

**REVIEW OF THE INSPECTOR'S REPORT TO THE  
PREMIER: THE INSPECTOR'S REVIEW OF THE  
ICAC**

**Organisation:** Department of Premier and Cabinet  
**Name:** Mr Blair Comley PSM  
**Position:** Secretary  
**Date Received:** 8 September 2016

**Supplementary Information provided at the  
request of the Parliamentary Committee on the  
Independent Commission Against Corruption**

***“Review of the Inspector’s Report to the Premier:  
The Inspector’s Review of the ICAC”***

Department of Premier and Cabinet

7 September 2016

## Contents

---

<b>Introduction</b>	<b>3</b>
The Committee's Inquiry	3
<b>Bringing the ICAC into the GSE Framework</b>	<b>3</b>
<b>Current Arrangements</b>	<b>3</b>
<b>GSE Framework</b>	<b>4</b>
Maintaining Independence	5
Modifications to the GSE Act	5
<b>Potential benefits</b>	<b>6</b>
Increased Efficiency	6
Workforce Mobility	6
Recruitment and Selection	7
Workforce Performance	7
<b>Practical implications</b>	<b>7</b>
Transitional Arrangements	7
Grading	8
Salaries	9
<b>Conclusion</b>	<b>9</b>

## Introduction

---

### The Committee's Inquiry

The joint statutory Parliamentary Committee on the Independent Commission Against Corruption (**ICAC**) (**Committee**) is currently conducting an inquiry examining the report of the Inspector of the ICAC, which was delivered on 12 May 2016 (**Inspector's Report**).

As part of this inquiry, the Committee wrote to the Department of Premier and Cabinet (**Department**) by letter dated 6 June 2016 inviting the Department to make a Submission to the inquiry. The Department prepared a Submission to the inquiry dated 28 June 2016 (**Submission**).

By letter dated 16 August 2016, the Committee requested that the Department provide further information regarding the material in the Department's Submission concerning the practical implications of bringing the ICAC into the GSE Framework.

The Department has prepared this supplementary information in response to the Committee's request.

### Bringing the ICAC into the GSE Framework

---

If structural reform of the ICAC were to be implemented to adopt features of other contemporary integrity institutions, consideration could also be given to the introduction of legislative amendments to bring the staff of the ICAC within the Government Sector Employment (**GSE**) framework. This would entail the staff being employed in the government sector under the *Government Sector Employment Act 2013* (**GSE Act**). Currently, the GSE Act does not apply to the staff of the ICAC employed under the *Independent Commission Against Corruption Act 1988* (**ICAC Act**).<sup>1</sup>

As raised in the Department's Submission, this would follow the approach to be taken in relation to the proposed Law Enforcement Conduct Commission (**LECC**),<sup>2</sup> and the approach that is taken in relation to the Police Integrity Commission,<sup>3</sup> NSW Ombudsman<sup>4</sup> and the NSW Electoral Commission.<sup>5</sup>

Bringing the staff of the ICAC within the GSE framework could offer a number of potential benefits for the ICAC's employment arrangements, executive structures and workforce management. As foreshadowed in our earlier submission, however, there are counter considerations particularly having regard to the role of the ICAC in overseeing those other institutions (including the Public Service Commission) that have a role in administering the GSE framework.

### Current Arrangements

The ICAC Act provides for the appointment of the Commissioner by the Governor.<sup>6</sup> The functions of the Commission are exercisable by the Commissioner.<sup>7</sup> The Governor may appoint one or more Assistant Commissioners, but only with the concurrence of the Commissioner. Assistant Commissioners are required to assist the Commissioner, as the Commissioner requires.<sup>8</sup>

The ICAC Act currently provides that the offices of Commissioner and Assistant Commissioner are statutory offices and the provisions of the GSE Act relating to the employment of Public Service employees do not apply to those offices.<sup>9</sup> This is appropriate given their status as statutory offices.

---

<sup>1</sup> GSE Act, section 5(1)(d).

<sup>2</sup> Draft Law Enforcement Conduct Commission Bill, section 21.

