

Supplementary Submission to the
Legislative Council Public Accountability
Committee (including responses to
Questions on Notice and other matters
raised in the public hearings on 12 and 13
December 2019)

“Inquiry into the budget process for
independent oversight bodies and the
Parliament of New South Wales”

28 January 2020

Contents

| | |
|---|----|
| Introduction | 1 |
| Questions taken on notice | |
| <i>Question as to the authority of DPC to withhold funding from independent oversight bodies</i> | 1 |
| <i>The number of formal Ombudsman investigations</i> | 3 |
| <i>Committee process in New Zealand</i> | 6 |
| <i>Section 4.13 of the Government Sector Finance Act</i> | 8 |
| <i>The rate of complaints declined by the NSW Ombudsman</i> | 10 |
| Other matters raised at the hearings | |
| <i>Independence from Government agencies and adequacy of budget are internationally-recognised as core principles of the Ombudsman institution</i> | 11 |
| <i>Provision of advice from Treasury and DPC about budget bids</i> | 12 |
| <i>Provision of funding to the NSW Ombudsman by fortnightly instalment</i> | 12 |
| <i>The reference to the NSW Ombudsman as part of a “DPC family”</i> | 13 |
| <i>Alternative funding models</i> | 13 |
| <i>The need for an appropriate funding model to be considered within the context of a cohesive institutional framework for Parliamentary statutory officers</i> | 13 |
| <i>The sequencing of change</i> | 14 |
| | |
| Attachment A: Letter from DPC dated 16 August 2019 | |
| | |
| Attachment B: Summary of funding models | |
| | |
| Attachment C: Council of Europe (Principles on the Protection and Promotion of the Ombudsman Institution) (the “Venice Principles”) | |

Introduction

The Public Accountability Committee of the Legislative Council (the **PAC**), in its inquiry into “the budget process for independent oversight bodies and the Parliament of New South Wales”, held public hearings on 12 December 2019 and 13 December 2019.

Michael Barnes (Ombudsman), Paul Miller (Deputy Ombudsman, Reviews, Investigations & Community Services) and Ainslee Scott (Director, Corporate), attended the hearing on 12 December 2019.

This document sets out the Ombudsman’s responses to questions taken on notice during the hearing.

We have also taken the opportunity to respond to a number of other matters raised during the hearings.

This document supplements the Submission made by the NSW Ombudsman on 18 November 2019.

Questions on Notice

Question as to the authority of DPC to withhold funding from independent oversight bodies

Question:¹

The Hon. TREVOR KHAN: When you have a look at the ICAC submission, at least as I take it, the suggestion made in the ICAC submission is that there were further deductions from the appropriated figure.

The Hon. MARK BUTTIGIEG: That financial year, yes.

The Hon. ADAM SEARLE: In fact, it was the clear evidence. Their evidence was that the money was allocated presumably to the Premier as the cluster Minister with the sort of maximum drawdown as specified but even within that envelope, there were moneys not advanced to the agency but withheld on account of further efficiencies—misnamed, as you call them.

Mr MILLER: If that is the case—and it is not the case for us—I am not sure with what legal authority DPC would take that action.

The Hon. TREVOR KHAN: Indeed. Would you have a look at the ICAC submission and perhaps come back to us?

The CHAIR: Which is exactly why I asked ICAC that question.

The Hon. ADAM SEARLE: This is something that we are interested in.

Response:

The Department of Premier and Cabinet (**DPC**) has not withheld any funding that has been appropriated for the NSW Ombudsman’s Office under the annual *Appropriation Act 2019*. In its letter dated 16 August 2019 (attached at tab A), DPC advised that it will not be seeking to withhold any such funding from the NSW Ombudsman’s Office in 2019/20.

DPC has, however, stated that the Ombudsman “is expected to contribute \$10.4m in savings” to the “Premier & Cabinet Cluster” for the next nine years (2020-21 to 2028-29). The letter does not make clear how these cuts will be applied to the Ombudsman’s Office,

¹ Uncorrected transcript, 12 December 2019, page 44.

including in particular whether they will be incorporated into the amount prescribed in respect of the Ombudsman in the annual Appropriation Bill each year, before that Bill is introduced and debated in Parliament, or whether DPC will seek to impose the cuts after the yearly Appropriation Bill has been passed.

As far as we are aware from internal office records, DPC has never previously sought to reduce the funding that is made available to the NSW Ombudsman's Office below the amount that was set in the Appropriation Act passed by the Parliament for that year.

As we noted when we appeared before the PAC, we doubt whether DPC has any legal authority to take such action.

In this regard, we draw the PAC's attention to the following:

- (a) Under the *Government Sector Finance Act 2018*, the NSW Ombudsman is a 'separate GSF agency'.² Section 2.5(2) of that Act provides that:

"Despite any other provision of this Act, a separate GSF agency (and the accountable authority for the agency and its government officers) are each not required to comply with a relevant Treasurer's requirement or Minister's information requirement if the accountable authority considers that the requirement is not consistent with the exercise of the statutory functions of the agency."

- (b) Neither the *Appropriation Act* nor the *Government Sector Finance Act* confer any function on DPC or the Secretary of DPC in respect of the appropriation for, provision of funding to, or expenditure by, the NSW Ombudsman or the NSW Ombudsman's Office.
- (c) Functions of the Minister in respect of separate GSF agencies cannot be delegated except to the accountable authority for the agency or a government officer of the agency.³
- (d) The annual Appropriation Act appropriates sums out of the Consolidated Fund for the relevant year for such uses and services as are particularised in that Act.
- (e) Under Part 4 of the annual Appropriation Act, a separate appropriation is made in respect of each of the 'Special Offices'. The Special Offices comprise:
- Judicial Commission of New South Wales
 - Office of the Director of Public Prosecutions
 - Office of the Children's Guardian
 - Independent Commission Against Corruption
 - Independent Pricing and regulatory Tribunal
 - Law Enforcement Conduct Commission
 - NSW Electoral Commission
 - Ombudsman's Office
 - Public Service Commission

² Section 2.5 *Government Sector Finance Act 2018*.

