

Question 1`

The Hon. MATTHEW MASON-COX: Is that where your concerns are in relation to, potentially, statutory independence restricted mandate? Is that where your concerns primarily lie?

Mr GOODWIN: I might bring the Auditor-General back in because it gets to the opening statement because independence has a budget focus but independence also has other focus, which you have touched on, around the statutory function and the mandate.

Ms CRAWFORD: But the budget process, the way it works, does have some threats to us. So one threat of course is the amount of funding that the government contributes for performance audits because that, by its nature, does determine the number of performance audits we are able to carry out. But even on the financial audits side and our general operations, even though we are raising our own revenue and spending that, we still comply with all the Treasury policies and guidance about expenditure caps and the like. So that could, depending on how those expenditure limits played out, also potentially have some impact. The labour expense cap, for instance—if we had a cap there and then all of a sudden a new agency was created, we would be constrained in our ability to fulfil our mandate based on that expense cap.

Mr GOODWIN: The other thing I was going to say is that with anything, if you have—within our budget envelope for performance audit we are trying to cut 20 audits within that and so we are trying to live within the budget means that we have. Hypothetically, more money could mean more audits. I think sometimes we might feel like there is a personal limit as to how much performance auditing one can process in a given year. But what I would draw out is that the amount of our expenditure, as a size of government, is relatively modest compared to our peers. So the auditors-general do a benchmarking exercise and the amount of expenditure that the Audit Office, as a percentage of government expenditure at the State level, is below the average of our peers, at around 29c for every \$1,000. And for the performance audit mandate, if you think that we are doing \$7.3 million out of a budget expenditure in the last budget of \$83.3 billion, is around 7c for every \$1,000 expended.

The Hon. MATTHEW MASON-COX: What do you think the benchmark is in that regard in other jurisdictions?

Mr GOODWIN: I would have to take it on notice around the performance audit comparator. But in our annual report, I think on page 37, we do outline where we sit against the average. It is an average because we are not calling out various individual audit offices but we have consistently year on year been below that average. In 2020 I think total office expenditure, so that includes financial audits, was 29c for every \$1,000 of expenditure, whereas the average was around 33c. Our performance audit program is relatively small when you look at it in the comparator of our office. So we have an expenditure of \$7.3 million on performance audit out of a total revenue of \$62.8 million.

ANSWER:

The Australasian Council of Auditors-General macro benchmarking of other audit offices does not specifically measure the cost of performance audit relative to public sector expenditure. It only looks at the total cost of running an audit office relative to total public sector assets and expenditure, with the public sector being the sum of the state and local government sectors. Therefore, it is difficult to provide a benchmark of performance audit spend relative to other jurisdictions' sector expenditure. There is no further information that the Audit Office of NSW can add to the answer to this question.

Question 2

The CHAIR: One of the eight places first raises its head, if I could put it that way, is where efficiency dividends are being imposed upon the various agencies, which reduce the funding from the amount in the appropriation bill by whatever percentage is contained in efficiency dividend. Is that right?

Ms CRAWFORD: That is right.

Mr GOODWIN: Yes.

The CHAIR: If that second interpretation is correct, the one that relies upon the purpose of both the statute that establishes the agency and the appropriations bill, it will absence an express statutory power to limit the funding and any effort to limit the funding would not be lawful. Is that correct.

Mr GOODWIN: That is the question that, on a closer examination when you look at the objects of those integrity agencies, we see this is an alternative view and one that should be clarified.

The CHAIR: Could I ask you on notice to look at the answers that Mr Pratt gave in response to the series of questions about the efficiency dividend and the lawfulness of the efficiency dividend? I think he gave answers about that both during the Committee hearing and on notice. Could I ask you to have a look at those on notice and provide us with your assessment of them?

Ms CRAWFORD: Yes.

ANSWER:

Our audit report states that there are two competing interpretations of appropriation legislation that lead to different conclusions about whether there is a clear legal basis for applying "efficiency dividends" to the integrity agencies. The interpretation favoured by NSW Treasury and DPC leads to the view that a Premier can restrict access to appropriation funding that was approved by Parliament. This interpretation is outlined in Mr Pratt's answers to questions at the hearing and in the response from NSW Treasury and DPC to a question on notice and focuses on the following key points:

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

NSW Treasury and DPC's interpretation is consistent with relevant financial legislation and financial administration conventions in New South Wales, but it does not sit well alongside the legislated role and functions of the integrity agencies. An alternative interpretation of Appropriation Acts would consider factors specific to the integrity agencies that differentiate them from other agencies subject to these measures. These factors include:

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

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

Sources

Audit report: <https://www.audit.nsw.gov.au/our-work/reports/the-effectiveness-of-the-financial-arrangements-and-management-practices-in-four-integrity-agencies>

Question 3

The CHAIR: But there would be no constitutional bar to the New South Wales Parliament passing an appropriation bill that provided the funding to agencies, rather than to Ministers, would there?

The Hon. TREVOR KHAN: I think that is rhetorical. The answer is no, there is none.

The CHAIR: No, I ask the question because the answers have been that we have to look at the constitution and other frameworks. I am more than happy for you to take that on notice, Mr Goodwin, if you like.

Mr GOODWIN: The practice has always been to appropriate to the Minister. That has been the practice in New South Wales.

The CHAIR: Could you take on notice and respond as you see fit whether or not you understand that that practice is based on some constitutional requirement or simply just practice?

Mr GOODWIN: I think we can. I try to be helpful but I do wonder whether, that being a legal question around the constitutional framework, it is a question best framed to us, or if is better framed to another organisation within the New South Wales Government that is better placed to provide a legal commentary on the framework.

The CHAIR: I am more than happy that if, on due reflection, that is your answer. You are never obliged to provide a legal opinion.

ANSWER:

The Crown Solicitor's advice in appendix three of the Auditor-General's special report *The effectiveness of the financial arrangements and management practices in four integrity agencies* details the appropriation process as it applies to the four integrity agencies. As this question requires a legal opinion, the Audit Office is not in a position to provide an answer.