

Models for safeguarding the independence of integrity agencies

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This article explores how the independence of New South Wales (NSW) integrity agencies can be safeguarded having regard to how independence is protected in other jurisdictions, such as Victoria and New Zealand. The NSW integrity agencies referred to in this article include the Auditor-General, the Ombudsman, the Independent Commission Against Corruption (ICAC) and counterparts in other jurisdictions, including Victoria and New Zealand. The author has consulted these agencies in undertaking research for this article. While the article examines these agencies in particular, other integrity agencies are also discussed and referred to and some of the options to safeguard independence may also apply to those agencies.

Integrity agencies constitute a significant accountability tool to ensure that the government and Members of Parliament act properly and in the public interest. The effectiveness of integrity agencies in discharging this important role may be curtailed where their independence is compromised by government action.

The article examines key concepts, including the meaning of 'integrity'; the key features of 'integrity agencies' and 'Officers of Parliament', and the benefits of these entities. Also explored in the article is the meaning of 'independence' for integrity agencies. The article then examines the impact of the separation of powers doctrine on the independence of integrity agencies.

The article goes on to explore ways to safeguard the independence of integrity agencies through several legal options:

- amendment of the *Constitution Act 1902* (NSW) to recognise the independence of integrity agencies having regard to the equivalent Act in Victoria;
- legislative change through the establishment of an 'Officers of Parliament Act' which defines particular integrity agencies as 'Officers of Parliament' and the general functions of these agencies, provides an express statement of the independence of the agencies, provides for the appointment and removal of the agency head and staffing arrangements for the agency, and provides information-sharing mechanisms between integrity agencies and funding arrangements; and
- a new funding model drawing on examples from Victoria, New Zealand, NSW and the Australian Capital Territory (ACT).

The article concludes that an available option to safeguard independence of NSW integrity agencies could be the development of a new funding model together with a new 'Officers

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of Parliament Act' that describes the funding process and details a consistent approach to various procedural matters noted above. Any new funding model and associated legislative change would also need to address the fact that Members of Parliament may be subject to investigation and oversight by the ICAC, which could threaten the ICAC's independence (in the same as the executive, whom it also oversees) if Parliament were to determine or make recommendations about the ICAC's budget.

The meaning of 'integrity'

The word 'integrity' is often used loosely.¹ Creyke has identified that the term 'integrity' has a behavioural and a systemic meaning.² The behavioural dimensions of 'integrity' involve characteristics of accountability, honesty, ethics, trust and incorruptibility.³ A system or institution with integrity is one that is 'whole and healthy, that is functioning well, as intended'.⁴ In considering the effectiveness of an integrity system, it is important to assess the operation of the overall system along with the behaviour of the individuals who contribute to or maintain the system.⁵

McMillan notes that 'the label "integrity" is applied to convey that our expectations of government and business go beyond legal compliance and incorporate other expectations such as good decision-making, respect for values that underpin institutional integrity and public virtue, fidelity to the public interest, and lack of corruption'.⁶

Ensuring integrity in government is particularly important where the functions of government expand and change, including through use of outsourced service delivery to the public; use of digital platforms for service delivery that leverage the personal information of the public; and functions that involve coercive or covert powers.⁷ Because of 'this expansion of the role of government, citizens have come to expect more of government, and perhaps place greater reliance on government, and in turn, integrity agencies'.⁸ Therefore, behaviours and systems of integrity are significant to ensure a healthy democracy, where the government is accountable to the public and acts in their interest.

Integrity agencies and their benefits

'NSW has a plethora of bodies which fulfil integrity functions'.⁹ Those bodies are part of the system of integrity but also promote behaviours of integrity through the exercise of their functions. Wheeler notes the complexity of the 'integrity environment'. Some agencies are

1 Robin Creyke, 'An "Integrity" Branch' (Conference Paper, Australian Institute of Administrative Law 2012 National Administrative Law Conference, Adelaide, 19 July 2012) 33.

2 Ibid 34; Chris Field, 'The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability' (Conference Paper, Australian Institute of Administrative Law 2012 National Administrative Law Conference, Adelaide, 19-20 July 2012) 24.

3 Creyke, above n 1.

4 Ibid.

5 Ibid 34.

6 John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 438-439.

7 Field, above n 2, 26.

8 Ibid.

9 TF Bathurst and NA Wootton, 'The Courts and Integrity Bodies: Constitutional Conundrums' [2018] *The Journal of the NSW Bar Association* 9.

'avenues of review for people aggrieved by administrative decision-making' (such as the Ombudsman), whereas others have a 'largely quasi-law enforcement type role of uncovering crime, corruption, fraud ... Different again would be auditors general who are neither avenues of review ... nor quasi-law enforcement bodies'.¹⁰

The terms, 'integrity agency' and 'oversight agency' are often used interchangeably in the academic literature. However, I prefer to use the term 'integrity agency' rather than 'oversight agency' because the function of oversight may be one of many functions of an integrity agency. Indeed, as the NSW Ombudsman has observed, the NSW Electoral Commission, 'for example, does not just oversight elections: it also runs them'.¹¹ So to describe the Electoral Commission as an 'oversight agency' would not adequately capture its role.

An integrity agency is one that is instrumental in upholding the systemic and behavioural qualities of integrity, that underpins responsible government, and that is accountable to the public. Categorising agencies as 'integrity agencies' better signals their role than use of the word 'oversight'.

The key features of integrity agencies in general are:

- They are established by statute (made by Parliament) which sets out their functions.
- The heads of integrity agencies are appointed by the Governor on advice from the government (executive).
- Agency heads have fixed terms and there is usually parliamentary control of their dismissal.
- Their functions involve checking and oversight on the exercise of public power and the use of public money.
- They have investigative powers and functions, including coercive powers.
- They report to Parliament through annual reporting and are accountable to oversight committees of Parliament.¹²

Integrity agencies strengthen the system of responsible government and they:

- improve public trust in government;
- enhance accountability of the government to the public;
- enhance the quality of government decision-making and processes through the availability to the public of review and law enforcement mechanisms;

10 Chris Wheeler, 'Response to the 2013 Whitmore Lecture by the Hon Wayne Martin AC, Chief Justice of Western Australia' (2014) 88 *Australian Law Journal* 746.

11 NSW Ombudsman, Submission No 8 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 18 November 2019, 6.

12 *Ibid* 8–9.

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- set standards for appropriate behaviour, decision-making and systems that are implemented to effectively serve the public; and
 - enable the development of specialised independent agencies with core expertise that function more efficiently and effectively than if the scrutiny function were undertaken by the Parliament.¹³

Officers of Parliament

Independent Officers of Parliament are types of integrity agencies established by statute that are independent of the executive and assist Parliament in carrying out its responsibilities of scrutinising the actions of the government.¹⁴ Officers of Parliament usually include the Ombudsman, the Auditor-General and the Electoral Commissioner. In Victoria, ‘the Auditor-General, the Ombudsman, the Electoral Commissioner, the Victorian Inspector and the Independent Broad-Based Anti-Corruption Commission (IBAC) Commissioner are currently all designated Independent Officers of Parliament under various pieces of legislation’.¹⁵ The NSW Audit Office (NSWAO) has identified Australian jurisdictions that have Officers of Parliament. These include Victoria, Queensland, Western Australia and the ACT. New Zealand also has Officers of Parliament.¹⁶

The NSW Ombudsman suggests ‘there would be benefit in pursuing broader reform that recognises the special status of integrity agencies as Officers of Parliament’.¹⁷ The ICAC has also identified a symbiotic relationship between itself and the Parliament and considers that the role of the ICAC 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’¹⁸ (which significantly includes ministers and Members of Parliament). It is important to note here that the threat to independence (referred to below) where integrity agencies investigate the executive also occurs in respect of the Parliament, as the ICAC can investigate politicians. Accordingly, where the funding of integrity agencies is determined by either the executive or the Parliament, similar impacts upon the independence to investigate may arise.

In the ‘Westminster-style Parliaments, [“Officer of Parliament”] has come to imply a special relationship of accountability to Parliament and an independence from the Executive’.¹⁹

In 1989, the New Zealand Parliament’s Finance and Expenditure Committee developed five criteria for creating an Officer of Parliament:

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- 13 Jaimie Baxter, ‘From Integrity Agency to Accountability Network: The Political Economy of Public Sector Oversight in Canada’ (2014) 46 *Ottawa Law Review* 259.
 - 14 Jon Breukel et al, *Independence of Parliament* (Research Paper No 3, Parliamentary Library & Information Service, Department of Parliamentary Services, Parliament of Victoria, 2017) 19.
 - 15 Ibid.
 - 16 Audit Office of New South Wales, *The Effectiveness of the Financial Arrangements and Management Practices in Four Integrity Agencies* (Special Report, 2020) 13.
 - 17 NSW Ombudsman, above n 11, 7. It is noted that the Commonwealth Auditor-General and the Ombudsman are officers of Parliament under their respective legislation.
 - 18 NSW Independent Commission Against Corruption, *A Parliamentary Solution to a Funding Model for the ICAC* (Special Report, 2020) 10.
 - 19 Lesley Ferguson, ‘Parliament’s Watchdogs — New Zealand’s Officers of Parliament’ (2010) 25 *Australasian Parliamentary Review* 133.

