424 at 449; [1998] HCA 71 at [36]). As a result, the exercise of the functions of the Electoral Commissioner and Electoral Commissioner involves matters of interest to Ministers, as members of political parties.

78. It is plain from the legislation establishing each of the agencies, and the related statutory officers, that they are independent from ministerial control in the exercise of their statutory functions. I prefer the view, in the context outlined above, that the "purposes for which the appropriation was given" to these agencies not only include the exercise of the functions allocated to these agencies, but - subject to any relevant statutory exceptions - also include the exercise of those functions by these agencies *in a manner which is independent* of the Executive Government.

79. I therefore do not consider that a Minister could impose terms and conditions that operated in effect as terms and conditions on the *exercise* of a statutory function, in circumstances where the Minister has no power to direct or control the exercise of that function. A term or condition of a delegation could not, for example, purport to prevent expenditure on a particular investigation, or to require ministerial approval for expenditure on a particular investigation, when a statutory body has the power to initiate investigations on its own motion.

80. The requirement in s. 5.3 applies only a delegation made by a Minister under the *GSF Act* "so as to limit the amounts and purposes for which expenditures of money are permitted". It does not limit "any *other kinds of terms or conditions*" that can be imposed on the delegation of appropriation expenditure functions under Div. 9.2 of the *GSF Act*. It would also, of course, not apply to limit the exercise of other ministerial functions under the *GSF Act*, or under any other Act.

Section 2.5(2) GSF Act – whether separate GSF agencies required to comply with Treasurer's directions, etc

81. Section 2.5(2) of the *GSF Act* is, however, significant. That provision applies only to a *separate GSF agency* (and to the accountable authority for the agency and its government officers). The ICAC, the Electoral Commission, and the Ombudsman's Office are, as outlined above, each a separate GSF agency.

82. Section 2.5(2) provides that: (emphasis added)

> "Despite any other provision of this Act, a separate GSF agency (and the accountable authority for the agency and its government officers) are each not required to comply with a **relevant Treasurer's requirement** or **Minister's information requirement** if the accountable authority considers that the requirement is **not consistent with the exercise of the statutory functions** of the agency."

83. A "relevant Treasurer's requirement" is defined in s. 2.5(3) of the *GSF Act* as meaning:

Crown Solicitor's Office

"(a) a provision of the Treasurer's directions that a separate GSF agency (or the accountable authority for the agency or its government officers) would be required to comply with but for this section, or

(b) any other direction, request or other requirement given or made by the Treasurer under this Act that a separate GSF agency (or the accountable authority for the agency or its government officers) would be required to comply with but for this section."

84. A "Minister's information requirement" means "any direction, request or other requirement given or made by a Minister under this Act for the provision of information about a separate GSF agency that the agency (or the accountable authority for the agency or its government officers) would be required to comply with but for this section": s. 2.5(4).

85. The accountable authority for a separate GSF agency must ensure that a written document (a "*non-compliance reasons statement*"), stating the reasons for any non-compliance with a relevant Treasurer's requirement or Minister's information requirement, is: (s. 2.5(5), *GSF Act*)

"(a) given to the Treasurer or other Minister who gave or made the requirement as soon as practicable after it is decided not to comply, and

(b) included in the annual reporting information for the separate GSF agency for the annual reporting period during which the non-compliance occurred or reported in any other way prescribed by the regulations."

86. The regulations may provide for or with respect to the tabling in Parliament of a "non-compliance reasons statement": s. 2.5(6).

87. Section 2.5(2) does not apply to the LECC, because it is not a separate GSF agency.

88. It is not possible, in the available time, to identify the various "relevant Treasurer's requirements", or "Minister's information requirements", or any other ministerial powers under the *GSF Act*, which might potentially have an impact on the expenditure of funds by the agencies. I would only add that all such functions must of course be exercised lawfully, having regard to the specific statutory requirements for each function, and in accordance with applicable administrative law principles.

Question 3 – legislative intention if agency considers it is not sufficiently funded

89. Your final question asks how the relevant legislation anticipates the resolution of a situation where an integrity agency considers it is not sufficiently funded.

90. I note that each of the four agencies is subject to parliamentary oversight by a committee. That is one parliamentary forum in which the adequacy of funding to these agencies could be considered. These matters could also of course be considered in Budget Estimates inquiries, or other committee inquiries, and in each House.

91. Each agency is also required to prepare an annual report, including audited financial reports, for tabling in Parliament. This is another significant mechanism for parliamentary consideration of the operations of these agencies.

Crown Solicitor's Office

92. I have attempted to outline in this advice the principal legal aspects of the present funding arrangements for these agencies. These arrangements, as a practical matter, will inevitably involve discussions between these agencies and the Executive Government in relation to appropriate funding for these agencies. It is not otherwise possible for me to comment on the current practices.

93. I note, however, that these existing arrangements are consistent with the general principle that it is the Government of the day that initiates or moves to increase parliamentary appropriations and taxation. This constitutional and parliamentary principle has been described as embodying "the financial initiative of the Crown", as discussed at [19] above.

Karen Smith
Crown Solicitor

Tom Chisholm
Principal Solicitor

ADVICE

Crown Solicitor's Office

FINANCIAL ARRANGEMENTS & MANAGEMENT PRACTICES IN INTEGRITY AGENCIES ADVICE 2

Executive summary

1. In my first advice I answered three questions relating to the funding and expenditure arrangements of five "integrity agencies" and statutory officers: the Independent Commission Against Corruption ("ICAC"), the Law Enforcement Conduct Commission ("LECC"), the Ombudsman, and the Electoral Commissioner and the Electoral Commission. In this advice I answer three further questions relating to the extent of the independence of these agencies and officers.