³ Section 9.9 *Government Sector Finance Act 2018*.

- (f) The appropriation to the NSW Ombudsman is made “to the Premier...for the services of the Ombudsman’s Office”.⁴
- (g) Section 27 of the annual Appropriation Act authorises the Treasurer to authorise payments *in excess of* the sum appropriated “but only if an equivalent sum is not paid out for another purpose”. This provision enables the Treasurer to authorise one part of Government to spend in excess of its appropriated budget, provided another part or parts of Government are under-budget by an equivalent amount. However, this is subject to a number of caveats.
- (h) In particular, under the *Appropriation Act 2019*, the following provision applies:
- “The sums appropriated under Part 4 may only be paid out for any of the purposes specified in Part 4”.⁵
- (i) It is noted that the words “...any of...” in the above provision do not appear in the corresponding provision in previous Appropriation Acts. For example, the *Appropriation Act 2018* provided that:
- “The sums appropriated under Part 4 may only be paid out for the purposes specified in Part 4.”⁶

We could find no reference to this change of wording in the 2019 Budget Papers, in the second reading speech of the Appropriation Bill 2019, or in any of the Parliamentary Debate on the Bill.

- (j) The effect of sections 25 and 27 of the *Appropriation Act 2019* appear to be:
- A Special Office may expend in excess of the amount appropriated to the Premier for that office, provided there is an offsetting underspend elsewhere in Government.⁷ (As a result of the change to the wording of the relevant provision in 2019, that offsetting underspend can include any underspends by another Special Office).
 - There is no basis upon which funds appropriated for the use of Special Offices can be withheld and used for other Government purposes.

The number of formal Ombudsman investigations

*Question:*⁸

Mr BARNES: Yes, that is largely true. We have got 40,000 contacts. We end up with a reasonable number of investigations but that is largely because we have been constrained. We have had so little discretionary spending left that we have done far fewer systemic investigations than we would choose to do. We are not after gotcha type investigations. We are after improving systems to make better the delivery of government services, so that is something you are able to plan more.

The Hon. TREVOR KHAN: And have you seen a reduction in the number of those style of investigations undertaken. It is obviously before your time but you have obviously got access?

⁴ Section 22 *Appropriation Act 2019*.

⁵ Section 25(7) *Appropriation Act 2019*.

⁶ Section 27(4) *Appropriation Act 2018*.

⁷ Under section 4.8 of the *Government Sector Finance Act 2018* any unused appropriation for an annual reporting period would otherwise lapse and cease to have effect.

⁸ Uncorrected transcript, 12 December 2019, pages 42-43.

Mr BARNES: Yes, certainly we do far fewer investigations than we have in previous times.

The Hon. TREVOR KHAN: Would you be able to provide us with some indication, say over the last whatever is a suitable period for you in terms of tracking that style of reduction?

Mr BARNES: I will certainly do my best.

Response:

Under the *Ombudsman Act 1974*, a formal investigation may be undertaken where it appears to the Ombudsman (following complaint(s) or on own motion) that conduct of a public authority may be contrary to law, unreasonable, unjust, improperly discriminatory or otherwise wrong.

Where possible and appropriate, the NSW Ombudsman seeks to resolve complaints without undertaking a formal investigation. This may be done through the provision of information to complainants, the undertaking of conciliation or mediation,⁹ preliminary enquiries,¹⁰ and the making of comments and suggestions.¹¹ Formal investigations are, however, a core function of the NSW Ombudsman to address issues of serious and/or systemic maladministration.

The average number of formal investigations finalised by the NSW Ombudsman over the last 10 years is 12 per year. However, this rate is declining. In the first five years of the past decade the average number of finalised investigations per year was 14.8. In the second five years of the decade the average per year was 7.8.

Since 2016-17, the number of finalised investigations declined to a low of 2 in 2016-2017. Only 8 investigations were finalised in each of 2017-18 and 2018-19.

Table 1: Number of formal investigations under s 13 *Ombudsman Act 1974*

| Year | 2009-10 | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19 |
|-------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|
| Total | 12 | 21 | 12 | 17 | 12 | 9 | 12 | 2 | 8 | 8 |

(Note: all of the above figures exclude the investigation known as 'Operation Prospect', which was a large one-off investigation for which additional special-purpose Government funding was provided.)

In our earlier Submission we noted that, although informal resolution is generally desirable for most complaints received by the Ombudsman, it is certainly the case that there are serious and systemic concerns that would otherwise have been made the subject of an investigation or other formal action but for the Ombudsman's limited resources.

The following are examples of the kinds of matters that have been affected by our increasingly constrained resourcing:

- (a) The Ombudsman is currently undertaking a targeted investigation into conduct of the Land and Housing Corporation (LAHC) and Housing NSW concerning their responses to certain requests from public housing tenants for property

⁹ Section 13A *Ombudsman Act 1974*.

¹⁰ Section 13AA *Ombudsman Act 1974*.

¹¹ Section 31AC *Ombudsman Act 1974*.

modifications relating to tenant disability, and to the management and completion of such disability modifications. This investigation was commenced in late 2019.¹²

This investigation has been initiated following a significant number of complaints from public housing tenants. Such complaints have continued to be received despite a report of the Public Accounts Committee in 2016 recommending changes to the management of NSW Public Housing maintenance contracts, and the entry by the LAHC into new Asset Management Services contracts with five private sector suppliers.

As noted in our most recent Annual Report, Housing NSW and LAHC together were the subject of 25 per cent of all finalised complaints about State government agencies made to the Ombudsman in 2018-19.¹³

Limited internal resources within the Ombudsman's Office has meant that the current investigation was commenced later and has a narrower scope than would otherwise have been the case.

