

ICAC

INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

NSW INDEPENDENT COMMISSION
AGAINST CORRUPTION SPECIAL REPORT

The need for a new
independent funding model
for the ICAC

May 2020

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ICAC

INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

The Hon John Ajaka MLC
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Sydney NSW 2000

The Hon Jonathan O’Dea MP
Speaker
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Mr President
Mr Speaker

In accordance with s 75 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) I am pleased to present a special report by the Commission dealing with the need for a new independent funding model for the Commission.

Section 75 of the ICAC Act provides that the Commission may, at any time, make a special report to the Presiding Officer of each House of Parliament on any administrative or general policy matter relating to the functions of the Commission. This is the first such special report made by the Commission.

The subject matter of this special report concerns administrative and general policy issues of significant public interest – the statutory independence of the Commission on the one hand and the control and influence of the Executive Government over the allocation of funding to the Commission on the other.

I draw your attention to the recommendation that the report be made public forthwith pursuant to s 78(2) of the ICAC Act.

Yours sincerely



The Hon Peter Hall QC
Chief Commissioner

Executive summary

This special report by the NSW Independent Commission Against Corruption (“the Commission”), made under s 75 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”), is being provided at a time when the NSW Government and many in the community are concerned with the safety and economic repercussions of COVID-19.

This special report addresses an issue of fundamental principle underpinning and concerning an independent funding model for the Commission. It does not address nor advocate for the allocation to the Commission of any specific amount of public monies now or in the future. The Commission fully recognises and respects the very substantial call upon public funding in response to COVID-19 and its consequences. The whole concept of an independent funding model is that funding will be assessed on an independent basis for consideration by the NSW Parliament.

Section 75 of the ICAC Act provides that the Commission may, at any time, make a special report to the Presiding Officer of each House of Parliament on any administrative or general policy matter relating to the functions of the Commission. This is the first such special report made by the Commission.

The subject matter of this special report concerns administrative and general policy issues of significant public interest – the statutory independence of the Commission and the role of the Parliament and Executive Government in respect of the allocation of funding to the Commission.

The role of the Executive Government in relation to the Commission essentially involves an administrative process that, while of importance in the present model of funding for the Commission, is not based on any statutory warrant. As has now been accepted by two relevant Parliamentary Committees (the Parliamentary Committee on the ICAC (“the ICAC Committee”) and the Legislative Council Public Accountability Committee (“the PAC”)), as well as by the Inspector for the ICAC (“the Inspector”), Bruce McClintock SC, such role of the Executive Government is inconsistent with the essential independence of the Commission created and conferred by the provisions of the ICAC Act.

The ICAC Committee’s November 2019 report *Review of the 2017–2018 Annual Reports of the ICAC and the Inspector of the ICAC* contains a recommendation that the NSW Government examine a new independent funding model for the Commission in the current budget cycle. The PAC’s March 2020 report *Budget processes for independent oversight bodies and the Parliament of New South Wales* contains a number of recommendations the purpose of which is to remove Executive Government from involvement in funding of the Commission.

Since those two reports were tabled, the Commission obtained advice from Senior Counsel, Bret Walker SC, on whether the current funding arrangements were appropriate given the Commission’s status as an independent body. Mr Walker’s advice, which is published as Appendix 1 to this report, is 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.

The purpose of this report is to:

- address the inconsistency of the current funding model with the Commission’s independence
- inform the ICAC Committee of matters that pertain to the parliamentary funding of the Commission
- propose a new independent funding model in accordance with the recommendations made by the Commission, the ICAC Committee and the Inspector of the ICAC.

The new funding model proposed by the Commission has two objectives. The first is to ensure that the Parliament’s constitutional function in scrutinising the Commission’s financial resource requirements and determining appropriations is based on, and assisted by, expert independent assessment. The second is to apply the principles of certainty, flexibility, transparency and accountability to funding for the Commission.

The model proposed by the Commission is for the appointment by the Presiding Officers of the Parliament (the President of the Legislative Council and the Speaker of the Legislative Assembly) of an “eminent person” as an ICAC budget assessor to establish the Commission’s core annual funding requirements to maintain its operational effectiveness and for that amount to be included in a report provided to the Presiding Officers and tabled in Parliament. Parliament would approve a budget amount for the Commission, which would then be appropriated from the Consolidated Fund.

The proposed funding model also makes provision for supplementary funding that the Commission might require in any given year to meet unforeseen contingencies. If satisfied that such funding was required, the ICAC budget assessor would publish in the *Gazette* and in a special report to Parliament the amount of additional funds required to be provided. The required funding would then be appropriated from the Consolidated Fund without the need for special appropriation legislation.

Details of the new funding model are set out in chapter 5 of this report.

The Commission recognises that the impact of COVID-19 and the consequent deferral of the state budget for 2020–21 means that the timeframe in which the annual state budget is prepared and settled will necessarily extend beyond the usual period. This delay provides the Government and Parliament with an opportunity to consider and adopt a new funding model in time for the 2020–21 state budget. The Commission is, of course, available to engage in any consultation process with the Government and the Parliament with a view to adopting a new funding model in a timely manner.

Recommendation this report be made public

Pursuant to s 78(2) of the ICAC Act, the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of a House of Parliament to make the report public, whether or not Parliament is in session and whether or not the report has been laid before that House.

Chapter 1: Background

The Commission is presently funded through a mix of appropriations approved by Parliament and grants from the Department of Premier and Cabinet (DPC). The capacity of the Commission to sustain its core operations is challenged by the lack of adequate ongoing parliamentary appropriation funding and reliance on grant funding from DPC to make up deficiencies in appropriation funding.

As explained later in this report, Executive Government effectively determines the amount of appropriation funding received by the Commission and determines the amount (if any) and the timing of grant funding. This funding model neither guarantees sufficient funds for the Commission to perform its statutory functions but, most importantly – because of the level of Executive Government involvement in determining what funding is provided and also, in the case of grant funding from DPC, the timeliness of funding – nor is it compatible with the Commission’s statutory independence.

The Commission has obtained advice from Bret Walker SC on whether the current funding arrangements are appropriate given the Commission’s status as an independent body. Mr Walker’s advice, which is published as Appendix 1 to this report and is dealt with in more detail in the following chapters, is that, because aspects of the current funding arrangements are incompatible with the Commission’s independence, they are unlawful. This advice emphasises the importance of moving with expedition to a new funding model that respects and gives effect to the Commission’s independence.

The Commission initially proposed consideration be given to a new funding model in a letter to the Premier dated 13 December 2018.

On 11 October 2019, the Commission sent a report to the Premier titled: *The new ICAC at a funding crossroads* (“the Report to the Premier”), which also recommended consideration be given to a new funding model.

The need for a new funding model was also identified in the foreword to the Commission’s 2018–19 annual report, which was published on 18 October 2019. In the foreword, the Chief Commissioner noted there was:

...an urgent need for action to secure an appropriate and accountable level of resourcing so as to enable the Commission to operate effectively in the public interest.

Also on 18 October 2019, the Inspector published his annual report for 2018–19 in which he called for the Commission’s current funding model to be reconsidered. In the foreword to his report the Inspector referred to the need to properly resource the Commission and that in order:

...to ensure the ultimate statutory independence of the Commission, funding for it should be determined via a non-politicised process and one that is not subject to bureaucratic management or oversight. A reconsideration of the current funding model to one which takes into account the entirety of the Commission’s ever-increasing workload, particularly following

the introduction of the three Commissioner model would ensure that the Commission can continue to expose and investigate serious corrupt conduct.

The Inspector questioned the current funding model:

This funding model may have worked in the past but I query whether it is desirable for an independent statutory body whose primary role is ensuring the integrity of public administration in NSW. I hope the Government will give consideration to an alternative model which maintains the independence of the Commission by ensuring adequate funding.

On 21 October 2019, in his opening statement to the ICAC Committee inquiry to review the 2017–18 annual reports of the Commission and the Inspector of the ICAC, the Chief Commissioner noted the need for a new funding model that reflects its independence.

On 20 November 2019, the ICAC Committee tabled its report: *Review of the 2017–2018 Annual Reports of the ICAC and the Inspector of the ICAC* (“the ICAC Committee Report”)¹. Recommendation 3 in the ICAC Committee Report is that the NSW Government examines a new independent funding model for the Commission in the current budget cycle. Finding 3 in the ICAC Committee Report is that it is appropriate to consider a funding process for the Commission that is separate from the process that applies to other government or independent agencies. As explained at paragraph 1.49 of the ICAC Committee Report:

The Committee agrees with the Chief Commissioner and the Inspector that it is appropriate to consider a funding model for the ICAC which is separate from the process that applies to other government or independent agencies. As the Chief Commissioner and the Inspector have highlighted, there are many important differences between the ICAC and other government or independent agencies. The ICAC’s independence must be maintained.

The Government has until 20 May 2020 to respond to the ICAC Committee Report.

On 14 October 2019, the PAC announced an inquiry into the budget process for independent oversight bodies, including the Commission, and the Parliament of NSW. On 4 November 2019, the Commission made a submission to the PAC highlighting the danger to the Commission’s effectiveness arising from inadequate ongoing funding and proposing consideration be given to a new funding model to overcome that danger while acknowledging and ensuring the Commission’s independence (“the Submission”). On 12 December 2019, the Chief Commissioner and other Commission officers gave evidence to the PAC in support of the Submission.²

The PAC tabled its report in March 2020. As noted in the Chair’s foreword to that report, the institutions the subject of the inquiry “perform a vital role in maintaining the health of our democracy” and that, in order to perform their functions, “each institution requires a high degree of independence

¹ Available on the parliamentary website at www.parliament.nsw.gov.au.

² The Submission and a transcript of the Commission’s evidence are also available on the NSW parliamentary website.

from the government of the day and adequate resourcing". The PAC made a number of recommendations to achieve these ends. The following recommendations are of particular relevance to the Commission:

Recommendation 1

That the parliamentary oversight committees for the NSW Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the NSW Ombudsman and the NSW Electoral Commission review the annual budget submissions of each agency and make recommendations as to the funding priorities.

Recommendation 2

That the annual budgets for the NSW Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the NSW Ombudsman and the NSW Electoral Commission include a set contingency fund to address unbudgeted financial demands, with access to the funds governed by prescribed criteria and approval of the relevant parliamentary oversight committee.

Recommendation 3

That the NSW Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the NSW Ombudsman and the NSW Electoral Commission be directly allocated their annual funding through the Appropriation legislation, rather than the funding being allocated to the relevant Minister, so that they are not subject to reductions in funding during the financial year.

Recommendation 4

That the NSW Government remove the NSW Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the NSW Ombudsman and the NSW Electoral Commission from the Premier and Cabinet cluster.

The Commission fully endorses recommendations 3 and 4. With respect to recommendations 1 and 2, the Commission fully endorses the rationale – which is to preserve the Commission's independence – but, for the reasons given in chapter 5 of this report, the Commission recommends adoption of a different funding mechanism for determining its funding requirements.

There is a need for a new funding model both to ensure that the Commission has sufficient funds to meet its statutory charter and to maintain its independence.

As noted in the PAC report:

[I]t is clear that reform of the budget process is needed if the ICAC is to continue to carry out the functions it has been charged by Parliament to perform. The case for the Commission to have adequate and secure funding is compelling.³

³ *Budget process for independent oversight bodies and the Parliament of New South Wales (March 2020) First report, paragraph 3.95.*

Chapter 2: The Commission's independence

The Commission is, as reflected in its title, an *independent* anti-corruption commission.

A fundamental aspect of any funding model is the need to ensure the Commission's statutory independence from the Executive, as noted by then-premier the Hon Nicholas Greiner MP during the second reading speech for the Independent Commission Against Corruption Bill:

*The commission will have an independent discretion, and will decide what should be investigated and how it should be investigated. That is the whole point of having a commission independent of the Executive Government and responsible only to Parliament.*⁴

Mr Greiner emphasised such independence of the Commission when telling the Parliament: "The commission will not be subject to public service legislation".⁵

That it is Parliament's intention the Commission is to operate as an independent body was also emphasised by a 2005 amendment to the ICAC Act, which inserted s 2A into the ICAC Act. That section sets out the principal objects of the Act as including:

...to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body [emphasis added].