Question 4: Current legal mechanisms to ensure independence of integrity agencies from executive direction or control

2. The Acts which constitute these agencies and officers confirm that they are not subject to the direction and control of any minister in the exercise of their statutory functions. A minister (or other member of the executive, such as an employee of a public service agency) would require clear statutory authority in order to "direct" or "control" these officers and agencies in relation to the exercise of any particular statutory function.

3. I have identified four additional legal mechanisms which help ensure these agencies and officers are able to carry out their statutory functions without undue influence from the executive.

4. First, each statutory officer has security of tenure for the term of his or her appointment, subject to removal from office by the Governor; either on an address of both Houses of Parliament, or for incapacity, incompetence or misbehaviour of the statutory officer. Secondly, these agencies and officers are subject to oversight by parliamentary committees. Thirdly, statutory decisions made by these agencies and officers would generally be subject to judicial review (unless the decisions are not justiciable or if a privative clause applies), including on a ground that a ministerial direction to the agency or officer was invalid. Fourthly, an agency or statutory officer would also be able to obtain independent legal advice from the Solicitor General, or from me, if concerned about the proper exercise of any of their statutory functions.

Question 5: extent to which agencies required to comply with government policy

5. Government policy may be reflected in Acts and delegated legislation; and in lawful directions, orders, etc, made under them. In these cases the government policy is binding and has the force of law. Whether these agencies and officers are required to comply with a "government policy", in this sense, will involve construction of the applicable Act, regulation, direction or order.

6. Staff are employed under the *Government Sector Employment Act 2013* ("the *GSE Act*") in separate Public Service agencies to enable the Electoral Commissioner and the Electoral

Crown Solicitor's Office

Commission; the Ombudsman; and the LECC; to exercise their functions. Sections 30 and 84 of the *GSE Act* may, to some extent, support ministerial directions to the heads of these separate Public Service agencies in relation to staffing and employment matters. In my view, however, there is nothing in the staffing arrangements under the *GSE Act* which confers any power on the relevant ministers to direct staff *in the conduct of their work* in enabling the Ombudsman, the Electoral Commission and Commissioner, and the LECC, to exercise their functions.

7. I also do not think that general principles of ministerial responsibility – arising from the fact ministers have been allocated the administration of the Acts which constitute these statutory agencies and officers and confer functions on them – provide a source of power to direct these agencies and officers in the exercise of their functions. This conclusion applies equally to the ICAC, which is not generally subject to the *GSE Act*.

Question 6 – effect of the cluster arrangements

8. Your final question asks (to the extent not covered by my answer to Question 5) whether the agencies and statutory officers are required to comply with administrative requirements imposed by the cluster arrangements.

9. In my view, a "cluster" is a term of reference with no established legal meaning or effect. I am not aware of any legal basis by which the concept of a "cluster" could be said to have any relevant legal significance, except to the extent these arrangements are reflected in the annual Appropriation Acts. (I considered the legal significance of the operation of the "cluster" arrangements as reflected in the Appropriation Acts and the annual budget process in my first advice).

Analysis

Question 4: Current legal mechanisms to ensure independence of integrity agencies from executive direction or control

10. You ask what legal mechanisms are currently in place to protect the ability of these agencies and officers to carry out their statutory functions without unlawful *direction or control* from a minister or public service agency.

Independence of these agencies and officers

11. The Acts which constitute these agencies and officers confirm that they are not subject to the direction and control of any minister in the exercise of their statutory functions:

    (a) ss. 10(4) and 12(4) of the *Electoral Act 2017* confirm that the Electoral Commission and the Electoral Commissioner are not subject to the control or direction of the Minister in the exercise of their functions under the *Electoral Act* or any other Act;

    (b) the independence of the ICAC is confirmed in the objects provision in s. 2A of the *Independent Commission Against Corruption Act 1988*, which refers to the constitution of the ICAC "as an independent and accountable body";

(c) s. 22 of the *Law Enforcement Conduct Commission Act 2016* provides that the LECC and its Commissioners are not subject to the control or direction of the Minister in the exercise of their functions; and

(d) whilst there are no equivalent specific provisions in the *Ombudsman Act 1974*, it is plain from the Act as a whole (and from the provisions relating to the appointment and removal of the Ombudsman by the Governor) that the Ombudsman is not subject to the direction and control of any minister.

12. A minister (or other member of the executive, such as an employee of a public service agency) would therefore require clear statutory authority in order to "direct" or "control" these officers and agencies in relation to the exercise of any particular statutory function. I discuss this, and related issues about the application of government policy, further in my answers to Questions 5 and 6.

13. I also note, as another aspect of their independence, that the ICAC, the LECC and the Ombudsman do not depend upon any referral from a minister or government agency before being able to exercise their investigative powers[1].

14. Another important manifestation of the independence of these bodies and officers is their capacity to report directly to Parliament on the exercise of their functions[2].

15. I outline below four additional legal mechanisms which help ensure these agencies and officers are able to carry out their statutory functions without undue influence from the executive.

Removal and remuneration of heads of integrity agencies from office

16. Each statutory officer has security of tenure for the term of his or her appointment, subject to removal from office by the Governor:

(a) *upon the address of both Houses of Parliament*, in respect of the Ombudsman, the Chief Commissioner and the two other Commissioners of the ICAC, and a member of the Electoral Commission (including the Electoral Commissioner);[3] or

(b) *for incapacity, incompetence or misbehaviour*, in respect of the members (the Chief Commissioner and the two other Commissioners), Assistant Commissioners and alternate Commissioners of the LECC; and an Assistant Commissioner of the ICAC.[4]

[1] I also note that both s. 20(1) of the *ICAC Act*; and s. 51(2)(b) of the *LECC Act* expressly provide that these agencies may commence investigations on their own initiative.