In terms of the scope of the investigation, the decision to confine this investigation to disability modifications has been made having regard to resourcing constraints, and taking into account considerations including:

- Public housing tenants with a disability represent an especially vulnerable cohort (within an already vulnerable community)
- The consequences of potential maladministration (including delay, failure and inadequate quality of provision) in respect of disability modifications may be especially serious
- As disability modifications are provisioned through the same Asset Management Services arrangements as other public housing repairs and maintenance services, it is expected that an examination of disability modifications may identify broader systemic issues and that recommendations relevant to disability modifications may have broader system benefits.

In respect of the last bullet point above, depending on the outcome of the current investigation and subject to resource availability, it may be open to the Ombudsman to consider commencing an expanded investigation in the future.

(b) Under the *Public Interest Disclosures Act 1994* (**PID Act**), the Ombudsman has functions including:

- (i) to audit and provide reports (*audit reports*) to Parliament on the exercise of functions under the Act and compliance with the Act by public authorities,¹⁴ and

¹² As with all investigations by the Ombudsman, this investigation must take place "in the absence of the public": s 17 *Ombudsman Act 1974*.

¹³ NSW Ombudsman, Annual Report 2018-19, available at <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0006/74283/NSW-Ombudsman-Annual-Report_2018-19.pdf>, at 21.

¹⁴ s 6B(1)(f) *Public Interest Disclosures Act 1994*.

- (ii) to monitor and provide reports (*monitoring reports*) to Parliament on the exercise of functions under the Act and compliance with the Act by public authorities.¹⁵

A monitoring report must be provided once every 12 months, and an audit report must be provided whenever the Ombudsman considers it desirable to do so and at least once every 12 months.¹⁶

In 2018-19, we produced a single annual report dealing with the Ombudsman's oversight functions in respect of the PID Act. In it we noted that the Ombudsman's Office had conducted only one audit of one State government agency during the year, which involved reviewing 56 files. There are approximately 420 public authorities and 130 local councils who are liable to audit under the PID Act.

The Ombudsman's PID Unit comprises 4 FTE staff and it is responsible for all of the Ombudsman's oversight functions under the PID Act including developing and delivering training content, issuing advice and assistance to public authorities and public officials, data collation and reporting, and providing support to the Ombudsman as Chair of the PID Steering Committee.

- (c) The Ombudsman has jurisdiction to investigate allegations of reprisals against public officials who have made a public interest disclosure under the PID Act. However, where complaints about alleged reprisal are raised, limited resources mean that the Ombudsman's Office is not always in a position to undertake such investigations. In those circumstances, alternative arrangements have been made. Most commonly, the relevant agency is asked to appoint (and itself pay for) an external investigator. In other cases, another agency may investigate; this was the case, for example, in respect of an investigation concerning WorkCover NSW, where an investigation was undertaken by the Public Service Commission/Internal Audit Bureau.

Subject to resourcing, the investigation of reprisal allegations by the Ombudsman would generally seem to be preferable given the Ombudsman's impartiality, its special investigatory powers and capability, and its broader oversight responsibility for public interest disclosures and the protection of whistleblowers.¹⁷

Committee process in New Zealand

Question:¹⁸

The Hon. TREVOR KHAN: Let us assume that that occurs in, say, February that the submission is made, somewhat similar to what would be now, I suppose. The submission is made to the committee in about February. The committee considers it over the next month or so and then comes up with a recommendation that the submission made by the Ombudsman be accepted. Is that then the subject of a separate vote in the House or would you perceive it simply disappearing into the budget process and everyone again gets a surprise on a date in May when it does or does not come through?

¹⁵ s 6B(1)(e) *Public Interest Disclosures Act 1994*.

¹⁶ s 6B(2) *Public Interest Disclosures Act 1994*.

¹⁷ Allegations of reprisal that also constitute 'corrupt conduct' under the *Independent Commission Against Corruption Act 1988* could also, if sufficiently serious, be appropriately investigated by the ICAC.

¹⁸ Uncorrected transcript, 12 December 2019, page 44.

Mr BARNES: I am not sure what happens in New Zealand in relation to that aspect. I can make inquiries if you would like.

Response:

The process in New Zealand is as follows:¹⁹

| Step | Comment | Timing (2019/20) |
|--|--|-------------------------|
| Officer of Parliament submits to the Parliament an estimate of its expenses and capital expenditure for the year ahead. | This is forwarded by Parliament directly to the Officers of Parliament Committee. | 31 January 2019 |
| The Committee forwards the proposals to the Treasury and seeks written comment. The Committee also takes oral evidence from the officer of Parliament. | | 4 March 2019 |
| The Committee reports to the Parliament its recommendation as to the proposed budget for the officer. | | 21 March 2019 |
| The Parliament makes a recommendation to the Governor-General, by way of an address, of the amounts to be included in the Appropriation Bill for the relevant officer of Parliament. | The making of this address involves a vote of the Parliament. ²⁰ Although Parliament is not legally bound to follow the recommendations of the Committee, it invariably does so. | 2 May 2019 |
| The Government introduces the Appropriation Bill, including the recommended amounts for the officer of Parliament. | When the Government introduces the annual Appropriation Bill into Parliament, it includes within it the recommended estimates for the officer of Parliament. Again, the Crown is not legally bound to include the recommended amounts in the Appropriation Bill, but "it is an established convention that it will do so since Ministers have been a party to the address from the House recommending the amounts in the first place." ²¹ | 30 May 2019 |

As explained in McGee Parliamentary Practice in New Zealand:

*"Any alteration during the course of the financial year to the Estimates so approved is subject to a similar process of recommendation by the Officers of Parliament Committee and commendation by the House to the Governor-General by way of address. Such altered Estimates are included in the Appropriations Bill setting out the Supplementary Estimates of expenditure."*²²

¹⁹ See our Submission at pages 29-31.

²⁰ See New Zealand Parliament/Parameta Aotearoa, Hansard, 2 May 2019, available at <https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20190502_20190502_12>.