The Commission's independence arises at a number of levels, including the following:

- (i) It is independent of Government and, accordingly, it is not subject to the control or direction of Government.
- (ii) It is independent in the conduct of investigations – in what it investigates, when, how and the extent to which it investigates, subject only to jurisdictional limits.
- (iii) It is operationally independent, in that it may employ such powers, including in particular its statutory powers, as it determines, and it may employ strategic and other investigative methodologies as it considers appropriate.
- (iv) It is independent in the resources (both financial and otherwise) it uses and how such resources are deployed or expended in any particular matter.

⁴ Hansard, 26 May 1988, p. 674.

⁵ Ibid, p. 678.

Under s 4 of the ICAC Act, the Commission is constituted as a statutory corporation. It is not a department of Government. It is not a Government agency in any sense. Instruction and directions to Government agencies issued by Executive Government are, of course, not applicable or binding on the Commission. In particular, the Commission is not bound by directions issued by Government with respect to employment or reporting matters. The Commission's staff are not employed under the *Government Sector Employment Act 2013*; they are employed under the ICAC Act. The *Government Sector Finance Act 2018* provides that the Commission is not required to comply with a relevant treasurer's request or a minister's information request if the request is not consistent with the Commission's statutory functions.

Mr Walker has provided the Commission with advice ("the Opinion") on matters related to its independence and the budget process by which it is funded. As noted by Mr Walker, at paragraph 2 of the Opinion, under the current funding model:

...in my opinion there is a present danger that duties and values relating to ICAC are about to collide with insensitive, even inappropriate, approaches to the general administration of the governmental allocation of funding to what some may call its agencies. In a nutshell, there is looming a conflict between the essential independence of ICAC in order that it may discharge its definitional functions, and the dependence that is created and wielded by senior public servant involvement in influencing the work programmes of ICAC by means of restricting its funding.

Mr Walker considered that the provisions of the ICAC Act to which he referred in the Opinion:

...are clear in their overall and detailed requirements for the independent functioning of ICAC in order to carry out its unique role in the governance of New South Wales⁶ [and] ...the notion that budgetary scrutiny could be distorted so as to constrain ICAC from independently carrying out its functions (which include duties) is alien to the legislative scheme – not to mention, contrary to informed political science concerning responsible government in a parliamentary democracy, with oversight agencies⁷

Of particular importance is the advice contained in the Opinion that:

...it is plain beyond serious argument to the contrary that ICAC's statutorily explicit independence is required by the law to be given substantive effect in all regards that materially touch upon ICAC's operations. And, emphatically, these include the means by which annual and more frequent occasional arrangements become necessary for the funding of ICAC's operations⁸

⁶ Paragraph 11 of the Opinion, Appendix 1 of this report.

⁷ Ibid, paragraph 22.

⁸ Ibid, paragraph 41.

Mr Walker concludes that Executive Government involvement in the current funding arrangements for the Commission is not only undesirable but unlawful.⁹

Although independent, the Commission is accountable in a number of ways for the exercise of its powers. As noted by Mr Walker:

*This defining element of independence, it must be emphasized, is accompanied by the accountability essential in any civilized society under the rule of law.*¹⁰

In particular, the Commission is accountable to the NSW Parliament through the ICAC Committee. The Commission is also accountable to the Inspector. In matters of financial management, the Commission is accountable to NSW Treasury and the Auditor-General of NSW for the proper expenditure of its funds. The Supreme Court also has power to review aspects of the Commission's use of its powers.

It has long been accepted that the provision of appropriate financial resources for an anti-corruption agency is inextricably linked to its independence. It is, therefore, important that any funding model for the Commission respects this independence.

⁹ Ibid, paragraph 46.

¹⁰ Ibid, paragraph 15.

Chapter 3: Current funding arrangements

The Commission's ability to serve the public interest through its investigation and corruption prevention functions is directly commensurate with its financial resources. This chapter examines the current funding arrangements that are in place. The next chapter examines problems with those funding arrangements, including their incompatibility with the Commission's independence.

The Commission's main source of funding is through recurrent parliamentary appropriations. The appropriation for 2019–20, as provided for in the *Appropriation Act 2019*, is \$24.899 million; comprising recurrent expenditure of \$24.099 million and capital expenditure of \$800,000.

A secondary but essential source of revenue for 2019–20 is grant funding from DPC, which has been promised in the amount of up to \$2.5 million.

Appropriation funding

The Commission's main source of funds is through annual Parliamentary appropriations.

Table 1 sets out the appropriation funding the Commission has received since its inception.

Table 1: Appropriations the Commission has received since its inception

Year	"Appropriation (\$'000)"	Incl./Dec	"Appropriation (excl. Capital) (\$'000)"	Incl./Dec	"Capital (\$'000)"	Capital Expenditure (\$)	Incl./Dec	FTE Employees	Incl./Dec	Inflation	Cumulative Inflation	"Appropriation + Inflation (\$'000)"
1988/89	42	N/A	42	N/A	-	-	N/A	61.0	N/A	7.30%		42
1989/90	14,308	N/A	14,201	N/A	107	107	N/A	117.0	N/A	7.92%	15.22%	16,485.68
1990/91	11,540	-19.35%	11,433	-19.49%	107	107	0.00%	132.5	0.00%	5.72%	20.94%	13,956.48
1991/92	15,421	33.63%	14,206	24.25%	1,215	1,685		142.0		2.12%	23.06%	18,977
1992/93	13,466	-12.68%	12,706	-10.56%	760	782	-37.45%	141.0	-37.45%	1.02%	24.08%	16,709
1993/94	12,612	-6.34%	12,420	-2.25%	192	181	-74.74%	123.0	-74.74%	1.80%	25.88%	15,876
1994/95	14,088	11.70%	13,907	11.97%	181	222	-5.73%	129.0	-5.73%	2.96%	28.84%	18,151
1995/96	14,057	-0.22%	13,877	-0.22%	180	232	-0.55%	143.3	-0.55%	4.36%	33.20%	18,724
1996/97	12,904	-8.20%	12,700	-8.48%	204	221	13.33%	137.6	13.33%	1.58%	34.78%	17,392
1997/98	13,508	4.68%	13,268	4.47%	240	255	17.65%	127.8	17.65%	0.04%	34.82%	18,211
1998/99	14,010	3.72%	13,789	3.93%	221	306	-7.92%	129.5	-7.92%	1.16%	35.98%	19,051
1999/00	13,625	-2.75%	13,385	-2.93%	240	242	8.60%	131.0	8.60%	2.22%	38.20%	18,830
2000/01	13,816	1.40%	13,663	2.08%	153	153	-36.25%	125.0	-36.25%	5.70%	43.90%	19,881
2001/02	15,524	12.36%	15,274	11.79%	250	388	63.40%	126.0	63.40%	3.02%	46.92%	22,808
2002/03	15,924	2.58%	15,523	1.63%	401	401	60.40%	101.0	60.40%	3.02%	49.94%	23,876
2003/04	15,330	-3.73%	14,756	-4.94%	574	574	43.14%	111.0	43.14%	2.44%	52.38%	23,360
2004/05	16,383	6.87%	15,404	4.39%	979	979	70.56%	112.6	70.56%	2.40%	54.78%	25,358
2005/06	14,886	-9.14%	14,657	-4.85%	229	229	-76.61%	105.2	-76.61%	3.10%	57.88%	23,502
2006/07	15,334	3.01%	15,094	2.98%	240	240	4.80%	111.5	4.80%	3.08%	60.96%	24,682
2007/08	16,239	5.90%	15,539	2.95%	700	700	191.67%	116.1	191.67%	3.14%	64.10%	26,648
2008/09	18,198	12.06%	17,157	10.41%	1,041	1,437	48.71%	111.9	48.71%	3.38%	67.48%	30,478
2009/10	18,867	3.68%	18,389	7.18%	478	479	-54.08%	117.6	-54.08%	2.20%	69.68%	32,014
2010/11	20,093	6.50%	19,857	7.98%	236	236	-50.63%	117.1	-50.63%	3.08%	72.76%	34,713
2011/12	22,766	13.30%	21,604	8.80%	1,162	1,162	392.37%	124.8	392.37%	2.50%	75.26%	39,900
2012/13	21,422	-5.90%	20,770	-3.86%	652	1,352	-43.89%	123.8	-43.89%	2.16%	77.42%	38,007
2013/14	23,774	10.98%	22,272	7.23%	1,502	1,502	130.37%	126.4	130.37%	2.66%	80.08%	42,812
2014/15	27,512	15.72%	21,238	-4.64%	6,274	6,125	317.71%	122.3	317.71%	1.86%	81.94%	50,055
2015/16	20,222	-26.50%	19,638	-7.53%	584	584	-90.69%	114.3	-90.69%	1.40%	83.34%	37,075
2016/17	21,103	4.36%	20,533	4.56%	570	583	-2.40%	98.1	-2.40%	1.62%	84.96%	39,032
2017/18	21,113	0.05%	20,097	-2.12%	1,016	932	78.25%	105.0	78.25%	1.92%	86.88%	39,456
2018/19	25,407	20.34%	24,463	21.72%	944	944	-7.09%	114.0	-7.09%	1.65%	88.53%	47,900
2019/20	24,899	-2.00%	24,099	-1.49%	800	800	-15.25%	120.0	-15.25%	2.00%	90.53%	47,440
												34,614.86

Between 1989 and 1994, the Commission's appropriation was a separate line item for recurrent (and one for capital) funding under the Premier's section of the relevant Appropriation Bill. Between 1995 and 2010, there was a separate Appropriation Bill for the "Special Offices", as defined within the *Public Finance and Audit Act 1983*. The Commission had its own line item in these bills under the Premier's section. Then, from 2011 to the current year, the Commission's appropriation appears in the same Appropriation Bill as every other government entity, but it is now listed in the section entitled "Appropriation (Special Offices)".

While the amount of the Commission's appropriation is set each year by Parliament through an Appropriation Act, an understanding of how the budget process works demonstrates that it is the Executive Government that has a central role in determining the funding amount the Commission will receive. As noted by Mr Walker:

*With the best will in the world, the senior public officials engaged in the dealings made necessary by the current arrangements for funding ICAC cannot avoid a substantial risk of appearing to be capable of exerting, by the power of the purse string, inappropriate influence over ICAC's operations from time to time.*¹¹

How the budget process works

At present, the Commission is part of the DPC cluster of agencies, and is dealt with for budgetary purposes as part of that cluster. The DPC cluster comprises a number of agencies ranging in diversity and, apart from the Commission, includes the following:

- Art Gallery of NSW
- Audit Office of NSW
- Australian Museum
- Government House Sydney
- Greater Sydney Commission
- Infrastructure NSW
- Library Council of NSW
- NSW Electoral Commission
- Ombudsman Office
- Parliamentary Counsel's Office
- Office of the Inspector of the Law Enforcement Conduct Commission
- Public Service Commission
- Sydney Opera House

¹¹ Ibid, paragraph 42.

- Trustees of the Museum of Applied Arts and Sciences.

Each year, the Commission submits its budget proposal to NSW Treasury through the latter's online Prime system, to which DPC has access. With the exception of consultation that took place in early 2020 with NSW Treasury to explain the Commission's business case for its 2020–21 budget bid, there is currently no formal face-to-face consultation process whereby the Commission is able to explain in detail to NSW Treasury or DPC the business case for its budget bid. This is a relatively recent change. Up until about two years ago there was a mechanism in place where relevant agency chief financial officers met with DPC and senior NSW Treasury staff to present and explain funding requests and respond to any questions.

In December 2019, NSW Treasury issued its *Guidelines for submitting proposals under Outcomes Budgeting* for the 2020–21 budget ("the 2019 Guidelines"). These apply to the Commission.

The 2019 Guidelines make it very clear that the budget process is managed through the cluster system and that it is the relevant cluster that effectively determines the amount of funding that will be appropriated to relevant bodies within the cluster. For example, the 2019 Guidelines provide that:

- clusters are expected to manage pressures through cross-portfolio reallocation in the first instance, rather than seeking additional funding
- the Expenditure Review Committee of Cabinet ("the ERC") will evaluate the performance of existing cluster resourcing before considering new proposals
- the ERC will consider how every proposal affects performance, as set out in the Cluster's Outcome and Business Plans.

