

I·C·A·C

INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

NSW INDEPENDENT COMMISSION
AGAINST CORRUPTION SPECIAL REPORT
No. 2

A parliamentary solution to a
funding model for the ICAC

November 2020

Contents

Chapter 1: Introduction	4
Chapter 2: Threats and risks to the independence of the Commission established.....	5
Chapter 3: Management of the Commission’s budget process by the Executive Government.....	8
Chapter 4: The relationship between the NSW Parliament and the Commission.....	10
Chapter 5: The legal divide and separation between the Commission and the Executive Government	13
Chapter 6: The approach to a parliamentary solution	14
Appendix 1 – Supplementary Opinion of Bret Walker SC, 15 October 2020.....	15



The Hon John Ajaka MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Jonathan O’Dea MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

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 parliamentary solution to a 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 second such special report made by the Commission.

For the reasons set out in the special report, the Commission contends that there is now an urgent need for an exercise of the New South Wales Parliament’s role and authority in implementing, as a matter of high public importance, a new funding model for the Commission that ensures the Commission is properly funded by a mechanism that is independent of Executive Government control.

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

A handwritten signature in blue ink, appearing to be 'Peter Hall', written in a cursive style.

The Hon Peter Hall QC
Chief Commissioner

Chapter 1: Introduction

This is a Special Report by the Independent Commission Against Corruption (“the Commission”) pursuant to s 75 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”). The provisions of that section operate as an important and formal channel of communication between the Commission and the NSW Parliament.

This report is intended to be read together with the matters concerning policy and administration affecting the Commission as discussed in its first Special Report, which was provided to the presiding officers of each House of Parliament in May 2020, entitled *The need for a new independent funding model for the ICAC*.

A “Special Report” to Parliament by implication is an exceptional report by the Commission as to matters of policy and/or administration affecting the Commission. It operates as a formal process for the Commission, of its own motion, to communicate by reporting on a matter it has decided is sufficiently significant or important to it and/or to the performance of its statutory functions as to warrant Parliament’s attention. Indeed, not to report such matters in some circumstances could constitute a failure by the Commission to account to Parliament.

As discussed in this report, with the tabling in Parliament of the NSW Auditor-General’s Special Report, 20 October 2020 – *The effectiveness of the financial arrangements and management practices in four integrity agencies* – there is now an urgent need for an exercise of the NSW Parliament’s role and authority in implementing, as a matter of high public importance, a new funding model that ensures the Commission is properly funded by a mechanism that is independent of Executive Government control.

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 2: Threats and risks to the independence of the Commission established

In its first s 75 Special Report of May 2020, the Commission expressed its deep concern in relation to its existing funding arrangements in that they impermissibly threaten and impinge upon its independence. That concern was, by the analysis of eminent Senior Counsel Bret Walker SC, in his Opinion dated 16 April 2020, shown to be one that was well justified. A copy of Senior Counsel's Opinion was attached to the first s 75 Special Report.

On 4 November 2019, the Hon Don Harwin MLC, Special Minister of State, requested the NSW Auditor-General to undertake a performance audit under s 27(b)(3)(c) of the *Public Finance and Audit Act 1983* into the effectiveness of the financial arrangements and management practices of four integrity agencies, including the Commission. The Auditor-General's report, dated 20 October 2020, was presented to the Presiding Officers of each House of Parliament. The report was recently tabled.

As an independent officer, the Auditor-General examined all four independent agencies including the Commission. The Commission, of course, is independent of ministerial control in the exercise of its statutory functions. It was designed and established by legislation enacted by the NSW Parliament to be independent of the Executive Government.

The findings and conclusions expressed by the Auditor-General in her abovementioned report – to the effect that existing funding arrangements for the Commission impact adversely upon its independence – are entirely consistent with the Commission's first s 75 report and with the Opinion of Mr Walker SC. A number of the specific findings and conclusions of the Auditor-General in respect of the Commission are discussed in this report.

The Auditor-General's observations included the following:

The process for determining the annual appropriation funding for ICAC does not recognise ICAC's status as an independent agency (p. 19).

The executive's involvement in the funding decisions for ICAC can create tensions which could limit the effectiveness of the current financial arrangement (p. 20).

Good governance principles suggest that an effective decision-making process should ensure that those who could be investigated do not undermine the funding of the investigating bodies. In the case of ICAC this is very difficult to achieve because of its broad remit... (p. 20).