²¹ Harris M and Wilson D (ed), *McGee Parliamentary Practice in New Zealand*, Orataria Books, 4th ed., 2017, at 548.

²² Ibid.

Section 4.13 of the Government Sector Finance Act

Question:²³

The Hon. JOHN GRAHAM: I have one more deep follow-up on the detail. I am referring to principle 9 of your budget process design considerations. On page 36 you were indicating before you do not support a blank cheque approach. This is in relation to supplementary funding requests during the year. One option might be having a provision similar to the existing section 4.13 of the Government Sector Finance Act authorising a payment essentially. In principle how is that working? What is the approval process in that instance?

Mr MILLER: I am not sure whether it is actually being utilised in practice now by government. Essentially the way it works is like a contingency fund that bodies like ICAC could draw upon during the course of the year.

The Hon. JOHN GRAHAM: So maybe on notice then I would be interested in: What is the approval process for that option?

Response:

Section 4.13 of the *Government Sector Finance Act 2018* provides as follows:

4.13 Payments out of Consolidated Fund for exigencies of Government

- (1) This section applies if the annual Appropriation Act for an annual reporting period for the NSW Government has already been enacted.
- (2) The Treasurer may, with the approval of the Governor, determine that additional money is to be paid out of the Consolidated Fund during the annual reporting period for the NSW Government in anticipation of appropriation by Parliament if it is required to meet any exigencies of Government during the current annual reporting period for the NSW Government.
- (3) Any money determined under subsection (2) for an exigency must be no more than is necessary in the public interest to fund expenditure to meet the exigency.
- (4) The Treasurer must cause details of the payments of money paid under this section to be included in the Budget Papers for the next annual reporting year for the NSW Government.

This provision replaced the former section 22 of the *Public Finance and Audit Act 1983*, which was in substantially similar terms, as follows:

22 Expenditure for certain services or works

- (1) Notwithstanding section 21, where, after an Act is passed in respect of a financial year appropriating money out of the Consolidated Fund to meet the requirements of that financial year, the exigencies of Government so require, the Treasurer may, with the approval of the Governor, determine that there shall be paid from the Consolidated Fund, in anticipation of appropriation by Parliament, such additional sums as may be necessary in the public interest to provide for expenditure of a recurrent nature or for capital works and services.
- (2) Details of the sums paid from the Consolidated Fund pursuant to a determination under subsection (1) shall be included in any Bill introduced

²³ Uncorrected transcript, 12 December 2019, page 44.

with the object of appropriating sums of money for the ordinary annual services of the Government or capital works and services of the Government during the financial year next succeeding the financial year in respect of which the sums were paid from the Consolidated Fund pursuant to the determination.

These provisions authorise the Treasurer (with the approval of the Governor) to provide money out of the Consolidated Fund despite that funding not having been appropriated for that purpose in the relevant period's Appropriation Act. The funding is instead provided in anticipation of *future* appropriation by Parliament (in the Appropriation Act for the next period).

In effect, the provision allows for a direct appropriation of exigency funding in the current year, with a requirement to seek a ratification of that appropriation by statute in the next year.

The mechanism under section 41.3 GSF Act may be considered where some exigency arises such that the expenditure during the appropriation period exceeds both the amount appropriated for the relevant purpose for that period and the Treasurer's State contingencies appropriation (previously known as the Treasurer's Advance): see s 4.12 GSF Act.

We are unaware of the internal Government approval processes that may be followed in considering whether to seek the provision of funds under s 4.13 GSF Act. As the Governor's approval is required, the Treasurer would need to submit a Minute paper to the Executive Council via the Department of Premier and Cabinet. However, we do not know what prior or other internal approvals, such as Cabinet or Cabinet Committee approvals may also be needed prior to the Treasurer seeking the approval of the Governor-in-Council.

In terms of the issues under consideration by the PAC, the concern that has been raised by ICAC and others is that a process of setting a single annual appropriation does not adequately account for the possibility that their funding requirements during the year may be unpredictable, with the possibility of significant but unexpected additional funding being needed (for example, because of some significant but unanticipated investigation arising during the course of the year).

Our point in raising section 4.13 of the GSF Act in our Submission was to demonstrate that there are alternative ways in which this problem may be addressed:

- (a) One approach would be to require any unexpected new funding requirement to be found within the existing annual appropriation, by finding offsetting savings or reduced funding elsewhere. This is effectively the process that is currently applied. That is, should ICAC require additional funding for a new investigation mid-year, it must either find that funding internally or it must approach DPC, which seeks an offsetting funding source from elsewhere in the DPC cluster.
- (b) A second approach would be to include in the annual Appropriation Act for the ICAC (and for other oversight bodies, if relevant) an amount by way of a special-purpose "contingency". This would operate in a similar way to the Treasurer's state contingency fund under s 4.12 of the GSF Act. Like s 4.12 GSF Act, if any amounts are drawn down from the contingency fund, these would need to be reported in the Budget Papers for the next financial year for transparency.

- (c) A third approach would be to allow ICAC (and other oversight bodies, if relevant) a direct appropriation for exigencies similar to the mechanism under s 4.13 of the GSF Act. Again there would be a requirement that any amounts appropriated under this provision be reported (and ratified) in the Appropriation Bill for the next financial year.

Under the second or third approach, the legislation providing for those mechanisms could impose additional approval requirements to ensure that the relevant oversight body is appropriately accountable for its use of any contingency fund or direct appropriation.

For example, in our Submission we proposed that the annual appropriation for the oversight bodies be determined following a Parliamentary Committee process. If that model is adopted, then an oversight body that wished, during the course of the year, to draw on a contingency fund (second approach above) or a direct appropriation (third approach) might likewise be required to seek the approval of (or at least to notify) the relevant Parliamentary Committee before doing so.

The rate of complaints declined by the NSW Ombudsman

*Question:*²⁴

The CHAIR: Therefore, if your budget is very tight, you can never get beyond the complaints and go to the structural. That is a poor summary of the LECC's proposition. Do you find those same propositions operating to date?