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- An Officer of Parliament must only be created to provide a check on executive power.
 - An Officer of Parliament must only discharge functions that the Parliament, if it so wished, might carry out (this excludes entities exercising judicial functions). An Officer of Parliament is therefore ‘an arm of the legislative branch’.²⁰ This criterion aligns with the separation of powers paradigm.
 - An Officer of Parliament should be created only rarely — in other words, it should not apply to the plethora of bodies which fulfil integrity functions in the jurisdiction.
 - Parliament should periodically review the appropriateness of each Officer of Parliament’s status.
 - Each Officer of Parliament should be created in separate legislation principally devoted to that position.²¹

The key characteristics of the Officer of Parliament model are:

- The Officers are established by an Act of Parliament.
- There is parliamentary involvement in their appointment and dismissal — this is directed to minimising politically partisan appointments. In New Zealand, the Officer is appointed and removed by the Governor-General on recommendation and address respectively to the Governor-General by the Parliament.
- There is a statutory parliamentary committee responsible for budget approval and oversight of Officers of Parliament.
- There is a specific parliamentary committee to whom the Officer of Parliament is required to report.²²

The meaning of ‘independence’

‘Independence’ denotes at a minimum that integrity agencies are not accountable to a minister. If they were, there would be a ‘direct tension’ affecting the ‘ability of the agency to effectively review the actions’ of the executive.²³ Independence means these agencies can ‘exercise significant discretion in how they undertake their role of integrity oversight’.²⁴ This aligns with their role (akin to that of the Parliament) of keeping ‘a check on the government’ and reporting back to Parliament.²⁵

The ICAC has referred to the former Premier’s (the Hon Nick Greiner MP) second reading speech for the Independent Commission Against Corruption Bill, which describes the independence of the ICAC:

²⁰ Ibid 134.

²¹ Ibid 135; Public Accounts and Estimates Committee, Parliament of Victoria, *Report on a Legislative Framework for Independent Officers of Parliament* (2006) 31.

²² Public Accounts and Estimates Committee, above n 21, 33.

²³ Wayne Martin, ‘Forewarned and Four-Armed: Administrative Law Values and the Fourth Arm of Government’ (2014) 88 *Australian Law Journal* 121.

²⁴ Field, above n 2, 30.

²⁵ Breukel et al, above n 14, 2.

The Commission will have 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.²⁶

The NSW Ombudsman observes that integrity agencies should not be ‘entirely independent in the sense of being accountable to no-one’.²⁷ Indeed, the functions of these agencies are limited by statute and they are generally accountable to Parliament.²⁸ The ICAC and the Law Enforcement Conduct Commission (LECC) are oversighted by inspectors that report to Parliament (ss 57B, 77A and 77B of the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act); and ss 122, 140 and 141 of the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act)). Independence from the executive must be balanced by accountability to Parliament.²⁹ The NSW Ombudsman goes on to observe that independence from the executive is conditional, where the executive controls the budget process for integrity agencies.³⁰

Stuhmcke observes that ‘independence of an Ombudsman is a “cherished norm” ... independence of an Ombudsman allows a powerless individual to question a powerful government on an equal footing. Without independence, or the perception of independence, this ethical or therapeutic element of an ombudsman’s role is diminished’.³¹ Stuhmcke goes on to observe that the Ombudsman investigates a ‘split executive’ — the political, elected government and the unelected, ‘relatively unaccountable’ public service:

It is here that the Ombudsman renders the unaccountable accountable. For this to work citizens must share belief in the independence of the ombudsman ... as investigations are usually carried out in the absence of the public and the credibility of ombudsman therefore is related to an ability to be perceived to be separate from the State.³²

Baxter notes four dimensions of formal independence of integrity agencies:

- the status of the agency head, including their term of office, appointment, dismissal and renewal procedures;
- the agency’s relationship with elected politicians (that is, the executive and the Parliament), including statutory declarations of independence, obligations and duties, and whether the agency’s decisions can be overturned;
- the agency’s financial and organisational arrangements, including its source of budget, internal organisation and control over human resources; and
- the agency’s regulatory competencies, including its powers to set policy, monitor or investigate performance and sanction misbehavior.³³

26 NSW Independent Commission Against Corruption, Submission No 2 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 6 November 2019, 6.

27 NSW Ombudsman, above n 11, 6.

28 Ibid.

29 Ibid 8.

30 Ibid 10.

31 Anita Stuhmcke, ‘Australian Ombudsman: A Call to Take Care’ (2016) 44 *Federal Law Review* 546.

32 Ibid 547.

33 Baxter, above n 13, 241.

A fifth dimension of independence was identified by the Victorian Public Accounts and Estimates Committee in 2006 — namely, ‘the reporting requirements for the agency and whether its performance is monitored’.³⁴

The Australasian Council of Auditors General (ACAG) has examined³⁵ Australian and New Zealand audit legislation against eight core independence principles identified by the International Organisation of Supreme Audit Institutions (INTOSAI) as essential for public sector auditing. These principles are:

1. an effective statutory legal framework;
2. independence and security of tenure for the head of the audit institution;
3. full discretion to exercise a broad audit mandate;
4. unrestricted access to information;
5. a right and obligation to report on audit work;
6. freedom to decide the content and timing of audit reports and to publish them;
7. appropriate mechanisms to follow-up on audit recommendations; and
8. financial, managerial and administrative autonomy and availability of appropriate resources.³⁶

ACAG has observed that the ACT³⁷ has the strongest independence safeguards, followed by New Zealand³⁸ and Victoria,³⁹ and ‘Independence safeguards continue to be less well developed in NSW’.⁴⁰

The impact of the separation of powers doctrine on the independence of integrity agencies

Separation of powers doctrine

The doctrine of the separation of powers was developed during the Enlightenment of the 18th century. This was a period when political philosophers were developing modern democratic theory. In 1748 one of them, Baron de Montesquieu, identified three branches

34 Public Accounts and Estimates Committee, above n 21, 9. Ferguson describes this as Thomas’ five indices of independence: Ferguson, above n 19, 141.

35 The purpose of this examination is to identify and compare a range of independence safeguards for auditors general across the jurisdictions.

36 Australasian Council of Auditors General, *Independence of Auditors General: A 2020 Update of Australian and New Zealand Legislation* (2020) 1.

37 The ACT has ‘improved safeguards in its statutory framework, appointment and immunity mandate and discretion, follow-up mechanisms and office autonomy’: *ibid* 12.

38 ACAG has noted ‘New Zealand’s overall position continues to be strongly supported by its safeguards over appointment and immunity, wide mandate and office autonomy’: *ibid* 12.

39 Of Victoria, ACAG observes that it ‘retains its constitutional protection from Executive influence and has added new protections through its significantly expanded mandate and greater access to information’: *ibid* 12.

40 Australian Council of Auditors General, above n 36, 11.

of government in the separation of powers. He considered that effective separation required functional separation (no branch of government should exercise a function belonging to the other) and physical separation (no individual should be able to be a member of more than one branch of government at the same time).⁴¹

The separation of powers is an important doctrine underpinning democracy:

[It will reduce] abuse of power and prevent tyranny or oppression from occurring, as might be the case under a dictatorship or when undemocratically elected governments hold power. According to this principle, the three main institutions of government: the legislature, executive and judiciary, are maintained as separate entities in order to provide effective checks and balances upon each other, thus preventing power from becoming centralised in any one entity. To protect and preserve the democratic system, these three bodies must remain separate and independent and be respected for their independent status.⁴²

In Australia there is a separation of legislative, executive and judicial power in in the structure and text of the *Australian Constitution*.⁴³ Chapter I of the *Constitution* vests legislative power in the Parliament — that is, the Parliament has the power to make laws. Chapter II provides that the Governor-General (as the Queen’s representative) and on advice of the Executive Council (being responsible ministers of the Crown) exercises executive power. This is the power to administer laws. Chapter III gives, among other things, judicial power to the High Court of Australia and other federal courts. Courts decide whether the law has been correctly formulated and applied in determining disputes.

McMillan observes that the separation of powers is the ‘most important doctrine in analysing government legal accountability’.⁴⁴

There is an ‘increasing trend towards executive dominance’ in the tripartite paradigm, with members of the executive being Members of Parliament and able to control and dominate Parliament.⁴⁵ Anita Stuhmcke has observed that parliaments are generally under the thrall of the executive, except where the government is a minority in the upper house or dependent on the support of independents or minority parties in the lower house.⁴⁶ Parliaments ‘have become mere rubber stamps of approval for legislation and other enactments formulated by Cabinet’.⁴⁷ These observations are significant because, if the funding model of integrity agencies in NSW is to change to include a greater role for the Parliament (see below), there will still be issues with political partisanship. Funding of integrity agencies cannot in my view be an apolitical process, but it can be a more transparent one. In this regard, I note the ICAC can investigate both ministers and Members of Parliament who are ‘public officials’ under the ICAC Act. This is significant because any funding model that involves the executive or the

41 Bede Harris, *Constitutional Law Guidebook* (Oxford University Press, 2015) 25; Peter Cane, ‘Executive Primacy, Populism and Public Law’ (2019) 28 *Washington International Law Journal* 546.