[2] See, for example, *ICAC Act* ss. 74; 75-77; *LECC Act* ss. 132-133; *Ombudsman Act* s. 31; *Electoral Act* s. 271.

[3] See s. 6(5) of the *Ombudsman Act 1974*, cl. 7(2) of Sch. 1 to the *Independent Commission Against Corruption Act 1988*; cl. 8 of Sch. 1, and cl. 4 of Sch. 2, to the *Electoral Act 2017*.

[4] See s. 18(1), cl. 1(7) of Sch. 1 to the *Law Enforcement Conduct Commission Act 2016*: cl. 7(3) of Sch. 1 to the *Independent Commission Against Corruption Act 1988*.

Crown Solicitor's Office

Parliamentary oversight

17. These agencies and officers are subject to oversight by various parliamentary committees, including:

    (a) the non-statutory Joint Standing Committee on Electoral Matters, which inquires into and reports on matters referred to it that relate to electoral laws (including the Electoral Commission);[5]

    (b) the statutory Committee on the ICAC , which monitors, reviews, reports and inquires into the functions of, and matters appertaining to, the ICAC;[6] and

    (c) the statutory Committee on the Ombudsman, the LECC and the Crime Commission, which monitors, reviews, reports and inquires into the functions of, and matters appertaining to, the Ombudsman and the LECC.[7]

18. I think that an agency or officer could raise any concerns about the independent exercise of their functions during the inquiry process with the relevant parliamentary committee.

19. I note that both the ICAC and the LECC are also overseen by an independent Inspector.

Judicial review of administrative decisions made by integrity agencies

20. Statutory decisions made by these agencies and officers would generally be subject to judicial review (unless the decisions are not justiciable or a privative clause applies). A court may, for example, declare a decision invalid and set it aside if agencies or officers exercised statutory powers in the following circumstances:

    (a) if the statutory precondition to the exercise of the agency's power had not been enlivened prior to its purported exercise to comply with a direction from the minister or a public sector agency: see for example *Bosnjak Bus Service v Commissioner of Motor Transport* (1970) 92 WN (NSW) 1003 at 1014-1015. If, for example, the Electoral Commissioner were not "satisfied on reasonable grounds" that one the circumstances set out in s. 68(2)(a)-(d) of the *Electoral Act 2017* applied, the Electoral Commissioner could not purport to cancel the registration of a party under s. 68(2) on a ministerial direction alone; or

    (b) if the minister or public sector agency did not have the power to require the agency to exercise its statutory power in a particular way, and the agency exercised its power in that way to comply with the direction without turning its own mind to the exercise of that power: see for example *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 429-430. Without express statutory authority,[8] whether or not a minister can direct an agency in

[5] See NSW, Legislative Assembly, *Resolution passed 18 June 2019*, 57th Parliament, Votes and Proceedings No.10, Item 13; and NSW, Legislative Council, *Resolution passed 19 June 2019*, 57th Parliament, Minutes No. 10, Items 11 and 18.

[6] See ss. 63-64 of the *Independent Commission Against Corruption Act 1988*.

[7] See ss. 31A-31B of the *Ombudsman Act 1974*, and ss. 130-131 of the *Law Enforcement Conduct Commission Act 2016*.

[8] I note that none of the Acts constituting the ICAC, the LECC, the Ombudsman or the Electoral Commission and Commissioner expressly confer a power of direction or control on a minister. An example of such a provision in another Act is s. 13 of the *Protection of the Environment Administration Act 1991*.

the exercise of a statutory discretion depends upon a variety of considerations including the particular statutory function, the nature of the question to be decided, the character of the decision-maker and the way in which the statutory provisions may bear upon the relationship between the minister and the decision maker[9]. If, for example, the relevant minister purported to direct the LECC to assemble evidence under s. 28(1)(a) of the *Law Enforcement Conduct Commission Act 2016* and the LECC did so at the minister's behest, such an action by LECC would arguably be invalid by operation of s. 22, which expressly provides that the LECC is not "subject to the control or direction of the Minister in the exercise of ... [its] functions".

Independent legal advice

21. An agency or statutory officer would also be able to obtain independent legal advice from the Solicitor General, from me, or from an external lawyer, if concerned about the proper exercise of their statutory functions. It may in some circumstances be appropriate for the agency to seek legal advice jointly with the relevant minister or Public Service agency[10].

Question 5: extent to which agencies required to comply with government policy

22. You ask to what extent these agencies and officers are required to comply with government policy.

Introduction

23. There may, of course, be instances in which these agencies and officers will *voluntarily* comply with government policy, where there are no legal impediments to doing so. I would simply note that when an agency or officer, in exercising a statutory power, voluntarily proposes to take into account a government policy, it would always be necessary to consider whether the statute would permit the policy to be taken into account: see above at [20]. It is beyond the scope of this advice to consider further the nature of these administrative law limits. It is also not a matter for me to comment on the appropriateness of these agencies and officers choosing to apply government policy in circumstances where it is legally open (but not mandatory) to do so.

24. Your question instead asks me to consider the extent to which these agencies and officers can legally be *required*, or *compelled,* to comply with government policy.

25. The nature of "government policy" may vary greatly in the level of generality with which it is expressed[11]. In some instances a policy may confer significant discretion on the person required to comply with it. In other instances a policy may effectively dictate the outcome in a particular

[9] See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514; [2015] HCA 1; at 537, [37] (French CJ).