Mr BARNES: It is even worse than that, in that we have an obligation to respond to complaints. We can do that constructively and resolve the complainant's concerns or we can simply decline to take any action in relation to the complaint. The third option, to conduct investigations, is not even being considered in this conversation. We are just saying, "How do we get the complainants out of the building?" Instead of seeking to resolve the complaints by conciliation or some preliminary inquiries to get a better outcome, we find increasingly we are just declining complaints off the bat. The percentage of complaints that are declined has steadily climbed in the past five years.

The CHAIR: Could you give us some data on that on notice?

Mr BARNES: Yes.

Response:

Under section 12 of the *Ombudsman Act 1974*, any person has a right to complain to the Ombudsman about the conduct of a public authority (subject to certain exclusions). The Ombudsman also receives complaints about community service providers under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

The number of formal complaints that the NSW Ombudsman's Office has declined to pursue (by investigation or by other action) has increased steadily in both absolute and proportional terms. The number of formal complaints declined increased from 1,753 in 2009-10 to 3,830 in 2018-19. The proportion of formal complaints declined increased from 46 percent in 2009-10 to 61 percent in 2018-19.

²⁴ Uncorrected transcript, 12 December 2019, page 44-45.

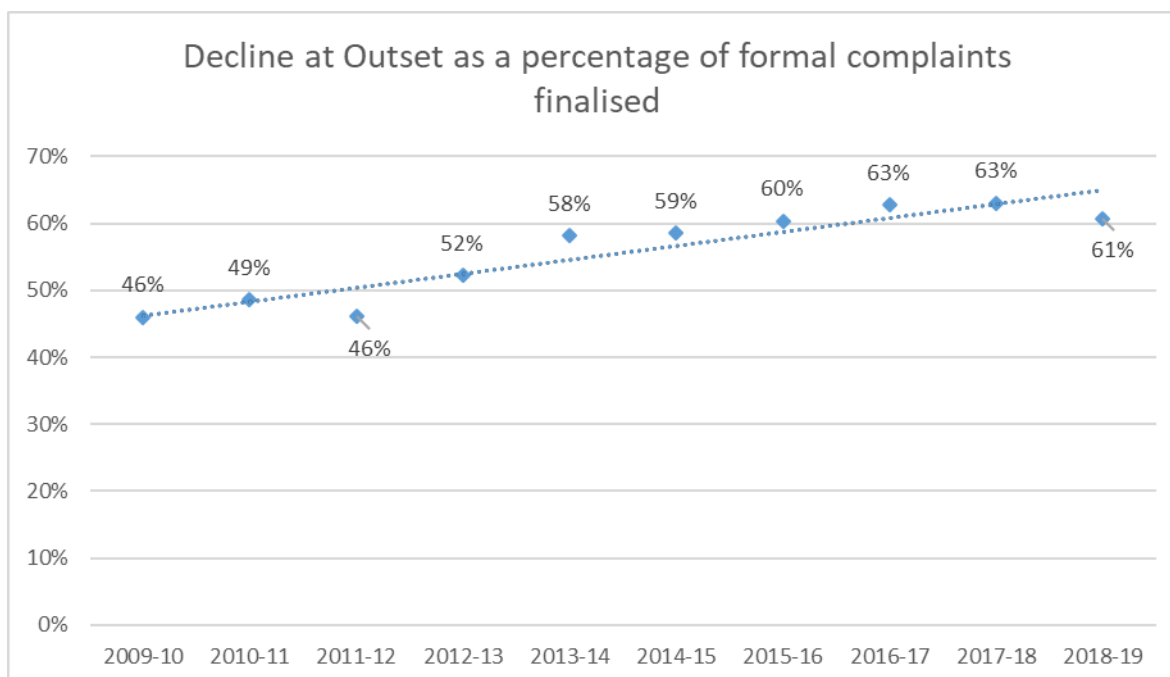


Table 2: Formal complaints declined at outset (total number and percentage of all formal complaints received)

| | 2009-10 | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19 |
|-------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|
| Total | 1,753 | 2,115 | 2,282 | 2,287 | 2,789 | 3,352 | 3,473 | 3,767 | 3,923 | 3,830 |
| % | 46% | 49% | 46% | 52% | 58% | 59% | 60% | 63% | 63% | 61% |

Other matters raised at the public hearing

Independence from Government agencies and adequacy of budget are internationally-recognised as core principles of the Ombudsman institution

There are now more than 190 independent Ombudsman institutions operating at the national, regional or local level in more than 100 countries worldwide. While their specific roles vary, they share a core mission of protecting people against the violation of rights, abuse of public power, unfair decisions and maladministration. Each seeks to improve public administration while making the government's actions more open and its administration more accountable to the public.²⁵

There is a recognition globally that certain core principles underpin the effectiveness of the Ombudsman institution. These include both full independence from Government agencies and the assurance of financial resources adequate to the full and effective discharge of functions.

Last year the Council of Europe endorsed principles on the protection and promotion of the Ombudsman institution (known as the "Venice Principles"). A copy of these principles is attached (Attachment C). The following principles are of particular relevance:

²⁵ See website of the International Ombudsman Institute (IOI) at <www.theioi.org/the-i-o-i>.

14. *The Ombudsman shall not be given nor follow any instructions from any authorities.*
....
21. *Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions. The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.*

Provision of advice from Treasury and DPC about budget bids

The NSW Ombudsman's Office maintains a good working relationship with officers at both Treasury and DPC. No criticism of them should be inferred from our Submission or comments at the hearing.

However, while it is the case that those officers will sometimes provide comments to our office on the framing, content or merit of our proposed budget submissions, it is not the case that we are aware of the advice that is to be given by Treasury and/or DPC to their Ministers or the Expenditure Review Committee of Cabinet in relation to those submissions. Indeed, Treasury and DPC officers are careful to remind us that they are not in a position to divulge to us Cabinet-in-confidence information, and that any comments they might provide to us are expressly couched as "officer-level" comments only, which may or may not reflect the view of, or advice that would be given by, senior executives.