The 2019 Guidelines provide that proposals:

...for funding from the 2020-21 Budget, whether a new policy proposal (NPP) or parameter and technical adjustment (PTA), must explicitly reference their impacts against the respective cluster's Outcome and Business Plan.

The 2019 Guidelines go on to provide that "independent entities" such as the Commission "will need to have their bids included in the Cluster Ministerial letter".

The Commission's experience is that its budget proposal is considered by the DPC Secretary along with the proposals from the other DPC cluster agencies. The Commission has no direct input into that consideration and there is no formal consultation process. The DPC Secretary finalises the DPC cluster budget bid and provides that to NSW Treasury. The amount sought referable to the Commission may differ substantially from what the Commission sought.

There is no mechanism in place requiring the DPC Secretary to advise the Commission whether, or in what way, the amount of funding sought by DPC on behalf of the Commission differs from what was sought by the Commission. There is no disclosure by DPC as to how and why funding amounts are

determined. There is no process available to enable the Commission to challenge or have the funding allocated to it reviewed or set aside and re-determined.

In other words, there exists no process that enables the Commission to ensure that Parliament has the benefit of assistance on funding matters from an independent and qualified assessor, who is authorised to inform it on Commission appropriations.

Table 2 summarises how the appropriation budget process usually works with respect to the Commission (the NSW state budget for 2020–21 has been deferred due to COVID-19).

Table 2: Commission budget process

Date	Event
November/December	NSW Treasury sends letter to all agency heads, CEOs and cluster secretaries outlining key deadlines to support preparation of the NSW Government budget.
February	The Commission submits its Final Budget Proposal (FBP) bid via NSW Treasury's online Prime system. NSW Treasury and DPC have automatic access to the FBP in Prime.
February/March	The Commission's FBP is considered by NSW Treasury and DPC. The DPC Secretary evaluates the FBP bids of each cluster agency and determines funding priorities, which may be discussed at the Cluster Secretaries Board meeting where final adjustments may be made by the DPC Secretary. The DPC Secretary then submits the cluster budget to NSW Treasury, with prioritised rankings of individual agency budget bids as determined by the DPC Secretary.
February/March	NSW Treasury receives and considers the DPC cluster budget bid and consults with the DPC Secretary prior to finalising its recommendations to the ERC. Relevant agencies are not consulted by NSW Treasury as part of this process.
March	NSW Treasury provides brief to the ERC with recommendations as to whether particular funding bids should be approved or not supported. The brief does not include a copy of the FBP, so the ERC does not have before it the detail of what was sought by the Commission. The brief is a Cabinet in-confidence document that is not available to the affected agencies.
March/April	The ERC meets to consider funding proposals for each cluster and makes decisions impacting cluster agencies.
April/May	Cabinet considers ERC decisions and approves funding decisions.
May	The budget decisions are available to be viewed by agencies in Prime.
May/June	NSW Treasury prepares consolidated budget papers for tabling in Parliament.
June	NSW budget handed is down by the Treasurer.

As noted in the PAC report:

*Budget submissions and Treasury's advice are considered by the Expenditure Review Committee of Cabinet. 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.*¹²

Once the Appropriation Bill is prepared:

*The Appropriation Bill and the Appropriation (Parliament) Bill are introduced in the Legislative Assembly by the Government and have traditionally been passed by both Houses of Parliament in the form in which they are introduced.*¹³

As demonstrated above, funding decisions are determined without formal consultation with the Commission. The first time the Commission becomes aware of the funding it is likely to receive for the following year is in about May, when the ERC budget decisions are available to be viewed in Prime¹⁴. If the proposed funding is less than that sought in the FBP, no explanations are provided as to the reasoning behind that decision. In effect, Parliament has little ability to consider whether the funding proposed for the Commission in the Appropriation Bill is sufficient to enable the Commission to meet its statutory mandate. As noted in the PAC report:

*Once an agency has lodged its budget bid then the entire process of scrutiny and either approval or rejection is controlled by the Executive without any independent review and without any public disclosure.*¹⁵

During the annual budget cycle, the Commission may be invited to submit new funding proposals to NSW Treasury but this is by no means guaranteed. In some years, the applicable parameters excluded the Commission from applying, or only allowed applications on certain aspects of the Commission's budget.

By way of example, as part of the process leading up to the 2019–20 budget, NSW Treasury invited agencies to make submissions for supplementary funding for what was termed a "parameter and technical adjustment" with tighter eligibility criteria than in previous years. The Commission made a submission based on work it had commissioned from KPMG on the challenges facing the Commission under the three-Commissioner model. That work identified additional staff positions that required

¹² *Budget process for independent oversight bodies and the Parliament of New South Wales, (March 2020) First report, paragraph 2.7.*

¹³ *Ibid*, paragraph 2.13.

¹⁴ Prime is the NSW Government financial systems platform used by Government bodies to submit and receive budget data.

¹⁵ *Budget process for independent oversight bodies and the Parliament of New South Wales, (March 2020) First report, paragraph 2.23.*

funding, plus a two-year program of moving a large number of manual work processes to electronic ones to improve the Commission's efficiency and effectiveness. The Commission sought \$4.065 million for 2019–20 and forward years for these purposes.

The Commission's submission was unsuccessful. The latter work was deemed by NSW Treasury to be outside the scope of the parameter and technical adjustment. NSW Treasury advised that funding for that work would require a new business case to be prepared and submitted but such a business case would not be supported by NSW Treasury.

The KPMG analysis was based on the work and findings detailed in the KPMG report. No one in Government has challenged its accuracy in any respect. Notwithstanding, the Treasury's dismissal of what was an evidence-based analysis came with no explanation and no reasons were disclosed.

For the financial years between 2008–09 and 2019–20, the Commission has applied for increases in recurrent funding in seven (of 12) annual budget processes. The Commission was only fully successful on two of these occasions (\$0.85 million in 2009–10, and \$3.6 million in 2018–19) and partly successful on one occasion (\$1.2 million in 2010–11; when \$2.24 million was sought, but \$2.2 million was funded over the forward estimates). Applications were rejected on the other four occasions, as follows:

- \$1.7 million rejected in 2013–14
- \$1.9 million rejected in 2015–16
- \$1.89 million rejected in 2016–17
- \$4 million rejected in 2019–20.

Grant funding

The inflexible annual appropriation processes and unpredictable outcomes of new funding business cases to government has necessitated a history of the Commission seeking and receiving grant funding to cover the costs of its activities. Grant funding requires a reallocation of funds from within the DPC cluster. Such funding has become a normal part of the Commission's current funding model.

Applications for such funding, however, are considered on a case-by-case basis by the DPC Secretary. There is no guarantee that applications will be granted at all or granted for the full amount sought. There is no independent methodology in place to ensure that due process is rigorously applied to Commission funding applications.

In its performance of its investigative and corruption prevention functions, the Commission serves and only serves the community interest. A refusal by Executive Government to provide funds necessary to enable the Commission to properly fulfil its statutory charter would plainly not be in the public interest. As noted by Mr Walker, the Commission's broad mandate "would be contradicted by any

substantive subordination of ICAC to the wishes of those involved in public administration – such as officers of DPC, among others”.¹⁶

Table 3 shows the amount of grant funding received or promised from 2001–02 to 2019–20.

Table 3: Grant funding received by the Commission since 2001–02 to 2019–20

Year	Amount
2001–02	2,570,000
2002–03	305,000
2003–04	234,000
2004–05	1,218,000
2005–06	Nil
2006–07	82,000
2007–08	Nil
2008–09	Nil
2009–10	850,000
2010–11	1,200,000
2011–12	Nil
2012–13	2,510,000
2013–14	2,625,000
2014–15	2,630,000
2015–16	2,621,000
2016–17	529,000
2017–18	1,683,000
2018–19	1,716,000
2019–20	3,500,000*
Total	\$24,273,000

* This includes \$1 million for 2018–19, which was received in July 2019.

It can be seen from table 3 that the amount of grant funding has varied over the years but has, since at least 2012–13, formed a vital part of the Commission’s overall funding.

¹⁶ Paragraph 12 of the Opinion, Appendix 1 of this report.

Chapter 4: Problems with the current funding arrangements

As noted by the PAC, the arrangements in place to fund oversight agencies such as the Commission, as set out in the preceding chapter, “are quite simply not consistent with transparent and accountable government in New South Wales”.¹⁷ This chapter examines some of the other problems with the Commission’s current funding arrangements.

The Commission’s cost base – fixed and variable costs

The current funding arrangements do not always display a recognition of the nature of the Commission’s cost base. This is reflected in particular in the Government-mandated savings imposed on the Commission without any analysis by Government of whether the Commission is able to absorb such savings without detriment to its operations. Before examining how these mandated savings operate and have affected the Commission, it is appropriate to set out some information about the Commission’s cost base.

Much of the Commission’s base is fixed, in the sense that there is no flexibility in expenditure. Rent, insurance, equipment maintenance costs, telephone, licence fees and depreciation are examples of non-discretionary fixed costs. In essence, the only cost areas of any substance in which the Commission may be said to have any discretion are salaries for staff and expenses associated with the conduct of compulsory examinations and public inquiries.

The bulk of the Commission’s budget for 2019–20 comprises employee-related expenses. This represents 68% of Commission funding. Those fixed costs, over which the Commission has no discretion, represent a further 23% of the Commission’s funding. The bulk of the 9% that is left is accounted for by legal and transcription costs associated with public inquiries and compulsory examinations, costs associated with the Commission’s telecommunications interception capability and training of staff.

Any reductions in funding must therefore be met primarily through reducing staff numbers, the number of compulsory examinations, and the number and duration of public inquiries. Each of these measures will necessarily have a detrimental impact on the Commission’s ability to fulfil its statutory charter as NSW’s anti-corruption commission.

Government-mandated savings

For a number of years, the Commission has been subjected to Government-mandated savings. In evidence before the PAC, the DPC Secretary confirmed that he has flexibility in the application of

¹⁷ Op cit, paragraph 3.98.

savings to bodies within the DPC cluster but, in order to exclude one body from such savings, it would be necessary to allocate greater savings to other bodies within the cluster.¹⁸

Government-mandated savings have been applied without consideration of their effect on the Commission's ability to operate. The continued application of these savings undermines the Commission's work.

Some appropriated funds are withheld by DPC and/or NSW Treasury as part of savings measures imposed across Government, where they were not removed as part of the budget processes prior to the Appropriation Bill being drafted.

Generally, the savings that have been flagged from previous years or new savings that are to be introduced in the new financial year, will already have been removed from the forward estimates prior to the Appropriation Bill being introduced into Parliament. Thus, Parliament is voting on imposing these savings at the time of the passage of the Appropriation Bill through Parliament. But, on other occasions, as was the case in 2018–19, additional imposts may be made during the budget process but the funds not removed from the Commission appropriation line item in the Appropriation Bill.

For 2018–19, they were removed by DPC in conjunction with NSW Treasury after the appropriation had become law. In 2018–19, \$210,000 was removed from the Commission's appropriated budget because the Government determined that an additional 1% in efficiency savings measures be imposed on top of the existing 2% savings impost. A further \$38,000 was removed by DPC for "procurement" savings. The latter savings will be removed from the Commission's available budget by DPC each year until 2028–29, at which time it will be \$49,000.

There is a very serious question as to whether additional imposts made after the appropriation passed by Parliament are lawful.

The PAC recognised that there was a problem with removing funding from the amount appropriated. In recommendation 3, the PAC recommended that the Commission be directly allocated its annual funding through the appropriation legislation rather than the funding being allocated to the relevant minister so that it would not be subject to reductions in funding during the financial year.