<sup>3</sup> The LECC is being introduced to replace the Police Integrity Commission.

<sup>4</sup> *Ombudsman Act 1974* (NSW), section 32.

<sup>5</sup> *Parliamentary Electorates and Elections Act 1912* (NSW), section 21D.

<sup>6</sup> ICAC Act, section 5.

<sup>7</sup> ICAC Act, section 4(3).

<sup>8</sup> ICAC Act, section 6.

<sup>9</sup> ICAC Act, Schedule 1, clause 8.

If the staff of the ICAC were to be transitioned into the GSE framework, it would be appropriate for the statutory officeholders (that is, the Commissioner(s) and Assistant Commissioners) to remain outside it, with their appointments to continue to be governed by the relevant legislation that provides for their appointment. This is the case also for other statutory offices that head independent organisations whose staff are otherwise employed under the GSE framework (e.g. the Ombudsman, the Police Integrity Commissioner and the Electoral Commissioner).

Section 104 of the ICAC Act provides that the Commissioner may appoint, as members of staff of the ICAC, such persons (including a Director of Operations and a Director of Administration) as may be necessary to enable the ICAC to exercise its functions. Section 104A allows the ICAC to use staff from government departments or public authorities, and section 104B allows the ICAC to engage consultants.

The ICAC Act contains no other statutory provisions governing how the ICAC is to be structured, the qualifications of its staff, or how its staff are to be organised and managed. ICAC staff are appointed directly under section 104 of the ICAC Act, not under the GSE Act.

Remuneration and conditions of employment of non-executive ICAC staff are determined by contracts of employment in accordance with the ICAC Award (made under the *Industrial Relations Act 1996*).<sup>10</sup> Increases in the ICAC Award have followed the Crown Employees (Public Sector – Salaries 2015) Award.<sup>11</sup> The ICAC has also adopted some government sector policies such as the Managing Excess Employees Policy through the ICAC Award.<sup>12</sup>

The Commissioner and Assistant Commissioners are entitled to the remuneration specified in the instrument of appointment. The remuneration of ICAC executives (the Commissioner and any Assistant Commissioners) is not currently determined by the Statutory and Other Offices Remuneration Tribunal.

In 2014–15, the ICAC employed an average of 122.3 full-time equivalent (FTE) staff across its six functional areas. At the end of the reporting period, of the 151 staff working at the Commission (head count figure), 117 were employed on a permanent basis, 26 on a temporary basis, one was a casual employee, and six (not including the Commissioner) were employed in the equivalent of Senior Executive Service (SES) contract positions.<sup>13</sup>

## GSE Framework

The GSE Act establishes the Public Sector as part of the broader government sector. The Public Service comprises:

- Departments;
- Public Service executive agencies (being agencies related to a Department); and
- separate Public Service agencies (being agencies independent of a Department).

The broader government sector includes any other service in the government sector not captured by the above three groups, such as the Teaching Service, Health Service, Police Force and Transport Service.<sup>14</sup> For the purposes of some parts of the GSE Act, the government sector is defined even more broadly to include, for example, staff of state owned corporations.

There are two approaches that could be taken if the ICAC were to be brought, to any extent, within the GSE framework. Under section 50D of the *Constitution Act 1902*, a new separate Public Service agency could be established for the staff of the ICAC.

This new Public Service agency could be added to those agencies currently listed in Part 3 of Schedule 1 of the GSE Act by way of an administrative arrangements order under Part 7 of

<sup>10</sup> ICAC Annual Report 2014-15, 59.

<sup>11</sup> ICAC Annual Report 2014-15, 59.

<sup>12</sup> ICAC Award, Industrial Relations Commission of NSW, clause 9.

<sup>13</sup> ICAC Annual Report 2014-15, 60.