[10] I note that public sector agencies to whom Premier's Memoranda apply are expected to defer to my opinion; I in turn defer to the opinion of the Solicitor General. See *NSW Government Core Legal Work Guidelines* attached to Premier's Memorandum M2016-04.

[11] See *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* ("*PSA Case*") [2012] HCA 58; (2012) 250 CLR 343; at [39]-[40], 363-364 (French CJ).

case (where a particular case comes within a class or category to which the policy applies). In this advice, for convenience, I will focus on whether these agencies are subject to ministerial direction. This approach should, however, be understood on the basis that the extent to which a requirement to apply a government policy may influence or dictate the outcome in any particular case will vary.

26. It is also convenient in this advice to focus on the extent to which these agencies are subject to *ministerial* direction (including a requirement to apply a policy, in the sense outlined above). My use of the expression "ministerial direction" in this advice does not necessarily assume that ministers would personally give any such direction. Ministers are not of course expected to exercise all their functions personally, and the functions of a minister may *devolve* (under what is commonly referred to as the *Carltona* doctrine) to public servants in a department or other agency responsible to a minister. Ministers may also, where there is power to do so, delegate the exercise of powers.

Government policy reflected in legislation

27. In many instances "government policy" is reflected in Acts, or in delegated legislation such as regulations. As French CJ has observed, all legislation "reflects policies attributable to the legislature but, in many if not most cases, they are policies originating with the executive government as the proponent of most statutes enacted by the parliament"[12]. Justice Heydon has also noted that, in a system of responsible government, all legislation enacted substantially in conformity with a Bill presented to the legislature by the Executive may be said to "give effect to ... government policy dictated by the executive"[13].

28. Justice Heydon also observed, in relation to regulations, that:

> "[W]hen legislation enacted in conformity with the will of the Executive contains regulation-making power, the regulations, which are themselves a form of legislation and which are subject to parliamentary scrutiny and the power of disallowance, may equally be said to `give effect to ... government policy dictated by the executive'"[14].

29. Once a "policy" is reflected in statutes and regulations, "it is binding as a matter of law"[15].

30. The exercise of discretionary powers conferred on a person or body *by or under an Act* may also constitute giving effect to government policy.

31. Agencies and statutory officers are, of course, required to comply with any government policy reflected in statutes or regulations, or in lawful directions, orders, etc, made under them. Whether these agencies are subject to such directions in any particular case will be a question of statutory construction. In my first advice, for example, I considered (at [81]-[88]) the extent to

[12] *PSA Case* [2012] HCA 58; (2012) 250 CLR 343; at [44], 365.

[13] *PSA Case* at [69], 372. The expression "give effect to ... government policy dictated by the executive" reflected a submission made in that case.

[14] *PSA Case* at [69], 372, references omitted.

[15] *PSA Case* at [69], 372. See also at [58], 368 (Hayne, Crennan, Kiefel and Bell JJ); and at [43], 365 (French CJ).

which these agencies and officers could be required to comply with Treasurer's directions issued under the *Government Sector Finance Act 2018* ("the *GSF Act*").

32. You have not asked me to address any specific legislative provisions, or any specific government policies, although I would of course be pleased to do so if required in a subsequent advice. I will, however, consider two examples of specific legislative provisions.

NSW Procurement Board directions

33. The NSW Procurement Board may issue directions to "government agencies" regarding the procurement of goods and services by and for government agencies: *Public Works and Procurement Act 1912* ("the *PWP Act*"), s. 175(1).

34. The expression "government agency" is defined broadly in s. 162 of the *PWP Act*, to mean any of the following:

> "(a) a government sector agency (within the meaning of the *Government Sector Employment Act 2013*),
>
> (b) a NSW Government agency,
>
> (c) any other public authority that is constituted by or under an Act or that exercises public functions (other than a State owned corporation),
>
> (d) .. "

35. A direction or policy may apply to government agencies generally, or to a particular government agency: s. 175(2). A government agency is required to exercise its functions in relation to the procurement of goods and services in accordance with any policies and directions of the Board that apply to that agency: s. 176(1)(a).

36. In my view each of the following is a "government agency" within the meaning of s. 162 of the *PWP Act*, and is therefore generally required to comply with any applicable policies and directions of the Board:

    (a) the Electoral Commission - because it is a statutory body representing the Crown, and therefore a "NSW Government agency"[16];

    (b) the ICAC and the LECC - because each is a "public authority that is constituted by or under an Act"; and

    (c) the Ombudsman's Office, the Office of the LECC, and the Electoral Commission Staff Agency – because each is a "government sector agency" within the meaning of the *GSE Act*.

Public administration and ministerial responsibility

37. I will also address the extent to which the *GSE Act* may require these agencies and officers to comply with government policy. I also consider, more generally, the extent to which agencies and officers may be required to comply with government policy without specific statutory

[16] *Electoral Act* s. 8(2); and s. 13A(4).

authority. This requires consideration of the nature of ministerial responsibility and public administration in this State.

38. There is a helpful history of public administration set out in the *Laws of Australia*, in discussing the nature of a "public office"[17]. The authors define a public office as a position or post that continues without regard to the identity of the holder from time to time, and in which the public is interested, particularly if paid out of public funds. They then state that:[18]

> "Before the 19th century, government administration was performed through `public officers'. Persons were appointed to public office by the Monarch exercising prerogative power. The office was associated with various powers, duties and emoluments which were strictly defined. The individual was not an employee and was subject to little, if any, direction. Public office was often treated as a property right.
>
> This system was greatly altered in the nineteenth century primarily due to the inefficiency of the previous system, and due to the development of the concept of Ministerial responsibility. Instead, a system of public administration was developed involving officials working in a hierarchical departmental system, ultimately answerable to a Minister. The pre-nineteenth century public officer was not an employee of the Crown. The holder of an office within a hierarchical bureaucracy is an employee, although it remains unclear whether the employer-employee relationship is contractual in nature.
>
> There remain some public officers whose position is either the same as or similar to those existing prior to the nineteenth century. These office-holders are not employees. The most obvious are Ministers of the Crown and judges. The class is not limited to these, although it is not clear what other office-holders (and, in particular, holders of statutory offices) might fall within the category."