The safeguards to threats to ICAC's independence are not sufficient (sub-heading at p. 20).

There are several avenues that ICAC can use to communicate directly with Parliament about its funding requirements (as set out at p. 20).

After setting out the avenues that the Commission can use to communicate directly with Parliament about its funding requirements, the Auditor-General observed:

These mechanisms allow ICAC to raise concerns about funding decisions. However, they do not allow the funding amounts to be reconsidered or changed because Parliament does not have any formal role in ICAC's budget development process (p. 20).

The role of the Executive Government in deciding annual funding for the integrity agencies presents a threat to their independence (sub-heading at p. 5: Key Findings).

The above extracts do not detail the specific threats and risks to the Commission's independence but the Auditor-General's report elaborates upon them along with other deficiencies in the arrangements (see pp. 4, 5, 6, 7, 10, and 19-21). Certain of these are referred to in the next chapter.

It is essential to note the importance of the analysis undertaken by the Auditor-General and by Senior Counsel.

The risks and threats posed by the existing arrangements in determining the financial resources that are required by the Commission to undertake its prescribed functions largely arise from the wrongful application of a funding system to the Commission that is used and appropriate only for government departments and agencies.

In accordance with legal principle, the Commission must not be the subject of any risk to its independent operations, whether before or after any such risk materialises. It must be funded by a system that is as independent as the Commission itself.

The response from the Department of Premier and Cabinet and NSW Treasury addressed to the NSW Auditor-General, dated 19 October 2020, acknowledged what is termed "theoretical risk" to the independence of the integrity agencies but asserted that it has not materialised. Such an assertion, however, fails to address the underpinning legal framework for the Commission, which prohibits any risk – theoretical, potential and actual – arising from any activity of the Executive Government. The Commission is a distinct legal entity, separate and apart from departments or agencies of government, and answerable to Parliament and not to the Executive.

A recent example of the potential or "theoretical risk" materialising occurred in recent years. As discussed in the Commission's first s 75 Special Report, May 2020, at p. 26, the then Government, without Parliamentary consultation or approval, announced that Commission 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 serious reduction in funding resulted in the first compulsory redundancies in the Commission’s history. It necessitated the abolition of 12 positions (most were frontline positions), effectively reducing the number of investigation teams from four to three.

The Executive Government’s decision-making in relation to that reduction in funding, unsupported by any disclosed reason or explanation, illustrates in clear terms both the potential and the capability of the Executive to act in disregard of the Commission’s statutory independence and to assume, wrongly, an authority to so act; an authority which is vested in Parliament and Parliament alone.

Chapter 3: Management of the Commission's budget process by the Executive Government

As with other independent agencies, the Commission is accountable to the Parliament, not the Executive Government. In the words of the NSW Auditor-General:

ICAC's legislation establishes it as an independent agency that is accountable to Parliament.¹

That statement is in line with a similar reference by then-premier the Hon Nicholas Greiner MP in the second reading speech on 26 May 1988 for the Independent Commission Against Corruption Bill:

I made it clear in my statements before the election that the proposed Independent Commission Against Corruption would be responsible to Parliament, and not to the Executive Government. The independence of the commission and its responsibility to Parliament is constituted in a number of ways...

As the Auditor-General has made plain in her abovementioned report, the Commission's capacity to independently operate is made subject to control over its financial resources, which is exercised by the Executive at multiple levels. In that regard, the Auditor-General has identified the following processes and decision-points as directly within the Executive's control:

Executive control over ICAC Funding Processes

As to processes – Accordingly, the Executive Government – through Cabinet, NSW Treasury and DPC – is involved in the processes that determine the funding for the integrity agencies that are the focus of this audit. This system principally exists to enable funding decisions for NSW Government departments and agencies. These departments and agencies are created by the Executive Government and ministers oversee them directly.²

Decisions about the annual appropriation for ICAC are made by Cabinet, with advice from NSW Treasury. Members of Cabinet or NSW Treasury could be the subject of, or more broadly affected by, an ICAC investigation.³

¹ *The effectiveness of the financial arrangements and management practices in four integrity agencies*, NSW Auditor-General's Report, 20 October 2020, p. 7.

² *Ibid*, p. 5.

³ *Ibid*, p. 7.