<sup>14</sup> See definitions of 'Public Service agency' and 'government sector agency' in the GSE Act, section 3.

the *Constitution Act 1902*.<sup>15</sup> By including the staff agency of the ICAC in Schedule 1 of the GSE Act, people employed in the agency would be Public Service employees.<sup>16</sup>

Alternatively, the staff of the ICAC could be established as a new service within the broader government sector (rather than the Public Service) like the Teaching Service, Health Service, Police Force and Transport Service. If the staff of the ICAC became part of the government sector but not part of the Public Service, the staff would not be subject to those provisions of the GSE Act, Regulations and Rules that apply only to the Public Service. While some aspects of the GSE framework could be applied, it would mean that staff would not have the benefit of some provisions, such as mobility provisions, that apply only to Public Service employees.

### **Maintaining Independence**

If the Committee favoured bringing the staff of the ICAC within the GSE framework, it would be necessary to ensure that the ICAC's independence (both in actuality and appearance) was unaffected by the new staffing arrangements.

If the staff of the ICAC were brought into the GSE framework as a separate Public Service agency, the safeguards of independence that apply to separate Public Service agencies under the GSE Act would also extend to the ICAC staff agency.

Specific provisions apply to separate Public Service agencies under the GSE Act that are different to the provisions for Public Service executive agencies related to Departments.<sup>17</sup> Importantly, the head of a separate Public Service agency exercises the employer functions in relation to all employees of the agency, including its senior executive employees.<sup>18</sup>

This is in contrast with the arrangements relating to the senior executives of a Public Service agency related to a Department. The Secretary of the Department exercises the employer functions in relation to those executives, not the head of the related agency.<sup>19</sup> Further, the head of a separate Public Service agency is not required to comply with a direction from the Public Service Commissioner given under section 13 of the GSE Act if the head considers that the direction is not consistent with the independent exercise of statutory functions by the head and the agency.<sup>20</sup>

The Public Service Commissioner is also not permitted to assign a Public Service senior executive to a role in a separate Public Service agency without the agreement of the head of the agency.<sup>21</sup> In contrast, the Commissioner is required only to consult with the head of a Public Service agency related to a Department before assigning an executive to the related agency.<sup>22</sup>

There are already a number of separate Public Service agencies under the GSE Act that have 'Royal Commission' like investigative functions. Examples include the Ombudsman's Office and the Police Integrity Commission Staff Agency.<sup>23</sup>

### **Modifications to the GSE Act**

Even with the recognition of independence that applies to separate Public Service agencies under the GSE Act, consideration could be given to whether additional modifications would be appropriate to protect the independence of the ICAC, given its broad jurisdiction to investigate Public Service agencies.

<sup>15</sup> See also the note to section 22 of the GSE Act.

<sup>16</sup> The NSW Public Service consists of those persons who are employed under Part 4 of the GSE Act by the NSW Government (GSE Act, section 20). Under Part 4 of the GSE Act, Public Service employees are employed in the Departments and agencies listed in Schedule 1 of the GSE Act (GSE Act, section 22).

<sup>17</sup> NSW Public Service Commission, 'Government Sector: Separate Public Service Agencies', 2013. Available at: <http://www.psc.nsw.gov.au/employmentportal/resources/fact-sheets>

<sup>18</sup> GSE Act, section 31(1).

<sup>19</sup> GSE Act, section 26(1).

<sup>20</sup> GSE Act, section 13(4).

<sup>21</sup> GSE Act, section 38(7).

<sup>22</sup> GSE Act, section 38(5).

<sup>23</sup> GSE Act, Schedule 1, Part 3.

It might, for example, be appropriate to expressly exempt the ICAC from the application of certain provisions in the GSE Act. Consideration could be given to exempting the ICAC from the application of sections 82 and 83 of the GSE Act. Section 82 of the Act allows the Minister (i.e. the Premier), in the case of any matter relating to a government sector agency or a NSW government agency, to direct such person as the Minister specifies in the direction to conduct a special inquiry into the matter. Section 83 of the Act allows the Public Service Commissioner or Secretary of the Department of Premier and Cabinet to conduct an inquiry into any matter relating to the administration or management of a government sector agency.