As the Secretary of Treasury indicated in his evidence to the PAC,²⁶ the NSW Ombudsman's Office is not provided with a copy of any written advice that is provided by Treasury or DPC to their Ministers, or any Treasury paper or other submission put to the Cabinet Committee. Obviously, we are also not present during any deliberations of the Ministers or Cabinet Committee.

Provision of funding to the NSW Ombudsman by fortnightly instalment

The NSW Ombudsman's Office receives funding on a fortnightly instalment basis from the NSW Treasury.

The amount of each instalment is determined by reference to monthly expenditure projections provided by the Office to Treasury. As most of the Ombudsman's funding is required for employment-related expenditure, the fortnightly instalments tend not to fluctuate significantly.

The fortnightly instalments are paid into a bank account that is required to maintain a 'minimum cash balance' (which in the case of the Ombudsman's Office is \$800,000).

²⁶ Uncorrected transcript, 13 December 2019, page 7-8.

The reference to the NSW Ombudsman as part of a “DPC family”

In our Submission, we raised a number of concerns with the presentation of the NSW Ombudsman as a part of a DPC ‘cluster’, and the risk that this may undermine the public perception of our independence.

The description of the NSW Ombudsman as part of a DPC ‘family’ may have the potential to raise concerns similar to those we raised previously in relation to the ‘cluster’ concept.

Alternative funding models

In various submissions and during the Committee’s hearings, a number of funding models have been raised and discussed.

We have taken the opportunity to put together a table (attached at Tab B) setting out what we see as the models (at a high level). The table includes our brief assessment of how each of these models addresses the issues raised in the Committee around independence, transparency, flexibility, and accountability.

The attached table is not exhaustive of the possible models available. Hybrid models could also be considered. For example, it could be possible to develop a hybrid model that combines:

- a general annual appropriation process under which the annual budget for each oversight body is set by Parliament on the recommendation of a Parliamentary Committee (Model 1), and
- a process to allow those oversight bodies to apply to an independent tribunal for special-purpose supplementary funding if required for some unexpected mid-year exigency (Model 5).

The need for an appropriate funding model to be considered within the context of a cohesive institutional framework for Parliamentary statutory offices

In our earlier Submission we identified a number of budget process design considerations that we consider critical for an alternative or enhanced budget process:

1. The budget setting process should be overseen by a Parliamentary Committee rather than by Treasury/Cabinet
2. Treasury/the Government must be given the opportunity to provide advice on funding, and all advice should be made public
3. The budgets of the Parliament and the independent oversight bodies should be set in advance of the Government budget setting process
4. The budgets for Parliament and the independent oversight bodies should each be assessed *separately*
5. In setting the budgets for Parliament and the independent oversight bodies, advice from Treasury and the Government on the overall fiscal position of the State may be relevant

6. Government should retain the ability to approve additional grant funding for oversight bodies, for example where their work contributes to the Premier’s Priorities and other Government-set outcomes
7. Budgets for independent oversight bodies need to be set having regard to the particular statutory mandates and business models of each body, which will differ
8. Funding should be considered and adjusted whenever functions or jurisdictions change
9. Quarterly reviews may be needed to allow for the repurposing of unused contingency funding and/or providing supplementary funding requests
10. The budget setting process should be embedded in legislation
11. The independent oversight bodies should continue to be held accountable for their financial management and performance, in particular to their Parliamentary oversight committee
12. The independent oversight bodies should no longer be publicly represented as forming part of the “DPC cluster”

It is essential that any new arrangements for the oversight bodies not only addresses the concerns with independence and transparency raised by the current budget process, but that those arrangements also ensure appropriate accountability of those oversight bodies for their performance, including their financial performance.

In the Ombudsman’s view, this balancing of independence and accountability would best be achieved through the formal recognition of ‘Parliamentary statutory offices’ through an Act of Parliament. Such an Act would deal not only with the proposed new funding model for these bodies, but would also entrench their accountability to Parliament.²⁷

The sequencing of change

We recognise that reforms of the type contemplated in our Submission and in the attached table may require significant further policy development and public debate.

In light of this, it is important to classify the various concerns that have been raised, as well as the various proposals for addressing those concerns, in terms of their urgency and possible timing. Although a new, fully-developed budget process is unlikely to be feasible in the very near term, there are a number of steps that can (and in our view should) be taken immediately to address some of the critical concerns that have been raised.

In that regard, the following table may provide a useful guide to the prioritisation of potential enhancements. If additional proposals for change arise from the performance audit of the independent oversight bodies that is currently being undertaken by the Auditor General, then those changes could also be added to this table in due course:

| | |
|--|--|
| <p>Critical changes (ideally to be implemented immediately, with effect from 2020/21 financial year)</p> | <ul style="list-style-type: none"> • Government confirms that ‘efficiency dividends’ and additional DPC ‘savings measures’ will not be applied to the independent oversight bodies. • Government ceases publicly representing the oversight bodies as part of any ‘cluster’ headed by DPC. |
|--|--|

²⁷ See section 1.2 of our earlier Submission.

| | |
|---|---|
| | <ul style="list-style-type: none"> • Treasury ceases expecting DPC to co-ordinate and consolidate budget information from the oversight bodies. • Treasury confirms that oversight bodies are excluded from any Government requirement to report to Cabinet by reference to 'Premier's Priorities' or any other form of Government-set outcomes.²⁸ (Instead, funding submissions and other reports, including to Parliamentary oversight committees, should be made by reference to the oversight bodies' particular statutory functions and objects.) |
| Budget process reforms (could be implemented from 2021/22 financial year) | <ul style="list-style-type: none"> • Legislation is enacted to give effect to a new budget process, such as Model 1 or 2 of the attached table, to provide for the budgets of the independent oversight bodies to be recommended to Parliament by way of a Parliamentary Committee process, rather than a Government Cabinet process. |
| Cohesive institutional reform, including budget process reforms (could be implemented from 2021/22 financial year) | <ul style="list-style-type: none"> • The above, as well as the following. • Detailed consideration is given to whether there is merit in broader reforms that will bring coherence to the unique status and function of independent oversight bodies as 'offices of Parliament', perhaps through an 'Offices of Parliament Act'. • This proposal could be pursued initially through a working group comprising the Parliamentary Departments and the oversight bodies, as has been suggested in the submission made to the PAC by the Parliamentary Departments. |