39. Ministerial responsibility (as outlined further below) forms part of the constitution of this State. The concepts of ministerial responsibility and responsible government are not fixed, and have evolved over time, due to developments in legal and constitutional principle and as a result of historical practice.

40. Although it cannot be defined precisely, a system of responsible government traditionally has been considered to encompass "the means by which Parliament brings the Executive to account"[19]. Although there is no express reference to responsible government in the *Constitution Act 1902*, the principle operates as part of the "Constitution of NSW"[20]. Responsible government is derived from "a combination of law, convention and political practice"[21].

41. One of the principles of responsible government is that a minister is responsible and accountable to Parliament for the conduct of his or her department[22]. Further, the relationship between a minister and his or her subordinate agencies must countenance the minister having the capacity

[17] This history appears to be based primarily on the comprehensive historical and legal analysis in Selway, B., "Of Kings and Officers: The Judicial Development of Public Law" (2005) 33 *Federal Law Review* 187, especially at 189-196; 224.

[18] *The Laws of Australia*, Thomson Reuters Professional (Australia) Ltd, at [19.3.34] (footnotes and internal references omitted): accessed online on 26 March 2020.

[19] *Egan v Willis* (1998) 195 CLR 424 at 451, [42] (Gaudron, Gummow and Hayne JJ).

[20] *Egan v Chadwick* (1999) 46 NSWLR 563 at 568 (Spigelman CJ).

[21] *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 660 (Gleeson CJ).

[22] *Egan v Chadwick* (1999) 46 NSWLR 563 at 570 (Spigelman CJ); *Egan v Willis* (1999) 195 CLR 424 at 452 (Gaudron, Gummow and Hayne JJ).

to direct the affairs of the department; and the department having a corresponding obligation to obey. A minister conventionally enjoys a broad latitude to issue directions concerning the activities of a department responsible to the minister, such as to require access to certain documents held by the department, for the purposes of exercising the minister's functions and portfolio responsibilities.

42. These aspects of ministerial responsibility are of course subject to any contrary legislative provision. A minister may not generally, for example, have power to direct the head of a department in the exercise of a statutory function conferred upon that officer (as discussed further above at [20]).

43. The concept of ministerial responsibility[23] has generally developed, as indicated above, in a context of a system of public administration traditionally organised in hierarchical departments.

"Integrity agencies"

44. As indicated in my first advice (at [76]-[78]), the principal functions of the Ombudsman, the ICAC and the LECC, could, in very broad terms, be described as involving scrutiny of the activities of the executive government. The principal functions of the Electoral Commission and the Electoral Commissioner are different, in that they involve, in equally broad terms, administering the electoral process and the funding of political parties (and other participants) under the *Electoral Funding Act*. The exercise of the functions of the Electoral Commissioner and Electoral Commissioner involves matters of interest to ministers, as members of political parties. It is plain from the legislation establishing each of the agencies, and the related statutory officers, that they are independent from ministerial control in the exercise of their statutory functions. I have also noted aspects of the institutional independence of these agencies and officers at [11], [16] and [20] above.

45. It is not necessary to express a view on the extent to which it is legally appropriate to label any or all of these agencies and officers as "integrity" or "oversight" agencies". On any view, however, there are some significant differences between the roles of the ICAC, the LECC and the Ombudsman on the one hand; and the roles of the Electoral Commissioner and the Electoral Commission on the other.

46. I note, in any case, that the relationship of "oversight" or "integrity" bodies" to the traditional branches of government is complex and unsettled. In a recent speech[24], Bathurst CJ discussed the rise and continuing expansion of "independent institutions that explicitly embody this

[23] The relevant aspect for present purposes is *individual* ministerial responsible. Collective ministerial responsibility refers either to the collective responsibility of the ministerial government to maintain the confidence of the Legislative Assembly; or to the related sense of collective ministerial responsibility for the decisions of Cabinet. See generally the judgment of Spigelman CJ in *Egan v Chadwick* (1999) 46 NSWLR 563.

[24] The Hon T Bathurst AC, Chief Justice of NSW, "New Tricks for Old Dogs: The Limits of Judicial Review of Integrity Bodies", The James Spigelman Oration 2017, 26 October 2017; available at:

http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst_20171026.pdf.

integrity function", noting that, since the 1970s, Australia has seen a proliferation of statutory oversight bodies.

47. Bathurst CJ noted (at [4]) that Professor John McMillan had identified the primary characteristics of such bodies as being that they:

    (a) are established by statute;

    (b) are independent and not subject to government direction;

    (c) possess extensive statutory powers to conduct investigations, either upon complaint or as an own motion investigation; and

    (d) have the power to produce reports which are often published, either by the body themselves, through a minister, or through Parliament.

48. Bathurst CJ noted that, of the examples of such institutions cited by Professor McMillan, with the exception of royal commissions and auditor-generals, none existed before 1974, when the office of the NSW Ombudsman was established.