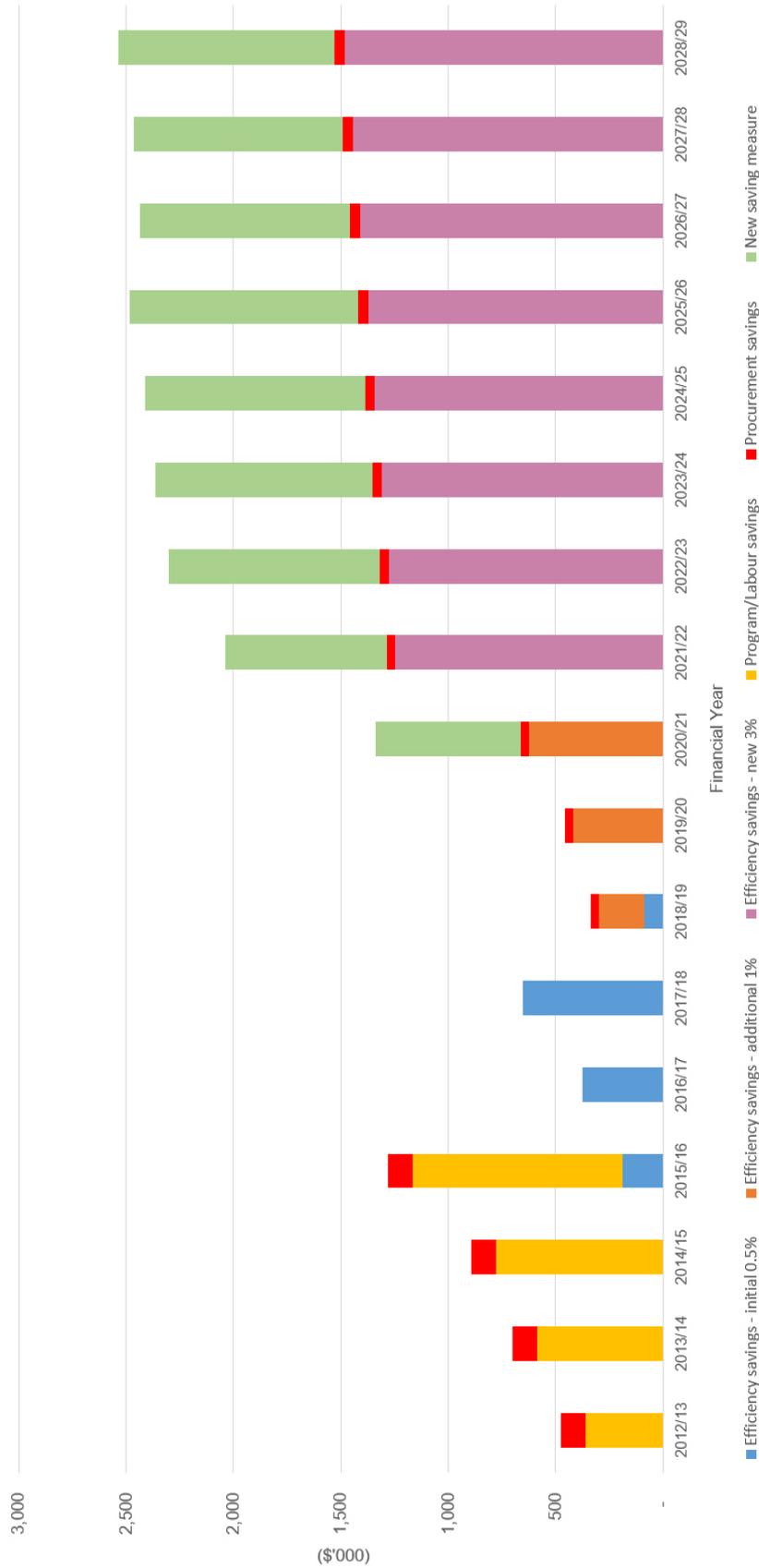
Table 4 shows the history of savings measures that have been applied to the Commission from 2012–13, as well as the future savings measures for the 2019–20 financial year. In 2028–29, the currently known savings measures will be \$2.536 million. The cumulative impact of proposed savings from 2020–21 to 2028–29 will be \$20.316 million.

Based on the recent history of their application, there is no certainty that these savings measures will not increase over time. It leaves small entities, such as the Commission, very vulnerable, as it creates no certainty for setting budgets in future financial years.

¹⁸ Submission 56, DPC and NSW Treasury, p. 6.

In addition, with an institution such as the Commission, which, from the outset, was marked as one completely independent of Executive Government, there is a serious question of law in the imposition of Government-mandated savings where the Executive Government fails to specifically assess adverse impacts on the Commission's independence and responsibility to regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns, as specified in s 12 of the ICAC Act.

Table 4: History of savings measures since 2012–13 and predicted savings to 2028–29



A recent example of additional savings mandated by Government and their effect on the Commission can be provided. On 16 August 2019, the Acting Secretary DPC wrote to the Commission advising that the DPC cluster, of which the Commission is a part, had been allocated \$20.7 million in reductions for 2019–20, which would increase to \$38.8 million by 2028–29. The rationale for these savings was expressed to be to strengthen the state’s fiscal position and “support streamlined service delivery”. There was no explanation as to how the projected savings would streamline the Commission’s service delivery.

The explanation given by DPC for the “savings”, insofar as they impact on the Commission’s financial resources, wrongly assumes that the financial resources of the Commission are available to be used to strengthen the state’s financial position rather than to enable the Commission to meet its statutory charter.

The Commission’s share of these reductions for 2019–20 was \$400,000, but the Commission was advised that the DPC would absorb that amount to “allow your agency additional time to prepare for the forward year impacts of these reductions”. The Commission was, however, advised in the letter that it would be expected to “contribute \$8.5m in savings for the remaining nine year period from 2020-21 to 2028-29”. It was noted that the savings are “ongoing and permanent” and that “savings measures are expected to be applied predominantly to labour expenses”. Table 5 details the savings estimation the Commission is required to make over the next nine years.

Table 5: Additional forecast savings between 2020–21 and 2028–29

Year	Savings from the Commission’s budget
2020–21	673,000
2021–22	751,000
2022–23	983,000
2023–24	1,011,000
2024–25	1,026,000
2025–26	1,065,000
2026–27	979,000
2027–28	972,000
2028–29	1,008,000
Total	\$8,468,000

Clearly, there has been no analysis of how these savings will affect the Commission's operations or to what extent any reduction in "labour expenses" will impact on the Commission's ability to successfully fight corruption.

Unpredictability of investigations and public inquiries

The current funding model does not make adequate provision for the unpredictability of the Commission's work, particularly work on investigations and public inquiries. Although grant funding has been used in the past to meet such costs, as explained below, this is, at best, an uncertain source of funding.

The unpredictable nature, content, and timing of the Commission's workload makes it impossible to accurately predict what amount of funding will be required each year in order to, in particular, effectively discharge its investigative functions.

The reasons for this are well known. The Commission cannot predict in advance what matters may be received by it by way of complaint or s 11 report or the nature of those matters. It cannot predict whether it will receive a referral from the NSW Parliament, or from the NSW Electoral Commission (as was the case in 2018). It cannot predict what matters might be identified by the Commission's Strategic Intelligence and Research Unit, as involving significant allegations of serious and systemic corruption within, or affecting, the NSW public sector. The need for further resources is always a contingency where the Commission assesses a reasonable suspicion of corrupt conduct as credible and decides to investigate a matter.

No matter how much the Commission analyses fluctuations in workload and costs from the previous financial year(s), it has little bearing on what will emerge during the following financial year. This is not to say that matters being investigated may not continue from one financial year to the next, which is quite common; however, it is not a predictive tool for estimating investigation and public inquiry loads in any new financial year in the future.

The inability of the Commission or any other body to undertake *accurate forecasting* given the nature of corruption investigations indicates a need for flexible funding to meet actual needs but also a need for certainty; that is, a need for the Commission to be able to perform its statutory mandate and operate with the certainty that funding for such matters will be available when and as needed.

It is no proper answer to the lack of adequate funding to say that the Commission should simply reduce or delay its operational work to avoid having to seek additional funding.

Section 12 of the ICAC Act provides that, in exercising its functions, the Commission "...shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns". Section 12A of the ICAC Act requires the Commission, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

To these ends, the Commission has been given extensive powers to investigate, expose and prevent corrupt conduct. It would be contrary to the statutory requirements of the ICAC Act for the Commission to decline to investigate matters involving serious corrupt conduct and systemic corrupt conduct or to not investigate such matters in a timely manner in circumstances where such an investigation could not be effectively conducted by any other body. Failure to investigate by the Commission in such circumstances would result in serious corrupt conduct and/or systemic corrupt conduct going unchecked and adversely impacting on public administration in NSW. Delay also increases the risk of loss or destruction of evidence and the unavailability of witnesses (through death or movement out of jurisdiction). These last mentioned factors can also impede the ability of the Director of Public Prosecutions to pursue criminal proceedings.

Grant funding – an uncertain option

As noted above, in the past, grant funding from DPC has been sought when required to fund any shortfall between the amount the Commission has received by way of appropriations and what it needs to meet the costs of its operations.

The amount of grant funding provided or promised to the Commission between the 2001–02 and 2019–20 financial years is set out in table 3.

Recent experience demonstrates the limitations and risks of relying on grant funding to make up any budgetary shortfalls. The ad hoc nature of such funding leads to uncertainty and less than optimum staffing arrangements. In addition, the necessity to rely on the discretionary and unreviewable decision-making by a member or members of Executive Government poses a real risk of challenging and impairing the Commission's independence. An adverse decision as to grant funding by DPC or even a decision to delay such funding amounts to an exercise of executive power that can directly detract from and influence the Commission's ability to exercise its statutory functions and therefore its ability to act in order to protect or further the public interest.

For a number of years up until 2016–17, the Commission relied on grant funding to cover the difference between what it received by way of appropriation and its operating expenses. In 2016, the Commission was advised that grant funding would be significantly reduced for the 2016–17 financial year. Grant funding decreased from \$2.621 million in 2015–16 to \$529,000 in 2016–17. This represented a serious reduction in funding and necessitated the Commission embarking on an unprecedented staff redundancy program under which 12 positions were lost, with the cost of most of the redundancies funded through a separate grant from NSW Treasury. This resulted from Executive Government decision-making unsupported by reasoned explanation

During the second-half of 2018, having experienced 12 months of activity under the three-Commissioner model, the operational impacts of that model had become clearer. On 14 September 2018, the Commission sought grant funding of \$2,565,620 from DPC for the 2018–19 financial year to meet unforeseen cost pressures associated with its operations. This included \$660,400 to meet estimated additional costs to fund then-current and projected public inquiries. Additional funds of \$1 million were granted by DPC in November 2018. The Commission considered this was insufficient to adequately meet cost pressures associated with its current operations. Following further

representations, an additional grant of \$716,000 was provided in late November 2018. That brought the amount provided to \$1.716 million – almost \$850,000 short of what had been requested.

By early 2019, it had become apparent that, without further additional funding, the Commission would not be able to complete its work associated with the operations Skyline and Dasha public inquiries, which were being conducted at the time, or to conduct any other public inquiry that financial year. On 13 February 2019, the Commission sought a further grant from the DPC of \$750,000. In seeking the further grant, the Commission noted that early advice was required, as the Operation Dasha public inquiry was due to resume on 1 April 2019, but that the Commission would not be able to proceed with that matter at that time without additional funds and would also need to curtail further work on Operation Skyline.

On 5 March 2019, the DPC Secretary acknowledged receipt of the request for additional funding but asked the Commission to bring the matter to a DPC Finance Committee meeting scheduled for the last week in March 2019. Clearly, that date did not reflect the urgency of the request, particularly given that there was no commitment that approval would be given at that meeting for the additional grant funding required. On 7 March 2019, the Chief Commissioner wrote to the DPC Secretary noting the urgency of the funding request.

On 11 March 2019, the DPC Secretary advised the Commission that DPC did not have the capacity to provide further in-year funding to the Commission. He advised that he and the Treasury Secretary had actioned an audit of the Commission's accounts. The Commission welcomed and fully cooperated with the audit. Later in March 2019, the request for additional grant funding, which had the full and unqualified support of the Premier, was agreed to. Ultimately, in July 2019, \$1 million was provided by DPC to fund the Commission's public inquiry schedule and to restore the Commission's cash buffer.

