

Mr Damien Tudehope MP  
Chair  
Committee on the Independent Commission  
Against Corruption  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Tudehope

I refer to your letter of 9 September 2016 in relation to the inquiry that the Joint Committee on the Independent Commission Against Corruption (ICAC) is conducting into the ICAC Inspector's *Report to the Premier: The Inspector's Review of the ICAC*.

In your letter you seek my views on the implications of transferring ICAC employees to the Government Sector Employment Framework, which is an option put forward for consideration in a submission to the inquiry by the Department of Premier and Cabinet (DPC). You also ask me to advise of any benefits I perceive in such a transfer.

### **Implications of bringing ICAC employees within the Government Sector Employment Framework**

As the Committee will be aware, the *Government Sector Employment Act 2013* (GSE Act) applies to the 'government sector', but 'government sector' is defined in such a way as to exclude the ICAC and section 5 of the GSE Act excludes the staff of the ICAC from the Act's application.

If staff of the ICAC were brought into the government sector the implications for the ICAC's independence would be dependent in part on whether or not they were employed in a Public Service agency. They would also be affected by the manner and extent to which the GSE Act and the regulations and rules under it were amended so as to reduce risks to the actual and perceived independence of the ICAC. Whether amendments could completely address perceptions regarding the independence of the ICAC is an important matter requiring careful consideration by the Committee.

As outlined in the supplementary information provided to the ICAC by DPC on 8 September 2016, one legislative option would be to establish the ICAC staff as a service that is part of the government sector but not a Public Service agency and another would be to create a Public Service agency in which the staff would be employed. (The latter is referred to on page 5 of DPC's supplementary information as a 'staff agency'.)

As the Committee may be aware, under the GSE Act there are three types of Public Service agency: a Department; a Public Service executive agency (which is an agency related to a Department); and a separate Public Service agency. Of these, the separate Public Service agency would be the type of Public Service agency that is most consistent with the critical independence of the ICAC. This is for the reasons given on page 5 of DPC's supplementary information.

There would be other ways of applying provisions of the GSE Act to the staff of the ICAC that did not rely on the staff being part of the 'government sector'. However, a partial 'engagement' with the GSE Act in this way would be likely to give rise to complexities and its objectives could be achieved in better ways.

DPC's supplementary information (pages 5 and 6) identifies some of the provisions of the GSE Act from which an ICAC staff agency could be exempted to protect the ICAC's independence, namely:

- **section 16**, which gives the Public Service Commissioner power to require the head of a government sector agency to provide the Commissioner with a report on matters relating to the employees of the agency, or to the employment policies and practices of the agency, or with information collected or held by the agency in dealing with matters relating to government sector employees;
- **section 82**, which gives the Minister (i.e. the Premier) the power, in the case of any matter relating to a government sector agency, to direct a person to conduct a special inquiry into the matter and which, in association with that, confers wide information-gathering powers; and
- **section 83**, which gives the Public Service Commissioner and DPC Secretary the power to conduct an inquiry into any matter relating to the administration or management of a government sector agency, again with wide information gathering powers.

DPC's supplementary information states that consideration would need to be given to these provisions having no application to an ICAC staff agency. In my opinion, it would be important that these provisions not apply. Use of any of them in relation to an ICAC staff agency would pose a risk to the actual and perceived independence of the ICAC. This is because it would be difficult to separate the workforce-related issues that might warrant use of the powers from the investigatory work that the ICAC does. If the provisions were to apply, care would be required to ensure that they were amended in such a way that their use could not, even inadvertently, touch on the ICAC's work.

The same issue would arise in relation to Public Service Commissioner's power in **section 13** of the GSE Act. It enables the Commissioner, for the purposes of exercising his or her functions or ensuring compliance with the Act (or regulations or rules under it) to give a direction in writing to the head of a government sector agency on a specific matter in relation to the employees of the agency. DPC's supplementary information (page 5) points out that section 13 allows the head of a separate Public Service agency not to comply with the direction if the head considers the direction is not consistent with the independent exercise of statutory functions by the head and the agency. (It is worth noting, however, that section 13 (4) would require the head of the ICAC staff agency to report to the Committee on the reasons for any non-compliance with the substantive employment outcomes sought by a direction.)

Given the unique nature of the ICAC's role, serious consideration would need to be given to exempting an ICAC staff agency and its head from section 13. An exemption would, among other things, avoid the risk of misperceptions about the reason for a direction being issued to the agency head by the Public Service Commissioner or about a decision by the agency head not to comply with the direction.