49. Bathurst CJ stated that, "[w]ithout a doubt", the rise of these new integrity bodies "represents a disruption to the traditional constitutional framework". Whilst there are arguments for placing these oversight bodies in any of the three traditional branches of government (legislative, executive and judicial), they are most commonly placed in the executive branch. The Chief Justice noted, however, several arguments against placing these bodies in the executive branch[25].

50. Bathurst CJ also noted (at [13]) arguments against regarding these bodies as forming a "fourth branch" of government, including the fear that a fourth branch would stand outside the traditional separation of powers, and therefore outside the system of mutual accountability contained in our constitution.

Public administration under the GSE Act

51. Section 47A of the *Constitution Act* provides that persons employed by the Government of New South Wales in the service of the Crown are to be employed in the Public Service of New South Wales under the *GSE Act* or in any other service of the Crown established by legislation.

52. The Public Service consists of those persons who are employed under Part 4 of the *GSE Act* by the Government of New South Wales in the service of the Crown: s. 20, *GSE Act*.

53. Section 21(2) of the *GSE Act* provides that persons may be employed in the Public Service: (emphasis added)

    (a) to enable ministers to exercise their functions,

    (b) to **enable** statutory bodies or statutory officers to **exercise their functions**,

[25] At [10]-[11]. His Honour also noted difficulties in placing these agencies within the legislative branch (at [12]).

(c) for any other purpose.

54. Section 104 of the *ICAC Act*, which provides that the Chief Commissioner of the ICAC may appoint the Chief Executive Officer and such other staff as may be necessary to enable the Commission to exercise its functions. The *GSE Act* does **not apply** to such staff (see s. 5(1)(d), *GSE Act*, although they are "taken" under the *ICAC Act* to be employed by the Government of NSW in the service of the Crown: s. 104, *ICAC Act*.

55. By contrast, staff are employed in the Public Service to enable the Electoral Commissioner and the Electoral Commission; the Ombudsman; and the LECC; to exercise their functions[26]. Each of the following is a "separate Public Service agency", within the meaning of s. 22(1)(c), listed in Pt 3 of Sch. 1 of the *GSE Act*,:

(a) the "Office of the Law Enforcement Conduct Commission";

(b) the "New South Wales Electoral Commission Staff Agency"; and

(c) the "Ombudsman's Office".

56. The **head** of each agency, also listed in Pt 3 of Sch. 1 of the *GSE Act*, is, respectively:

(a) the Chief Executive Officer of the LECC;

(b) the Electoral Commissioner; and

(c) the Ombudsman.

57. The office of head of a Public Service agency (other than a Department) is established by s. 28 of the *GSE Act*, unless it is a statutory office created by another provision of the *GSE Act* or by any other Act. The Electoral Commissioner and the Ombudsman are each treated as a "statutory office" created by another Act (as indicated by an asterisk in Pt 3 of Sch. 1). By contrast, the Chief Executive Officer of the LECC is not a statutory office: the Chief Commissioner of the LECC is to exercise the employer of the Government in relation to the Chief Executive Officer. The head of a Public Service agency (other than a Department) may, subject to the *GSE Act* and any other Act or law, exercise on behalf of the Government the "employer functions" of the Government in relation to the employees of the agency: s. 31(1), *GSE Act*. The "employer functions" of the Government are all the functions of an employer in respect of employees, including (without limitation) the power to employ persons, to assign their roles and to terminate their employment: s. 31(2), *GSE Act*.

58. Section 50C of the *Constitution Act* authorises the Governor, by administrative arrangements orders, to specify the minister to whom a Public Service agency is responsible. The current Administrative Arrangements orders identify the particular ministers to whom Departments, and executive agencies related to a Department, are responsible[27]. In the case of a Public Service

[26] See also s. 15(1) of the *Electoral Act 2017*, which specifically requires that the staff employed in the Public Service to enable the Commission and the Commissioner to exercise their functions be employed "in a separate Public Service agency". Section 21(1) of the *LECC Act* imposes a similar requirement. There is no equivalent requirement in s. 32(1) of the *Ombudsman Act*.

[27] See the Administrative Arrangements (Administrative Changes—Public Service Agencies) Order 2019, cls. 5(1)-(2).

agency (other than a Department or executive agency related to a Department) comprising Public Service employees who are employed to enable a statutory body or statutory officer to exercise functions, the minister to whom the agency is responsible is the minister administering the Act under which the statutory body is constituted or the statutory officer is appointed[28].

59. Section 30 of the *GSE Act* provides that: (emphasis added)

> "**30 General responsibility of heads of agencies (other than Departments)**
>
> (1) The head of a Public Service agency (other than a Department) is **responsible to the Minister** or Ministers to whom the agency is responsible for the general conduct and management of the **functions** and **activities of the agency** in accordance with government sector core values under Part 2.
>
> (2) Any action taken in the exercise of a responsibility under this section is not to be inconsistent with the functions conferred by this Act of a Minister administering this Act or the Public Service Commissioner.
>
> **Note**. The head of any such agency is also responsible for workforce diversity under Part 5."

60. Section 84 of the *GSE* Act provides that: (emphasis added)

> "**84 Minister's departmental authority with respect to control and direction of staff and work not affected**
>
> The **ordinary** and **necessary departmental** authority of a Minister with respect to the control and direction of staff and work is **not limited** by anything in this Act."

61. Sections 30 and 84 of the *GSE Act* reflect the conventional principles of a system of public administration outlined above, involving officials working in a hierarchical departmental system, ultimately answerable to a minister. Section 30 generally reflects the fact that the head of a Public Service agency is responsible to the minister, who in turn is responsible to Parliament for the conduct of agencies within his or her portfolio responsibilities. Section 84 *preserves* (by providing that the *GSE Act* "*does not limit*") the "ordinary and necessary departmental authority" of a minister which arises as a consequence of the hierarchical system of public administration in a system of responsible government.