²⁸ The only exception to this may be if the Government has itself decided to provide additional grant funding to an oversight body for some particular project or program of work. For example, a Premier's Priority is 'Towards Zero Suicides'. As part of pursuing that priority, the Government might provide grant funding to the NSW Ombudsman in its role as convener of the Child Death Review Team to undertake a specific project or program that would contribute to that priority.

Attachment A



**Premier
& Cabinet**

Ref:A3086699

Mr Michael Barnes
NSW Ombudsman
Ombudsman NSW
Level 24, 580 George Street
Sydney NSW 2000

Dear *Michael* Mr Barnes,

To strengthen the State's fiscal position and support streamlined service delivery, several whole of government Budget savings and reform measures were included in the 2019-20 Budget. This resulted in a budget reduction of \$3.2 billion over four years to 2022-23, across the total NSW Public Sector.

The Premier & Cabinet Cluster has been allocated \$20.7m in reductions for 2019-20, increasing to \$38.8m by 2028-29.

To allow your agency additional time to prepare for the forward year impacts of these reductions, DPC will absorb your agency's share in FY2019-20 of \$0.5m. Your agency is expected to contribute \$10.4m in savings for the remaining nine year period from 2020-21 to 2028-29. These savings are ongoing and permanent and have been escalated at 2.5% from 2023-24.

| | 2019-20 | 2020-21 | 2021-22 | 2022-23 | 2023-24 | 2024-25 | 2025-26 | 2026-27 | 2027-28 | 2028-29 | 10 Year |
|----|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|
| | (\$000s) | (\$000s) | (\$000s) | (\$000s) | (\$000s) | (\$000s) | (\$000s) | (\$000s) | (\$000s) | (\$000s) | (\$000s) |
| ds | 0 | (822) | (917) | (1,192) | (1,234) | (1,255) | (1,304) | (1,204) | (1,207) | (1,258) | (10,393) |

Your Agency has some latitude to determine how savings are achieved, however savings measures are expected to be applied predominantly to labour expenses

12.

A PRIME entry will be required to reflect these savings. Further details of this process will be communicated separately.

If you have any questions on these allocations, please do not hesitate to contact Christopher Wong on (02) 9228 5549 or Christopher Brennan (02) 9513 2028.

Yours sincerely

Amy Brown
Acting Secretary

16 August 2019

BAU Op. Model
P&L
Cashflow

Copy to all
exec.

20/8/19

Attachment B: Funding Models

| Model | Funding model | Independence | Public transparency of process | Adequacy of annual base-level funding | Flexibility to fund unanticipated mid-year exigencies | Accountability of oversight body (to justify funding bids and use of funds) | | Comment |
|------------|---|---|---|--|--|---|---|--|
| | | | | | | Pre-funding | Post-spending | |
| Status quo | Current process Funding set by the annual Appropriation Act, with the funding level for the oversight bodies set in the same way as other activities of Government (ie., determined by the Government through a Treasury-led Cabinet process). | Perception of independence is undermined. | Almost none. | Adequacy of funding is not assured, and there is a risk of the Government preferencing its own priorities over the statutory mandates of the oversight bodies (eg., by applying 'savings measures' to divert funds from the oversight bodies to other Government initiatives). | Limited – oversight body is required to seek an ad hoc grant from DPC if it faces an unexpected funding requirement. | Treasury and ERC scrutiny of oversight body's bid. Parliamentary/public debate of Appropriation Bill. | Annual Reporting Audit Parliamentary Oversight Committee | The weaknesses of this model are set out in detail in our Submission. |
| 1 | Committee recommended/ Parliament determined Funding set by the annual Appropriation Act, with the funding level in that Act provided for the oversight bodies recommended to Parliament by a Parliamentary Committee | Consistent with independence. | High public transparency - all advice to the tribunal (including from the body itself and from Treasury) is made public and the Committee is required to provide reasons. | The Parliamentary Committee's terms of reference would require it to recommend funding at a level that is adequate to the functions of the body. There may be some risk of Parliament approving a lower amount. However, if it did so this would be in a public process and a public explanation would be required. | If additional funding were needed mid-year, a supplementary Appropriation Act would need to be passed. | Accountability to Parliament. Budget bids of the oversight body would be made public, and subject to public critique by Treasury. Parliamentary Committee could also obtain advice of an independent expert if and when required. Parliamentary/public debate of Appropriation Bill if any deviation from Committee's recommendations. | Annual Reporting Audit Parliamentary Oversight Committee | This model is consistent with the status of the oversight bodies as offices of Parliament. It protects their independence, provides a high level of public transparency, and enhances their accountability. Different risks with this approach may arise depending upon the designation and composition of the Committee (eg., between Government and non-Government members; between LA and LC members), as well as how it operates in practice. The Parliamentary Committee that recommends annual budget amounts may or may not necessarily be the same as the oversight committee for the relevant body. |
| 2 | Option 1 with a contingency fund As well as option 1, the amount appropriated for each oversight body in the annual Appropriation Act includes a 'contingency fund' that the body can draw upon if it faces unpredictable funding requirements during the year | As above. | As above. | As above. | Yes. Contingency fund provides flexibility to meet unexpected exigencies. | As above. In relation to the contingency fund, a requirement could be imposed that the oversight bodies request be notified to and/or considered by the Parliamentary Committee prior to being drawn down. (Although there may | As above. In addition, any draw-down of contingency funding in the current year would need to be reported in the Budget Papers for the subsequent years. | This model is the one most consistent with the design principles that were set out in our Submission. As noted above, the main risk with this approach concerns the composition and approach of the Parliamentary Committee. Questions that would need to be considered include whether the Committee should be a joint committee of both houses of Parliament and the balance of membership between Government and non-Government members. |