42 Breukel et al, above n 14, 4.

43 There is no formal separation of powers in NSW under the *Constitution Act 1902* (NSW): Anne Twomey, *The Constitution of New South Wales* (The Federation Press, 2004) 203.

44 McMillan, above n 6, 423.

45 Breukel et al, above n 14, 9.

46 Anita Stuhmcke, ‘Australian Ombudsmen: Drafting a Blueprint for Reform’ (2017) 24 *Australian Journal of Administrative Law* 55.

47 Ibid.

Parliament may threaten this agency's investigative independence where it can investigate politicians who may also make decisions about its funding.

The executive generally decides who is appointed — whether as heads of integrity agencies or judicial appointments. The executive decides how the branches are funded via the annual appropriation process, which accords with constitutional requirements. The ultimate dependency of the other branches on government endorsement through appointments and funding may affect their independence and the ability to freely supervise. This impact on independence has been examined in various Australian jurisdictions, including NSW and Victoria.⁴⁸ Ways to address this are explored further below.

On 'separation of powers analysis', integrity agencies are generally positioned in the executive branch. This positioning could potentially compromise their independence from the government, whom they oversight. This article explores the alignment of integrity agencies with the Parliament, which under the tripartite paradigm arguably better fits with their function of holding government to account. That said, similar tensions may exist between the integrity agencies and the Parliament where integrity agencies have power to oversight members of Parliament.

McMillan notes the academic discourse about the Ombudsman not being independent because they are appointed by the Governor for a fixed term; and they rely 'on an annual budget,' as well as practising 'a close working relationship with agencies'.⁴⁹ However, McMillan extends this discourse by observing:

There is no obvious empirical evidence on which to conclude that those features weaken the independence of the Office, and indeed high public profile of the Office for being an accountability 'watchdog' suggests the contrary. If anything, the history of the Office in Australia suggests the need for a more sophisticated and contemporary understanding of principles such as 'independence' and 'accountability'.⁵⁰

McMillan's observation is important because it demonstrates that the relationship between integrity agencies and the three branches is complex and overlapping. The ways integrity agencies can be independent and accountable may be understood not only by their relationship with the executive under constitutional principles but also having regard to the broader workings of the public sector and the other arms of responsible government.

Wherever integrity agencies are positioned in the tripartite paradigm, their essential role in the integrity system should involve functional independence from the government and championing, in the public interest, oversight of government.

Justice McHugh has observed that a strict separation of powers is difficult to implement, and in Australia:

the system of party politics, the doctrine of responsible government and the Executive's desire for an efficient and practical working government have combined to weaken and to some extent erode, the

48 Breukel et al, above n 14, 19.

49 McMillan, above n 6, 437.

50 Ibid.

doctrine of the separation of powers. If there was a pure separation of governmental power, effective government would be impossible.⁵¹

The executive and the legislature cannot in practice operate separately because ‘gridlock’ in the conduct of government business would ensue if they could not agree.⁵² This is an important observation — while the doctrine is key to understanding governmental power and ensuring that the exercise of that power is balanced and monitored, in my view it cannot be slavishly followed in a 21st century democracy.

Accordingly, as Creyke observes, ‘the tripartite division has been under strain. This has forced a rethink of our foundational beliefs about the optimum structure of government’.⁵³ I take up McMillan’s invitation to rethink the separation of powers doctrine.⁵⁴ In my view, the tripartite separation of powers does not adequately reflect systems of government and justice in Australia. As Justice Gummow has observed, ‘the emergence of the modern regulatory state and of the bureaucracy to run it only serves to demonstrate that the tripartite division of powers, sourced 250 years ago in the Enlightenment, today provides an inadequate constitutional structure’.⁵⁵ As Weeks suggests, perhaps it is a political arrangement that should be renegotiated by the branches to better reflect what they do and how government operates.⁵⁶ Cane has also observed that:

We might conclude that while Montesquieu’s tripartite analysis of government was a work of genius in the eighteenth century, it now hinders public lawyers from understanding and analysing modern government. Instead of three powers, we have identified at least six: electoral power; coercive power; executive power; bureaucratic power; legislative power; and judicial power.⁵⁷

Separation of powers — integrity agencies

Dennis Pearce, former Commonwealth Ombudsman, observed in 1991 that ‘during my period as Commonwealth Ombudsman, I felt that I stood in a position that was part-way between the Executive and the Judiciary’.⁵⁸ In this regard, Stuhmcke observes that the critical issue is whether the integrity agency is ‘perceived as part of the machinery of government’ or whether it advances ‘the political autonomy of the ability of a citizen to argue against government decision-making’.⁵⁹

The separation of powers necessitates tension between the branches and, as Stuhmcke has observed, it is ‘indicative of a well-oiled government’.⁶⁰ However:

[If the] tension persists, it damages the public interest. For example, if the Ombudsman is continually criticized, the authority of its role may be undermined and public confidence in the integrity and impartiality

51 MH McHugh, ‘Tensions Between the Executive and the Judiciary’ (2002) 76 *Australian Law Journal* 569.

52 *Ibid.*

53 Creyke, above n 1.

54 McMillan, above n 6.

55 WMC Gummow, ‘A Fourth Branch of Government?’ (Paper, Australian Institute of Administrative Law 2012 National Administrative Law Conference, Adelaide, 19 July 2012) 20.

56 Greg Weeks, ‘Soft Law and Public Liability: Beyond the Separation of Powers?’ (2018) 39 *Adelaide Law Review* 318.

57 Cane, above n 41, 559.

58 Stuhmcke, above n 31, 544.

59 *Ibid.*

60 *Ibid* 551.

of the Ombudsman may be diminished. Continuing conflict is also likely to induce the Executive ... to prevail on the Legislature to review, reduce or abolish the jurisdiction of the Ombudsman with the result that the rule of law may be undermined.⁶¹

McMillan notes that a fourth branch of government comprising a variety of independent oversight bodies may be considered a way of 'institutionalising the concept of integrity in government'. But he goes on to say that it 'is premature — perhaps idle — to think of a fourth branch as having a constitutional footing (although that is now the case in Victoria for the Auditor-General and Ombudsman)'.⁶² Thinking about a fourth branch in respect of the separation of powers is a means to analyse the relationship of integrity agencies with the various arms of government.

Former NSW Chief Justice James Spigelman observed that:

the integrity branch or function of government is concerned to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.⁶³

The Chief Justice 'says it is not a separate, distinct branch, because many of the three recognised branches of government, including the Parliament, the head of state, various executive agencies and the superior courts, collectively constitute the integrity branch of government'.⁶⁴ Accordingly, it is arguable that the separation of powers doctrine supports the maintenance of a system of integrity to which integrity agencies are but one significant part.

Separation of powers — independence

It is clear from the foregoing analysis that the thinking about how integrity agencies can operate independently must be considered having regard to the separation of powers. To be a check and balance on governmental power, an integrity agency needs to be functionally separate from the executive. If, in order to safeguard their independence, integrity agencies are to be classified as Officers of Parliament (defined above) or their funding determined by Parliament then this should be considered having regard to the legislature being separate to the executive and having a key role in scrutinising the government.

While it is recognised by academics and lawyers that the paradigm may be an oversimplification and not a current reflection of the nuances and complexities of modern governmental power, the separation of powers paradigm nonetheless assists to identify the importance of the independence of integrity agencies in performing oversight and holding the government to account in the public interest. Further, the paradigm enables us to consider the position of integrity agencies in the broader system of government in which each arm is directed to integrity and accountability of itself and each other.

61 Ibid.

62 McMillan, above n 6, 441.

63 James Spigelman 'The Integrity Branch of Government' (2001) 31 *AIAL Forum* 2–3.

64 David Solomon, 'What is the Integrity Branch?' (Conference Paper, Australian Institute of Administrative Law 2012 National Administrative Law Conference, Adelaide, 19 July 2012) 26.