The amount appropriated out of the Consolidated Fund for the Commission in 2019–20 is less than the amount appropriated for the 2018–19 period. It was apparent to the Commission that, even after paring back operating expenses, there would be insufficient funds to properly resource its operations and, in particular, its public inquiry schedule for 2019–20. In June 2019, the Commission, therefore, sought grant funding from DPC of \$1.26 million for the first six months of the 2019–20 financial year. The Commission advised it would review its funding requirements in early February 2020 and if necessary submit a request for additional grant funding.

By letter of 9 July 2019, from the DPC Secretary, the Commission was advised that:

*...DPC **reluctantly** agrees to provision for around \$2.5M to assist the ICAC for 2019-20 in addition to the ICAC's annual appropriation*

...

*...the ultimate aim should be that the ICAC receives an annual appropriation covering all forecast workload and surge demand, and delivers outcomes within that budget and independently **without further supplementation from DPC or other sources** [Emphasis added].*

These statements appear to indicate a reluctance on the part of DPC to entertain any further requests for grant funding whether for 2019–20 or later years.

While, ideally, annual appropriation funding should cover the cost of the Commission's operations, experience has shown that not to be the case and, as earlier noted, it has been necessary to rely on grant funding to make up any shortfall between what is appropriated for the Commission's use and what is necessary to enable the Commission to properly discharge its statutory functions. In these circumstances, such stated *reluctance* and the stated aim to do away with "supplementation from DPC" is concerning and underlines the need for the timely establishment of a new funding model that specifically provides for flexibility of funding to address the inherent unpredictability of the Commission's work.

Effect of reduced funding on operations

Funding determines the level of resources available to the Commission to undertake its statutory roles.

Failure to maintain adequate funding, combined with the growing complexity of investigations, means that the Commission is effectively forced to try and do more with less resources. There is, however, a limit to what can be done without impairing effectiveness. Ultimately, insufficient funding means that matters that should, in the public interest, be investigated will not be able to be investigated with the real risk that cases of serious and systemic corruption will go unchecked. The only persons who would welcome such an outcome would be those intent on benefiting or enriching themselves through undetected corrupt conduct.

The current funding model is inconsistent with the Commission's independence and unlawful

As noted above, the advice provided by Mr Walker is that the Commission's statutorily explicit independence is, by law, to be given substantive effect in all regards that materially touch on the Commission's operations, including the means by which the Commission is funded. In his opinion, the current funding arrangements are unlawful.

Parliament has limited ability or opportunity to effectively scrutinise Appropriation Bills. In the case of the Commission, annual funding bids are considered by DPC and NSW Treasury. The DPC Secretary determines funding priorities for the DPC cluster (of which the Commission is a part) and submits the cluster budget to NSW Treasury. NSW Treasury then makes recommendations for consideration by the ERC. The ERC makes decisions based on NSW Treasury advice. Cabinet considers ERC advice and approves the final figures to be included in the Appropriation Bill. The Commission has little capacity to influence the outcomes of the process and no opportunity to put its case directly to the ERC or the full Cabinet. By practice or convention, the Parliament accepts and acts on the Cabinet decision by approving the Appropriation Bill. The only information available to members will be in the budget papers tabled by the Treasurer at the time of introducing the Appropriation Bill and any briefings that may be offered on the details of the Bill.

As observed earlier, neither DPC nor NSW Treasury have any statutory basis for undertaking their respective roles in relation to appropriation funding for the Commission. Similarly, there is no statutory basis for the role DPC plays in determining grant funding for the Commission. These roles exist as a matter of expediency, not legal principle.

While the Parliament, as a whole, should have a determining role in funding for the Commission, it is in practice the Government, which has majority support in the Legislative Assembly, that has control of the financial affairs of the state. That the political party or parties that form the Government of the day have a majority in the Legislative Assembly and therefore exercise control over the Legislative Assembly reduces, under the current funding model, the likelihood of any real debate or consideration of the funding requirements of the Commission within the Legislative Assembly. The lack of information available to members on the Commission's funding needs also reduces the likelihood of any challenge to the amount set out in the Appropriation Bill.

While the Government may not control the Legislative Council, there is no effective action that members of the Legislative Council can take to change amounts set out in an Appropriation Bill. Bills for appropriating public money or imposing a tax can only originate in the Legislative Assembly (s 5 of the *Constitution Act 1902*). Money Bills cannot be amended by the Legislative Council (by convention and by the fact that the amended Bill could not then be said to have originated in the Legislative Assembly). Annual Appropriation Bills can be assented to by the Governor even if not passed by the Legislative Council (s 5A of the *Constitution Act 1902*). Appropriation Bills (or Bills imposing a tax) cannot be introduced or passed by Parliament on the motion of a member of either House of Parliament without a message of support from the Governor acting on the advice of a minister (s 46 of the *Constitution Act 1902*).

While grant funding has proved a useful mechanism for providing the Commission with additional funding when required, the provision of such funding and its timing presently remains a matter that is decided by Executive Government.

As observed by Mr Walker, determinations made by Executive Government as to the financial resources available to the Commission subordinates the Commission to the Executive Government. This has the potential to place Executive Government in a serious conflict of interest where party political interests may conflict with the public interest in providing appropriate funding to the Commission.

The Commission's contention is that the Commission's funding requirements must be determined by Parliament independent of Executive Government.

Chapter 5: A new funding model

Public trust and confidence in the Commission must, as a matter of law, be buttressed by an independent funding process that delivers funding that is adequate to enable the Commission to fulfil its statutory roles. Additionally, the public interest requires funding for the Commission to be objectively and independently assessed.

Each of the Commission, the Inspector, the ICAC Committee and the PAC has recommended a new independent funding model for the Commission. The legal opinion provided by Mr Walker is that a new funding model is in fact required in order to eliminate the unlawful aspects of the current funding arrangements.

Underlying principles for a funding model

Any new funding model for the Commission should:

- i. acknowledge and preserve the Commission's independence from Executive Government
- ii. apply to funding determinations the underlying principles of certainty, flexibility, transparency and accountability.

Based on the Commission's experience over at least the last 10 years, it is important that the funding model incorporates two components – a fixed component for core funding and a flexible component to accommodate the unpredictable nature of the Commission's work.

In the ICAC Committee Report, the ICAC Committee noted that "(a)ny model chosen should ensure that the ICAC is sufficiently funded to continue its core work, provision for CPI and wage rises, and factors in the fluctuating nature of operational costs".¹⁹ The PAC has also expressed its concern that the Commission should be adequately resourced to perform its important functions.

The Commission contends that:

1. The fixed component should comprise base appropriation funding to cover the Commission's fixed and staffing costs, capital expenditure and other expenses including costs for the conduct of compulsory examinations and public inquiries.
2. The flexible component should comprise additional amounts available to the Commission during the financial year to enable it to undertake additional work or incur additional capital expenditure that is identified as being necessary during the course of the year. It would cover any additional legal and transcription costs for public inquiries and compulsory examinations, additional provision for investigations that emerge during the year that cannot be readily

¹⁹ *Review of the 2017–2018 Annual Reports of the ICAC and the Inspector of the ICAC*, 20 November 2019, at paragraph 1.50.

absorbed into the existing work program, and any need for new technical equipment or other additional capital expenditure.

The Commission also contends that neither component should be subject to so-called efficiency dividends or other cost-saving measures imposed by the NSW Government from time-to-time. There is precedent for this.

At the Commonwealth level, in its 2015–16 budget, the Australian Government announced that it would exempt the Office of National Assessments (now the Office of National Intelligence) and the Office of the Inspector-General of Intelligence and Security from the ongoing application of the efficiency dividend imposed on Commonwealth agencies.

The January 2015 *Review of Australia's Counter-Terrorism Machinery* by the Department of Prime Minister and Cabinet (PM&C) also recommended the removal of the efficiency dividend from the operational activities of the:

- Australian Security Intelligence Organisation (ASIO)
- Australian Secret Intelligence Service (ASIS)
- Australian Federal Police (AFP)
- (in-principle) operations of the former Australian Customs and Border Protection Service.

In its 2014–15 *Review of Administration and Expenditure*, the Parliamentary Joint Committee on Intelligence and Security recommended that, in line with the recommendations of the PM&C review, the efficiency dividend be removed from all ASIO, ASIS and AFP operations. In doing so, the committee noted that the high and increasing organisational security requirements of those agencies reduced their scope for cost-savings at a whole-of-organisation level without impacting operational capabilities.

The same rationale applies to the Commission, which is bound by statute law to protect the public interest as one of its paramount concerns (s 12 of the ICAC Act). To impose efficiency savings that would reduce frontline staff would directly impact operational capability.

What should the funding model look like?

It is ultimately the role and the responsibility of the Parliament and the Parliament alone to determine what funding is appropriated to the Commission. The Commission strongly contends that, in making that determination, the Parliament should have available to it independent and expert analysis of relevant data.

The PAC recommended that the parliamentary oversight committees of the Commission, the Law Enforcement Conduct Commission, the NSW Ombudsman and the NSW Electoral Commission review

the annual budget submissions of each agency and make recommendations as to the funding priorities.

The PAC expressed the view that the review process should be transparent, with the relevant committee consulting with relevant stakeholders, including NSW Treasury and DPC, on the bodies' budget submissions, inviting public submissions and holding public hearings. Each parliamentary oversight committee would table a report in both Houses of Parliament recommending the annual appropriation. If the Government did not support the body's budget submission in full, the report would include the Government's reasons as outlined in the consultation process. If the Government did not support the committee's recommendation, it would need to table a statement of reasons in Parliament.

In making this recommendation, the PAC noted there was merit in a single process to apply across all the independent oversight bodies.

While there is, with respect, merit in the model proposed by the PAC, the Commission considers there are problems with it, some of which are particular to the Commission and that call for an alternative model.

One issue is that it would be to the substantial benefit of the Parliament to have an independent and objective assessment undertaken for it by a person who possesses a requisite degree of financial and budgetary experience.

A detailed assessment of the Commission's needs in order to arrive at an appropriate budgetary figure is likely to require some knowledge of the Commission's program for the coming year, including its investigative and public inquiry schedule. It would not at all be appropriate that such information enter the public domain (such as through submissions to a parliamentary committee or public hearings conducted by a parliamentary committee). However, equally, in maintaining the integrity of the Commission's operations and given the secrecy provisions in the ICAC Act, it may not be possible or appropriate for such information to be divulged to members of a parliamentary committee, especially where to do so might prejudice a Commission investigation. Where relevant information cannot be disclosed to a parliamentary committee it simply may not be in a position to properly assess the Commission's request for funding.

A parliamentary committee, which would inevitably include members of the Government, may be faced with a difficult, if not impossible, burden if it received submissions from Government calling for the Commission to receive an amount of funding less than that sought by the Commission. Government members of the committee might find it difficult to support funding above the amount identified in the Government submission. There could then arise disagreement among committee members as to what level of funding should be provided. A failure to achieve consensus could undermine public confidence in the funding assessment process and the role of the committee in that process.

The Commission's jurisdiction extends to members of Parliament. From time-to-time, the Commission has conducted investigations into the conduct of members of Parliament and, in some cases, made

adverse findings, including findings of corrupt conduct, against them. Where the Commission is investigating one or more members or has made adverse findings against one or more members of a party to which members of the committee belong, it may be difficult for the latter to objectively determine or be seen to objectively determine the Commission's funding needs. This could lead to division among committee members. Even where such members sought to act objectively but the decision of those members or of the committee was to recommend funding below the level sought by the Commission, there may potentially arise a perception that the decision had been influenced by the Commission's findings and lead to a loss of public confidence in the funding assessment process.

Timing may also be an issue. Under the PAC proposal, the committee would need to consult with relevant stakeholders, invite and consider public submissions and hold public hearings. It would then need to complete a report for tabling in Parliament. As set out in chapter 3 of this report, the usual budgetary process requires funding proposals to be finalised by May each year with the budget handed down in June. Appropriation Bills are usually introduced into Parliament in June. The timelines may prove challenging.

This may particularly be so in an election year. Under the *Constitution Act 1902*, elections in NSW are generally held every four years in March. It may take some time after an election before a committee is established. For example, following the March 2019 state election, the present ICAC Committee was only established in June 2019. It would be extremely challenging for a new committee to undertake the necessary process to review a budget submission and make recommendations in an election year. While a committee might be able to undertake such tasks before the election, this would require the Commission to commit to a budget submission at a very early date, which would necessarily give rise to problems in accurately forecasting the likely full extent of its program for the following year.