62. It is not, however, easy to apply ss. 30 and 84 in relation to the work, and staffing arrangements, of independent statutory agencies and officers such as those the subject of this advice. The independence of these agencies and officers is, at least in part, conferred because these agencies either have the function of scrutinising the conduct of the executive government (including by exercising significant investigative and coercive powers), or because they have functions of administering elections and election funding arrangements, in which ministers (as active members of political parties) have an interest[29].

63. It is undoubtedly the case that the minister[30] who is allocated the administration of the Acts which constitute these agencies and officers is responsible to Parliament. The nature of that responsibility, however, may differ to some extent from the responsibility of a minister in relation

[28] Administrative Arrangements (Administrative Changes—Public Service Agencies) Order 2019, cl. 5(3).

[29] See my first advice at [76]-[78].

[30] Or ministers, where joint ministerial responsibility is allocated. I will use the singular for convenience.

to a department or other public service agency which is ultimately subject to the direction and control of a minister.

64. Conventions and legal principles relating to ministerial responsibility have primarily developed, as outlined above, in relation to the hierarchical departmental model of public administration. The ultimate capacity of a minister to direct a department or public service agency within the minister's portfolio responsibility underpins the sense in which a minister is responsible, or accountable, to Parliament for decisions taken by those agencies (whether or not the minister had any personal involvement in the decision). That link is missing in relation to decisions taken by statutory agencies and officers of the kind considered here which are not subject to ministerial direction or control. Indeed, decisions taken by these agencies and officers might, for example, involve confidential investigations into the activities of senior officials within the executive government. I am not aware of any significant discussion of the nature of ministerial responsibility in relation to independent agencies and officers of this kind (except that, as noted at [50] above, concern about a departure from constitutional principles of ministerial responsibility has been expressed as a reason against recognising "integrity agencies" as a fourth branch of government).

65. There are, in my view, two important considerations which affect the application of ss. 30 and 84 of the *GSE Act* to the "staff and work" of these statutory agencies and officers.

66. First, it is significant that neither of these provisions expressly confer power on the responsible minister to direct these agencies and statutory officers. By contrast, s. 13(1) of the *GSE Act* confers power on the Public Service Commissioner (for the purposes of exercising his or her functions or ensuring compliance with the *GSE Act*) to give a written direction to the head of a government sector agency on a specific matter in relation to the employees of that agency. The head of a "separate Public Service agency", however, is not required to comply with the direction if the agency head "considers that the direction is not consistent with the independent exercise of statutory functions by the head and the agency". The head is required to report to any Parliamentary Committee that oversees the exercise of those functions on the reasons for any non-compliance with the substantive employment outcomes sought by the direction: s. 13(4).

67. Secondly, s. 30(1) is directed to "the functions and activities of **the agency**". It is important to appreciate, in the present context, that "the agency" does *not* refer to the relevant statutory agency (the Electoral Commission and the LECC[31]) or statutory officer (the Electoral Commissioner and the Ombudsman). Instead, the "agency" referred to is the "separate Public Service agency" – the "Office of the Law Enforcement Conduct Commission", the "New South Wales Electoral Commission Staff Agency"; and the "Ombudsman's Office", which are all established for the purpose of enabling the corresponding statutory agencies and officers to exercise their functions.

68. The language of "Staff Agency" and "Office" reflects the fact each of these "separate Public Service agencies" is simply an administrative arrangement of persons who do not have any

[31] The *GSE Act* does not apply to the ICAC, as noted above at [54].

substantive functions in their own right, but who are employed by the Government for the purpose of enabling the principal statutory agencies and officers to exercise their functions. The head of each separate Public Service agency may exercise, on behalf of the Government, the "employer functions" of the Government in relation to the employees of the "agency" (s. 31 of the *GSE Act*, and see above at [58]).

69. In my view, in this context, the expression "functions and activities of the agency" in s. 30(1) of the *GSE Act* does not refer to the functions and activities of the principal statutory agency or officer. Instead, it refers to the functions and activities of these subsidiary separate Public Service "agencies" in *providing staff* so as to enable the principal statutory agencies or officers to exercise *their functions*[32].

70. This construction is consistent with the fact that the current Administrative Arrangements Orders distinguish, on the one hand, between the separate Public Service agency comprising Public Service employees who are employed to enable a statutory body or statutory officer to exercise functions; and the corresponding statutory body and statutory officer on the other. It is only the separate Public Service agency which is identified as being responsible to the relevant minister.[33]

71. This construction is also consistent with the fact that the *GSE Act* is, as indicated in its title, primarily concerned with the employment and management of staff.

72. The head of the separate Public Service staff agencies for the Ombudsman, the LECC and the Electoral Commissioner and Electoral Commission, are therefore in my view responsible to the relevant minister only for the functions and activities of employing staff, so as to enable the corresponding principal statutory agencies and officers to exercise their functions. Similarly, the Ombudsman, the LECC, the Electoral Commissioner and Commission, are not responsible to a minister for the exercise of their statutory functions.

73. I note that the Department of Premier and Cabinet Circular C2020-01 *Employment Arrangements during COVID-19*, issued on 12 March 2020, outlines arrangements for the effective and efficient management of the New South Wales government sector during the COVID-19 response. This is an example of a policy, issued without any express statutory authority, that goes directly to matters concerned with the employment of staff.