Safeguarding independence — legislative change

Constitution Act

Stuhmcke observes that across ‘Federal, State and Territory jurisdictions there is an absence of constitutional protection or sanction for either the traditional functions of the office’ of the Ombudsman or for its ongoing transformation of function.⁶⁵

Victoria, however, is an example of an Australian jurisdiction in which there is constitutional recognition of integrity agencies. The Victorian Auditor-General’s status and the Ombudsman’s status are protected in ss 94B and 94E respectively of the *Constitution Act 1975* (Vic). The sections expressly state that each is an independent Officer of the Parliament. Under s 18, a referendum would be required to change these provisions in the Victorian *Constitution*.⁶⁶

In Victoria, the Auditor-General was made an independent Officer of Parliament in 1997 following amendments to the *Audit Act 1994* (Vic). The position was embedded in the *Constitution Act 1975* (Vic), which:

- enshrined provisions relating to the appointment, independence and tenure, remuneration,⁶⁷ suspension and dismissal of the Auditor-General;
- enshrined the discretionary power for the Auditor-General to carry out audits in any way considered appropriate; and
- strengthened the relationship between the Auditor-General and the Parliament.⁶⁸

The Ombudsman and the Electoral Commissioner are also independent Officers of Parliament under the Victorian *Constitution*, but, unlike the Auditor-General, the *Constitution* only specifies the arrangements relating to their discretion in performance or exercise of their functions or powers, and suspension and dismissal arrangements. All other arrangements are specified in their respective enabling legislation.⁶⁹

The difficulty in changing how the Victorian Auditor-General is appointed, for example, is that the appointment provision is enshrined in the *Constitution*, requiring a referendum to amend under s 18 of the Victorian Constitution Act. It is therefore not easy to adapt legislatively to changing requirements for integrity agencies where the relevant provisions are entrenched in the *Constitution*.⁷⁰

65 Stuhmcke, above n 31, 537.

66 ACAG observes that ‘[a]lthough relatively rare in Westminster-style governments, constitutional provision is used much more widely internationally. An INTOSAI survey found that 79 of 113 Supreme Audit Institutions are established and have the mandates enshrined in their countries’ Constitution’: Australasian Council of Auditors General, above n 36, 15.

67 In Victoria, the *Constitution* mandates appropriation of the Auditor General’s remuneration. The *Constitution* protects the Auditor General’s remuneration from being reduced.

68 Breukel et al, above n 14, 21.

69 Public Accounts and Estimates Committee, above n 21, 7.

70 Ibid 72.

Following a referendum in 1995, the *Constitution Act 1902* (NSW) was amended to entrench the independence of the judiciary so that a judicial officer may only be removed by address of both houses of Parliament for proved misbehavior or incapacity.⁷¹ Both houses must reach agreement and then jointly petition the Governor. The provisions in the NSW *Constitution* protecting the independence of the judiciary can only be changed by referendum.⁷²

It may be possible to include similar provisions in the NSW Constitution Act for integrity agencies. However, there is less flexibility to change legislative provisions entrenched in the *Constitution*. It is arguable that there is a need for legislative flexibility for integrity agencies given their evolving functions and the changing nature of government and bureaucracies.

Amendment of the NSW Constitution Act to include integrity agencies may be seen as a powerful symbolic gesture but may not of itself necessarily achieve practical independence for those agencies (as is evident from the experience in Victoria, where the same concerns about independent funding have been raised as in NSW).

While it is open to amend the NSW Constitution Act to recognise the independence of integrity agencies, this article examines other options to safeguard independence.

Officers of Parliament Act

Each integrity agency explored in this article is established by separate legislation. Each Act is slightly different in how it describes the agency, its functions, whether there is an express statement of independence of the agency, how the head of the agency is appointed and removed, staffing arrangements and information sharing with other agencies.

There is scope to consider development of a new 'Officers of Parliament Act' in NSW that sets out these requirements and ensures they are consistent. It would harmonise the powers of those agencies (for example, Royal Commission powers; power to obtain Cabinet information). The 'Officers of Parliament Act' could sit alongside the existing Acts under which the integrity agencies are constituted, and where their functions are set out. The author acknowledges the work of the former NSW Ombudsman and now NSW Crime Commissioner, Mr Michael Barnes, on these issues.

The Victorian Auditor-General, Ombudsman and IBAC Commissioner have previously stated:

We propose consistency in provisions governing the appointment, tenure, immunity, removal and remuneration of our roles and seek to maximise the involvement of the Parliament rather than the Executive in these areas. This is particularly important for the process of allocated budgets: the Parliament, not the Government, should determine funding and other resources for independent officers.⁷³

There is an accountability benefit of such procedural legislation applying consistently to integrity agencies, as it makes it easier to assess whether they are doing the right thing — that is, acting within power and independently.

⁷¹ Twomey, above n 43, 308.

⁷² *Ibid* 309; *Constitution Act 1902* (NSW) s 7B.

⁷³ Breukel et al, above n 14, 21.

It is suggested that the following could be included in a new ‘Officers of Parliament Act’ in NSW:

- an express statement of independence of integrity agencies — that they cannot be directed on the exercise of discretionary powers or operational matters.⁷⁴ It is noted that the NSWAO does not have standalone audit legislation where the independence of the Auditor-General is explicitly mandated.⁷⁵ Similarly, the *Ombudsman Act 1974* (NSW) does not expressly state the Ombudsman is independent. A legislative example of such a statement is in s 2A of the ICAC Act, which provides that ‘the principal objects of this Act are to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body’ with specified functions. See also s 22 of the LECC Act, which provides for the independence of the LECC and commissioners. The section says, ‘The Commission and Commissioners are not subject to the control or direction of the Minister in the exercise of their functions’;
- a definition of ‘Officer of Parliament’ indicating what agencies the Act applies to. An example of this kind of definition in legislation is the definition of ‘investigating authority’ in s 4 of the *Public Interests Disclosures Act 1994* (NSW). The former NSW Ombudsman Mr Michael Barnes suggested the following NSW agencies as suitable Officers of Parliament: Auditor-General, Electoral Commissioner, ICAC and ICAC Inspector, Information Commissioner, Inspector of Custodial Services, LECC, LECC Inspector, Ombudsman and Privacy Commissioner. In identifying these agencies, he noted that their role is to provide a check on executive power and/or support the operation of the Parliament.⁷⁶ This is a broader category than that identified in New Zealand;
- the agency head of the integrity agency is appointed and removed by the Parliament as opposed to the Governor on advice from the executive. Stuhmcke suggests they could be appointed by unanimous resolution of Parliament.⁷⁷ ACAG observes that if ‘the appointment is made directly by or on the recommendation of the Parliament or a Committee of Parliament, it ensures that the appointee has the confidence of the Parliament and enhances the transparency of the appointment process’.⁷⁸ There should also be clearly stated grounds for removal. A legislative example of removal with parliamentary involvement is cl 4 of Sch 2 of the *Electoral Act 2017* (NSW); cl 7 of

74 ACAG considers that legislation ‘that explicitly mandates the independence’ of the Auditor-General is ‘an essential component of an effective legislative framework’: Australasian Council of Auditors General, above n 36, 15.

75 Evidence to Public Accountability Committee, NSW Parliament, Sydney, 23 October 2020 (Auditor-General for New South Wales) 2.

76 Michael Barnes, ‘Parliamentary Statutory Officers — Who, How and Why’ (Conference Paper, Legalwise Seminar — Practice, Procedure and the Law of Parliament, Sydney, 27 March 2019).

77 Stuhmcke, above n 46, 57.

78 Australasian Council of Auditors General, above n 36, 21. The ACAG observes that the ACT, Northern Territory, New Zealand and Victoria are the only jurisdictions that ensure the appointment of the Auditor-General is made on a recommendation of the Parliament or a parliamentary committee. By contrast, the Commonwealth and NSW continue to enable a parliamentary veto of an appointment proposed by executive.

Sch 1 of the ICAC Act; cl 5 and 6 of Sch 1 of the *Government Sector Audit Act 1983* (NSW); and cl 4 of Sch 3 of the *Public Audit Act 2001* (NZ);

- agency head tenure — Stuhmcke suggests the ideal term should be longer than the usual term of Parliament.⁷⁹ This provides agency heads with tenure security, ‘freeing them from the potential pressures and conflicts involved in seeking reappointment’.⁸⁰ ACAG suggests, ‘[t]he duration or term of appointments is a significant contributor to independence. The term needs to be long enough to enable the development of independence and to enable the incumbent to effectively “steer” the Audit Office. There is also a case to be argued for keeping the term short enough to avoid the incumbent becoming complacent or “stale” in the role and to enable the introduction of contemporary thinking’.⁸¹ As to reappointment of the agency head, ACAG suggests reappointment is ‘undesirable ... because it might compromise independence. Where an incumbent is eligible for reappointment, as the time for reappointment approaches, the incumbent could become reluctant to criticise, or seek prominence by being overly critical or controversial. An option for reappointment could also enable the Executive to exert pressure on an incumbent. This is more likely if the Executive makes the appointment’;⁸²
- agency head remuneration — see, for example, s 6 of the *Government Information (Information Commissioner) Act 2009* (NSW) (GIIC Act); see also cl 5, Sch 3 of the *Public Audit Act 2001* (NZ). ACAG notes that remuneration in New Zealand, the Commonwealth, NSW, Western Australia and the ACT is determined by an independent tribunal;⁸³
- the agency reports to Parliament on functions through annual and special reports, which are tabled and publicly available, ‘thereby improving the public’s ability to participate in agency monitoring’.⁸⁴ See, for example, the special and annual reports provisions in ss 75 and 76 of the ICAC Act;
- staff of the agency are employed by the agency head, who has employer functions. It is noted that staff of the ICAC and the NSWAO are not employed under the *Government Sector Employment Act 2013* (NSW) (GSE Act) but under their respective Acts: s 5 of the GSE Act. Similarly, in New Zealand, staff are employed by the Chief Ombudsman and not under public sector legislation: s 11 of the *Ombudsman Act 1975* (NZ). ACAG suggests this is a ‘truly independent staffing model’.⁸⁵ An agency’s independence could be diminished if anyone other than the agency head has control over agency staff, including the power to dismiss them;

79 Stuhmcke, above n 46, 57.

80 Baxter, above n 13, 242.

81 Australasian Council of Auditors General, above n 36, 22.

82 Ibid.

83 Ibid 16.

84 Baxter, above n 13, 245.

85 Australasian Council of Auditors General, above n 36, 47. ACAG notes that NSW remains the only Australian jurisdiction to have removed its Audit Office from the public service and created it as a statutory body. The Audit Office is also defined as a ‘separate GSF agency’ under the GSF Act. Being defined as a separate GSF agency brings with it an ability to not comply with a direction from the Treasurer or a Minister if the Auditor-General considers that the requirement is not consistent with the exercise of the statutory functions of the agency: Australasian Council of Auditors General, above n 36, 48–49.