Consideration might also be given to exempting the ICAC from the application of section 16 of the Act, which allows the Public Service Commissioner to require the head of a government sector agency to provide the Commissioner with a report on such matters relating to the employees of the agency, or to the employment policies and practices of the agency, as the Commissioner requires.

Both the Inspector of the ICAC and the Parliamentary Joint Committee on the ICAC are established under the ICAC Act with oversight functions regarding the ICAC. Consideration could be given to excluding the application of some provisions in the GSE Act such as sections 82, 83 and 16 of the GSE Act in relation to the ICAC if these sections are inconsistent with, or add nothing further to, the existing oversight mechanisms.

## Potential benefits

### Increased Efficiency

The GSE framework provides a ready-made structure that regulates employment arrangements, executive structures and workforce management.<sup>24</sup> The GSE Act commenced on 24 February 2014 after extensive consultation and consideration, and provided a new and streamlined statutory framework to replace the *Public Sector Employment and Management Act 2002*. Utilising this framework would enable the staff of the ICAC to draw on guidance and other resources available from the Public Service Commission particularly in relation to Public Service employment arrangements.

Under current arrangements, the ICAC reviews and updates Commission-wide policies in accordance with the ICAC's Compliance Monitoring Register, in order to ensure compliance with legislative requirements and alignment with the conditions of employment contained in the ICAC Award.<sup>25</sup> The ICAC's Audit and Risk Committee periodically monitors this register. Prior to approval by the Commissioner, the Executive Management Group reviews all policies, which are then endorsed by the Commission Consultative Group.<sup>26</sup>

### Workforce Mobility

The GSE Act offers mobility to employees and provides opportunity for employers to move resources expeditiously to priority areas.<sup>27</sup> Under the GSE Act:

- Public Service employees may be assigned from one role to another within a Public Service agency;
- Public Service executive employees may be assigned from a role in one Public Service agency to a role in another Public Service agency;
- government sector employees may be moved from one NSW government sector agency to another (through transfer and secondment); and

<sup>24</sup> NSW Public Service Commission, 'The government sector - What is the government sector under the Government Sector Employment Act 2013?', 2013. Available at: <http://www.psc.nsw.gov.au/employmentportal/resources/fact-sheets>

<sup>25</sup> ICAC Annual Report 2014-15, 58.

<sup>26</sup> ICAC Annual Report 2014-15, 58.

<sup>27</sup> NSW Public Service Commission, Guide: 'Government Sector Employment Act 2013', 2013. Available at: <http://www.psc.nsw.gov.au/ArticleDocuments/1845/Information%20BookletL1114%20PSC%20GSE%20FINAL%202%20FOR%20UPL OAD.pdf.aspx>

- government sector employees may be moved between the NSW government sector and other sectors (through secondments under section 66 of the GSE Act).<sup>28</sup>

Increased mobility could provide the ICAC with employees from other NSW government sector agencies by agreement between agency heads.<sup>29</sup> Increased mobility could also provide greater flexibility for employees to be assigned to different roles within the ICAC. Workforce resources could be readily deployed to where they are most needed and employees would be supported with opportunities for development.

However, to ensure that the ICAC's independence (both in actuality and appearance) is preserved, the transferability of employees between a separate Public Service agency (if that were a model considered appropriate) for ICAC staff and other Public Service agencies would need to be considered.

There is currently provision for staff of a government department or public authority to be seconded to the ICAC pursuant to section 104A of the ICAC Act. This has happened from time to time in the past. There is also provision for employees of government sector agencies to be transferred or seconded to or from the ICAC pursuant to section 64 of the GSE Act. If ICAC staff were employed in a Public Service agency, secondments and transfers could continue to be arranged pursuant to mobility provisions in the GSE Act.

### Recruitment and Selection

The GSE Act increases the reliability and validity of recruitment and selection processes, and enhances the application of the merit principle in NSW Public Service employment. Employment decisions relating to a role in the Public Service are based on an assessment of the capabilities, experience and knowledge of the person concerned against the pre-established standards for the role.<sup>30</sup> These pre-established standards are based on the NSW Public Sector Capability Framework.<sup>31</sup> The Framework provides a common foundation for creating roles, recruiting to roles, managing performance, capability development, career planning and workforce planning.<sup>32</sup> This resource would be available to the ICAC if its staff were brought into the GSE framework and would provide benefit for both staff and managers.