It would also be relevant to consider the Public Service Commissioner's reporting obligations under the GSE Act. The Commissioner is not subject to the control and direction of the Premier in the exercise of the Commissioner's functions. But the GSE Act (**section 14**) requires the Commissioner to report to the Premier in connection with the exercise of those functions. The Commissioner is also required (**section 15**) to report to the Premier annually on the 'state of the government sector', including its performance, notable achievements, challenges and priorities. If the staff of the ICAC were brought within the government sector, measures might be needed to address potential concerns that a report could compromise the ICAC's work in some way.

Consideration of the Public Service Commissioner's rule-making powers under the GSE Act is also relevant in this context. Most of the powers are exercisable in relation to the Public Service only. See for example, **sections 32 (4), 36, 48 and 54**. However, there are significant rule-making powers that are exercisable in relation to the government sector as a whole (i.e. its non-Public Service and Public Service components). These powers relate to matters such as the diversity of the workforce of a government sector agency (**section 63**), the core requirements of its performance management system (**section 67**) and dealing with the unsatisfactory performance of its employees (**section 68**). If the staff of the ICAC were brought into the government sector consideration would need to be given to modifying these rule-making powers in their application to those staff to help ensure the rules could not affect the independence of the ICAC (for example by having implications for how staff carried out their investigative work).

It would also be important to address the risk of a perception that the Public Service Commissioner's ability to make rules relating to the ICAC staff made the ICAC Commissioner in some way subject to the Public Service Commissioner's jurisdiction. I note that in his evidence before the Committee on 8 September 2016, Mr Paul Miller, DPC Deputy Secretary, referred to the importance of ensuring there was no such perception. This issue is underscored by the fact that the Public Service Commissioner's rules are not subject to disallowance. (They do not require the Governor's approval or confirmation and are therefore not 'statutory rules' for the purposes of Part 6 of the *Interpretation Act 1987*.)

I have noted that in her opening statement to the Committee on 9 September 2016 the ICAC Commissioner, the Hon Megan Latham, identified some GSE Act provisions (in addition to those mentioned by DPC) that she considered would impact on ICAC's independence, namely:

- **section 30**, which makes the head of a Public Service agency (other than a Department) responsible to the Minister or Ministers to whom the agency is responsible for the general conduct and management of the functions and activities of the agency in accordance with government sector core values and precludes action being taken in the exercise of that responsibility if it is inconsistent with the GSE Act functions of the Premier or the Public Service Commissioner;
- **section 31**, which enables the head of a separate Public Service agency to exercise the employer functions of the Government in relation to the employees of the agency, including the power to employ them, to assign their roles and to terminate their employment;

- **section 32**, which enables the head of a Public Service agency (other than a Department) to delegate to any employee of that or any other Public Service agency, or to a statutory officer, the head's functions under the GSE Act or employer functions under any Act or law in relation to the Public Service employees (unless the Public Service Commissioner's rules preclude that delegation); and
- **section 46**, which enables the head of a Public Service agency to assign Public Service non-executive employees of the agency to roles in the agency in the classification of work in which the employees are employed.

In her evidence the ICAC Commissioner expressed concern that bringing the ICAC staff under the GSE Act could enable proceedings to be brought in the Industrial Relations Commission with the risk of exposing the ICAC's processes and procedures to a form of oversight by the Industrial Relations Commission. I understand that currently this is precluded by section 104 of the ICAC Act. If it were proposed to alter this position care would need to be taken not to unduly impede the ICAC's ability to deal expeditiously and effectively with employee-related matters, some of which could be affecting its investigative and other activities. For the same reason, care would also need to be taken in applying to the ICAC staff the GSE Act provisions about dealing with employee misconduct (**sections 69 and 70 and** procedural requirements under **Part 8 of the GSE Rules**).

The ICAC Commissioner also commented on potential difficulties if these provisions were to apply in relation to an ICAC staff agency, particularly if the head of the agency were not the ICAC Commissioner but a separate Executive Manager (as shown in the possible structure outlined in DPC's submission). (I note that currently under the GSE Act the head of each separate Public Service agency is the statutory office holder for whom the staff work. For example, the head of the Police Integrity Commission Staff Agency is the Commissioner for the Police Integrity Commission.)

It might be possible to modify the provisions to address the risk of the duties and powers that they confer being exercised inconsistently with, or in a way that hinders the exercise of, duties and powers under the ICAC Act. For example, consideration could be given to adding a requirement for formal consultation between the Executive Manager and the ICAC Commissioner at appropriate points before particular decisions are made by the Executive Manager.