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- information sharing permitted between integrity agencies — see, for example, the information-sharing provisions in Div 5 of Pt 3 of the GIIC Act. ACAG suggests that auditors-general ‘should have adequate powers to obtain timely, unfettered, direct, and free access to all the necessary documents and information for the proper discharge of their statutory responsibilities. The information they obtain using their information gathering powers should be protected from inappropriate disclosure’;⁸⁶
 - funding of the agency — see discussion of funding models below.

Safeguarding independence — changing the funding model

Threats to the independence of integrity agencies in NSW

In its October 2020 special report the NSWAO observed that the current funding model in NSW for integrity agencies ‘poses a threat to their independence’.⁸⁷ The LECC and the ICAC have expressed support for the NSWAO’s findings in that report.⁸⁸ Key threats to independence identified by the NSWAO include:

- providing of additional funding from the Department of Premier and Cabinet (DPC) to integrity agencies (namely, those in the DPC cluster). The government has stated it has provided additional funding to the ICAC having regard to the agency’s ‘essential role in preserving the health of our democracy’.⁸⁹ The issue with this particular threat to independence, as the NSW Ombudsman has highlighted, is that it ‘confers on the Secretary of DPC a de facto discretion to approve or veto the exercise of particular functions’ by the integrity agency.⁹⁰ The NSW Ombudsman observes that, even if ‘the Secretary provides the funding, the perception that his or her approval was needed at all undermines the perception of independent and impartial oversight’.⁹¹ The NSW Government has acknowledged the ‘theoretical risk to the independence of the integrity agencies relating to the provision of additional funding from DPC ... this theoretical risk has never materialised or eventuated in practice. The ICAC, for example, has received supplementary funding from the Government on every occasion that the ICAC has requested it for at least the last ten years’.⁹² This pattern of supporting supplementary funding requests suggests a very low risk that a request for supplementary funding from an integrity agency would be refused, particularly where refusal could lead to a perception of interference with the activities of that integrity agency;
- applying efficiency dividends and budget savings to integrity agencies. The government has indicated that practically budget savings have not been required of integrity agencies within the DPC cluster for 2019–20;⁹³

86 Ibid 33.

87 Audit Office of New South Wales, above n 16, 1.

88 Law Enforcement Conduct Commission, Submission No 10a to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 30 September 2020; NSW Independent Commission Against Corruption, above n 18, 5.

89 NSW Government, Submission No 56 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 10 December 2019, 5, 7.

90 NSW Ombudsman, above n 11, 20.

91 Ibid.

92 Audit Office of New South Wales, above n 16, 57.

93 NSW Government, Answers to Questions on Notice to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 30 January 2020, 3.

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- requiring integrity agencies to report to DPC on activities and outcomes. In her evidence before the NSW Parliamentary Accountability Committee Inquiry, the Auditor-General observed that her office has been ‘requested to participate in outcomes budget reporting as part of the DPC cluster arrangements ... it is a request not a direction’.⁹⁴ Outcomes budgeting is described in the NSW Treasury *Policy Paper 18-09*. Outcome budgeting provides a ‘common framework that covers total budget spend’ to ‘increase transparency and accountability for public funds and promote greater value from public spending’.⁹⁵ The Auditor-General in her evidence before the committee expressed support ‘in general terms’ for the outcome budgeting process.⁹⁶

The NSWAO has said that:

The current approach to determining annual funding for the integrity agencies presents threats to their independent status. The approach is consistent with the legislative and *Constitutional* framework for financial management in New South Wales, but it does not sufficiently recognise that the roles and functions of the integrity agencies ... are different to other departments and agencies.⁹⁷

This observation is significant because, while it refers to the threat to independence caused by the current funding model, the NSWAO also notes that the current funding model for annual appropriation is lawful and constitutional. Further, of the current financial management arrangements in NSW, the NSWAO has previously opined that ministers are lawfully entitled to withhold approval for expenditure to agencies, including integrity agencies.⁹⁸

As to the above observation about threats to independence, the NSWAO goes on to say that the NSW financial management system is designed to determine funding for departments and agencies responsible to ministers.⁹⁹ There is insufficient separation in terms of the interests of the executive and the functions of the integrity agency, and the tension between these manifests in funding decisions. In this regard, the NSWAO identifies ‘the risk that funding decisions could be influenced by previous or planned investigations by the integrity agencies. This risk has the potential to limit the ability of the integrity agencies to fulfil their legislative mandate’.¹⁰⁰

The NSW Ombudsman has observed of the current funding model that:

A process of budget setting for independent oversight bodies that involves directly trading their funding requirements against all of the other funding options available to Government for its manifold activities fails to recognise that:

- the functions of these bodies comprise an essential institutional infrastructure that is necessary to assure that any of those other activities can be pursued with public trust and legitimacy; and
- the mandates of the independent oversight bodies are immutable (at least in the absence of long-term legislative amendment); they are distinct from and transcend whatever

94 Evidence to Public Accountability Committee, above n 75, 12.

95 NSW Treasury *Policy Paper 18-09 Outcome Budgeting* (December 2018) 1.

96 Evidence to Public Accountability Committee, above n 75, 14.

97 Audit Office of New South Wales, above n 16, 4.

98 NSW Government, above n 93, 2; Audit Office of New South Wales, *Compliance of Expenditure with Section 12A of the Public Finance and Audit Act 1983* (Special Report, 2019).

99 Audit Office of New South Wales, above n 16, 4.

100 Ibid.

happens to be the political mandate, objectives and priorities of the Government of the day.¹⁰¹

Where funding for integrity agencies derives from annual appropriation in NSW and is determined by the government,¹⁰² this indelibly links integrity agencies to the executive and ‘subordinates’ them to the executive where the latter makes determinations about financial resourcing of integrity agencies.¹⁰³ This creates a ‘perception that these bodies really are part of the machinery of the Executive government’.¹⁰⁴

The NSW Ombudsman has identified the following threats to independence:

- the impact of financial dependency on the executive, which may cause integrity agencies to ‘go soft’ when scrutinising government agencies; and
- the inability to investigate because of limited funding where funding competes against funding for other government priorities.¹⁰⁵

The potential to ‘go soft’ when an integrity agency exercises its scrutiny function because of the funding paradigm may occur not only in respect of government agencies but also it could arise in respect of corrupt government and non-government Members of Parliament who may participate in the parliamentary committee that determines funding (see discussion of funding models below). This scenario may be realised in circumstances where a parliamentary committee determines or makes recommendations about funding for the ICAC because the ICAC is empowered to investigate corrupt Members of Parliament.

Ultimately, integrity agencies need adequate funding to fulfil their legislative mandate and an ‘under-resourced office is unable to carry out [its] mandate effectively. It risks becoming part of the problem — namely an unsatisfactory interaction between a citizen and the agencies of government — rather than a means by which that relationship can be improved, and injustice avoided when disputes or misunderstandings arise’.¹⁰⁶

The NSWAO has identified ‘threats’ to independence but has not stated that any of these have eventuated, although the ICAC has suggested that the risk to independence is real, noting the 2016 budget cuts caused it to reduce staff, which in turn impacted its ability to conduct investigations and discharge its statutory functions.¹⁰⁷ In its November 2020 special

101 NSW Ombudsman, above n 11, 10–11.

102 Section 5A of the *Constitution Act 1902* (NSW) provides that, in circumstances where there is disagreement or deadlock between the houses of Parliament about an Appropriation Bill, the Legislative Council ‘has the power to suggest amendments’ by message to the Legislative Assembly: Twomey, above n 43, 571. However, the section goes on to provide that ‘the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented to the Governor ... and shall become an Act of the Legislature upon the Royal Assent ... notwithstanding that the Legislative Council has not consented to the Bill’.

