

ICAC Bill 2012

Amendments to the *Local Government Act* – What are they and what do they mean?

This Paper is the fourth paper prepared by the Local Government Team (now KellyJones Lawyers) which provides a detailed summary of the *Independent Commissioner Against Corruption Bill 2012* and how it will affect you and your council.

The *Independent Commissioner Against Corruption Bill 2012* contains a number of proposed amendments to the *Local Government Act 1999* which will operate in conjunction with other provisions of the Bill concerning the powers of the ICAC and the OPI. In brief, the amendments to the *Local Government Act* address codes of conduct, the ability for members to obtain legal advice, changes to the grounds for complaints against individual members and the investigation of members and councils.

The purpose of this Paper is to outline each of the proposed amendments and to explain their impact upon councils and individuals.

Uniform Codes of Conduct

Under sections 63 and 110 of the *Local Government Act*, councils are required to prepare and adopt codes of conduct that apply respectively to members and employees. The Bill proposes to:

- Repeal these sections in their entirety; and
- Replace them with new provisions that place a positive duty upon members and employees to comply with the uniform codes of conduct prescribed under regulation.

Accordingly, councils will no longer be required to adopt and keep under review their own codes of conduct because the prescribed codes will prevail. Further, the implementation of prescribed codes will promote consistency across the State in relation to the standards set out therein.

In respect to the code of conduct for employees, the Minister will be required to consult with any registered association that represents the interests of employees of councils. The Bill also proposes to codify the existing industrial relations common law position that a failure to comply with the code constitutes a ground for suspending, dismissing, or taking other disciplinary action against the employee.

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The prescribed codes will be developed by the Minister in consultation with the LGA. The codes will inevitably address the standards of behaviour expected to be observed by members and employees, and, presumably, complaint handling procedures.

The *‘Improving Governance Discussion Paper’* distributed by the LGA seeks feedback from councils in relation to the content of uniform codes of conduct. It is anticipated that regard will be had to the feedback received from councils in the preparation of the uniform codes.

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Obtaining Legal Advice

The Bill proposes to introduce a new provision which allows for the establishment of a scheme, pursuant to which a member of council may directly obtain legal advice at the expense of the council (‘the Scheme’). Specifically, legal advice may be obtained under the Scheme to assist a member in performing or discharging official functions or duties.

For example, the Scheme may allow a member to obtain advice as to whether or not the member has a conflict of interest for the purposes of the Act in relation to a matter arising for decision by the council. Alternatively, a member could also seek advice in relation to the member’s use of council information and whether or not his/her request and/or proposed use is lawful or otherwise breaches the member’s general duties under section 62 of the Act.

This new section further provides that the establishment of the Scheme may require councils to prepare and adopt a policy in relation to its implementation. Any such policy may:

- Impose limitations on the obtaining of legal advice (i.e. it may be that legal advice can only be obtained with the consent of the CEO or in relation to specific matters); and
- Provide for a process for approval of requests to obtain legal advice; and
- Allow for conditions to be imposed on an approval, including a condition limiting the expenditure that may be incurred (i.e. a condition could also include that the advice must be obtained from a specified legal advisor); and
- Provide for a council to set an overall budget for the purpose of members obtaining legal advice.

This amendment seeks to empower members to be proactive in complying with the requirements of the Act that apply to them (including in relation to codes of conduct, general duties, registers of interest and conflict of interest). This is especially relevant since the Bill also provides that a failure to comply will give rise to grounds for complaint against a member (see below for further detail about these amendments).

It is to be noted that the entitlement to obtain legal advice is the first of its kind which confers express power upon a member to expend council funds without a council resolution. However, it is **not** an unfettered entitlement since the introduction of a policy to manage the implementation of the Scheme will appropriately limit this power.

Conduct of Annual Audit

It is proposed to repeal the Minister's power under section 129(8) of the *Local Government Act* to order an investigation following an audit report. This amendment is consequential having regard to the proposed changes to give the Ombudsman more extensive investigatory powers (discussed below). This includes the ability for the Ombudsman to conduct an investigation, upon referral by the Minister, on the basis of a report which the Minister has received from an Auditor.

