

13 May 2022

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Dear Premier and Attorney

Government response - Budget process for independent oversight bodies and the Parliament of New South Wales Final Report

The Department of Premier and Cabinet (DPC) has sent me a copy of the final [Government Response](#) to the Public Accountability Committee's (PAC's) *Budget process for independent oversight bodies and the Parliament of New South Wales Final Report* ([Report 7, 5 February 2021](#)).

The Government has indicated that, although it does not accept all of the PAC's recommendations, it will make other changes to the funding process for integrity agencies.

Those changes are generally consistent with the proposals that were put to us in draft earlier this year. As I indicated at that time, I am supportive of those changes because they reflect an improvement to the current funding process.

In particular, I support the proposals that:

- the integrity agencies be removed from the DPC cluster financial management processes
- efficiency dividends (which presumably includes any such global 'savings' measures, however they may be titled) not be applied to integrity agencies
- there be increased public transparency of funding decisions, including any variations from funding submissions
- a contingency fund for the integrity agencies be established.

I also note the Government's commitment to enhancing the budgets of the integrity agencies to ensure they have adequate and sustainable funding to fully perform their statutory functions, by way of a 're-baselining' exercise.

As you know, my office made detailed submissions to the PAC, and those submissions align with the PAC's recommendations.¹ Our views have not changed from what was set out there.

We continue to support the PAC's and Auditor-General's recommendations, while welcoming the important but more modest changes (noted above) that the Government has put forward.

The Government's written response to the PAC recommendations includes brief reasons as to why it has or has not accepted the various recommendations. I take the opportunity to comment on those stated reasons in respect of two recommendations that have not been accepted by the Government.

- (a) The first is the PAC's recommendation that the integrity agencies be removed from the DPC cluster entirely.

The Government's response gives, as its reason why the integrity agencies are to remain within the DPC cluster, the following: *"as their enabling legislation will continue to be administered by the Premier"*.

There is, however, no legal or other necessary connection between the allocation of the administration of legislation and clustering arrangements. The allocation of the *Constitution Act 1902* to the Premier does not mean that the legislature falls within a DPC cluster. Likewise, that the *Ombudsman Act 1974* is administered by the Premier does not mean that the Ombudsman must be in the DPC (or any other) 'cluster'.

Clusters are an administrative not legislative – and certainly not constitutional – concept, and they have been put in place by recent governments to support the better management and co-ordination of the Executive Government's administrative departments and related agencies (effectively a form of 'super-department').

I remain of the view that it is not appropriate for independent integrity agencies to be 'clustered' under a department, recognising that integrity agencies are – and should be seen to be – fully independent of any department.

If the Government's rejection of this recommendation is based on an assumption that it must necessarily follow that an office is in the DPC cluster if the administration of its governing legislation is allocated to the Premier,² then I would respectfully request that this recommendation be reconsidered, as that is not correct.

- (b) The second is the PAC's recommendation for a parliamentary oversight committee to review the annual budget submissions of each agency and make recommendations as to the funding priorities.

The Government response rejects this recommendation, indicating as its reason for doing so that to have *'Parliamentary oversight committees review budget bids or advise Government prior to those decisions being made'* would be inconsistent with *'the principles of Cabinet confidentiality and responsible government'*.

There is, however, no principle of Responsible Government that would prevent a Parliamentary Committee reviewing proposals (policy, budgetary or otherwise) and providing advice and

¹ See our [First Submission](#) and our [Second Submission](#).

² In fact, the administration of the *Ombudsman Act 1974* and the governing legislation of the other integrity agencies is jointly allocated to both the Premier and the Attorney-General.

recommendations, before those matters are considered for legislation by Government and Parliament.

Nor would doing so lead to any breach of Cabinet confidentiality. Under the approach proposed by the PAC, budget submissions from integrity agencies would not be Cabinet in confidence - indeed, a key point of the PAC proposal is that these submissions should not be cloaked in Cabinet secrecy but be publicly visible, and so their disclosure to a parliamentary committee could not possibly breach any Cabinet confidence or otherwise reveal the position of any Minister within Cabinet.

I note that arrangements of the kind recommended by the PAC are already in place in other jurisdictions, including New Zealand, Canada and Victoria, all of which operate under systems of Responsible Government.

If the PAC's recommendation were to be implemented in a similar way, it would very clearly avoid any potential issue of incompatibility with core constitutional principles (such as Parliamentary Sovereignty and Responsible Government).

To illustrate that point, I have attached a fully developed model that would both implement the PAC recommendation and that also accords with all relevant constitutional principles. I should add that I am not aware of whether the other integrity agencies would support this model, and I am not necessarily putting it forward as a final or ideal model.

Rather, I present it here to illustrate how it can be possible to implement the PAC's and the Auditor General's recommendations in a manner that is compatible with the principle of Responsible Government and related conventions.

I therefore invite the Government to consider this model and reconsider its rejection of PAC recommendation 1, if that rejection was based on a misapprehension that the recommendation could not be implemented in a manner consistent with relevant constitutional principles.

For transparency, I have arranged for a copy of this letter to be provided to the Committee on the Ombudsman, the LECC and the Crime Commission, as well as to the Public Accountability Committee and the Auditor General, for their information.

Yours sincerely



Paul Miller
NSW Ombudsman

Encl A proposed model for a reformed budget process for the independent integrity offices