103 NSW Independent Commission Against Corruption, *The Need for a New Independent Funding Model for the ICAC* (Special Report, 2020) 29.

104 NSW Ombudsman, above n 11, 13.

105 *Ibid* 14.

106 *Ibid* 13.

107 Evidence to Public Accountability Committee, NSW Parliament, Sydney, 12 December 2019 (Independent Commission Against Corruption; Law Enforcement Conduct Commission; NSW Electoral Commission; NSW Ombudsman; NSW Parliament) 4.

report, the ICAC also observed that the risk to independence identified as theoretical ‘fails to address the underpinning legal framework for the Commission, which prohibits any risk — theoretical, potential and actual — arising from the activity of the Executive Government’.¹⁰⁸

Interestingly, the NSWAO is different from the other integrity agencies explored in this article, as it is largely self-funded, deriving revenue from charging auditees for the cost of financial audits.¹⁰⁹ The NSWAO receives a government contribution to cover the cost of carrying out performance audits and the cost of reporting to Parliament on the results of financial audits.¹¹⁰ However, even with this self-funded model, there may be constraints on independence where, for example, the NSWAO may experience pressure to tailor the findings of the financial audit to the expectations of the agency that is paying for the audit. However, the author is not aware that this has ever actually occurred.

Existing safeguards to protect independence may not be enough

The NSWAO has identified limitations to existing safeguards to independence, namely:

- The annual Appropriation Bill must be approved by Parliament — on its face this enables parliamentary oversight of funding by government. However, Members of Parliament do not see the initial budget proposals from the agency and are not aware of what proposals have been rejected or partially approved after Treasury and Expenditure Review Committee (ERC) decisions. The NSW Government submission to the Parliamentary Accountability Committee Inquiry touched on the Parliament’s role in the budget process and through its oversight committees. However, ICAC has observed that ‘there is no effective action that members of the Legislative Council can take to change the amounts set out in the Appropriation Bill’ introduced by the Legislative Assembly¹¹¹ (other than suggest amendments under s 5A of the *Constitution Act 1902* (NSW)).
- Agencies may raise issues with Parliament about funding or operations through annual and special reports, appearances before oversight committees or via the annual budget estimates hearings in Parliament — this is an important accountability measure to ensure, among other things, that integrity agencies are ‘accountable for the use of public resources’ and the way in which finances are managed.¹¹² However, these avenues do not enable the Parliament to change or reconsider funding amounts or the funding process, as that is not currently their role.¹¹³ While the committees do not make funding decisions, they can make recommendations to government and may report to both houses of Parliament on any matter relating to the integrity agencies they oversight, including funding matters. In its final report, the NSW Public Accountability Committee considered parliamentary oversight committees should be empowered to review

108 NSW Independent Commission Against Corruption, above n 18, 6.

109 NSW Legislative Council Public Accountability Committee, Parliament of NSW, *Budget Process for Independent Oversight Bodies and the Parliament of NSW — Final Report* (2021) 29.

110 Auditor-General of New South Wales, Submission No 57 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 16 October 2020, 4. ACAG notes NSW ‘is the only jurisdiction to make provision for additional resources to be made available for directed audits, but at the discretion of the Treasurer’: Australasian Council of Auditors General, above n 36, 32.

111 NSW Independent Commission Against Corruption, above n 103, 29.

112 NSW Government, above n 89, 8.

113 Audit Office of New South Wales, above n 16, 3, 12, 20.

the annual budget submissions of each agency and make recommendations as to funding priorities.¹¹⁴

A new funding model in NSW that increases transparency

The current funding process lacks transparency because of Cabinet confidentiality. In this regard, the Audit Office has described the NSW budget process and appropriation framework in its October 2020 special report. Key elements of the current budget process are:

- integrity agencies are grouped with departments for budget purposes;
- integrity agency budgets are included in annual budget papers as well as their likely budgets for the following three years ('forward estimates');
- if an integrity agency wants an increase to its appropriation funding from the amount in the forward estimates, it must prepare a budget proposal to NSW Treasury;
- as 'independent entities' integrity agencies can make their proposals directly to Treasury rather than via the DPC cluster (like other cluster agencies);
- once submitted, the integrity agency proposals are subject to the same processes and considerations as other agencies and departments — for example, Treasury may choose not to progress a proposal to the ERC if it considers the proposal does not meet budget guidelines;
- after integrity agency proposals are submitted, Treasury briefs the ERC on the proposals that have been progressed for consideration and the ERC makes the final decision about budgets for integrity agencies;
- ERC discussions are Cabinet-in-confidence, which means the reasons for decisions made by the ERC are not made public or provided to integrity agencies. The briefings Treasury provides to the ERC are also Cabinet-in-confidence and are not made public or shared with the integrity agencies;
- the decisions made during the budget development process are reflected in the annual Appropriation Bill that specifies amounts withdrawn from the Consolidated Fund in line with the *Constitution Act 1902* (NSW);
- the Appropriation Bill is introduced in the Legislative Assembly by the Treasurer. A Bill relating to appropriations can become law even without approval of the Legislative Council, consistent with the constitutional requirement for the government to initiate appropriation legislation;
- while Parliament is provided with the Bill and budget papers with information about funding amounts specified in the Bill, Parliament is not involved in the process of developing the annual NSW budget and does not see budget proposals that were made by integrity agencies during the budget development process; and

114 NSW Legislative Council Public Accountability Committee, above n 109, recommendation 1, ix.

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- the annual appropriation appropriates funding to the Premier, not directly to the integrity agencies, and reflects the principle that ministers are accountable to Parliament for expenditure of public funds. In practice, the Premier delegates expenditure of money to the head of each integrity agency in the cluster under the *Government Sector Finance Act 2018* (NSW) (GSF Act).

Transparency is desirable for the NSW budget process for integrity agencies. This is to ensure that the agencies and the public have visibility of funding decisions. This is important for integrity agencies who play a significant role in holding the government and Members of Parliament to account. If decisions about their funding impact the agency's ability to discharge their integrity functions, it is necessary that the government is accountable for that to the public in whose interest the government (and the integrity agencies) act.

Increasing transparency in the funding of integrity agencies would go some way to demonstrate how the government is funding them and the sector from the Consolidated Fund, having regard to the 'State's broader financial position and the need to ensure that all essential services are provided to a standard that meets public expectations'.¹¹⁵ Transparency leads to accountability of funding decisions across government.

In its October 2020 special report the NSWAO suggests that there should be an accountable NSW funding model for integrity agencies where the current threats to independence are overcome.¹¹⁶ A key element of this suggested increased transparency is increasing the role of Parliament and separating integrity agencies from inclusion in the NSW financial management paradigm, which includes clusters, efficiency dividends and outcomes budgeting.

Funding integrity agencies — the New Zealand model

A funding model supported by some NSW integrity agencies, including the NSWAO and the NSW Ombudsman, is the New Zealand approach (adopted by their unicameral Parliament). In New Zealand, there are three Officers of Parliament: the Controller and Auditor General, the Ombudsman and the Parliamentary Commissioner for the Environment.¹¹⁷ The application of appropriations in New Zealand as they apply to Offices of Parliament is set out in s 26E of the *Public Finance Act 1989* (NZ).

Ferguson has described the funding process in New Zealand for Officers of Parliament thus:

- The Minister of Finance initiates the annual funding process with Officers of Parliament by asking them to submit directly to the Officers of Parliament Committee (of Parliament) an estimate of expenses and capital expenditure for the next financial year and any top-up funds required for the current financial year.
- The Officers' budget bids are submitted to the Officers of Parliament Committee for consideration and report.

¹¹⁵ NSW Government, above n 89, 7.

¹¹⁶ Audit Office of New South Wales, above n 16, 9.

¹¹⁷ NSW Ombudsman, above n 11, 28.

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- The committee hears evidence from the officers (in private) and asks Treasury for advice on the appropriateness of the budget bids. Treasury also advises the committee on the criteria issued by the Cabinet within which Budget bids are to be considered.
 - The Officers of Parliament Committee reports to the House. The NSW Audit Office also noted that the committee assesses financial and performance matters of the Officers, including recommending appointments of agency heads, appointing external auditors and developing or reviewing codes of conduct.¹¹⁸
 - The House recommends to the Governor-General by way of address that the estimates be included for each Officer of Parliament in the Annual Appropriation Bill. This is a pre-budget approval of each officer's appropriation before their estimates are presented to the House.¹¹⁹

Significantly under the New Zealand model, the 'funding process for officers of Parliament is determined by the House because the functions to be funded are those of the House itself, if it wished it might perform'.¹²⁰ The New Zealand Parliament does not make decisions about entities that do not perform functions of a parliamentary nature.¹²¹ Officers of Parliament are not part of the government under the New Zealand model.

Under the New Zealand model spending and performance of Officers of Parliament are reviewed by separate subject select committees.¹²² There is a case for the oversight committee of the Officer of Parliament to be the same committee that reviews the budget. This ensures the committee has oversight of financial, operational and performance matters and centralises functional and financial accountability of integrity agencies.