Complaints against members, Investigations & Consequences

The Bill proposes to amend section 263 of the *Local Government Act* in relation to the grounds of complaint to the District Court against a member of council. Specifically, the grounds of complaint are extended beyond breaches of a member's conflict of interest obligations to any breach by a member of his/her obligations under Chapter 5, Part 4 of the Act being:

- the general duties at section 62;
- code of conduct;
- register of interest obligations; and/or
- conflict of interest obligations.

In the first instance, a breach by any member of Chapter 5, Part 4 of the Act can trigger a complaint which might be directed to the Ombudsman or otherwise to the OPI. The Bill proposes to include a new provision, section 263A which:

- addresses the Ombudsman's powers to investigate a member, which may occur upon referral by the Minister, a complaint by any person or the Ombudsman's own initiative; and
- clarifies that any acts that constitute grounds for a complaint against a member under the Act are an 'administrative act' (as defined in the *Ombudsman's Act*) that will invoke the Ombudsman's investigative powers. The Ombudsman's powers of investigation will be further addressed in the fifth Paper of this series.

“The Bill confers additional powers on the Ombudsman to investigate matters referred to him by the Minister, such that the Minister will no longer be responsible for investigating councils (i.e. by appointing an investigator).”

Pursuant to the proposed section 263B of the Act, where the Ombudsman has conducted an investigation of a member of a council, the Ombudsman may recommend that the council:

- reprimand the member. Including by means of a public statement; or
- require the member to attend a specified course of training or instruction to issue an apology in a particular form or to take other steps; or
- require the member to reimburse the council a specified amount; or
- ensure that a complaint is lodged against the member in the District Court.

The Bill provides that the council has the **power** to act in accordance with the Ombudsman's recommendation (including the power under section 264 of the *Local Government Act* to lodge a complaint in the District Court). If a member of council fails to comply with a requirement of the council made in accordance with a recommendation from the Ombudsman, the member is taken to have failed to comply with his/her duties under Chapter 5, Part 4 of the *Local Government Act*.

The Bill proposes to impose an **obligation** on a council to lodge a complaint in the District Court against any member that fails to comply with a requirement imposed by the council following a recommendation by the Ombudsman. This provision may have significant resource implications for councils since they will be required to fund Court proceedings against one of their own members (however, the council is **not** obliged to fund any legal representation obtained by the member that is party to the proceedings).

Finally, the Bill proposes to amend section 267 of the *Local Government Act*, which outlines the District Court's powers to make orders following the hearing of a complaint against a member. Specifically, the Court's powers are expanded to include reprimanding a person, including by means of a public statement, ordering the person to issue an apology in a particular form and requiring the person to reimburse the council a specified amount (this could include the council's costs in bringing the proceedings).

Investigations of Councils

The Bill confers additional powers on the Ombudsman to investigate matters referred to him by the Minister, such that the Minister will no longer be responsible for investigating councils (i.e. by appointing an investigator). The Minister has power to refer to the Ombudsman for investigation and report a matter in respect of which the Minister has reason to believe that:

- a council has contravened or failed to comply with any legislation; or
- a council has failed to discharge a responsibility under any legislation; or
- an irregularity has occurred in the conduct of the affairs of a council (in relation to matters arising under the Act or any other legislation).

Further, a referral may be made on the basis of any report received under the Act from an auditor or on any other basis (which could include a report received from the ICAC).

Importantly, before referring any matters to the Ombudsman for investigation and report, the Minister must give the council reasonably opportunity to explain its actions and make submissions **unless**, the Minister considers that the giving of notice would be likely to undermine the investigation of the matter. The Minister also retains power under section 273 of the Act in relation to taking action upon a report (such as appointing an administrator), but these powers are expanded to include taking such action in response to information provided by the ICAC or a report from the Ombudsman following an investigation under the Act or any other legislation.

The Bill also proposes to treat the investigation of subsidiaries under section 274 of the Act in the same manner as investigations of a council in that rather than appointing an investigator, the Minister will refer the matter to the Ombudsman for investigation and report. Before making such referral the Minister must give the subsidiary a reasonable opportunity to explain its actions and make submissions, **unless** it is considered that the giving of notice would be likely to undermine the investigation.

We will continue to provide a series of Information Papers over the next few weeks that will address 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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