The Commission's experience is that the earlier it is required to forecast its likely work program for the next financial year, the more inaccurate that forecast is likely to be. This is primarily because of the difficulty in forecasting what matters are likely to require investigation in the forthcoming financial year, the extent of such investigations, the number of public inquiries likely to be required and the duration of those public inquiries.

In summary, the Commission, with respect, considers there are both fundamental matters of principle and practicality in the model proposed by the PAC so far as it concerns the Commission.

An alternative model – appointment of an eminent person

The Commission proposes that an independent eminent and qualified person be appointed to assess the Commission's funding requirements. The eminent person would also have the role of approving the need for any additional funding during the course of the financial year to cover unexpected demands. For the purposes of this report, that person will be referred to as the ICAC budget assessor.

The principle of certainty in funding will be achieved by the ICAC budget assessor establishing the Commission's core annual budget funding needs for delivery of baseline activities, including costs associated with a fixed optimum staffing level and the conduct of compulsory examinations and public inquiries. The principle of flexibility will be achieved through the ability of the Commission to seek a

determination by the ICAC budget assessor for additional funding to cover unforeseen costs, particularly those associated with investigations, public inquiries and the acquisition of new technical equipment to ensure that the Commission is able to continue to effectively investigate matters within the relevant financial year.

The ICAC budget assessor would necessarily be someone with appropriate financial and budgetary expertise and standing in the community to enable effective assessment of the Commission's budgetary needs.

The ICAC budget assessor could be an independent officer of the Parliament appointed by the Presiding Officers of the Parliament. The mechanism could be similar to that under which the Parliamentary Budget Officer is appointed but with some necessary modifications.

Under the *Parliamentary Budget Officer Act 2010* ("the PBO Act") the Presiding Officers appoint the Parliamentary Budget Officer. The mechanism for identifying a suitable candidate is to be found in s 6 of the PBO Act. That section provides that the Presiding Officers are to select a person as Parliamentary Budget Officer from a list of at least two persons recommended by a panel comprising the:

- (a) Ombudsman
- (b) Information Commissioner, and
- (c) Chairperson of the Independent Pricing and Regulatory Tribunal.

If the Presiding Officers decline to appoint a person from a list of persons recommended by the panel, the panel is required to recommend a further list.

In applying this method of appointment to an ICAC budget assessor, consideration would need to be given to who should form such a panel.

Provision should be made for the Chief Commissioner to concur with any person being included in the list to be submitted to the Presiding Officers. This is important to ensure that the Commission was satisfied that any nominated person was truly independent and that there would be no conflict of interest (including from the person being involved in a Commission investigation) arising from the person's inclusion in the list or potential appointment as the ICAC budget assessor. Such provision is not without precedent. Under s 6A(1) of the ICAC Act, the Governor cannot appoint an Assistant Commissioner of the Commission without the concurrence of the Chief Commissioner.

Consideration could also be given to giving a role to the ICAC Committee in the selection of the ICAC budget assessor. Under s 64A of the ICAC Act, it has the power to veto the proposed appointment of a Commissioner or the Inspector. Consideration could be given to whether it should have a similar role with respect to the appointment of the ICAC budget assessor.

As with the Parliamentary Budget Officer, provision could be made for the ICAC budget assessor to engage staff and consultants where necessary to assist the ICAC budget assessor (see s 11 of the PBO Act).

Consideration would need to be given to a default mechanism if there were a delay in having someone appointed in sufficient time to enable a financial assessment to be made in time for the annual budgetary process or if the person appointed as the ICAC budget assessor was unavailable to undertake an assessment.

Consideration may also be given for the form and content of reports by the ICAC budget assessor. Such reports should be provided to the Presiding Officers and tabled in Parliament.

It is important to keep in mind that the Commission's functions are to be exercised by a Commissioner (s 6(1) of the ICAC Act). A decision to conduct a public inquiry is to be authorised by the Chief Commissioner and at least one other Commissioner (s 6(2) of the ICAC Act). It is for the Commission, and the Commission alone, to be satisfied it is in the public interest to conduct a public inquiry (s 31(1) of the ICAC Act). The ICAC budget assessor must not be able to effectively override a decision by a Commissioner as to whether a particular function should be exercised, when the function should be exercised, or whether it is in the public interest to conduct a particular public inquiry. It can be no part of the role of that position to assess or double-guess operational decisions. That, as provided for in the ICAC Act, is properly the role of the Commissioners. It must be clear that the role of the ICAC budget assessor is to assess the level of funding required for the exercise of functions as determined by the Commission.

Role of the ICAC budget assessor – core funding

Under the Commission's proposed model, core funding would be provided by way of annual appropriation by the NSW Parliament and would be assessed each year by the ICAC budget assessor. This aspect of the independent funding model would have the following features.

1. A draft annual budget would be prepared by the Commission after such consultation as the Commission considered appropriate, including with NSW Treasury.
2. The draft budget would be submitted to the ICAC budget assessor.
3. The ICAC budget assessor, if necessary assisted by such staff and/or consultants as the ICAC budget assessor deemed necessary, would determine whether the draft budget provided an appropriate level of core funding adequate for the Commission to carry out its functions (with prudent financial management) in accordance with a work program approved by the Chief Commissioner.
4. In making the determination, the ICAC budget assessor would be required to consider any advice provided by NSW Treasury on the budgetary position of the state. However, there would be no requirement that the ICAC budget assessor implement Government-mandated savings applicable to government agencies or so-called efficiency dividends.
5. If the ICAC budget assessor were not satisfied that the draft annual budget submitted by the Commission was appropriate to accommodate the work plan, there would be discussion between the ICAC budget assessor and the Commission with a view to reaching a mutually agreed position. However, in the absence of mutual agreement, the view of the ICAC budget assessor would prevail.

6. The ICAC budget assessor would prepare a report setting out a final determination. Where the ICAC budget assessor's determination differed from the draft budget provided by the Commission, the ICAC budget assessor would be required to set out the differences in the report and the reasons why the ICAC budget assessor had determined a different amount.
7. The report would be provided to the Presiding Officers, tabled in Parliament and made public.
8. The Legislative Assembly would be authorised to approve the Commission's budget in accordance with the ICAC budget assessor's determination or by altering that amount.
9. Once approved by the Legislative Assembly, that chamber would be required to send a message to the Legislative Council about its approval of the Commission's budget. The Legislative Council could either approve or reject the budget but, as with Appropriation Bills, the Legislative Council could not change the amount, although, as with money bills generally, it could send a message to the Legislative Assembly recommending a change to the amount that the Legislative Assembly could, but is not obliged to, consider. As with the assent to the annual Appropriation Bill, where the Legislative Council has failed to pass the Bill, the budget approved by the Legislative Assembly would be deemed to be approved within one month of the resolution of the Legislative Assembly being sent to the Legislative Council (s 5A of the *Constitution Act 1902*).
10. The legislation would provide that money is appropriated from the Consolidated Fund for the purposes of the annual Commission budget approved by the Parliament without the need for special appropriation legislation.

Section 4.10 of the *Government Sector Finance Act 2018* allows continued expenditure by an agency after 1 July each year in accordance with its annual budget for the previous financial year where the annual Appropriation Act is not passed by 1 July. That section allows the Treasurer to authorise the payment of sums out of the Consolidated Fund to meet necessary requirements. This provision could be adapted to continue after 1 July the appropriation of money to the Commission on a quarterly basis in accordance with its previous budget until a new annual appropriation was approved by Parliament.

At present, Appropriation Acts appropriate money to the Premier for the use of this Commission. The Premier then delegates authority to Commission officers to incur expenditure of appropriated funds. Section 5.2(2) of the *Government Sector Finance Act 2018* provides that a minister who delegates an appropriation expenditure function may impose terms and conditions on the delegation and also on any sub-delegation so as to limit the amounts and purposes for which expenditures of money are permitted under the delegation or a sub-delegation. The potential for the Premier to impose terms and conditions on the Commission's use of appropriated funds is inconsistent with the Commission's independence from Executive Government.

The PAC recommended that the Commission be directly allocated its annual funding.²⁰ If implemented, that recommendation would overcome the problem identified above.

²⁰ *Budget process for independent oversight bodies and the Parliament of New South Wales (March 2020) First report, Recommendation 3.*

Under the new funding model being proposed by the Commission, the amount determined by Parliament would be appropriated directly to the Commission and not to the responsible minister for the services of the Commission. Accordingly, its expenditure would not require the delegated authority of the minister or other public official.

Alternatively, if there is a preference by the Government for all appropriations (apart from that to Parliament) to be made to a responsible minister, provision should be made to confer on the Chief Commissioner a statutory delegation from the responsible minister under the *Government Sector Finance Act 2018* to spend money appropriated within the limits of the appropriated amount but not subject to any other limitation.

Provision would need to be made for the withdrawal of the annual appropriated amount from the bank accounts of the Consolidated Fund to the Commission's bank account (namely, a statutory obligation on the Treasury Secretary for the transfer of funds as and when required as notified by the Commission to the Secretary).

Role of the ICAC budget assessor – flexible funding

The PAC recommended that the annual budget for the Commission should include a set contingency fund to address unbudgeted financial demands.²¹ Access to the fund would be governed by prescribed criteria and subject to approval of the ICAC Committee. The PAC did not suggest how the amount of the contingency fund should be determined or what criteria should be applied before such funds could be accessed.

There are problems with this approach, some of which are similar to those discussed above.

One particular difficulty is that a contingency fund, the amount of which is set at the same time as the annual budget, may prove insufficient to meet pressing operational contingencies unforeseen at the time the annual budget was set. Under the model proposed by the PAC, there would be no mechanism for funding above the set contingency amount to be provided. That could potentially adversely affect the Commission's ability to respond expeditiously and effectively to new and emerging corruption.

Another potential difficulty, and one recognised by the PAC, is that the requirement for a parliamentary committee to approve access to the contingency fund might give rise to "...circumstances where the political implications of any such funding request may require a large degree of discretion in the disclosure of the need for the supplementary funding".²² While the PAC expressed the view that an agency has capacity to walk a delicate line of disclosure and discretion when making such funding requests, in practice this simply may not be possible. Potential difficulties will also arise for some committee members where the request for supplementary funding relates to the need to continue a public inquiry where one or more of those under investigation are members

²¹ Ibid, Recommendation 2.

²² Ibid, paragraph 3.102.

of Parliament or are known to committee members. Having an independent expert budget assessor would overcome these potential problems.

Under the Commission's proposed model, the need for flexibility in funding would be accommodated through assessment by the ICAC budget assessor of any applications made by the Commission for supplementary funding during a financial year and legislative provision for a standing appropriation without the need for a special appropriation. This aspect of the independent funding model would have the following features.

1. The Commission would prepare a special draft budget during a financial year for any additional funds, including for capital items, required to meet contingencies unforeseen at the time the annual budget was prepared in circumstances where the Commission does not have funds otherwise legally available for the expenditure (such as a likely underspend in its annual budget) and where the Chief Commissioner has certified that it is necessary those contingencies are dealt with in that financial year.
2. The special draft budget would be submitted to the ICAC budget assessor.
3. The ICAC budget assessor, if necessary assisted by such staff and/or consultants as the ICAC budget assessor deemed necessary, would be required to confirm the amount of additional funding to meet the contingencies.
4. If the ICAC budget assessor were not satisfied that the amount sought in the special draft budget was necessary, there would be discussion between the ICAC budget assessor and the Commission with a view to reaching a mutually agreed position. However, in the absence of mutual agreement, the view of the ICAC budget assessor would prevail.
5. The ICAC budget assessor would prepare a report setting out a final determination. Where the ICAC budget assessor's determination differed from the special draft budget provided by the Commission, the ICAC budget assessor would be required to set out the differences in the report and the reasons why the ICAC budget assessor had determined a different amount.
6. The ICAC budget assessor would publish the ICAC budget assessor's determination in the *Gazette* and in a special report to be provided to the Presiding Officers and for tabling in Parliament.
7. The legislation would provide that, on publication of the special budget in the *Gazette*, the amount of money concerned would be appropriated from the Consolidated Fund without the need for special appropriation legislation (a standing appropriation).

