

ICAC Bill 2012

Powers of the Ombudsman – What has changed?

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

This Paper considers the Ombudsman's powers as contained in the proposed amendments to the *Local Government Act 1999* and the *Ombudsman Act 1972*. These powers relate to the investigation of councils and individual elected members. In addition, the Ombudsman also has a role to play under the proposed ICAC legislation as a relevant 'inquiry agency' to which the ICAC may refer matters of misconduct and/or maladministration in public office.

Administrative Acts and Agencies subject to Ombudsman Investigation

Under section 13(1) of the *Ombudsman Act*, the Ombudsman may investigate any **administrative act**. An **administrative act** is defined under section 3 of the *Ombudsman Act* to mean:

- a) *an act relating to a matter of administration on the part of an agency to which the Ombudsman Act applies or a person engaged in the work of such an agency; or*
- b) *an act done in the performance of functions conferred under a contract for services with an agency to which the Ombudsman Act applies.*

“...the Bill operates to extend the definition of an **administrative act** to include actions by elected members which would not previously have fallen within this definition.”

As addressed in Paper 4, the Bill proposes to insert section 263A into the *Local Government Act*. This section specifies that any failure by an elected member to comply with his/her obligations under the *Local Government Act* (including in relation to general duties, codes of conducts, registers of

interest and conflict of interest) is an 'administrative act' for the purposes of the *Ombudsman Act*. Accordingly, the Bill operates to extend the definition of an **administrative act** to include actions by elected members which would not previously have fallen within this definition. Consequently, this amendment removes any doubt about the Ombudsman's jurisdiction in relation to the investigation of individuals.

Local Government bodies (i.e. councils, committees, subsidiaries, CDAPs etc) are all agencies to which the *Ombudsman Act* currently applies. This means that the Ombudsman already has express power to investigate any administrative act undertaken by or on behalf of a council.

However, the Bill proposes to amend the definition of 'agency to which the [Ombudsman Act] applies' to capture any statutory incorporated or unincorporated body that is established or continued in existence for a public purpose. This definition is very broad and encompasses not only Local Government bodies but also, for the first time, the Local Government Association, which is not currently subject to investigation by the Ombudsman. The Bill expressly excludes the ICAC and the Office for Public Integrity from this definition (i.e. the Ombudsman will not have powers to investigate the ICAC or the OPI).

“...the Ombudsman will also be able to conduct an investigation of a council upon referral from the ICAC or from the Minister.”

Ombudsman Investigations

At present, the Ombudsman's powers to investigate a council are usually triggered by a complaint to his office. However, he may commence an investigation of his own initiative. In addition, readers of our previous Papers will be aware that under the Bill, the Ombudsman will also be able to conduct an investigation of a council upon referral from the ICAC or from the Minister.

As outlined in Paper 4, the Bill contains changes in relation to the manner in which an investigation into a council may be conducted. Currently, under section 272 of the Act the Minister has power to appoint an investigator to investigate a council in prescribed circumstances. The Bill proposes to change this position such that the Ombudsman will have this function of investigation upon referral from the Minister in prescribed circumstances

Section 18 of the *Ombudsman Act* sets out the procedure that must be followed by the Ombudsman in conducting an

investigation. This procedure applies to all Ombudsman investigations including those undertaken upon referral or otherwise. In undertaking an investigation, pursuant to section 19 of the *Ombudsman Act*, the Ombudsman has the powers of a Royal Commission (i.e. the Ombudsman may compel witnesses to attend before him and answer questions and/or produce documents).

The Bill proposes to re-word section 19A of the *Ombudsman Act*, which relates to the Ombudsman's powers to issue a direction to an agency in relation to an administrative act. This proposed amendment does not result in any substantial changes to the Ombudsman powers. It provides that if the Ombudsman is of the opinion that an administrative act by a council is:

- likely to prejudice an investigation or proposed investigation or the effect or implementation of a recommendation the Ombudsman might make as a result of investigation or proposed investigation; or
- is likely to cause serious hardship to a person,

he retains the power to issue a written notice to the council to refrain from performing the administrative act as outlined in the notice for a specified period (which cannot be more than 45 days in aggregate). Any such notice must not be issued if it would result in the council breaching a contract or other legal obligations or cause any third party undue hardship.

