Safeguarding the independence of integrity agencies in Victoria and New Zealand: A case for New South Wales

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.

Victoria and New Zealand serve as important comparative jurisdictions in the examination of ways to safeguard the independence of integrity agencies in New South Wales (NSW). The NSW agencies examined in this research include the Auditor-General, the Ombudsman, and the Independent Commission Against Corruption (ICAC), and counterparts in other jurisdictions. The writer consulted these agencies as part of this research.

Prior to considering options for safeguarding independence, the key concepts of 'integrity', including the key features of 'integrity agencies' and 'Officers of Parliament', and the benefits of these entities was analysed. The importance of 'independence' for integrity agencies was also explored having regard to the separation of powers doctrine.

Several options were then identified as ways to safeguard independence, including:

- Amendment to 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. It further 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, as well as, providing information-sharing mechanisms between integrity agencies, and funding arrangements;

- A new funding model drawing on examples from Victoria, New Zealand, NSW, and the Australian Capital Territory.

Integrity, independence, and the separation of powers

The term 'integrity' has a behavioural and a systemic meaning.[1] The behavioural dimensions of 'integrity' involve characteristics of accountability, honesty, ethics, trust and incorruptibility.[2] A system or institution with integrity is one that is 'whole and healthy, that is functioning well, as intended.'[3]

[1] Robin Creyke, 'An 'Integrity' Branch' (Paper presented at Australian Institute of Administrative Law 2012 National Administrative Law Conference, Adelaide, 19 July 2012) 34.

[2] Ibid 33.

[3] Ibid.

An integrity agency is one that is instrumental in upholding the systemic and behavioural qualities of integrity that underpins responsible government, accountable to the public. Through oversight, integrity agencies enhance government accountability to the public, which in turn improves public trust in government.

Independent integrity agencies should, at a minimum, not be 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.[4] Integrity agencies are generally accountable to Parliament.

In Australia there is a separation of legislative, executive, and judicial power. The separation of powers is the 'most important doctrine in analysing government legal accountability'[5] and reduces abuse of power by separating power across the three branches of government. The Parliament has legislative power to make laws, the Governor on advice of the Executive Council (being responsible Ministers) exercises executive power, which is the power to administer laws, and courts exercise judicial power.

Integrity agencies are generally positioned in the Executive branch. This positioning could potentially compromise their independence from the Government whom they oversight. However, some integrity agencies, such as the ICAC, also oversight Members of Parliament which means the same tension may arise if integrity agencies are aligned with Parliament through possible legislative changes and an alternate funding model discussed below.

Options to safeguard the independence of integrity agencies

Legislative change

Victoria is an example of an Australian jurisdiction in which there is constitutional recognition of integrity agencies. The independent status of the Victorian Auditor-General and the Ombudsman is protected in the *Constitution Act 1975* (Vic) and a referendum would be required to change these provisions. The independence of the judiciary is similarly protected in the *Constitution Act 1902* (NSW) which can only be changed by referendum.[6]

Amendment to the NSW Constitution Act to include integrity agencies may be a powerful symbolic gesture but may not of itself necessarily achieve or support practical independence through funding and other means.

There is also scope to consider development of a new 'Officers of Parliament Act' in NSW. 'Officers of Parliament' are types of integrity agencies established by statute, which are independent of the Executive and assist Parliament in carrying out its responsibilities of scrutinising the actions of government.[7] The writer acknowledges

[4] Wayne Martin, 'Forewarned and four-armed: Administrative law values and the fourth arm of government' (2014) 88 *Australian Law Journal* 121.
[5] John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423.
[6] Anne Twomey, *The Constitution of New South Wales* (The Federation Press, 2004) 308 – 309.
[7] Breukel, Jon et al, *Independence of Parliament* (Research Paper No 3, Parliamentary Library & Information Service, Department of Parliamentary Services, Parliament of Victoria, 2017) 19.

the work of the former NSW Ombudsman, now NSW Crime Commissioner, Mr Michael Barnes on these issues.

Funding integrity agencies

The NSW Audit Office in its October 2020[8] Special report and the NSW Parliament Public Accountability Committee (the PAC) in its March 2020[9] and February 2021[10] reports have identified threats to the independence and independent funding of NSW integrity agencies.

There may be ways to enhance the transparency of the funding process for integrity agencies which is subject to Cabinet confidentiality. An alternate funding model supported by some NSW integrity agencies is the New Zealand approach where a Parliamentary Committee determines funding for ‘Officers of Parliament’ which includes the Auditor-General and the Ombudsman. The role of Parliament in determining funding for integrity agencies is also operative in Victoria.[11]

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 may threaten the ICAC’s independence (in the same way as the Executive, whom it also oversights) if the Parliamentary Committee were to determine or make recommendations about the ICAC’s budget. The ICAC’s proposed funding model responds to this issue.[12]

A new funding model, together with legislative changes may offer an opportunity to further support the independence of integrity agencies in NSW. A possible funding model could draw on the model proposed by the NSW Ombudsman in his submission to the PAC[13], 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 in accordance with the *Constitution Act 1902* (NSW).[14]

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[8] Audit Office of New South Wales, *The effectiveness of the financial arrangements and management practices in four integrity agencies*, Special Report (2020)

[9] NSW Legislative Council Public Accountability Committee, Parliament of NSW, *Budget process for independent oversight bodies and the Parliament of NSW – First Report* (2020)

[10] NSW Legislative Council Public Accountability Committee, Parliament of NSW, *Budget process for independent oversight bodies and the Parliament of NSW – Final Report* (2021)

[11] NSW Ombudsman, Submission No 8 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 18 November 2019 30.

[12] NSW Independent Commission Against Corruption, *The need for a new independent funding model for the ICAC*, Special Report (2020) 35-36

[13] NSW Ombudsman, above n 11, 31-35.

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