As with the annual appropriation, this standing appropriation would be made directly to the Commission.

Provision would be made for the withdrawal of the special appropriated amount from the bank accounts of the Consolidated Fund to the Commission's bank account (namely, a statutory obligation on the Treasury Secretary for the transfer of funds as and when required as notified by the Commission to the Secretary).

As with other current supplementary funding of agencies during a financial year, the ensuing state budget Bills would include the amount in the Budget Variation Bill or Schedule (for formal confirmation by Parliament of the special appropriation that has occurred).

In each case, accountability for use of the funding provided to the Commission would continue to be achieved through accounting to NSW Treasury and the Auditor-General of NSW for the proper expenditure of funds, and through reporting to the NSW Parliament and the public on the Commission's expenditure of public funds through its annual reports, which are also the subject of inquiry and review by the ICAC Committee. These processes also provide potent checks against extravagance.

In addition, the ICAC Committee could be given the function of monitoring and reviewing the exercise of the ICAC budget assessor's functions, with the ability to report to both Houses of Parliament on any matter appertaining to the ICAC budget assessor or connected with the exercise of the ICAC budget assessor's functions (the Public Accounts Committee of the Legislative Assembly has a similar role under s 15 of the PBO Act with respect to the Parliamentary Budget Officer). The ICAC Committee currently has such functions with respect to the Commission and the Inspector (s 64(1) of the ICAC Act). This would provide for additional accountability of the ICAC budget assessor.

Timing for consideration of a new model

The ICAC Committee recommended examination of a new independent funding model in the current budget cycle. Although the budget cycle commenced, the impact of COVID-19 has meant that the 2020–21 state budget has been deferred. The Commission understands that NSW Treasury is considering dates that may be suitable for delivering the budget later in the year. This necessary delay provides the Government and Parliament with an opportunity to consider and adopt a new funding model for the Commission in time for the 2020–21 state budget.

The matters addressed in this report concern issues of immediate importance to integrity in the public sector and anti-corruption work in society. Over the next few months, the Commission, in the public interest, stands available for consultation on the proposed independent funding model.

Appendix 1 – Opinion of Bret Walker SC, 16 April 2020

THE INDEPENDENCE OF ICAC, AND ITS BUDGET PROCESS

OPINION

I am asked to advise the Chief Commissioner of the Independent Commission Against Corruption on matters related to its independence and the budget process by which its operations are funded. It can be seen at once that the issues involve matters of statutory interpretation – what the written law of New South Wales requires – as well as political and constitutional matters – how the expenditure of public money is to be directed and controlled.

2 For the reasons explained below, in my opinion there is a present danger that duties and values relating to ICAC are about to collide with insensitive, even inappropriate, approaches to the general administration of the governmental allocation of funding to what some may call its agencies. In a nutshell, there is looming a conflict between the essential independence of ICAC in order that it may discharge its definitional functions, and the dependence that is created and wielded by senior public servant involvement in influencing the work programmes of ICAC by means of restricting its funding.

Constitutional, Political and Budgetary Background

3 At the outset, I must stress the fundamental importance of parliamentary control of expenditure of public monies. Nothing in the analysis below detracts from the central element of this aspect of our system of responsible government, articulated in

secs 45 and 46 of the *Constitution Act 1902* (NSW). Other relevant statutory controls on the expenditure of appropriated funds further this systemic feature by focussing on Ministers as the public officers by whose authority appropriated funds may be expended. That authority, of course, may in accordance with such legislation be delegated on specified terms. The point is that the expenditures themselves, as well as the perceived and contested wisdom of expenditures, are at the heart of the responsibility that a Minister bears to the House of Parliament in which he or she sits. More generally and in accordance with the nature of party politics, it is the Government that is held responsible politically by both Houses of Parliament and formally in the Legislative Assembly whose confidence the Government must retain.

4 The present problem arises, in general terms, from the following state of evolving public finance management. The annual budget process involves detailed and explicit consideration of so-called bids by so-called agencies, in the sense of proposals for consideration of the allocation of funds for the continuing operations of the agency in question. For these purposes, ICAC is treated as an agency, and specifically as one of the so-called independent entities, an important concept to which I turn further below. A telling recognition in the current guidelines for submitting budget proposals is granted by the exemption of the independent entities from the need to prioritise their bids against other bids. For agencies in general, the need to prioritise arises from recognizing that all bids seek funding from the same source, which is limited. In other words, in this regard the budget process is overtly and properly driven by political considerations that are both necessary and beneficial.

5 The detailed budget process includes, as a matter of current organization, a highly explicit and formalized bureaucratic process that includes, most notably, the

Expenditure Review Committee. The ERC operates in close conjunction with the Treasury, and currently addresses budget proposals by reference to so-called clusters. ICAC's funding is dealt with under the cluster entitled Premier & Cabinet and Legislature. The senior bureaucracy within the Department of Premier & Cabinet is therefore directly engaged in these budgetary processes affecting the funding of ICAC.

6 As it happens, there has developed a practice of supplementary funding outside the annual budget cycle for ICAC, by so-called DPC grant funding. It is resorted to typically when the exigencies of investigations and hearings exceed those which could sensibly be predicted. After all, the dangers of corruption to the public interest do not present in an easily managed steady state. That practice also, perhaps by a kind of default mode of conduct, has been dominated by senior bureaucrats as effective decision-makers, if not formally so. That is, very significant and highly influential gatekeeper and advisory functions exercised by senior bureaucrats have characterized the process by which ICAC has attempted to obtain from time to time supplementary funding.

7 The practical necessity and systemic desirability of Ministers – especially, the Premier – being informed and assisted by senior bureaucrats in their decision-making that involves the expenditure of public monies are obvious and need no elaboration. Nothing in my analysis below detracts from this position. Rather, it is accepted as a feature of our public finance system that should continue as an important aspect of it – but which now presents a particular difficulty for ICAC, ie for the intended benefit of the public interest for which ICAC exists.

8 The Chief Commissioner of ICAC has given evidence to the Public Accountability Committee of the Legislative Council in its Inquiry into Budget Process for Independent Oversight Bodies and the Parliament of New South Wales, on 12th December 2019. (ICAC is an independent oversight body.) This Opinion is not directed to the matters of operational expenditure, financial planning and agency management raised in that evidence and special report. Rather, they provide the factual background against which I have considered the issue of ICAC’s independence as a matter of law, as it affects and may be affected by the constitutional, governmental and bureaucratic aspects of public finance, as summarized above.

9 Following the Chief Commissioner giving evidence as noted above, the Public Accountability Committee of the Legislative Council, by an order for printing on 24th March 2020, has published its Report No 5 entitled *Budget process for independent oversight bodies & the Parliament of New South Wales – First Report*. I refer generally to the Report, and especially to its Chapters 1, 2 and 3. I note the important contingency of the impending report by the Auditor-General, herself one of the independent oversight bodies, with the particular role of auditing the others. (I do not expect that this future report will call into doubt any of the considerations and conclusions expressed in this Opinion.)

10 In relation to the institutional independence of ICAC and its functional role in government, I draw to attention in particular the expression of the relevant State Outcomes applicable in the current budget process (noted above) in para 2.4 of the PAC’s Report, as follows. ICAC’s cluster is dubbed “*Accountable and responsible Government*”, encompassing the aims of “*ensuring a robust democracy, upholding the integrity of Government, fighting corruption, enhancing public sector capability and*

improving service delivery". These are evidently concerns that subsume and transcend particular policy decisions of a kind that properly dominate ordinary budgetary allocations.

Institutional Independence and Accountability

11 The questions I have been asked all turn on the interpretation, properly and purposively understood, of ICAC's constating legislation, viz the *Independent Commission Against Corruption Act 1988* (NSW). The statute provides a comprehensive description of ICAC as a special agency, appropriately dubbed an "independent oversight body". The provisions noted below are clear in their overall and detailed requirements for the independent functioning of ICAC in order to carry out its unique role in the governance of New South Wales. It is unique because, unlike the supreme governance arrangements in our Constitution, the Houses of Parliament, the Cabinet and the Ministry, ICAC is not elected. In this regard, it is free from the political influence properly exerted by public opinion and periodic elections on Parliament and the Government. It is also special as an element in the government of New South Wales in that its personnel are not directly answerable, as other public servants generally are, to ministerial direction or the authority of senior public servants to direct ICAC in its operations.

12 So much is obvious from the first of the principal objects of the Act set out in para 2A(a). ICAC is "*to promote the integrity and accountability of public administration ... as an independent and accountable body*", in order "*to investigate, expose and prevent corruption involving or affecting public authorities and public officials*". This very broad mandate would be contradicted by any substantive

subordination of ICAC to the wishes of those involved in public administration – such as officers of DPC, among others.

13 ICAC’s principal objects also include (sub-para 2A(a)(ii)) the role of public education “*about corruption and its detrimental effects on public administration and on the community*”. Again, this is an object which would obviously be imperilled as to its effective realization were public authorities or public officials in a position to mute or even stifle ICAC’s activities in this regard.

14 The second principal object of the Act, in para 2A(b), is to confer on ICAC “*special powers to inquire into allegations of corruption*”. Many of the provisions noted below require, of their very nature, independence for ICAC to make the decisions involved in this essential characteristic of ICAC as it has been constituted by the Act.

15 This defining element of independence, it must be emphasized, is accompanied by the accountability essential in any civilized society under the rule of law. Very important provisions in relation to the Inspector of ICAC (Part 5A) and the Parliamentary Joint Committee (Part 7) provide the main mechanisms for this accountability. Special provisions limiting the jurisdiction of the Ombudsman in relation to ICAC and its officers, to references by the Inspector, are part of this scheme for ICAC’s accountability. Some of the other provisions of the Act (eg sec 96 concerning bribery of ICAC officers) are also directed to the enforcement of appropriate standards to be observed by ICAC, by way of a kind of accountability.

16 Provisions for review by the Supreme Court of a number of the drastic powers exercisable by ICAC (eg sec 36B concerning witnesses in custody and sec 100B

concerning the custody of contemnors) provide another form of vital accountability in relation to ICAC's exercise of its large and important powers.

17 An important form of accountability can be seen in the various provisions directed to the need for ICAC to give an account of its activities carried out in the public interest (eg sec 74 concerning reports of investigations, sec 75 concerning special reports to the Houses on administrative or general policy matters relating to ICAC's functions and sec 76 concerning comprehensive annual reports to the Houses). The detail of these and other reporting and recommendation requirements and powers imposed on or available to ICAC is unnecessary in this Opinion. They constitute in themselves a form of accountability, given that no-one is suggesting that ICAC is placed beyond the reach of criticism, either by public officials or by members of the public.

18 This legislative scheme for ICAC's accountability understandably accompanies but in no way reduces the need for independence on the part of ICAC, its statutory officers and staff included. To this end, one notes the familiar stipulation of the qualifications for appointment of a Commissioner or Assistant Commissioner by reference to qualification for judicial appointment (Sched 1, cl 1(1)). Separation of governmental powers is assured by the ineligibility of legislators or judges (cl 1(2)). (The veto power given to the Joint Committee by cl 2 in no way detracts from this safeguard of independence.) The remuneration of Commissioners and Assistant Commissioners may not be reduced during current terms of office, and is secured by a standing appropriation (cl 6). These officers hold statutory office, outside the *Government Sector Employment Act 2013* (NSW) (cl 9). Staff members of ICAC, seconded so to speak, from the Public Service etc are effectively guaranteed a return to

equivalent or better positions in the Public Service etc upon cessation of ICAC employment (Sched 3 cl 3). Similar protection is provided for seconded police (cl 4).

19 These institutional aspects of ICAC admit of no shortcoming in the real independence of ICAC – rather, they require it in unmistakable terms. In this regard, the current form of the Act continues to conform with the legislative history, whereby no appreciable diminution of independence was contemplated by Premier Greiner when the first iteration of the statute was proposed to Parliament.

20 And, at the risk of repetition, it is to be emphasized that the thorough and multi-pronged accountability of ICAC in no way detracts from that independence. In our society, authority and power enacted by statute is always accountable under the rule of law – hence, the entrenched jurisdiction of the Supreme Court with respect to all holders of office with enacted authority and power.