### Workforce Performance

Under the GSE framework, workforce performance is managed in accordance with the GSE Act, Regulations and Rules. Section 67 of the GSE Act gives responsibility to the head of a government sector agency for developing and implementing a performance management system with respect to employees of the agency. The GSE Rules prescribe the core requirements of this system.<sup>33</sup> There are also provisions dealing with the unsatisfactory performance of government sector employees,<sup>34</sup> and misconduct of government sector employees.<sup>35</sup>

## Practical implications

### Transitional Arrangements

Consideration could be given to legislating transitional provisions to support a smooth transfer to the new system. When the GSE Act commenced, it brought into the Public Service the staff of a number of authorities who before that commencement were not part of the general government sector employment arrangements. Transitional provisions contained in Schedule 4 of the GSE Act supported their movement into the Public Service. Clause 9 of Schedule 4 of the Act, in particular,

<sup>28</sup> NSW Public Service Commission, 'Mobility', 2013. Available at: <http://www.psc.nsw.gov.au/employmentportal/mobility>.

<sup>29</sup> GSE Rules, rules 29 and 31.

<sup>30</sup> GSE Rules, section 16.

<sup>31</sup> Available at: <https://www.psc.nsw.gov.au/workforce-management/capability-framework>.

<sup>32</sup> NSW Public Service Commission, 'NSW Public Sector Capability Framework', 5. Available at: <https://www.psc.nsw.gov.au/workforce-management/capability-framework>.

<sup>33</sup> GSE Rules, rule 35.

<sup>34</sup> GSE Act, sections 68 and 69.

<sup>35</sup> GSE Act, section 69; GSE Rules, Part 8.



makes provision for the continuation of conditions of employment of groups of staff that were brought into the Public Service when the GSE Act commenced.

Transitional provisions in the GSE Act supported the staff of the NSW Ombudsman and NSW Electoral Commission transitioning to employment and management arrangements under the GSE Act. A 2014 Administrative Arrangements Order authorised the inclusion of both agencies in Schedule 1 of the GSE Act.<sup>36</sup> The NSW Ombudsman formed a senior executive implementation plan and transitioned the senior executive service to the new structure and remuneration framework under the plan from 2014.<sup>37</sup>

The recent *Government Sector Employment Legislation Amendment Act 2016 (GSELA Act)* provides an example of specific arrangements introduced to transition executives in the NSW Health Service, NSW Police Force and Transport Service of NSW into employment arrangements that align with those for employees of Public Service agencies. These transitional arrangements could also be useful in formulating transitional arrangements for the ICAC staff.

## Grading

The GSE Act places employees in the Public Service into two main categories: Public Service senior executives and Public Service non-executive employees.

Public Service senior executives may be employed in ongoing or term employment.<sup>38</sup> A model contract of employment for Public Service senior executives (other than Secretaries and agency heads) is contained in Schedule 1 of the GSE Rules. Public Service senior executives are employed in a band, determined under the Premier's senior executive bands determination, that the employer of the executive considers appropriate for the role of the executive.<sup>39</sup> For the purposes of the GSE Act, the Public Service senior executive bands are as follows:<sup>40</sup>

- Band 4 - Secretary level
- Band 3 - Deputy Secretary level
- Band 2 - Executive Director level
- Band 1 - Director level

Public Service non-executive employees may be employed in ongoing, temporary or casual employment.<sup>41</sup> Public Service non-executive employees are employed in a classification of work determined by the head of the Public Service agency in which the person is employed in accordance with the GSE Act.<sup>42</sup>

If ICAC staff became employees in a Public Service agency, the ICAC Award could continue to apply to ICAC staff, unless and until it was agreed to modify those arrangements. The ICAC Award may be varied as provided for in the ICAC Award and the provisions of the *Industrial Relations Act 1996*.<sup>43</sup>