The New Zealand Officers of Parliament Committee is chaired by the Speaker, 'thus ensuring that it is seen as an important parliamentary committee, rather than one dominated by the Executive'.¹²³ There are four government members and four opposition members on the committee as well as the Speaker and assistant speaker.¹²⁴

This alternative funding model enables transparency of funding (where Parliament can see the budget) and disentangles the funding of integrity agencies from funding for other government priorities.

New Zealand is ranked first with Denmark on the Corruption Perceptions Index, which means the perception of public sector corruption is low.¹²⁵ Australia is ranked 11th on the

118 Audit Office of New South Wales, above n 16, 13.

119 Ferguson, above n 19, 136–137.

120 Ibid 140.

121 Ibid.

122 Ibid 144; Oonagh Gay, 'Officers of Parliament — A Comparative Perspective' (Research Paper No 03/77, Parliament and Constitution Centre, House of Commons Library, 2003) 19.

123 Gay, above n 122, 19.

124 Ibid.

125 Transparency International, Corruption Perceptions Index 2020 <<https://www.transparency.org/en/cpi/2020/index/nzl>>.

index with Canada, Hong Kong and the United Kingdom.¹²⁶ Transparency and accountability of government has a significant impact on the perception of corruption in government.

Bret Walker, in his advice to ICAC, has opined that:

the constitutional responsibility of the Houses of Parliament in relation to appropriations provides the obvious cue for a better funding model for ICAC ...

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 better ICAC funding model ... 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.¹²⁷

Although there is transparency under the New Zealand model, it is important to note the constitutional convention of budget secrecy which protects budget-related information from disclosure during the preparation of the budget. However, the question of disclosure in this regard is subject to a balancing exercise weighing prejudice to the budget's effective preparation against the public interest in favour of disclosure.¹²⁸ It is now usual for the New Zealand Government to release budget papers one month after budget day.¹²⁹

Funding integrity agencies — the Victorian model

The role of Parliament in funding decisions for integrity agencies is also operative in Victoria, where the budget of the IBAC, Ombudsman and Victorian Inspectorate is determined each year in consultation with the Parliamentary Integrity and Oversight Committee.¹³⁰ The IBAC differentiates in its budget between 'core work' and additional projects considered on a case-by-case basis.¹³¹ A business case must be submitted to the committee for consideration if IBAC believes it requires more funding for additional work during the year.¹³²

On 1 July 2020, legislative changes came into effect in Victoria under Pt 5 of the *Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Act 2019*. In her second reading speech on the Bill, the Victorian Attorney-General, Minister for Workplace Safety, the Hon Ms Hennessy MP, said:

This Bill will amend the budget processes of the IBAC Commissioner, Ombudsman and Victorian Inspector to require: the Ombudsman's, IBAC's and the Victorian Inspectorate's draft budgets to be determined in consultation with the Integrity and Oversight Committee; the Ombudsman, IBAC and the Victorian Inspectorate to prepare an annual plan to be considered in conjunction with the draft budget by the Integrity and Oversight Committee; and the Ombudsman's, IBAC's and Victorian Inspectorate's annual appropriations to be specified in the Parliament Appropriation Bill. These reforms aim to strengthen

126 Ibid.

127 Audit Office of New South Wales, above n 16, 53–54.

128 New Zealand Parliament, 'Chapter 33 The Process of Supply' in *Parliamentary Practice in New Zealand* (2017) <<https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/chapter-33-the-process-of-supply/>>.

129 Ibid.

130 NSW Ombudsman, above n 11, 30; NSW Audit Office, above n 16, 12.

131 Audit Office of New South Wales, above n 16, 12.

132 Ibid.

the independence of these bodies in a manner that accords with their status as 'independent officers of Parliament'. The Ombudsman, IBAC and the Victorian Inspectorate will no longer appear under the Department of Premier and Cabinet's annual appropriation. They will be vested with full responsibility for the financial management and financial services that support their annual appropriation allocation. The reforms will strengthen their relationship with Parliament and bring their budget processes in line with other independent officers of Parliament, namely the Auditor General and the Parliamentary Budget Officer ...

The Victorian Auditor-General's Office (VAGO) already received its annual appropriation within Parliament's annual Appropriation Act.¹³³ However, the Bill comes directly from Treasury. Therefore, the Parliament Appropriation Bill may be seen as 'nothing more than a symbolic concession to Parliament — as it has not resulted in greater protection of its independence from the Executive'.¹³⁴ Section 77 of the *Audit Act 1994* (Vic) provides that the Auditor-General's budget for each financial year is to be determined in consultation with the parliamentary committee concurrently with the annual plan under s 73.

Significantly, despite these recent funding reforms in Victoria, the Victorian Ombudsman has observed in the *Annual Report 2019–20* that:

The independence of my budget, while welcome, does not ensure it, and once again my ongoing funding has fallen substantially short of what is needed to respond to public expectations of my office. The funding of integrity agencies should be above the politics of the day — a principle even more important given our mandate to investigate the Government. Trust in Government risks being fundamentally diminished, as the Ombudsman's independence is widely known and respected, and new powers without funding are a meaningless gesture.¹³⁵

Similarly, the IBAC Commissioner commented in October 2020:

Securing our budget independence, which came into effect on July 1 this year, was an important step as it ended our previous direct financial relationships with any department. However, adequate resourcing of IBAC remains an ongoing concern ... Exposing and preventing corruption cannot be adequately done on a static, inadequate budget ...¹³⁶

This commentary suggests that, even though there is direct appropriation to integrity agencies in Victoria, there remains concern about the amount of money allocated and that the decision about the amount of funding allocated resides with Treasury and thus independence of the integrity agencies may be compromised.

In a recent research paper the Victorian Parliament proposed that independent Officers of Parliament (described above) are 'funded under the Parliamentary Appropriation Bill and for their appointments to be made by Parliament through its Presiding Officers, rather than by the government. This would separate them from the executive and delineate their functions more clearly under Parliament'.¹³⁷ The paper goes on to say that, in 'order for these entities to be truly independent, the Parliamentary Appropriation Bill would need

133 Breukel et al, above n 14, 22.

134 Ibid 55.

135 Victorian Ombudsman, *Annual Report 2019–20 (2020)* <<https://assets.ombudsman.vic.gov.au/assets/Reports/Annual-Reports/Annual-Report-2019-20-and-Annual-Plan-2020-21.pdf?mtime=20201202085254>>.

136 Independent Broad-Based Anti-Corruption Commission, 'Message from the Commissioner — October 2020', IBAC Insights, Issue 25, October 2020 <<https://www.ibac.vic.gov.au/publications-and-resources/ibac-insights/issue-25/message-from-the-commissioner---october-2020>>.

137 Breukel et al, above n 14, 19.

to be determined in consultation with each entity and delivered not by the government, but by the Speaker of Parliament'.¹³⁸ In its March 2020 and February 2021 reports the NSW Public Accountability Committee suggested funding be allocated to integrity agencies directly through the appropriation legislation rather than to the relevant minister: recommendation 3. This recommendation was made so integrity agencies are not subject to funding reductions in the financial year. This approach to funding is also supported by the NSW Electoral Commissioner.¹³⁹

Other funding models

The ACT Electoral Commission receives ongoing recurrent funding that is determined in consultation with the Parliamentary Committee for the Electoral Commission.¹⁴⁰ The Treasurer can veto the amount sought but must table a document that explains the reasons.¹⁴¹

In the ACT, specified officers have been designated under legislation as 'Officers of the Assembly' — namely, the Auditor-General, Ombudsman, Integrity Commissioner, Inspector of the Integrity Commission and members of the ACT Electoral Commission.¹⁴² These officers have special status because 'they perform independent oversight and integrity roles which require a high degree of separation from Executive government'.¹⁴³ They are appointed by the Speaker with agreement of the relevant standing committee. Budget protocols have been developed between the Speaker and the Treasurer, which establish procedures for the development of budgets for Officers of the Assembly.¹⁴⁴

Another funding model identified is the 'judicial council' for funding of courts, seen in South Australia and Victoria.¹⁴⁵ These states have implemented centralised funding to minimise the executive's control of court's financial arrangements.¹⁴⁶ The judicial council is established by legislation and comprises representatives from state courts and tribunals: 'The executive determines the amount of funding, which is paid to the judicial council, which then has autonomous powers to administer and fund the courts.'¹⁴⁷

A further funding model example is the Court Services Victoria (CSV) established under the *Court Services Victoria Act 2014* (Vic) as an independent statutory body. The CSV provides administrative services to Victoria's courts and tribunals.¹⁴⁸ Victoria's courts and tribunals are independent from the executive and are accountable to Parliament for their appropriation

138 Ibid 19–21.

139 Evidence to Public Accountability Committee, above n 107, 27.

140 Audit Office of New South Wales, above n 16, 12.

141 Ibid.

142 Office of the Legislative Assembly for the Australian Capital Territory, Submission No 3 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 7 November 2019, 2.