...NSW Treasury does provide separate advice to Cabinet on these submissions (ICAC funding submissions). There is no independent advice on ICAC's funding requirements and there is no transparency to Parliament about the reasons for decisions made about ICAC's budget. The absence of these safeguards in the current financial arrangements creates a threat to ICAC's independence and has the potential to limit its ability to fulfil its legislative mandate.⁴

After the integrity agencies submit their budget proposals, NSW Treasury provides briefings to the ERC (the Expenditure Review Committee) on the proposals that have been progressed for consideration. The ERC makes the final decisions about the budgets for the integrity agencies ... the reasons for decisions made by the ERC are not made public or provided to the integrity agencies. Briefings that NSW Treasury provides to the ERC during the budget development process are also considered Cabinet-in-Confidence and are not made public or shared with the integrity agencies.⁵

The NSW Auditor-General also noted that the ERC makes decisions about any limit it wishes to apply to government agencies' access to the appropriations approvals by Parliament. These include "efficiency dividends" and "budget savings and reform measures" which, it is submitted, have been wrongly imposed upon the Commission. The Auditor-General has raised the question as to whether there in fact exists a clear legal basis for imposing such limits on the integrity agencies (including the Commission).⁶

⁴ Ibid, p. 7.

⁵ Ibid, p. 11.

⁶ Ibid, p. 3.

Chapter 4: The relationship between the NSW Parliament and the Commission

The “architectural principle” that applies to the Commission and the NSW Parliament is that the former’s statutory independence is subject only to its accountability to Parliament and, of course, to the rule of law. In turn, Parliament, and only Parliament, has the responsibility and the power to safeguard the Commission’s independence from any risks and threats to it arising from the Executive Government including, in particular, those identified and discussed by both the Auditor-General and Senior Counsel.

Such risks and threats clearly must be eliminated and the Commission safeguarded by the only institution with the requisite authority, the NSW Parliament, exercising its constitutional and traditional role and responsibility to scrutinise and review the Executive by the establishment of an independent funding model.

In the framework of what is a symbiotic relationship between the Parliament and the Commission, the role of the Commission is directed to, and assists, the Parliament in securing public accountability through the Commission’s use, as required, of its substantial coercive powers to investigate those in the governmental system (all public officials and public authorities as defined in s 3 of the ICAC Act).

Actions by the Executive, that limit the Commission’s capacity to do so, undermine its independence as well as its role in supporting and assisting Parliament (along with the other independent parliamentary agencies) in scrutinising and overseeing the Executive. As the WA Inc Royal Commission observed in relation to its proposal for the establishment of independent agencies in the state of Western Australia, including, in particular, what it referred to as a new “Official Corruption Commission”:

*...the recommended measures are intended also to ensure the independence of these offices. **The linkage between them and the Parliament recognises that their powers are exercised for the public within the institutional framework of representative democracy** (emphasis added).⁷*

The matters set out above and in the first s 75 Special Report constitute a call for urgent action by the NSW Parliament. They now find full support in the authoritative statements by the Auditor-General and Mr Walker SC.

⁷ *Report of the Royal Commission into Commercial Activities of Government and Other Matters WA, Part II, Chapter 1, para 1.3.8. See also 1.3.7.*

(a) NSW Auditor-General

*The recommendations in this report outline the principles that should inform the financial arrangements for the integrity agencies. Consistent with the Audit Office of NSW's role in auditing NSW Government departments and agencies, the recommendations are directed to NSW Treasury and the Department of Premier and Cabinet. However, the report recognises that the current role of these entities in the funding arrangements for the integrity agencies poses a threat to their independence. Consequently, **it is important to recognise the important role of the NSW Parliament in determining the appropriate funding model for the integrity agencies.** The audited agencies should consult closely with the NSW Parliament when considering these recommendations to ensure the views of Parliament are reflected appropriately in any changes arising from the implementation of these recommendations. **This recognises the appropriate role of the NSW Parliament in safeguarding the independence of its integrity agencies** (emphasis added).⁸*

(b) Opinion of Bret Walker SC

A copy of the 15 October 2020 Supplementary Opinion of Mr Walker SC has been included in Section One – Appendices to the Auditor-General's report of 20 October 2020. For convenience of reference, a further copy of Senior Counsel's Supplementary Opinion is attached to this Special Report (Appendix 1). The following paragraphs have been extracted from it (emphasis added).

