

## ICAC Bill 2012

# What is the ICAC and what can the ICAC do?

This Paper is the second of seven papers prepared by the Local Government Team (now KelliedyJones Lawyers). These Papers collectively provide a detailed summary of the *Independent Commissioner Against Corruption Bill 2012* and how it will affect you and your council. This second Paper focuses on the ICAC Model proposed in the Bill.

### What is ICAC?

“ICAC stands for the Independent Commissioner Against Corruption.

The Bill provides that the primary objects of the ICAC are to:

- investigate serious or systemic corruption in public administration; and
- refer serious or systemic misconduct or maladministration in public administration to the relevant body, give directions or guidance to the body or exercise the powers of the body as the Commissioner considers appropriate.

However, the ICAC also has secondary objects, being the prevention or minimisation of corruption, misconduct and maladministration in public administration, through referral of potential issues, education and evaluation of practices, policies and procedures.

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### What are the ICAC’s Functions?

In addition to the objects, the **functions** of the ICAC are:

- to identify corruption in public administration and to refer matters for prosecution, or to SAPOL for investigation and prosecution;
- to assist inquiry agencies (e.g. the Ombudsman) and public authorities (e.g. councils) to identify and deal with misconduct and maladministration;

- to evaluate the practices, policies and procedures of inquiry agencies and public authorities with a view to advancing comprehensive and effective systems for preventing or minimising corruption, misconduct and maladministration; and
- to conduct or facilitate the conduct of educational programs designed to prevent or minimise corruption, misconduct and maladministration.

The ICAC is obligated to perform his/her functions in a manner that is as open and accountable as is practicable, subject to a number of exceptions designed to maintain the integrity of investigations before a decision is made to commence a prosecution, including

- that complaints, reports or investigations of ICAC or the OPI containing details of the identity of an informant must be kept confidential;
- examinations being held in private; and
- information obtained in the administration of the Act not being publicly disclosed.

The ICAC will, however, have the power to make public statements concerning investigations, where it is deemed appropriate to do so.

### How will the ICAC be Appointed?

The ICAC will be appointed by the Governor for a term not exceeding 7 years, and cannot hold office for consecutive terms that exceed 10 years in total.

The ICAC must be a legal practitioner of at least 7 years standing and must not be a judicial officer (i.e. a Judge or Magistrate etc) or a member of the Australian Parliament. The ICAC can be removed from office by the Governor, on the address of both Houses of Parliament on grounds including the contravention of a condition of appointment or misconduct.

The ICAC will be assisted by a Deputy ICAC, who will be appointed in the same manner as, and subject to the same requirements of the ICAC. The ICAC will be able to appoint staff, appoint investigators and examiners (who each have special powers under the Bill), and will also be able to make use of administrative units of the Public Service, including the utilisation of staff from SAPOL and the Director of Public Prosecutions.

### How will ICAC Operate?

ICAC will operate in conjunction with the Office for Public Integrity. The OPI will be responsible for receiving complaints concerning corruption, misconduct and maladministration from inquiry agencies, public authorities and public officers. The role and functions of the OPI will be separately considered in our third paper.

Directions and guidelines governing how complaints must be made to the OPI will be created by the ICAC.

The Bill provides guidance on how the OPI is to assess complaints, and when the ICAC must act upon those complaints. Where the OPI assesses a complaint:

- as raising a potential issue of corruption, the ICAC **must investigate** the complaint or refer it to SAPOL;
- as raising a potential issue of misconduct or maladministration in public administration, the ICAC **must** either:
  - (after consultation with the inquiry agency – i.e. the Ombudsman) refer the matter to the agency and, if the ICAC deems appropriate, he/she may provide directions or guidance to the agency in respect of the matter; or
  - (after consultation with the relevant public authority – i.e. a council) refer the matter to the authority, and the ICAC may give the direction and guidance to the authority in respect of the matter;
- as raising some other issue that should be referred to an inquiry agency (e.g. the Ombudsman) or a council, the OPI will make recommendations to the ICAC on what (if any) action should be taken;
- as being trivial, vexatious or frivolous, then no further action is required to be taken by the ICAC.

Where an investigation is commenced by the ICAC, he/she must oversee the investigation and may appoint the Deputy ICAC or an examiner to head the investigation. The ICAC may also appoint one or more legal practitioners to assist the investigation.

**“The ICAC Bill provides guidance on how the OPI is to assess complaints, and when the ICAC must act upon those complaints”**

If the ICAC deems it appropriate, an investigation may also include an “examination” which is a hearing akin to a Court hearing in which witnesses may be subpoenaed to give verbal evidence to an examiner. The investigatory and examination powers of the ICAC will be provided in detail in Paper 6 of this series.

The ICAC may decide, in the course of exercising his/her functions, to evaluate the practices, policies and procedures of an inquiry agency or a public authority. This could mean that the ICAC, at some point in the future, may decide to evaluate the policies of an individual council, or a policy which has been adopted by one or more councils. Before an evaluation occurs, the ICAC is obliged to notify the relevant agency or authority of the nature and timing of the evaluation. During an evaluation, the relevant agency or authority must assist the ICAC.

At the conclusion of an evaluation, the ICAC must prepare a report and provide it to both Houses of Parliament. This means that all policies, procedures and practices of councils may be subject to unprecedented levels of public scrutiny once the ICAC Bill becomes law.

In addition to this reporting requirement, the ICAC may also make recommendations to the relevant agency or authority that it:

- change practices, policies or procedures in a specified way or review practices, policies or procedures to achieve specified outcomes; or
- conduct, or participate in, specified educational programs or education programs designed to achieve specified outcomes.

**“...the ICAC could, at some point in the future, decide to evaluate the policies of an individual council...”**

Further, if the ICAC is not satisfied that any recommendation has been complied with by the relevant agency or authority, the ICAC must inform the agency or authority of this and allow it an opportunity to respond. If, after considering any comments received from the agency or authority within the specified time, the ICAC is still not satisfied, he/she may submit a report to the Minister responsible for the agency or authority (i.e. the Minister for state/Local Government Relations for councils) setting out the grounds of dissatisfaction, together with any comments from the agency or authority. If, after considering any comments received from the relevant Minister, the ICAC is still not satisfied, he/she may then provide a report setting out the grounds of dissatisfaction to both Houses of Parliament. This process is no different to that currently available to the Ombudsman.

## Reporting and Review Mechanisms

The ICAC will also be responsible for providing annual reports on its operations and those of the OPI.

Where the ICAC deems it appropriate, he/she may provide reports to the Attorney-General and both Houses of Parliament, detailing recommendations for law reform, or for amendments to the ICAC’s own powers or functions.

The ICAC Bill also prescribes that the ICAC’s website must contain information concerning educational programs, evaluations and reports, information on the ICAC’s powers and functions as well as other information relevant to the prevention of corruption, misconduct and maladministration.

Once the ICAC Bill becomes law, the Attorney-General will be required, on an annual basis, to review the powers of the ICAC and whether they were exercised over the review period in an appropriate manner.

*We will continue to provide a series of Information Papers over the next few weeks that will address particular topics in detail relating to the impact of the ICAC Bill 2012 on councils, elected members and staff (and other persons/organisations).*

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