143 Ibid.

144 ACAG has observed that the ACT now has the strongest independence safeguards because of the 2020 legislative amendments making the Auditor General an Officer of the Legislative Assembly: Australasian Council of Auditors General, above n 36, 11.

145 Breukel et al, above n 14, 18.

146 Ibid.

147 Ibid.

148 Ibid.

and operations.¹⁴⁹ Control and responsibility for funding and administration of courts sits with the CSV and no longer the Department of Justice and Regulation (the executive).¹⁵⁰

Funding models proposed by the ICAC and the NSW Ombudsman

The ICAC has also proposed a model which involves Parliament scrutinising and determining appropriations assisted by an independent expert assessment. In this regard, the NSWAO has observed that integrity agencies are ‘there to service the Parliament of the day and the citizens of NSW’. It is that distinction that requires unique funding arrangements for integrity agencies.¹⁵¹

The ICAC proposes that the Presiding Officers of Parliament appoint an ‘eminent person’ as the ICAC’s budget assessor to establish the ICAC’s fixed core annual budget and report to the Presiding Officers. This report would be tabled in Parliament and Parliament would approve the budget to be appropriated.¹⁵² The April 2020 opinion that Mr Bret Walker gave to the ICAC considers that a ‘parliamentary solution’ best supports institutional independence and accountability of the ICAC.¹⁵³ Mr Walker opines that a ‘parliamentary solution need not involve legislation only, as the procedures of the Houses’ can also be utilised.¹⁵⁴

The ICAC has referred to existing statutory models in NSW that are like the funding model the ICAC proposes — namely, the Statutory and Other Officers Remuneration Tribunal (SOORT) under the *Statutory and Other Officers Remuneration Act 1975* (NSW). The SOORT is a person appointed by the Governor to determine remuneration ranges for statutory and other officers with the support of two assessors. The SOORT provides reports to the responsible Minister, which are published in the *Gazette* by the Minister. They are laid before both houses of Parliament, which can pass a resolution to disallow the determination. The SOORT is also required to give effect to government policy on remuneration that also applies to the NSW Industrial Relations Commission.¹⁵⁵

Similar is the Parliamentary Remuneration Tribunal established under the *Parliamentary Remuneration Act 1989* (NSW).¹⁵⁶ This Tribunal also consists of one person appointed by the Governor, with others appointed to assist the Tribunal. The Tribunal reports on determinations about salaries, expenses, and allowances payable to members of Parliament. The report is tabled in each house of Parliament and published in the *Gazette*. The Tribunal can conduct inquiries and invite submissions.¹⁵⁷

The ICAC model allows for a flexible component — supplementary funding to meet unforeseen contingencies. If satisfied the supplementary funding is required, the ICAC budget assessor can publish in the *Gazette* and in a special report to Parliament the additional funds

149 Ibid.

150 Ibid.

151 Evidence to Public Accountability Committee, above n 75, 3.

152 NSW Independent Commission Against Corruption, above n 103, 5.

153 Ibid 17.

154 Ibid.

155 NSW Independent Commission Against Corruption, above n 26, 39.

156 Ibid.

157 Ibid.

to be provided. The additional funds would be appropriated without the need for special appropriation legislation.¹⁵⁸

The ICAC suggests the fixed and flexible funding amounts should not be subject to efficiency dividends or other cost-saving measures imposed by the government. The ICAC draws on a Commonwealth precedent where the Office of the Inspector-General of Intelligence and Security was exempted from the application of efficiency dividends imposed on Commonwealth agencies in the 2015–16 budget.¹⁵⁹ Similarly, the LECC suggests it should not be ‘subject to the wholesale “one size fits all” budget cuts which are applied across the public service’. The LECC suggests a ‘more nuanced approach’ is taken to determining its budget, having regard to its functions.¹⁶⁰

The NSW Ombudsman proposes the following ‘alternative or enhanced budget process’¹⁶¹ largely derived from the New Zealand model:

- The budget-setting process should be overseen by a parliamentary committee rather than by Treasury/Cabinet — the committee should be broadly representative of Parliament, with members who are not ministers.
- Treasury and the government must be given the opportunity to provide advice on funding, and all advice should be made public. Once the committee has considered all advice (including Treasury advice) and has set the funding amount, that amount should not be reopened by the government.
- The budgets for integrity agencies and the Parliament should be set in advance of the government budget-setting process.
- The budgets for integrity agencies and the Parliament should be assessed separately — if a single funding allocation was made to Parliament and then split amongst the integrity agencies, this would not address the current tensions and issues with budget allocations.
- In setting budgets for integrity agencies and the Parliament, advice from Treasury and the government on the overall fiscal position of the State may be relevant.
- The government should be able to approve additional grant funding where the work of integrity agencies contributes to the Premier’s Priorities and other government priorities or outcomes.
- Budgets for integrity agencies need to be set having regard to their specific statutory mandates and business models — even though the same budget process may be applied to all integrity agencies, the way those agencies are funded may differ.
- Funding of integrity agencies should be considered and adjusted whenever their functions or jurisdiction changes.

158 NSW Independent Commission Against Corruption, above n 103, 30.

159 Ibid 31.

160 Law Enforcement Conduct Commission, Submission No 10 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 18 November 2019, 5–6.

161 NSW Ombudsman, above n 11, 31–35.

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- Quarterly reviews should be conducted to allow for repurposing of unused contingency funding and supplementary funding requests — as to the latter, see, for example, s 4.13 of the GSF Act. This aspect of the proposed process would support the ICAC, which has identified an inability to ‘undertake accurate forecasting given the nature of corruption investigations’.¹⁶² It is suggested that there needs to be inbuilt flexibility in the process that allows for supplementary funding requests to be made and transparently considered. The Public Accountability Committee, in its March 2020 and February 2021 reports, suggested the annual budget include a set contingency fund to address unbudgeted financial demands: recommendation 2.
 - The budget-setting process should be embedded in legislation.
 - Integrity agencies should continue to be held accountable for their financial management and performance — the parliamentary oversight committee should consider and report on the activities of the integrity agency against its budget plans. Consideration may be given to the committee obtaining expert advice on performance and expenditure of funds.
 - Integrity agencies should no longer be publicly represented as being part of the ‘DPC cluster’. In its March 2020 and February 2021 reports, the Public Accountability Committee agreed with this: recommendation 4.

In its March 2020 and February 2021 reports the Public Accountability Committee noted there were a number of problems with the current funding arrangements for integrity agencies and suggested ‘the relevant parliamentary oversight committee established for each body should be allowed to review the budget submission for each agency’ and make recommendations as to the funding priorities: recommendation 1.

Conclusion

This article has explored several options for safeguarding the independence of NSW integrity agencies having regard to how independence is protected in other jurisdictions, such as Victoria and New Zealand.

A new funding model, together with legislative changes, may offer an opportunity to further support independence of integrity agencies in NSW.

A possible funding model could draw on the model proposed by the NSW Ombudsman but align with the fundamental principles of representative and responsible government where the government of the day is politically and electorally accountable for the management of the State’s finances.¹⁶³

‘Fundamental to the system of government in New South Wales is the capacity of the Executive to impose taxation for the purposes of raising revenue and to appropriate that revenue for

¹⁶² NSW Independent Commission Against Corruption, above n 103, 25.

¹⁶³ NSW Government, above n 89, 7.

the provision of public services and the implementation of government policies.¹⁶⁴ As s 5A of the *Constitution Act 1902* (NSW) makes clear, in circumstances where there is disagreement or deadlock between the houses of Parliament about an Appropriation Bill, although the Legislative Council 'has the power to suggest amendments', the Legislative Assembly may direct that the Bill (with or without any amendment suggested by the Legislative Council) be presented to the Governor to become an Act of Parliament. Accordingly, any new funding model must align with constitutional requirements and the primacy of the government for Appropriation Bills.

Further, any funding model that involves oversight by a parliamentary committee would also need to address the fact that Members of Parliament may be subject to investigation and oversight by the ICAC. It would potentially pose a threat to the ICAC's independence (in the same way as the executive, whom it also oversees) if the parliamentary committee were to determine or make recommendations about the ICAC's budget. A possible new model could therefore allow for referral of the ICAC's budget to an independent person to assess the ICAC's funding requirements.¹⁶⁵

The importance of preserving the independence of integrity agencies is to enable them to effectively discharge their important role of overseeing government and Members of Parliament to ensure they act properly and in the public interest.

164 NSW Legislative Council, 'Chapter 17, Financial Legislation' in *NSW Legislative Council Practice* (2008) <<https://www.parliament.nsw.gov.au/lc/proceduralpublications/Documents/Chapter%2017%20Financial%20legislation.pdf>>.

165 The ICAC has suggested that this person could be 'an independent officer of the Parliament appointed by the Presiding Officers of Parliament. The mechanism could be similar to that under which the Parliamentary Budget Officer is appointed': NSW Independent Commission Against Corruption, above n 103, 33–34. The ICAC sets out the proposed role of the 'ICAC Budget Assessor' in its May 2020 Special Report: *ibid* 35–36.