74. This is in my view a policy with which the separate Public Service staff agencies for the Ombudsman, the LECC, the Electoral Commissioner and Electoral Commission, would be expected to comply – subject (without necessarily being exhaustive) to there being no inconsistency with any applicable awards or other legally binding employment arrangements

[32] See also *The Ombudsman v Laughton* [2005] NSWCA 339 at [25]-[26]; (2005) 64 NSWLR 114 at 119 (Spigelman CJ); where the Court of Appeal determined that an immunity provision (s. 35A of the *Ombudsman Act*) was concerned with the exercise by the Ombudsman of his or her statutory powers and functions with external effect. Section 32 of the *Ombudsman Act* (which referred to "[s]uch staff as may be necessary to enable the Ombudsman to exercise the Ombudsman's functions" being employed under and subject to the then *Public Sector Management Act 1988*"), was "not of that character". Section 32 was instead "concerned with the employment of staff, an internal matter not arising in the course of an investigation or report or any other such function". The employment of staff was also described as a matter of "internal administration".

[33] See above at [59].

relating to these staff. The separate Public Service agencies may also not be required to comply with a policy such as this if, in any particular instance, compliance would be inconsistent with the exercise of the statutory functions of the Ombudsman, the LECC and the Electoral Commissioner and Electoral Commission.

Conclusions – GSE Act and ministerial responsibility

75. Sections 30 and 84 of the *GSE Act* may, to some extent, support ministerial directions to the heads of these separate Public Service agencies in relation to staffing and employment matters. It may be, for example, that the minister would have power to require the agency head to provide information relating to staffing and employment matters, at least where that would not involve any inconsistency with the exercise of the substantive functions of the principal statutory agencies and officers.

76. On the other hand, the fact that s. 13 of the *GSE Act* expressly confers directions powers on the Public Service Commissioner "on a specific matter in relation to the employees of that agency" - and then exempts *separate Public Service agencies* from complying if the head "considers that the direction is not consistent with the independent exercise of statutory functions by the head and the agency" - provides reason to be cautious about the scope of a ministerial direction power derived from the more general and indirect terms of ss. 30 and 84 of the *GSE Act*.

77. In my view there is nothing in the staffing arrangements for the Ombudsman, the Electoral Commission and Commissioner, and the LECC, reflected in the *GSE Act* which confers any power on the responsible minister to direct staff *in the conduct of their work* in enabling the Ombudsman, the Electoral Commission and Commissioner, and the LECC to exercise their functions.

78. Similarly, I do not think that general principles of ministerial responsibility – arising from the fact ministers have been allocated the administration of the Acts which constitute these statutory agencies and officers and confer functions on them – provide a source of power to direct these agencies and officers in the exercise of their functions. This conclusion applies equally to the ICAC, which is not generally subject to the *GSE Act*.

79. It follows that, subject to the qualifications above, these agencies and statutory officers cannot be directed or required to comply with government policy, except where that is authorised by statute.

Question 6: effect of the cluster arrangements

80. Your final question asks, to the extent not covered by my answer to Question 5, whether the agencies and statutory officers are required to comply with administrative requirements imposed by the cluster arrangements.

81. The analysis in my answer to Question 5 is not affected by what can be described as the current "cluster arrangements".

Crown Solicitor's Office

82. Premier's Memorandum M2013-03 *NSW Public Sector Governance and Accountability* dated 16 May 2013 refers to "clusters". (While I note that this memorandum is no longer current, it has some ongoing usefulness in outlining the intended roles of what were then called Coordinating Ministers.) My understanding is that the cluster concept as an organisational tool for government is particularly relevant at the ministerial level, where Coordinating or Lead ministers of a cluster have particular responsibilities in the Cabinet, budget and appropriation processes in relation to a cluster. This relates to the Government's strategic plan *NSW 2021: A Plan to Make NSW Number One* and the Commission of Audit *Interim Report: Public Sector Management*.

83. The Memorandum notes that the Coordinating Minister will allocate the cluster budget appropriation to entities within the cluster in consultation with relevant Portfolio Ministers and the Director General (now Secretary) of the principal Department of the cluster. I discussed aspects of these arrangements, in relation to budget appropriations and expenditure, in my first advice. The word "cluster" is used in a note to s. 9.7(2) of the *GSF Act* ("Delegable functions"), which refers to appropriations "given for the services of a cluster or other grouping of agencies to which a separate GSF agency belong"[34].

84. There are very few references with any substantive effect in any Acts or regulations to a "cluster"[35]. The word "cluster" does not, in particular, appear in the *Constitution Act*, the *GSE Act*, the Government Sector Employment Regulation 2014, or the Government Sector Employment (General) Rules 2014.

85. In my view, a "cluster" is a term of reference with no established legal meaning or effect. I am, therefore, not aware of any legal basis by which the concept of a "cluster" could be said to have any relevant legal significance, except to the extent these arrangements are reflected in the annual Appropriation Acts.

Karen Smith
Crown Solicitor

Tom Chisholm
Principal Solicitor

Professional people with purpose

OUR VISION

Our insights inform and challenge government to improve outcomes for citizens.

OUR PURPOSE

To help parliament hold government accountable for its use of public resources.

OUR VALUES

Pride in purpose

Curious and open-minded

Valuing people

Contagious integrity

Courage (even when it's uncomfortable)

auditoffice
OF NEW SOUTH WALES

audit.nsw.gov.au

Level 19, Darling Park Tower 2
201 Sussex Street
Sydney NSW 2000 Australia

PHONE +61 2 9275 7100
FAX +61 2 9275 7200

mail@audit.nsw.gov.au

Office hours: 8.30am-5.00pm

auditoffice
OF NEW SOUTH WALES

audit.nsw.gov.au