| | | | | | | | | |
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| | | | | | | be confidentiality restrictions where funding is required for specific confidential investigations). | | |
| 3 | <p>Tribunal recommended/ Parliament determined</p> <p>Funding continues to be set in the annual Appropriation Act.</p> <p>However, the amount included in the Appropriation Bill for the oversight bodies is determined by an independent tribunal.</p> <p>Parliament retains the discretion to amend the Bill.</p> | Consistent with independence. | High public transparency - all advice to the tribunal (including from the body itself and from Treasury) is made public and the tribunal is required to provide reasons. | <p>The tribunal's terms of reference would require it to recommend funding at a level that is adequate to the functions of the body.</p> <p>There may be some risk of Parliament approving a lower amount. However, if it did so this would be in a public process and a public explanation would be required.</p> | No. | <p>Accountability to Parliament.</p> <p>Budget bids of the oversight body would be made public, and subject to public critique by Treasury.</p> <p>Expert body's recommendation made public.</p> <p>Parliamentary/ public debate of Appropriation Bill if a deviation from tribunal's recommendations.</p> | <p>Annual Reporting</p> <p>Audit</p> <p>Parliamentary Oversight Committee</p> | <p>This model is consistent with independence and provides a high degree of transparency (if all advice to the tribunal is made public) as well as being consistent with principles of Parliamentary sovereignty and the status of the oversight bodies as offices of Parliament.</p> <p>However, placing the recommendation in the hands of an individual "expert" may risk idiosyncratic and inconsistent decision making, and for this reasons options 1 and 2 are preferred. (Noting that, under those options, the relevant Parliamentary Committee may seek the advice of independent experts if required, before making its recommendation).</p> <p>The 'independent expert' model resembles, in some ways, the SOORT and Parliamentary Remuneration Tribunal (PRT). However, there are important differences between setting the remuneration of individual office-holders and setting the budget for an entire agency. And that difference goes beyond just the order of magnitude of the dollars involved.</p> <p>In the case of SOORT and the PRT, both are required by legislation to make decisions that are consistent with the State-wide wages policy, which at the moment caps salary increases at 2.5 per cent per annum. So those existing tribunals have quite a confined discretion.</p> <p>They also have the benefit of relatively straightforward comparators against which to assess salary levels. For example, even though the day-to-day functions of a judge, an ICAC Chief Commissioner and an Ombudsman will be quite different, one can easily compare the salary levels of them and recognise that there should be some objective relationship between them. You would not expect, for example, the Ombudsman to earn many multiples of the salary of a Supreme Court judge. It is much harder to look at the overall budgets of agencies like the ICAC and the Ombudsman and the Electoral Commissioner and see some natural relationship they should have to each other. It will depend on the nature, extent and scale of their functions, which are very different.</p> |
| 4 | <p>Option 3 with a contingency fund</p> <p>As for option 3, plus the amount appropriated for each oversight body in the annual Appropriation Act includes a 'contingency fund' that the body can draw upon if it faces unpredictable funding requirements during the year</p> | As above. | As above. | As above. | Yes. Contingency fund provides flexibility to meet unexpected exigencies. | <p>As above.</p> <p>In relation to the contingency fund, a requirement could be imposed that the oversight bodies notify the independent tribunal</p> | <p>As above.</p> <p>In addition, any draw-down of contingency funding in the current year would need to be reported in the Budget Papers for</p> | As above. |

| | | | | | | | | |
|---|---|-------------------------------|--|---|---|---|--|--|
| | | | | | | prior to being drawn down. | the subsequent years. | |
| 5 | <p>Tribunal determined</p> <p>Legislation is enacted that provides for the independent oversight body to receive whatever funding is determined, both annually and as needed, by an independent tribunal.</p> | Consistent with independence. | High public transparency - all advice to the tribunal (including from the body itself and from Treasury) is made public and the tribunal is required to provide reasons. | Yes – The tribunal’s terms of reference would require it to set funding at a level that is adequate to the functions of the body. | Yes – further mid-year funding could be sought from the tribunal as required. | <p>Accountability to an expert body.</p> <p>Funding bids of the oversight body would be made public, and subject to public critique by Treasury. (Although there may be confidentiality restrictions where funding is required for specific confidential investigations).</p> | <p>Annual Reporting</p> <p>Audit</p> <p>Parliamentary Oversight Committee</p> | <p>Lack of pre-funding accountability to Parliament means that this model is probably inappropriate for general annual appropriations.</p> <p>There may also be a risk of idiosyncratic and inconsistent decision making.</p> |
| 6 | <p>Direct appropriation</p> <p>Legislation is enacted that gives statutory authority for the independent oversight body to directly draw whatever funds it requires to perform its functions, whenever it needs to do so.</p> | Consistent with independence. | None. | Yes – Adequate funding is assured. | Yes. | None. | <p>Annual Reporting</p> <p>Audit</p> <p>Parliamentary Oversight Committee</p> <p>Any appropriation made during the current year would need to be reported in the following year.</p> | <p>A lack of pre-funding transparency and accountability means that this mechanism is not appropriate for oversight bodies’ general functions.</p> <p>However, it might be considered for some ad hoc special purpose functions where adequacy and flexibility of funding are considered of utmost importance and where after-the-event accountability for the use of funds is considered adequate. For example, the Electoral Commission has suggested that a direct appropriation approach might be appropriate for some of its special election-time functions.</p> |

Attachment C: The Venice Principles

Council of Europe (Principles on the Protection and Promotion of the Ombudsman Institution) (the “Venice Principles”)

[Overleaf]