The same issue might arise with the application of **section 38** of the GSE Act. It enables the movement of a Public Service senior executive from a role in one Public Service agency to a role in another Public Service agency. The movement – which the GSE Act calls an 'assignment' to a role – can be either by the Public Service Commissioner or by agreement between the current and prospective employer. DPC's supplementary information (page 5) refers to the fact that section 38 (7) precludes the Public Service Commissioner assigning a Public Service executive to a role in a separate Public Service agency without the agreement of the head of the separate agency.

Consideration could be given to section 38 being modified so that consultation with the ICAC Commissioner or perhaps the Commissioner's agreement was required before an executive from another agency could be assigned to a role in the ICAC staff agency. The



proposed assignment might be inappropriate because, for example, the executive has a connection with a matter that is being or has been investigated by the ICAC.

I note that this issue would become a broader one with the commencement of amendments in the *Government Sector Employment Legislation Amendment Act 2016* that are intended to commence on 1 January 2017. The amendments to the *Health Services Act 1997*, the *Police Act 1990* and the *Transport Administration Act 1988* provide for the transfer of executives from the NSW Health Service, Police Force (excluding sworn executives) and Transport Service to a Public Service agency and their assignment to a role in the agency. The assignment will require the agreement of the head of the Public Service agency.

### **Potential benefits of bringing ICAC employees within the Government Sector Employment Framework**

The potential benefits of bringing the staff of ICAC into the government sector under the GSE Act are dealt with comprehensively on pages 7 to 9 of DPC's supplementary information. The reforms brought by the GSE Act to the employment, management and leadership of government sector employees could also have beneficial application in the staffing of the ICAC provided provisions were modified as needed to ensure that the application was consistent with the unique and independent role of the ICAC.

I have just a few additional observations to make that relate to the greater mobility of employees that is possible under the GSE Act compared with the laws it replaced. Workforce mobility is one of the main benefits of the government sector reforms. It has the potential to make a significant contribution to improving the management and performance of the sector's workforce. However, careful thought would need to be given to any potential ramifications it might have for the independence of the ICAC. For example, having the ICAC's staff outside the government sector might be regarded as important for the detached examination of the sector's activities that is expected of the ICAC.

As DPC's submission notes, under section 104A of the ICAC Act the ICAC can already arrange for the use (by secondment or otherwise) of the services of any staff of a 'government department or public authority'. The submission indicates that staff have been seconded to the ICAC under section 104A.

For the purposes of at least the ICAC Act, staff who are the subject of a section 104A arrangement are, in that capacity, staff of the ICAC and under the control and direction of the ICAC Commissioner (see section 104A (4) and the definition of 'member of staff of the Commission' in section 3 of the ICAC Act). They are also, in that capacity, officers of the ICAC (see the definition of 'officer of the Commission' in section 3). I understand that these secondees are therefore subject to the secrecy requirements in section 111 of the ICAC Act and the requirements of the *Independent Commission Against Corruption Regulation 2010* relating to security, conflicts of interests and similar matters.

It may be helpful for the Committee to know how, in practice, the secrecy and other requirements have worked in relation to staff seconded to the ICAC under section 104A. The PSC does not have this information. However, if it can be obtained by the Committee it might assist the Committee to form a view on whether requirements such as these would

help to address any potential risks to the ICAC's independence that might arise from the greater mobility of staff under the government sector framework.

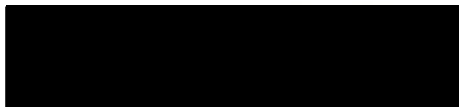
The DPC submission (page 7) notes that section 64 of the GSE Act already enables secondments *to* the ICAC of an employee of: a government sector agency; a State owned corporation; a subsidiary of a State owned corporation; or any service that is otherwise excluded from the GSE Act by section 5 of the Act. The section also enables staff to be seconded *from* the ICAC to any of these listed entities.

The ICAC Act does not state that a section 64 GSE Act secondee to the ICAC is an officer or member of the staff of the ICAC for the purposes of the ICAC Act or Regulation (as it states about a secondee under section 104A of the ICAC Act). It is therefore unclear whether a section 64 GSE Act secondee to the ICAC would be subject to the secrecy requirements in section 111 of the ICAC Act or the requirements of the ICAC Regulation relating to security, conflicts of interests and the like. The same question would arise in relation to a section 64 GSE Act secondee from the ICAC.

The PSC is unaware whether there have been secondments to or from the ICAC under section 64 of the GSE Act. If there have, it might be helpful for the Committee to be advised by the ICAC how issues such as secrecy and conflicts of interests were addressed in the arrangements.

I trust that this information is helpful to the Committee in its inquiry. I would be happy to provide any clarification of the information that the Committee might require.

Yours sincerely



Graeme Head  
**Public Service Commissioner**