

Ms Leslie Williams MP
Chair
Committee on the Independent Commission Against Corruption
Parliament House
Macquarie Street
SYDNEY NSW

By email: icaccommittee@parliament.nsw.gov.au

Dear Ms Williams

I am writing with reference to the Committee's inquiry: Review of the 2020-2021 Annual Reports of the ICAC and the Inspector of the ICAC.

During my appearance before the Committee on 2 May 2022 I advised that I would provide the Committee with a copy of the recent correspondence between the Premier and the Commission concerning the Government's proposed reform of integrity agency funding arrangements. I am now enclosing a copy of the following:

1. Letter dated 14 February 2022 from the Premier
2. Letter dated 3 March 2022 to the Premier.

The Commission has no objection to either letter being made public by the Committee.

Yours sincerely



The Hon Peter Hall QC
Chief Commissioner

13th May 2022



Dominic Perrottet MP
Premier of New South Wales

Ref: A5259788

The Hon Peter Hall QC
Chief Commissioner
NSW Independent Commission Against Corruption
GPO Box 500
SYDNEY NSW 2001

OFFICIAL Sensitive: NSW Cabinet

Dear Chief Commissioner *Rekn*

I refer to the letter dated 15 July 2021 from the then Chair of the NSW Electoral Commission, the Chief Commissioner of the Independent Commission Against Corruption (ICAC) and the Auditor-General for NSW to the then Premier, the Hon Gladys Berejiklian MP, requesting that the Government delay responding to the Auditor-General's October 2020 report entitled *The effectiveness of the financial arrangements and management practices in four integrity agencies (Auditor-General's report)* to enable further consultation with affected agencies.

I confirm that, following changes in Ministerial arrangements and the allocation of Acts, the Attorney General, the Hon Mark Speakman SC MP, and I will share joint responsibility for the Acts establishing the ICAC, the NSW Electoral Commission, the Law Enforcement Conduct Commission, and the NSW Ombudsman. I also have responsibility for relevant provisions of the *Government Sector Audit Act 1983*, which establishes the office of Auditor-General and the Audit Office.

The Government remains committed to ensuring that the integrity agencies receive sufficient funding to fulfil their important statutory functions. The Government also recognises that, while the annual budget process must be consistent with the constitutional principle that the Government of the day is accountable to the Parliament and the people of NSW for the proper management of the State finances, it should not compromise the actual and perceived independence of the integrity agencies from the Executive.

I am now writing to seek your views, on a Cabinet-in-confidence basis, on proposed reform of integrity agency funding arrangements.

The proposal is that:

- The integrity agencies will remain in the Premier and Cabinet cluster, but will be removed from usual cluster financial management processes in recognition of their independence.
- The funding provided to integrity agencies will be 're-baselined' in the 2022-23 budget to better reflect resourcing needs.
- The budget process for integrity agencies will be enhanced, with measures including that a specialist unit within Treasury will manage representations for budget and supplementary funding and provide the integrity agencies information on funding outcomes. The Treasury representatives will receive specialist training on the unique functions performed by the integrity agencies and their statutory framework to ensure that the independence of the integrity agencies is not compromised during the budget process. A senior Department of Premier and Cabinet official will also be involved in the consideration of funding requests.

- Integrity agencies will be consulted on Treasury's proposed advice to the Cabinet Expenditure Review Committee (ERC), and be provided the opportunity to comment. The Treasurer will provide the integrity agencies, and the relevant Parliamentary Committees with oversight of the integrity agencies, with written decisions on funding bids, and, if relevant, reasons for variation from an agency's bid.
- Contingency funding will be set aside for integrity agencies. Expenditure of contingency funds may be approved by the Treasurer on request, with the request and response also provided to the relevant Parliamentary Committee.
- The Government will agree not to impose any post-Appropriation Act efficiency dividends on the integrity agencies.
- The above matters would be codified in a charter of independence for integrity agencies issued under a Treasury Policy Paper or Treasurer's Direction.

Although I recognise that the proposal differs in some respects from the model proposed by the ICAC in its May 2020 and November 2020 special reports to Parliament, it is intended that this proposal will address the recommendations of Auditor-General's report, while preserving constitutional principles by ensuring that the Government of the day maintains responsibility for the management of the State's finances.

I would be grateful if you could provide feedback on the proposal at your earliest convenience.

If you have any questions about the proposal, please contact [REDACTED],
[REDACTED], Department of Premier and Cabinet on [REDACTED] or by email to [REDACTED].

Yours sincerely

[REDACTED]

Dominic Perrottet MP
Premier

14/2/22

CC: The Hon Mark Speakman SC MP, Attorney General

The Hon Dominic Perrottet MP
Premier
52 Martin Place
SYDNEY NSW 2000

Your Ref: A5259788

Dear Premier

REFORM OF INTEGRITY AGENCY FUNDING

I am writing in response to your letter of 14 February 2022 in which you seek feedback from the Commission on the proposal for reform of integrity agency funding arrangements set out in that letter ("the Proposal").