The staff of the NSW Electoral Commission are currently in the process of transitioning to the GSE framework. The staff agency of the NSW Electoral Commission in June 2015 consisted of one senior executive, six permanent transitional senior executives (under the GSE Act), three temporary transitional senior executives (under the GSE Act), 29 permanent officers, and 28 temporary officers.<sup>44</sup>

---

<sup>36</sup> Available at: <http://www.legislation.nsw.gov.au/regulations/2014-11.pdf>

<sup>37</sup> NSW Ombudsman Annual Report 2014-2015. Available at: [https://www.ombo.nsw.gov.au/annual\\_report/managing-our-organisation/our-people](https://www.ombo.nsw.gov.au/annual_report/managing-our-organisation/our-people)

<sup>38</sup> GSE Act, section 34.

<sup>39</sup> GSE Act, section 37.

<sup>40</sup> Government Sector Employment (Senior Executive Bands) Determination 2014, section 3.

<sup>41</sup> GSE Act, section 43.

<sup>42</sup> GSE Act, section 45.

<sup>43</sup> ICAC Award, Industrial Relations Commission of NSW, clause 32(1).

<sup>44</sup> NSW Electoral Commission Annual Report 2014-15. Available at:

[http://www.elections.nsw.gov.au/\\_data/assets/pdf\\_file/0019/211249/PM\\_00-0998\\_NSWEC\\_AR\\_2014-15-AC.pdf](http://www.elections.nsw.gov.au/_data/assets/pdf_file/0019/211249/PM_00-0998_NSWEC_AR_2014-15-AC.pdf).

## Salaries

Under the GSE Act, the remuneration package of a Public Sector senior executive must be within the range determined under the *Statutory and Other Offices Remuneration Act 1975* for the band in which the executive is employed.<sup>45</sup> The Statutory and Other Offices Remuneration Tribunal makes annual determinations on the remuneration payable to Public Service senior executives.<sup>46</sup>

The remuneration of Public Service non-executive employees is largely dependent on what classification of work they are employed in. This classification of work is determined by the head of the Public Service agency in which the person is employed by reference to the Award/s applicable to the employee.

Conditions of employment are laid down in the GSE Act, Regulation and Rules and, for non-executive employees, in industrial instruments and determinations made by the Industrial Relations Secretary (i.e. the Secretary of the Treasury) from time to time.<sup>47</sup>

## Conclusion

---

The GSE framework devolves workforce management to agencies within a centrally defined framework and allows for increased employee engagement with their employment system.<sup>48</sup> It allows for workforce mobility and increased efficiency, and ensures the sustained independence of separate Public Service agencies. Practical considerations such as transitional arrangements, grading and salaries could be addressed by provisions similar to those that ensured the transition of other agencies and their staff into the new GSE framework when it commenced on 24 February 2014.

Bringing the staff of the ICAC within the GSE framework would align with the approach adopted by other integrity oversight bodies in New South Wales, and could be considered as a possible complement to structural reform.

The Department considers this could be achieved either by designating the staff of the ICAC as a separate Public Service agency or as an aligned service of the government sector (that is not part of the Public Service). In either case, it would be necessary to ensure that the independence of the ICAC – both in appearance and actuality – is maintained.

The Department would be happy to assist the Committee by providing further factual material to the Committee if requested.

The Committee may also be assisted by seeking input from the Public Service Commission and the ICAC, as well as other separate Public Service agencies, such as the NSW Electoral Commission, the Ombudsman's Office and the Police Integrity Commission which have recently transitioned, or are currently in the process of transitioning, to the GSE framework.

---

<sup>45</sup> GSE Act, section 40.

<sup>46</sup> *Statutory and Other Offices Remuneration Act 1975* (NSW), section 24O.

<sup>47</sup> GSE Act, section 52.

<sup>48</sup> NSW Public Service Commission, 'About the Government Sector Employment Act'. Available at: <http://www.psc.nsw.gov.au/policy---legislation/government-sector-employment-act--gse--2013/about-the-act>.