Outcome of an Investigation

The Bill does not change or otherwise impact the Ombudsman's powers and obligations following an investigation into a council. Specifically, section 25 of the *Ombudsman Act* outlines the actions that the Ombudsman may take in circumstances where he considers an **administrative act** to which an investigation relates:

- appears to be made contrary to the law; or
- was unreasonable, unjust, oppressive or improperly discriminatory; or
- was in accordance with a rule of law or provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
- was done for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations; or
- was done and no reasons for the act were given (and should have been); or
- was based wholly or in part on a mistake of law or fact; or
- was wrong.

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Where an **administrative act** of a council falls within one or more of the above categories, the Ombudsman must report his findings to the CEO of the council and may make any recommendations he considers fit. With respect to investigations into elected members, the Bill proposes to insert section 263B into the *Local Government Act* which sets out the recommendations that may be made by the Ombudsman upon completion of his investigation (these recommendations are outlined in **Paper 4**).

Upon request from the Ombudsman, the CEO of a council in relation to which a recommendation has been made, **must** inform the Ombudsman what steps have been taken to give effect to the recommendation(s) and, if no such steps have been taken, the reasons why. If the Ombudsman considers that appropriate steps have not been taken he may provide a report on the matter to the Premier and may request that the report be laid before both Houses of Parliament.

"...under the proposed amendments to section 26 of the *Ombudsman Act*, the Ombudsman has power to, if it is in the public interest, cause a report on an investigation, or a statement about an investigation or a decision not to investigate or discontinue an investigation to be published as the Ombudsman thinks fit."

A copy of a report prepared by the Ombudsman following an investigation **into a council must** be sent to the Minister. Upon receipt of such report, the Minister's powers under section 273 of the *Local Government Act* are enlivened (which could include directing the council to take specified action or, making a recommendation to the Governor that the council be declared a defaulting council and an administrator appointed to manage its affairs).

Any report prepared by the Ombudsman regarding an investigation **into an elected member must** also be provided to the Minister. If a council fails to comply with any recommendations made by the Ombudsman following such an investigation, the Minister may refer the matter (i.e. the council's failure to comply with the recommendation) to the Ombudsman for investigation and report under section 272 of the *Local Government Act*. This gives rise to the situation whereby the Ombudsman, following appointment by the Minister, may investigate a council for non-compliance with a recommendation the Ombudsman has previously made. As above, upon receipt of a report from the Ombudsman regarding such investigation into the council, the Minister may then take action under section 273 of the *Local Government Act* as he considers appropriate.

Publication of Ombudsman Reports & Disclosure of Potential Information

The starting point is that all Ombudsman investigations are confidential. However, the Bill amends section 26 of the *Ombudsman Act* to enable the disclosure of information obtained in the course of the investigation of an **administrative act** in prescribed circumstances. This includes where such disclosure is authorised or required by the Ombudsman (the Ombudsman may only require or authorise such disclosure where it is in the public interest).

Further, under the proposed amendments to section 26 of the *Ombudsman Act*, the Ombudsman has power, if it is in the public interest, to cause a report on an investigation, or a statement about an investigation, or a decision not investigate or to discontinue an investigation, to be published as the Ombudsman thinks fit. In this way, the Bill proposes to broaden the Ombudsman's current powers to publish only a report on an investigation **if** in the public interest or the interests of an agency (such publication occurred following the Ombudsman's investigation into the City of Charles Sturt regarding the St Clair land swap). This means that there is still potential for any report prepared by the Ombudsman following an investigation into a council or an elected member to be published, provided such publication is in the public interest.

Taking the above into account, the view is that the most significant changes under the Bill that impact upon the Ombudsman's powers from a Local Government perspective include:

- extending his powers of investigation to capture breaches by elected members of their obligations under the Local Government Act and the actions of the Local Government Association; and
- a conferral of power to investigate a council upon referral from the ICAC or the Minister.

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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