I welcome your advice that the Government remains committed to ensuring that the integrity agencies receive sufficient funding to fulfil their important statutory functions and your acknowledgement that funding arrangements should not compromise the actual and perceived independence of those agencies from the Executive.

I note that you seek the Commission's views on the Proposal on a "Cabinet-in-confidence basis. The reason for dealing with the Commission's response on such a basis is not clear. The Commission does not consider that it is appropriate that its response be dealt with on such a basis.

The reason for this, at least in part, arises from the Commission's obligation in exercising its functions to maintain the public interest as a paramount concern (s 12 ICAC Act). Funding processes that affect the Commission, of course, involve matters of significant relevance to the community. This in turn requires, in my view, openness in communications concerning it.

The Commission and the Executive

The Commission's position with respect to what needs to be done to ensure that its actual and perceived independence is not compromised through Executive involvement in funding decisions affecting it is set out in its May 2020 and November 2020 special reports to the Parliament. In particular, it is the Commission's position that involvement of the Executive in funding arrangements for the Commission is incompatible with the Commission's independence and that there is a need for an exercise of the NSW Parliament's role and authority in implementing a new funding model that is independent of the Executive. This position is consistent with the observations made by the Auditor-General in her October 2020 Special Report – *The effectiveness of the financial arrangements and management practices in four integrity agencies* ("the Auditor-General's Report"). It is also consistent with the legal Opinion of eminent Senior Counsel Bret Walker SC, a copy of which was annexed to the first of the Special Reports to Parliament referred to above.

The analysis of the existing funding arrangements in the Auditor-General's Report identifies both the lack of transparency and the absence of safeguards as risks to the Commission's statutory independence. In general terms, the risks have been established by the Auditor-General as having arisen from control exercised by the Executive in relation to the Commission's funding (in particular by the NSW Treasury, Department of Premier and Cabinet ("DPC") and Cabinet via the Expenditure Review Committee ("ERC"), such involvement by the Executive has been undertaken without transparency, without independent advice and without any role by the NSW Parliament in the development of the Commission's annual budget or in the process by which supplementary funding is considered and determined.

In relation to the issues of *transparency*, the Auditor-General noted that the assessment of the budget case for the Commission is largely undertaken by NSW Treasury which provides the ERC with Commission funding submissions along with Treasury's advice on the submissions to ERC without there being any disclosure of that advice to the Parliament or to the Commission. The Auditor-General noted¹ that *"there are no mechanisms for the agencies to question the decisions made"* and that, in developing the annual budget, *"There is no independent advice on ICAC's funding requirements."*

The Auditor-General also noted that the NSW Parliament was effectively precluded from the processes associated with annual and supplementary funding of the Commission:

"The NSW Parliament reviews appropriation legislation but it is not involved in the process of developing the annual NSW budget and does not see budget proposals that were made by the integrity agencies during the budget development process. . ."

The Auditor-General further noted that the Parliament is not provided with the reasons for decisions made about the NSW budget.

Whilst the Proposal addresses a number of matters, including transparency that can improve on the present system, it, with respect, fails to address the risks to the Commission's independence and the need for safeguards.

Matters arising in relation to the Proposal

1. In relation to *"Treasury's proposed advice to the Expenditure Review Committee (ERC)"*, provision is made in the Proposal for *"the opportunity to comment"*. However, there is no mechanism proposed for resolving matters of disagreement or contention by the Commission. That omission would permit NSW Treasury to proceed with its assessment, potentially leaving Treasury with the similar advisory role that it currently possesses.
2. If the Auditor-General's observation concerning the present lack of *"independent advice"* to Cabinet is not addressed and corrected, it would continue Cabinet's total reliance upon NSW Treasury advice.
3. The Proposal does not, as recommended by the Auditor-General, make provision for the role of Parliament in relation to the resourcing of the Commission. If accepted, this would fail to implement a key safeguard in ensuring the Commission's statutory independence, the Commission being an independent agency of the NSW Parliament, answerable to it and independent of the Executive.

¹ *The effectiveness of the financial arrangements and management practices in full integrity agencies*, pp 35-36, and as summarised in the Auditor-General's media release on publication of her report pp 2-3

4. The principles that inform the Auditor-General's recommendations were succinctly stated as follows:

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

In addition, the Auditor-General noted:

"The report also notes that the NSW Parliament should be consulted when considering the report's recommendations."

Further,

"Consistent with the Audit Office of NSW's role in auditing NSW Government agencies, the recommendations are directed to NSW Treasury and the Department 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 Proposal is silent on Parliament's constitutional and associated legal role and responsibility to the people in relation to the Commission's resources and its independence.

The Proposal therefore differs substantially not only from the Commission's proposed funding model but also from the approach discussed in the Auditor-General's Report, in particular, on the subject of appropriate safeguards.