21 An equally cogent proposition is that the requisite independence of ICAC must be observed by all arms of government: an aspect of our legal system that in extreme cases may require the exercise of jurisdiction by the Supreme Court to protect against unlawful intrusions on ICAC’s independence. I will return to this possibility, which is on any view extreme if not theoretical, further below.

22 The independence of ICAC, it may be noted, does not involve answering to members of the Public Service, however senior and important their positions or responsibilities. As explained further below, the notion that budgetary scrutiny could be distorted so as to constrain ICAC from independently carrying out its functions (which include duties) is alien to the legislative scheme – not to mention, contrary to informed

political science concerning responsible government in a parliamentary democracy, with oversight agencies.

23 The subject matter of ICAC's functions and duties is, in accordance with the purpose for which it was first proposed to Parliament, as ample as may be imagined with respect to anti-corruption endeavours. The list of persons included in the definition of "*public official*" (in subsec 3(1)) starts with the Governor, and includes Ministers, Members and Judges. This is top to bottom coverage of the activities that ICAC is charged to examine with a view to serving the public interest opposed to corruption. As such, it plainly demonstrates the need for real independence in the operational decisions and ordering of priorities for ICAC's work. Otherwise, the role of ICAC is in danger of succumbing to a detrimental observance of hierarchy. In short, no-one is too grand to be exempt from ICAC's salutary exercise of its functions.

24 Finally, as to institutional aspects, one notes the significance of the Chief Commissioner under the provisions of and referred to in secs 5, 6 and 6A. This concentration of responsibility in that individual also contributes to the clear requirement for independence, both on his or her part as Chief Commissioner, and on the part of ICAC institutionally.

Staffing and Funding of ICAC

25 The staff and other services necessary for ICAC’s work are appointed by the Chief Commissioner (subsec 104(1)). The appointment of a person to the staff of ICAC is, generally, “*at the discretion of the Chief Commissioner*” and a staff member is, in that capacity, “*subject to the control and direction of the Commissioners*” (subsec 104(3)). Other provisions of sec 104 mark out ICAC’s staff separately from members of the Public Service generally. Under subsec 104(6), subject to other law, the Chief Commissioner may fix their salaries etc. Ordinary application of industrial relations law is greatly modified (eg subsecs 104(7), (10), (11), (12)). When departmental staff are seconded to ICAC, by arrangements made by ICAC, they are also under the control and direction of the Commissioners (sec 104A). ICAC is also empowered to “*engage any suitably qualified person to provide the Commission with services, information or advice*” (sec 104B).

26 Another staffing aspect of ICAC’s organization is the possibility of regulations for disclosure of pecuniary interests and other matters, being a familiar way in which institutions maintain real and apparent independence (sec 110).

Public Interest and Public Trust

27 The unique and crucial feature of ICAC’s role is best gauged by reflecting on the relationship between ICAC and all other aspects of government and public administration. This focus is most explicit in the provisions of secs 12 and 13 of the Act, concerning ICAC’s functions generally. The former provision requires ICAC, when exercising its functions, to “*regard the protection of the public interest and the*

prevention of breaches of public trust as its paramount concerns". Given the object of ICAC's required attention to official corruption, top to bottom so to speak, it is clear that ICAC's mandate is to be fulfilled as robustly in relation to the most senior bureaucrats, or Ministers, as with subordinate functionaries (such as those who may engage in petty bribery).

28 The principal functions of ICAC are specified in subsecs 13(1) and (3) of the Act. They are expressed in terms redolent of the independent responsibility of ICAC, legislatively imposed, to form critical evaluative functions about governmental activities. By way of illustration, para 13(1)(a) contemplates the Commission being of the "*opinion*" that an allegation or complaint implies the possibility of past, present or imminent corruption. ICAC is not limited to the exception of others in that regard. The specification in paras 13(1)(d)-(h) of the Act of principal functions to the effect of examining the laws governing and regulating public administration and instructing and advising and educating those involved in public administration about corruption and its elimination most obviously cannot be discharged properly if there were any suggestion of subordination of ICAC to direct or indirect pressure, let alone direction, exerted by officers involved in public administration. Similarly, the principal functions of public education and the fostering of public support, set out in paras 13(1)(h)-(j) could not sensibly be achieved were there to be any basis for a perception that ICAC could be muzzled, deliberately or consequentially, by the decisions of senior members of the Government or the bureaucracy.

29 Significantly, ICAC's investigations, the nature and implications of which are considered further below, are expressly required by subsec 13(2) to be conducted with particular matters in mind. Investigations are to be conducted "*with a view to*

determining”, among other things, “*whether any laws ... need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and ... whether any ... practices ... of any ... public official ... could allow, encourage or cause the occurrence of corrupt conduct*”. This compulsory “*view*” with which ICAC is to conduct investigations that should be seen as a real supervision of aspects of government in the most comprehensive fashion. Both legislation and administrative practices are positively required to be scrutinized by ICAC in all investigations, with an anti-corruption purpose. Again, it should be obvious that for such supervision to be effective, there cannot be the appearance of ICAC being subject to superior influence exerted by those responsible for public administration under existing legislation and in accordance with current practice – let alone, it need hardly be said, there being any such superior influence as a matter of fact.

30 Under the provisions of para 13(3)(b), the principal functions of ICAC also include making “*recommendations for the taking of action that [ICAC] considers should be taken ...*”. On any view, this is a broad mandate, given that ICAC is empowered “*to make findings and form opinions*” following investigations, extending beyond corrupt conduct as such (para 13(3)(a)).

31 Quite literally, a “*public authority*” which is the object of a recommendation under para 13(3)(b) of the Act answers to ICAC concerning implementation “*in response to the recommendation*” (subsec 111E(2)). Further, a possible two-year timetable for reporting progress by such a public authority to ICAC is required by subsec 111E(3).

Investigations and Reports

32 The functions and powers for which ICAC is popularly best known focus on the decisions to initiate the conduct of and the reporting on investigations, particularly contained in Part 4 Divs 2-4 of the Act. They may be summarized as containing very ample powers, of a kind that might not unfairly be described as drastic in their extent and nature. Further detail is unnecessary on this occasion. But the present point is that these powers and responsibilities are very much at the heart of the role for which ICAC's independence is critical. As a matter of substance, not merely form.

33 For present purposes, it is important to note the power in subsec 20(1) to "*conduct an investigation on [the Commission's] own initiative*", as well as on complaints, reports or references made to the Commission.

34 Allied with that very broad independent power is the equally broad provision in subsec 20(3) in relation to the Commission's consideration "*whether or not to conduct, continue or discontinue an investigation*". (The exception for "*a matter referred by both Houses of Parliament*" under sec 73 serves to underscore the governmental position of ICAC – bound to respond positively to a parliamentary reference, but not so bound in relation to, say, complaints, reports or references emanating from the heights of the bureaucracy or even the Premier or another Minister.)

35 Emphasis is appropriate on the very explicit stipulation in subsec 20(3) that the matters properly regarded in such considerations by ICAC are "*such matters as it thinks fit*", including trivial subject-matter, conduct too remote in time and frivolous, vexatious or bad faith complaints (paras 20(3)(a), (b) and (c)).

36 As a matter of drafting, there is some significance in the added explicit stipulation that these included considerations in relation to conducting, continuing or discontinuing an investigation depend upon how they are regarded “*in the Commission’s opinion*”. Within the bounds of rationality, this statutory formula preserves the merits of such vital decisions for ICAC alone. Judicial review would, except in extreme cases beyond the bounds of rationality, or good faith, not be available. The Supreme Court would be confined to checking the lawfulness of ICAC’s decision making in this regard, in the main, by examining simply whether ICAC had formed a relevant opinion, as a matter of fact.

37 It is true that secs 27 and 28, relating to injunctions, provide a substantive role for the Supreme Court in such proceedings to be satisfied (by forming an appropriate “*opinion*” itself) about the threat presented to an investigation or proposed investigation, or the need to prevent “irreparable harm” because of corrupt or suspected corrupt conduct. Again, this basal requirement for the exercise of judicial power concerning the grant of injunctions with their possibility of penal sanction, in no way detracts from the central importance of ICAC’s independence. Rather, they are additions to the armoury of means available to the Commission in its paramount service for the public interest in relation to combatting corruption.

38 Wording that produces a similar conclusion concerning ICAC’s independence of operations can be seen in detailed provisions granting powers and regulating their exercise with respect to investigations. By way of illustration, compulsory examinations may be conducted if ICAC “*is satisfied that it is in the public interest to do so*” (subsec 30(1)). Public inquiries may be conducted, if ICAC “*is satisfied that it is in the public interest to do so*” (subsec 31(1)). Mandatory but non-exhaustive factors

to be taken into account by ICAC in deciding whether to conduct a public inquiry include “*the benefit of exposing to the public, and making it aware, of corrupt conduct*” (para 31(2)(a)), and “*whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned*” (para 31(2)(d)). Decisions by ICAC to hold part of an inquiry in private require ICAC to consider “*this to be in the public interest*” (subsec 31(9)).

39 These repeated invocations of the public interest, in terms, and as a premise of ICAC’s essential operations, could not be clearer in their implied demand for genuine independence for ICAC. Not even the Government or the Houses of Parliament can dictate how ICAC is to view the public interest in this regard (leaving aside the capacity for both Houses of Parliament to require an investigation, as noted above).

40 It is a very large thing for ICAC’s perception of the public interest to be the governing perception when it comes to ICAC exercising its powers. But then, combatting corruption is itself a very large project. It is, arguably, all the more important in relation to the top echelons of government, including the bureaucracy. Surely, the legislative scheme could not have been otherwise if anything like an effective oversight function is to be discharged by ICAC, top to bottom.

41 For all the reasons discussed above, drawing on the express and clearly implied meaning of the Act, as discussed above, in my opinion it is plain beyond serious argument to the contrary that ICAC’s statutorily explicit independence is required by the law to be given substantive effect in all regards that materially touch upon ICAC’s operations. And, emphatically, these include the means by which annual and more

frequent occasional arrangements become necessary for the funding of ICAC's operations.

42 It follows, in my opinion, that the current arrangements referred to above and described in the PAC's Report are not fit for purpose. With the best will in the world, the senior public officials engaged in the dealings made necessary by the current arrangements for funding ICAC cannot avoid a substantial risk of appearing to be capable of exerting, by the power of the purse string, inappropriate influence over ICAC's operations from time to time. A crude, hypothetical but not fantastic example would be DPC refusal of supplementary funding sought to enable extra effort by ICAC in conducting an investigation, where a possible outcome of the investigation might reflect adversely on the Government.

Justiciability

43 This Opinion does not extend to consideration of the alarming prospect of litigation concerning the lawfulness, in relation to ICAC, of current funding arrangements. On the one hand, statutorily guaranteed independence, meaning genuine and substantive independence in the senses discussed above, easily fits the description of important rule of law elements of our form of government. As such, it might be thought to be just the kind of constitutional feature of government that can and, in appropriate cases, should be protected by the exercise of judicial power. It is a contradiction in terms, I suppose, to conceive of an unenforceable rule of law.

44 On the other hand, for the reasons noted at the outset of this Opinion, there are very broad and basal political questions involved in the manner of funding the

operations of government, including those of ICAC. Instinctively, they are the very kind of questions to be left to parliamentary legislation and parliamentary scrutiny, with periodic electoral response – rather than enforcement by judicial determination and order. The conclusions I have expressed above about the legal requirement that ICAC’s independence not be endangered by funding arrangements should not be understood as entailing the availability of judicial enforcement of that independence. The question of justiciability, which I hope will only ever be academic, can remain unanswered, for the purposes of this Opinion.

Conclusion

45 For all these reasons, a parliamentary solution presents as that which principle best supports. A parliamentary solution need not involve legislation only, as the procedures of the Houses can themselves be adapted to achieve many of the desiderata explained in the PAC Report.

46 With great respect, there is much to be said for the improvements recommended by PAC in its Report. They would go a long way to eliminating the undesirable – unlawful, as I see them – aspects of the current funding arrangements for ICAC. Put shortly, they spare senior bureaucrats the impossible burden imposed by fiscally supervising the organ of government intended to supervise the whole administration in relation to possible corruption.

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16th April 2020



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