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

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

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

12 *Apart from the indispensable formal role of the Executive in proposing legislation, particularly for an appropriation, it **follows that the Houses are the best suited of all available centres of political power in New South Wales to devise and promulgate a***

⁸ Op cit, NSW Auditor-General's Report, p. 1.

better ICAC funding model. Respectfully, I agree with the Auditor-General that the Houses have an important role - although, for the reasons discussed in my earlier Opinion and above, I would stress that the importance of their role partly comes from the inappropriateness of the Executive, including senior public servants in DPC and Treasury, having any substantive role in devising let alone implementing a proper ICAC funding model.

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

Chapter 5: The legal divide and separation between the Commission and the Executive Government

The NSW Parliament's constitutional authority to act in the public interest in respect of the Commission and its funding has now been enlivened by the gravity of those findings and conclusions of the Auditor-General that identify the risks and threats to the Commission that directly arise from the Executive Government's control and influence over Commission funding and, potentially, its capacity to function according to law, including, in particular, its statutory charter and in line with the fundamental principle upon which it was established by the ICAC Act.

There is now a solid and uncontradicted body of legal and Auditor-General opinion that establishes the current approach to determining the annual funding for the Commission threatens its independence. In this respect, the current funding model fails to recognise and acknowledge the Commission's role and its functions as the state's anti-corruption agency and the fact that it, and its role and functions, are entirely different in law and in operation to those of government departments and agencies.

The system for managing public funds in the public sector is appropriate for departments and agencies that are responsible to ministers but is not at all appropriate for the Commission, which, as noted above, is not responsible to any minister, is independent of the public sector, has the coercive powers of a standing Royal Commission, and by its statutory jurisdiction may, in appropriate circumstances, investigate any elected or appointed public official. Its jurisdiction, in particular, is potentially exercisable over any member of the Executive Government including those involved in its funding decisions.

There is an additional concern. Although control and influence over the Commission and its funding has, to date, been exercised by the Executive, as the opinion of Senior Counsel makes plain, the Executive Government in fact and in law lacks any statutory or other legal authority or legal power in respect of the Commission. That, of course, is separate from the matters to which the reference has been made above. It, however, makes any conduct that even potentially undermines the Commission's independence serious indeed.

The Crown Solicitor's opinion of 13 March 2020 (a copy of which is included in the appendices to the Auditor-General's Special Report) observed that the appropriation framework is enabled by the *Constitution Act 1902*, the annual appropriation Acts and the *Government Sector Finance Act 2018*. It also may be noted that there is, of course, no statutory enactment or common law principle that supports or authorises the Executive Government to act in ways that are contrary to, or that are in conflict with, the Commission's independence, including its funding, and that gives rise to any of the threats or risks to its independence in any of the several respects identified by the Auditor-General.

Chapter 6: The approach to a parliamentary solution

The Commission respectfully now seeks the response of the NSW Parliament to the issues identified in the Commission's Special Report of May 2020 and this Special Report, both made pursuant to s 75 of the ICAC Act, by exercising its role and authority to implement a new funding model that ensures the Commission is properly funded by a mechanism independent of Executive Government control.

As the recognised linkage between the Commission and the Parliament operates to ensure that their respective powers are exercised for the public benefit within the constitutional framework, an efficient and cooperative approach to the establishment of a parliamentary solution is clearly essential.

The Commission remains available, if necessary, at short notice, to engage with the NSW Parliament in the development of practical measures designed to ensure that the overriding and direct involvement of Parliament in its funding arrangements is facilitated.

Finally, it is noted that the core elements of an independent funding model for the Commission have been earlier identified and discussed in the Commission's first Special Report under s 75 of the ICAC Act at pp. 33-39.

Appendix 1 – Supplementary Opinion of Bret Walker SC, 15 October 2020

THE INDEPENDENCE OF ICAC, AND ITS BUDGET PROCESS

SUPPLEMENTARY OPINION

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

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

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

4 The very reason ICAC exists, as explained in my earlier Opinion, renders the integrity of public administration, for which ultimately the government of the day is politically responsible to the Houses and electorally to the people, central to its operations. Corruption in any part of public administration reflects adversely on the whole, to greater or lesser degree according to

circumstances. There is therefore a constant potential for the operations of ICAC to embarrass the Government, to criticize the leadership of the bureaucracy and to affect the political fortunes of Ministers (including the Premier) to whose directions those senior public servants are subject.

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

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

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

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

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

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

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

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

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

Fifth Floor St James' Hall
15th October 2020



Bret Walker