Before providing further feedback by the Commission on the Proposal, I seek in this letter clarification on aspects of it so that the Commission is in a more informed position to provide an additional response.

Request for particulars re the Proposal

For ease of reference, I will set out the matters on which the Commission seeks clarification by reference to each of the seven aspects of the Proposal as set out in your letter.

1. *The integrity agencies will remain in the Premier and Cabinet cluster but will be removed from usual cluster financial management processes in recognition of their independence.*
 - a) Why, given the recognised need to ensure that the actual and perceived independence of the Commission is not compromised by involvement of the Executive, is it proposed that the Commission remain part of the Premier and Cabinet cluster or be made part of any other cluster?

2. *The funding provided to integrity agencies will be 're-baselined' in the 2022-23 budget to better reflect resourcing needs.*
 - a) What does this mean?
 - b) How is it proposed that this funding baselining will be conducted and who will be involved in determining what is an appropriate funding baseline for the Commission?
 - c) How would this impact on any budget bid submitted by the Commission as part of the current 2022-23 budget process?
 - d) How would the revised baselining of funding affect the Commission's funding post 2022-23?
3. *The budget process for integrity agencies will be enhanced, with measures including that a specialist unit within Treasury will manage representations for budget and supplementary funding and provide the integrity agencies information on funding outcomes. The Treasury representatives will receive specialist training on the unique functions performed by the integrity agencies and their statutory framework to ensure that the independence of the integrity agencies is not compromised during the budget process. A senior Department of Premier and Cabinet official will also be involved in the consideration of funding requests.*
 - a) Which staff positions within Treasury will form the "specialist unit"?
 - b) Will the "specialist unit" report to the Secretary of NSW Treasury?
 - c) Who will be responsible for undertaking the "specialist training"?
 - d) What role will the "senior Department of Premier and Cabinet official" have in the consideration of funding requests?
4. *Integrity agencies will be consulted on Treasury's proposed advice to the Cabinet Expenditure Review Committee (ERC) and be provided the opportunity to comment. The Treasurer will provide the integrity agencies, and the relevant Parliamentary Committees with oversight of the integrity agencies, with written decisions on funding bids, and, if relevant, reasons for variation from an agency's bid.*
 - a) The Proposal provides for the opportunity to comment on Treasury's proposed advice to the ERC. In the event that the Commission did not agree with Treasury's proposed advice and provided comment setting out its reasons for its disagreement, would a copy of the Commission's response be made available to the ERC to be taken into account in its deliberations?
 - b) Under the Proposal the Treasurer would provide the Commission and its Parliamentary Committee with written "decisions" on funding bids. Are these "decisions" the decisions of Treasury as to what advice will be given to the ERC or the decision of the ERC as to what funding to provide to the Commission?
 - c) At what stage of the funding process is it intended the "written decisions" would be provided to the Commission?

5. *Contingency funding will be set aside for integrity agencies. Expenditure of contingency funds may be approved by the Treasurer on request, with the request and response also provided to the relevant Parliamentary Committee.*

- a) Is it proposed that contingency funding be set aside for integrity agencies as a group or for each agency?
- b) How will the amount of contingency funding to be set aside each year be calculated?
- c) What role would the Commission have in determining the amount of contingency funding to be set aside?
- d) The Proposal provides that the Treasurer "may" approve expenditure of contingency funds. What criteria is it proposed will be used by the Treasurer to determine any application for expenditure of contingency funding?
- e) What pathways would be available to the Commission in the event that it needed additional funding exceeding the available contingency funding?

6. *The Government will agree not to impose any post-Appropriation Act efficiency dividends on the integrity agencies.*

As noted in the Commission's May 2020 special report, the imposition of efficiency dividends pre-Appropriation Act leaves the Commission very vulnerable as it creates no certainty in setting budgets in future financial years and there is a serious question of law in the imposition of such savings where the Executive 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.

- a) In light of the above, will the Government also agree not to impose any pre-Appropriation Act efficiency savings on the Commission?
- b) If not, how will the imposition of such efficiency savings impact on any revised baseline funding level determined through the exercise proposed to be undertaken at point 2 above?
- c) What, if any, steps is it proposed Government would take to specifically examine and assess adverse impacts upon the Commission before determining whether to impose any pre-Appropriation Act efficiency savings or the quantum of any such savings?

7. *The above matters would be codified in a charter of independence for integrity agencies issued under a Treasury Policy Paper or Treasurer's Direction.*

- a) Who will be involved in developing the proposed charter and what role will the Commission have in its development?
- b) Who will be responsible for approving the proposed charter?
- c) What matters would be covered by the proposed charter?
- d) Once such a charter was established, who would have authority to make changes and under what circumstances could changes be made?

I look forward to receiving your response to the above matters.

Yours sincerely



The Hon Peter Hall QC
Chief Commissioner

3 March 2022